16 May 2014
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Re: Investigating and prosecuting sexual and gender-based violence as crimes under international law

Dear National Contact Points,

We write to you ahead of the 16th meeting of the European Network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes ("the EU Genocide Network") regarding the planned discussion on the investigation and prosecution of sexual and gender-based violence as crimes under international law. We welcome the initiative of the Secretariat of the EU Genocide Network to dedicate part of the upcoming meeting to this important topic.

We hope that the meeting will provide a useful opportunity for national practitioners to discuss and exchange views on best practices regarding efforts to combat impunity for sexual and gender-based crimes, and to address common obstacles and challenges.

We, the undersigned civil society organisations wish to draw your attention to the increasing recognition and documentation of the frequency, intensity and scale of sexual and gender-based crimes in recent years. In an important step in September 2013, 141 states adopted a *Declaration of Commitment to End Sexual Violence in Conflict* on the margins of the UN General Assembly.[1] This document underscores that rape and other forms of sexual violence in armed conflict may constitute war crimes including grave breaches of the Geneva Conventions and their first Protocol, which trigger the universal jurisdiction obligations of states.[2] Also, in certain circumstances these acts may constitute genocide. In addition, it is important to recall that even a single act of rape or other form of sexual violence by state actors or others in positions of power can also amount to torture[3] or a crime against humanity.[4]

[1] *A Declaration of Commitment to End Sexual Violence in Conflict*, 24 September 2014. 141 states had endorsed the initiative as of April 2014: see Foreign and Commonwealth Office, *Human Rights and Democracy Report 2013*, 10 April 2014.

[2] See for example Articles 27 and 147 of Geneva Convention IV on the Protection of Civilian Persons, and Articles 75(2)(b), 76 and 77(1) of the First Protocol Additional to the Geneva Conventions; see Patricia Viseur Sellers, *The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation*, Office of the High Commissioner for Human Rights, p8-10.

[3] This has been established in the jurisprudence of the international criminal courts and tribunals as well as the European Court of Human Rights, the Inter-American Commission on Human Rights and other bodies. See

The undersigned civil society organisations are aware of very few convictions for acts amounting to sexual violence prosecuted on an extra-territorial basis: that of Ephraim Nkezabera in Belgium,[5] and Désiré Munyaneza in Canada,[6] both in 2009.[7] In addition, sexual violence forms part of the elements underpinning the charges against of Ignace Murwanashyaka and Straton Musoni,[8] whose trial is underway in Germany. However, other cases in which sexual violence has been charged have later seen charges dropped or the defendant acquitted of the allegations at trial. These cases should serve as useful examples for the Network to consider in reflecting on the challenges encountered in investigating and prosecuting these crimes in is upcoming planned discussion.

There are at least three common obstacles to the investigation and prosecution of those responsible for committing sexual and gender-based violence, which we ask you to consider during your deliberations:

i) **Insufficient or uncorroborated evidence**: the nature of sexual violence means that complaints are frequently based on the testimony of only one person (the victim), while in conflict situations it may be that victims have died subsequent to the commission of the offence, and sometimes at the hands of those that perpetrated the sexual violence against them. As such, only second- or third-hand accounts of the crime may be available. Challenges to prosecute such crimes can be further amplified by rules of procedure which may disproportionately impact efforts to prove sexual offences. This was seen in one case where the rules of the country concerned prohibit convictions on the basis of uncorroborated evidence. In that case, the defendant was convicted of torture and – on appeal – war crimes, but acquitted of four counts of alleged rape, in part because the evidence against him in relation to one count of rape was provided by only one witness.[9]

REDRESS, *Redress for Rape: Using international jurisprudence on rape as a form of torture or other ill-treatment*, October 2013.

[4] Rape or other forms of sexual violence which takes place in the context of an attack on a civilian population can amount to a crime against humanity even when only a single act of sexual violence occurred, as long as the overall attack is widespread or systematic in nature.

[5] Ephraim Nkzabera was reportedly convicted of war crimes for giving specific orders to rape and subsequently execute Tutsi women, among other charges. See Reuters, *Rwanda banker gets 30-year sentence for war crimes*, 1 December 2009.

