



NON C'È PACE SENZA GIUSTIZIA
NO PEACE WITHOUT JUSTICE

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**Women's Initiatives
for Gender Justice**



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NPWJ and WIGJ Submission on the Draft OTP Policy on Cultural Heritage

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Introduction

1. No Peace Without Justice (NPWJ) and Women's Initiatives for Gender Justice (WIGJ) welcome the opportunity to provide written comments to the Office of the Prosecutor (OTP) on its draft Policy on Cultural Heritage. Over the years, we have participated in consultations relating to different OTP policies and continue to believe such consultations are important not just in terms of the content of submissions the OTP may receive, but also in terms of a concrete expression of the OTP's commitment to transparency and cooperation, including with civil society.
2. NPWJ is an international non-profit organisation founded by Emma Bonino and born of a 1993 campaign of the Transnational Radical Party that works for the protection and promotion of human rights, democracy, the rule of law and international justice. NPWJ's International Criminal Justice work focuses both on international and national efforts to restore the rule of law and provide accountability and redress for the victims of crimes under international law, be they through the International Criminal Court, or through ad hoc Courts or Tribunals, national prosecutions or other accountability processes. NPWJ has been working on the ICC since its inception; NPWJ participated in the Rome Conference and all subsequent Preparatory Committees and Assembly of States Parties sessions and works with stakeholders around the world, including with the ICC itself, to promote the principles of universality, effectiveness, efficiency and impact of the ICC.
3. WIGJ is an international women's rights organisation that advocates for gender justice through domestic mechanisms as well as the International Criminal Court. WIGJ



monitors the work of the ICC and advocates for the inclusion of women in the international justice process as well as accountability for sexual and gender-based crimes (SGBCs) within ICC procedures. Survivors of sexual and gender-based violence inform the voice of Women's Initiatives to ensure inclusive gender justice in international and domestic laws, policies, practices, adjudications and jurisprudence. WIGJ was created to ensure the legacy of the Women's Caucus in the Rome Statute negotiations and has been working on the ICC since its inception.

4. This submission is divided into three parts. The first part concerns elements of the draft that NPWJ and WIGJ particularly welcome and support ("Positive elements"). This part highlights those elements and concepts that NPWJ and WIGJ believe should be retained and for which reasons. The second part concerns elements of the draft that NPWJ and WIGJ believe could usefully be clarified, amended or expanded ("Suggestions on specific elements"). This part focuses both on language and concepts, including some aspects that may seem less significant, but which could cause confusion. The third part concerns elements that NPWJ and WIGJ believe should be included in the draft policy that are currently absent ("Suggestions for additions"). This part contains specific recommendations and the reasoning behind the suggestions.

Positive elements

5. NPWJ and WIGJ welcome the OTP's efforts towards the adoption of a comprehensive policy on cultural heritage, particularly one adopted with a holistic approach throughout all the stages of the Office's work, namely, Preliminary Examinations, Investigations, Prosecutions and, if relevant, Reparations. We also welcome the analysis made in connection and in relation to the various categories of crimes within the Statute, particularly war crimes, crimes against humanity and genocide.
6. In general, the draft Policy is forward-thinking in its objectives. In particular, we welcome that the OTP recognises cultural heritage as a broad concept that incorporates



both tangible and intangible expressions of human life (paras 3-4), highlighting that the degradation and destruction of tangible and intangible cultural heritage is a loss both for local communities and for the international community as a whole. This recognition is important since damage to intangible cultural heritage can be difficult to perceive and quantify, as can be seen with languages, cultural practices, traditions and worldviews that have traditionally been under-valued or ignored in the western understanding of cultural heritage.

7. Going beyond the mere notion of “cultural property” from the outset (para 15) is essential for addressing and prosecuting crimes against intangible cultural heritage, which is present in social relations and interactions that do not necessarily take place in a particular physical space (e.g. language). Of particular relevance is the inclusion of natural heritage within the concept of cultural heritage (para 16) and the inclusion of examples from the Inter-American human rights system, as well as case-law related to the Americas within the universal human rights system, which address a notion of cultural heritage that goes beyond property, buildings, objects, etc.
8. The recognition of natural heritage, i.e. “natural sites of cultural value, including certain landscapes or physical, biological, or geological formations”, as part of cultural heritage (para 16) is particularly important because it gives the possibility to highlight that there are different ways of understanding what cultural heritage is. For instance, in some societies, the conception of nature is not dissociated from culture, meaning that landscapes, animals, plants and other non-human entities play an active role in cultural life. They have agency because of their condition of being social subjects instead of objects - as they are traditionally perceived. This is also highlighted by the recognition that the appropriation of traditional lands can be linked both to the destruction of people’s cultural heritage but also to the physical destruction of the affected group (para 81). Building a bridge between these different forms of heritage offers the possibility to protect better what is essentially human (culture) and protect the natural environment and other expressions of nature from an interconnected perspective, as well as to demonstrate



cultural sensitivity towards conceptions of heritage that have traditionally been suppressed or overlooked.

