

Re: Comments to the Draft Crimes Against Humanity Convention

30 November 2018

To the distinguished members of the International Law Commission:

We have the honour to address you in our capacities as Special Rapporteur on extrajudicial, summary or arbitrary **executions**; Working Group of Experts on People of **African Descent**; Special Rapporteur on the situation of human rights in **Cambodia**; Working Group on enforced or involuntary **disappearances**; Special Rapporteur on the right to **food**; Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental **health**; Special Rapporteur on adequate **housing** as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context; Special Rapporteur on the rights of **indigenous** peoples; Special Rapporteur on the human rights of **internally displaced persons**; Special Rapporteur on the situation of human rights in the **Islamic Republic of Iran**; Special Rapporteur on the elimination of discrimination against persons affected by **leprosy** and their family members; Working Group on the use of **mercenaries** as a means of violating human rights and impeding the exercise of the right of peoples to self-determination; Special Rapporteur on the situation of human rights in **Myanmar**; Special Rapporteur on the situation of human rights in the **Palestinian territories** occupied since 1967; Special Rapporteur on contemporary forms of **racism**, racial discrimination, xenophobia and related intolerance; Special Rapporteur on freedom of **religion or belief**; Independent Expert on protection against violence and discrimination based on **sexual orientation and gender identity**; Special Rapporteur on contemporary forms of **slavery**, including its causes and consequences; Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering **terrorism**; Special Rapporteur on **torture** and other cruel, inhuman or degrading treatment or punishment; Special Rapporteur on **trafficking in persons**, especially women and children; Special Rapporteur on **violence against women**, its causes and consequences; Working Group on the issue of discrimination against **women** in law and in practice; and, Special Rapporteur on the human rights to safe drinking **water and sanitation**.

In this connection we write to you regarding the draft crimes against humanity (CAH) convention that is currently pending with the International Law Commission.

We commend the Commission's work on the draft CAH and recognize the invaluable contribution such a convention would make towards enhancing states and

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others' efforts to deter and prevent the world's worst atrocities and address impunity for them. We also recognize that in order for such a text to be constructive it must reflect current definitions for terms used to describe human rights protections and abuses under international law, including for the definition of gender.

We write to express our concern that the draft CAH convention adopts the outdated and opaque definition of gender from the Rome Statute. It states, "it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society." While we recognize that gender is understood as a social construction under this definition, and while prosecutors have brought charges of various forms of sexual violence, the international criminal court has never successfully prosecuted charges of gender-based persecution. This definition has also never been adopted in any subsequent human rights instrument nor cited in tribunal jurisprudence.

International human rights law recognizes gender as the social attributes associated with being male and female, an evolving social and ideological construct that justifies inequality and provides a means to categorize, order and symbolize power relations.¹ This also reflects the ICC's Office of the Prosecutor's (OTP) understanding of the definition of gender as the "social construction of gender, and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and to girls and boys."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 Numerous UN and regional treaty bodies and courts have echoed this over the last two and half decades,⁴ as have our thematic reports:

¹ 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).

² The Office of the Prosecutor of the ICC, *Policy Paper on Sexual and Gender-based Crimes*, 3 (June 2014), <https://www.icc-cpi.int/iccdocs/otp/otp-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>

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

⁴ *See, for example*, UN Secretary-General, Protection against violence and discrimination based on sexual orientation and gender identity UN Doc. A/73/152 (12 July 2018); the Inter-American Court of Human Rights, Advisory Opinion OC-24/17 (November 24, 2017) par. 32; CAT Committee, Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. CAT/C/57/4 (22 March 2016); CEDAW, General Recommendation 33, UN Doc. CEDAW/GC/33 (3 August 2015); CAT General Comment 3, UN Doc. CAT/C/GC/3 (19 November 2012); CEDAW, General Recommendation 28, UN Doc. CEDAW/GC/28 (16 December 2010); ICESCR, General Comment No. 20, UN Doc. E/C.12/GC/20 (2 July 2009); General Comment 2, UN Doc. CAT/C/GC/2 (24 January 2008); ICESCR, General Comment 16, UN Doc. E/C.12/2005/4 (11 August 2005); Secretary-General, Question of torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/56/156 (3 July 2001); ICCPR, General Comment 28, UN Doc. CCPR/C/21/Rev.1/Add.10, (29 March 2000); Report of the Secretary-General: Implementation of the Outcome of the Fourth World Conference on Women (Beijing Platform for Action) (3 September 1996); CEDAW, General Recommendation 19, UN Doc. A/47/38 (1992). **Council of Europe Convention on preventing and combating violence against women and domestic violence (2011).**