[6] Désiré Munyaneza was convicted of sexual violence as a war crime and as a crime against humanity; the verdict was upheld on appeal in May 2014. The Montreal Gazette, *Désiré Munyaneza case: Quebec's Court of Appeal upholds conviction for his role in Rwandan genocide*, 7 May 2014.

[7] An further example is the case of Didier Bourguet who was convicted in France in 2008 of raping a number of minor girls in the DRC while he was serving as a UN peacekeeper. See RFI, *Un ancien fonctionnaire de l'ONU condamné à neuf ans de prison*, 12 September 2008.

[8] Ignace Murwanashyaka and Straton Musoni have been on trial in Stuttgart since May 2011 on charges of war crimes and crimes against humanity related to their role as alleged leaders of the FDLR militia group in the Democratic Republic of Congo (DRC). See ECCHR, *FDLR-Leadership Trial in Stuttgart,* Status Reports of February 2012, November 2012 and February 2014, available on ECCHR's website.

[9] See the case of Joseph Mpambara in the Netherlands, Chapters 11-13 of the first instance judgment of The Hague District Court, 23 March 2009 and Chapter 12 of the judgment of The Hague Court of Appeal, 7 July 2011. Mpambara was acquitted of allegations of rape by both courts despite the courts' findings that the witness against him in relation to one count of rape was credible.

Practitioners should be mindful of international rules which have been adopted to permit exceptions to corroboration requirements in cases concerning sexual violence amounting to crimes under international law. See for example, the rules of the *ad hoc* international criminal tribunals and the International Criminal Court.[10] However this also underpins the need for careful investigation of such offences and, as discussed further below, consideration of other evidence in addition to witness testimony.

ii) **Victims' and witnesses' fear to testify** (as a result of security concerns and inadequate protection measures): survivors' and witnesses' genuine fears and prosecutors' inability to protect against reprisals can significantly impact the prospects for successful investigations and prosecutions. In one case, prosecutors cited the dangers for survivors to testify when justifying their request that charges of sexual violence be dropped midway through trial. Witnesses' wish to avoid testifying stems from fears of reprisals but it appears that withdrawals have also stemmed from witnesses' feelings that the process of giving evidence was too burdensome and their credibility was repeatedly called into question by the defence.[11] To enable survivors and witnesses of sexual violence to testify in an environment in which they feel safe and comfortable to come forward, practitioners should develop ways to identify, mitigate and manage all potential risks to survivors' and witnesses' security and wellbeing, while ensuring the rights of the accused to a fair trial.

iii) **Investigators' and prosecutors' lack of awareness of the prevalence of sexual violence, which may impact charging decisions**: an additional challenge may relate to insufficient legislative frameworks or penal codes, which will not always include the full scope of gender-based crimes recognised in international standards and jurisprudence.[12] Lack of awareness can undermine or result in "gender-blind" investigation strategies and charging decisions. For example, not all sexual or gender-based crimes under international law will occur during conflict.[13] In addition, recognising the occurrence of gender-based crimes when they do not encompass sexual violence can also be particularly challenging. For example, destruction of water wells in an intentional attack against civilian objects (a possible war crime) in a community where providing water is

[10] See for example Rule 63(4) of the ICC Rules of Procedure and Evidence provides: "Without prejudice to article 66, paragraph 3, a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence". See also Rule 70, ICC Rules of Procedure and Evidence, "Principles of evidence in cases of sexual violence", and Article 21(3) of the Rome Statute, which requires that application of the Statute and related instruments must be "consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender…".

[11] In the trial of Murwanashyaka and Musoni, two counts of rape and enslavement relating to sexual violence (as well as one count of recruitment of child soldiers) were provisionally dropped at the request of prosecutors in 2013. See ECCHR, *FDLR-Leadership Trial in Stuttgart,* Third Status Report of February 2014, available on ECCHR's website.

[12] For example rape, sexual slavery, enforced prostitution, forced pregnancy and enforced sterilization, among others; see ICC Elements of Crimes.

[13] For example, individual acts of rape or sexual violence which amount to torture. See further note 2, *supra,* and ECCHR, *Argentinean court follows international jurisdiction on sexual violence,* 23 March 2011.

the responsibility of women and girls has a gender element and could amount to gender-based crimes.

Training and sensitisation is central to overcoming challenges in this regard. Practitioners may need to develop – or be able to access and draw on – specialist legal expertise regarding sexual and gender-based violence amounting to crimes under international law, in order to avoid missing key opportunities to investigate and appropriately charge sexual and other gender-based offences. Further, practitioners who have not investigated or prosecuted such crimes previously are likely to particularly benefit from training which is focused on input and guidance by and for other practitioners. This could include practical investigative techniques, analysis of the applicable legal frameworks, lessons learned from past experience or case studies. Development of capacity in this regard should also help ensure a significant gender presence in the 'war crimes units' or in the number of relevant practitioners handling these cases. All of this should be accompanied by education on victims and survivors' perspectives, sensitivities, specificities relating to trauma in order to challenge stereotypes regarding sexual violence and ensure that survivors' evidence is interpreted and responded to appropriately.

The upcoming Network meeting, as well as future meetings, present an opportunity for practitioners to consider these training needs, with a view to developing effective prosecutorial and investigative responses to the phenomenon of sexual and gender-based violence. Practitioners should use the meeting as an opportunity to identify and highlight areas of common concern, with the twofold aim of considering how their current operational arrangements and procedures can be strengthened to order to achieve a more gender-sensitive approach to international justice, and to inform future initiatives which can also help to build capacity in this field.

In order to ensure that sexual violence is not marginalised or treated as a collateral crime, it is key that investigation and prosecution of sexual violence is fully integrated into the overall case strategy from the outset of the case. This should, for example, inform decisions to collect other evidence in addition to witness testimony which can support identification and charging decisions in relation to sexual and gender-based violence.[14] Such an approach may be particularly useful regarding a situation such as Syria for example, because in contrast to older crime situations such as Rwanda, contextual information about an emerging backdrop of sexual violence is becoming available alongside contemporary efforts to document and gather evidence on the ground.[15]

[14] See Chapter V, "Investigations", of the Draft Policy Paper on Sexual and Gender Based Crimes, Office of the Prosecutor of the ICC, February 2014, which cites "insider testimony, the testimony of relevant experts, medical and pharmaceutical records, empirical research" and reports of credible organisations as examples. See also Lawry, de Brouwer, Smeulers, Rosa, Kisielewski, Johnson, Scott, and Wieczorek, *The Use of Population-Based Surveys for Prosecutions at the International Criminal Court: A Case Study of Democratic Republic of Congo*, International Criminal Justice Review, March 2014 24: 5-21.

[15] See UN Human Rights Council, *Report of the independent international commission of inquiry on the Syrian Arab Republic*, A/HRC/25/65, 12 February 2014; Foreign and Commonwealth Office, *Case Study of UK response to reports of sexual violence in the Syrian conflict,* 10 April 2014.

The EU Genocide Network could and should play an important role to share experience and build capacity. The planned discussion at the upcoming meeting is an important starting point. The EU Genocide Network can however also complement current debates with practitioner-driven proposals for practical means to improve the prospects for successful investigations and prosecutions. These could include for example, practitioners' seminars, practical workshops for focus groups, or targeted training by fellow practitioners as a means to complement roundtable discussions. Such initiatives could also have regard to the experiences of practitioners in countries other than those represented at the Genocide Network, which have prosecuted sexual and gender-based crimes amounting to crimes under international law.[16]

We hope that the upcoming meeting will be a useful starting point for future debates within the EU Network on how to foster a best practice orientated approach to the investigation and prosecution of these crimes. We welcome this opportunity to engage with the Secretariat and National Contact Points, and would be happy to follow up on any points which may arise from this letter.

Yours sincerely,

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[16] Two recent examples include the trial of 39 soldiers in Goma, DRC regarding sexual violence committed in Minova in November 2012 (see UN News Centre, *DR Congo mass rape verdict fails to deliver justice to victims, says UN envoy*, 8 May 2014); and the conviction of former president of Guatemala José Efraín Ríos Montt of genocide and crimes against humanity, including rape and sexual violence, in May 2013 (see Open Society Justice Initiative, *Judging a Dictator: The Trial of Guatemala's Rios Montt*, November 2013).