- The Special Rapporteur on extrajudicial, summary or arbitrary executions affirms that gender is understood “as an evolving social and ideological construct that justifies inequality, and a way of categorizing, ordering and symbolizing power relations.”⁵ “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 Working Group on enforced or involuntary disappearances affirms that “The application of the principle of gender equality requires a full understanding of the different roles and expectations of the genders to effectively overcome issues that hinder the attainment of gender equality and full enjoyment of women’s rights... Gender equality in the area of enforced disappearances primarily requires that all individuals – regardless of their sex or gender – enjoy without discrimination the rights enshrined in the Declaration for the Protection of All Persons against Enforced Disappearances...”⁷
- The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health constantly refers to the discriminatory grounds that proscribe economic, social and cultural rights, pursuant to article 2 of the ICESCR. These include sexual orientation, gender identity and health status⁸. “Rights to sexual and reproductive health [...] are further compromised by violence, [...] and patriarchal and heteronormative practices and values. This reinforces harmful gender stereotypes and unequal power relations [...]”⁹ [Health] [s]ervices must be sensitive to gender and lesbian, gay, bisexual, transgender and intersex status, they must be non-judgmental regarding [...] personal characteristics, lifestyle choices or life circumstances and they must treat all [...] with dignity and respect, consistent with their status as rights holders.”¹⁰
- The Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, affirms that “housing strategies should identify groups that suffer housing disadvantages and should address the particular barriers they face. These groups include: women; persons with disabilities; people living in poverty; migrants; racial and ethnic minorities; indigenous peoples; youth; older persons; lesbian, gay, bisexual, transgender and intersex persons; and people who are homeless or living in informal settlements.”¹¹

⁵ 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).

⁶ Id. at para. 22.

⁷ General comment on women affected by enforced disappearances adopted by the Working Group on Enforced or Involuntary Disappearances, UN Doc. A/HRC/WGEID/98/2 (14 February 2013)

⁸ UN Committee on the Rights of the Child, General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), 17 April 2013, CRC/C/GC/15.

⁹ Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health on the right to health of adolescents, para. 84, UN doc. A/HRC/32/32 (4 April 2016)

¹⁰ Ibid, para. 32.

¹¹ Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Leilani Farha, para. 36, UN Doc. A/HRC/37/53 (15 January 2018).

- The Special Rapporteur on the rights of Indigenous Peoples recognizes “the gendered forms of violations against Indigenous women and the gendered effects of human rights abuses that target Indigenous communities as a whole.”¹²
- The Special Rapporteur on the human rights of internally displaced persons affirms that “Internally 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.”¹³
- The Special Rapporteur on the human rights of migrants, affirms the need to “ensure a robust gender analysis of the difference in the impacts of policies on men and women, with special attention to the ways in which restrictions on women’s mobility as a means of protection violate their rights and create favourable conditions for smuggling networks to thrive, including the use of a gender lens at all stages and in all aspects of the discussion as specific consideration of gender in the context of bilateral agreements.”¹⁴
- The Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, affirms 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. Those misconceptions include: that human nature is to be classified with reference to a male/female binary system on the basis of the sex assigned at birth; that persons fall neatly and exclusively into that system on the same basis; and that it is a legitimate societal objective that, as a result, persons adopt the roles, feelings, forms of expression and behaviours that are considered inherently ‘masculine’ or ‘feminine.’ A fundamental part of the system is a nefarious power asymmetry between the male and the female.”¹⁵
- The Special Rapporteur on contemporary forms of slavery, including its causes and consequences, recognizes that “different forms of contemporary slavery are gendered in nature. From a binary perspective, gender has historically resulted in a hierarchical distribution of power and rights that favours men and disadvantages women, with

¹² Report of the Special Rapporteur on the rights of indigenous peoples, Victoria Tauli Corpuz, para. 10, UN Doc. A/HRC/30/41 (6 August 2016).

¹³ 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).

¹⁴ Report of the Special Rapporteur on the human rights of migrants, Mr. François Crépeau, para.123(i), UN doc. A/71/285 (4 August 2016).

¹⁵ 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). The Independent Expert and other Special Rapporteurs have also adopted the definition of gender identity found in the Yogyakarta Principles which reads in the Preamble that gender identity’ “refers to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.”

important consequences for the comprehension of contemporary forms of slavery and the measures to prevent and eradicate the phenomena”.¹⁶

- The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment recognizes that “gender-based violence, endemic even in peacetime and often amplified during conflict, can be committed against any persons because of their sex and socially constructed gender roles. While women, girls, lesbian, gay, bisexual and transgender persons, sexual minorities and gender-non-conforming 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.”¹⁷
- The Special Rapporteur on trafficking in persons, especially women and children affirms that “the nature and form of trafficking in persons associated with conflict are highly gendered... Sexual enslavement, a practice exacerbated by situations of conflict, is highly gendered in that it disproportionately affects women and girls.”¹⁸
- The Working Group on the issue of discrimination against women in law and in practice has consistently demonstrated the global persistence of a discriminatory, cultural construction of gender... and the continued reliance of States on cultural justifications for adopting discriminatory laws or for failing to respect international human rights law and standards.¹⁹
- The Special Rapporteur on violence against women, its causes and consequences affirms States’ obligations “to take positive measures to change harmful stereotypes relating to gender roles conducive to violence.”²⁰
- The Special Rapporteur on the human rights to safe drinking water and sanitation affirms that “water and sanitation facilities must be safe, available, accessible, affordable, socially and culturally acceptable, provide privacy and ensure dignity for all individuals, including those who are transgender and gender non-conforming.”²¹

¹⁶ Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, para. 7, UN doc. A/73/139 (10 July 2018)

¹⁷ 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).

¹⁸ Report of the Special Rapporteur on trafficking in persons, especially women and children, Maria Grazia Giammarinaro, para. 61, UN Doc. A/HRC/32/41 (3 May 2016).

¹⁹ The report of the Working Group on the issue of discrimination against women in law and in practice, para. 25, UN doc. A/HRC/38/46 (14 May 2018).

²⁰ Report of the Special Rapporteur on violence against women, its causes and consequences, Dubravka Šimonović, para. 71, UN Doc. A/HRC/32/42 (19 April 2016). The Special Rapporteur also notes in particular the **Council of Europe Convention on preventing and combating violence against women and domestic violence** which defines gender as “the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men” under Article 3(c)

²¹ Report of the Special Rapporteur on the human rights to safe drinking water and sanitation, Léo Heller, para. 9, UN Doc. A/HRC/33/49 (27 July 2016)

These and other expert opinions help demonstrate the wide recognition of gender as a social construct that permeates the context in which human rights abuses take place. We therefore urge the International Law Commission to either remove the definition of gender in article 3(3) of the draft crimes against humanity convention (since no other persecutory category comes with a definition) or to insist on the social construction of gender as it is widely recognized to be²².

In closing, we thank you for taking the time to consider this letter alongside the many other inputs you are receiving. We would like to also inform you that this letter will be made available to the public on the website of the Office of the High Commissioner for Human Rights, on the Special Procedures mandates webpages.

We thank you for your commitment to promoting the progressive development of international law and its codification, and we commend you for your important work in drafting the crimes against humanity convention.

Sincerely, _____

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Special Rapporteur on extrajudicial, summary or arbitrary executions

Michal Balcerzak
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Rhona Smith
Special Rapporteur on the situation of human rights in Cambodia

Bernard Duhaime
Chair-Rapporteur of the Working Group on Enforced or Involuntary Disappearances

²² We note particularly the definition of gender proposed by the Council of Europe Convention

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