9. The Office's recognition of the multi-faceted nature of crimes against cultural heritage is a very positive aspect, as is the acknowledgement of the inter-generational impact (para 26) of these crimes, their transboundary nature (para 27) and their impact on indigenous peoples and communities (para 27), including by referencing important case-law on the matter. We encourage the Office to extend an inter-sectional approach to cover all vulnerable groups across all aspects of the draft Policy.
10. In keeping with other OTP policies,¹ this policy applies a gender perspective and child-sensitive approach, which is very important. It is vital that the draft Policy commits to applying a gender analysis to all crimes affecting or against cultural heritage, given the historical lack of consideration of this dimension (para 29). We welcome the Office's analysis of the relationship between sexual and gender-based crimes and their impact on cultural heritage (see also para 59) and encourage the Office to apply this draft Policy by assessing and understanding the cultural significance of certain acts. In this respect, we welcome the reference to both sex and gender in its analysis, even though article 21(3) only refers to gender. As described below, we encourage the Office to review relevant literature, including the *Hague Principles on Sexual Violence*,² to expand its understanding of sexual and gender-based crimes and their impact, particularly on issues relating to cultural heritage, in this instance.
11. The distinction made by the Office of pillaging as opposed to seizure of property is key to this draft Policy. We welcome its specific inclusion, as well as the recognition that there is a particular harm in the pillaging of cultural property (paras 57-58).
12. We welcome the draft Policy's recognition that attacks on cultural heritage can affect the mental health of groups and cause serious psychological suffering that could qualify as

¹ Notably the *OTP Policy Paper on Sexual and Gender-Based Crimes* of June 2014 and the *OTP Policy on Children* of November 2016.

² See generally <https://thehagueprinciples.org/>.



torture (paras 70, 80). The witness testimonial used at para 80 shows that the draft Policy acknowledges that attacks on cultural heritage can cause both individual and collective mental harm, and that the effects on mental health are not just limited to the short term but have an impact also in the long term. This is particularly relevant in the case of cultural heritage, which, as noted, extends beyond any one finite period of time and is inter-generational in nature.

13. We welcome the recognition of the right to self-determination as a fundamental right that could be included within the meaning of article 7(1)(h) of the Statute (para 74). The fact that attacks on cultural heritage are recognised as affecting the right of peoples to “freely pursue their [...] cultural development” is particularly relevant for indigenous peoples in the Amazonia region.
14. A key issue in the overall success of this draft Policy will be the proper implementation of the relevant provisions related to cultural heritage within domestic systems, in line with the principle of complementarity. Reference to domestic implementation in para 124 of this draft Policy is therefore welcomed, as is the reference to universal ratification, which also remains an important policy priority for both NPWJ and WIGJ.

Suggestions on specific elements

15. We welcome the efforts of the Office to include an analysis of how this draft Policy can benefit from developments within the fields of International Human Rights Law and International Humanitarian Law (see, for example, para 28). We note that throughout the draft Policy, there is a reference to the importance of highlighting that “all practice of cultural heritage must be done in a manner that corresponds with international law (...) including human rights law” (see, for example, para 7). It would be important for the Office to clarify this and, if possible, provide relevant examples. We further encourage the Office to reflect on the contributions from and interactions with all relevant international legal fields, including for example international environmental law, in line



with article 21 of the Statute, especially given the inclusion of natural heritage within the concept of cultural heritage.

16. We note the reference in para 42 to the potential “preferencing” of the crime of attacks against cultural property over other potentially applicable crimes. We do welcome a focus being placed on these types of crimes and other crimes within the Rome Statute that are relevant to cultural heritage, given their importance and impact on individuals and communities. We nonetheless wish to sound a note of caution in preferencing these crimes to the exclusion of others. We believe that the crimes charged in particular cases should, to the extent possible, reflect the broad experiences of victims, rather than be driven by policy priorities about specific types of harm. As noted in a previous NPWJ submission, “[t]here are challenges of perception involved with “one-charge indictments”; if charges do not represent the experience of victims and communities, this may [also] lead to disillusionment and challenges in terms of obtaining evidence relating to other crimes”.³
17. We welcome the Office’s reflection, in para 50, that there is a lacuna in provisions on general protection of civilian property (art 8(2)(b)(ii) and 8(2)(b)(iv)) and the need to extend this protection to non-international armed conflict, not solely to international armed conflict, which can be of particular relevance for the defence of the cultural heritage of indigenous peoples. In general, we encourage the Office to reflect on this type of gap in the broadest sense, namely limitations in protection during non-international armed conflicts that are not linked specifically with cultural heritage and to keep an eye on this for future policies relating to other types of crime or harm.
18. The distinction between “attacks” on cultural heritage and “destruction” of cultural heritage is a very important one, which draws analysis from the different provisions existing in International Criminal Law and International Humanitarian Law frameworks.

³ NPWJ *Submission on the Draft OTP Policy Paper on Case Selection and Prioritisation* of 1 April 2016, para 6, available from <http://www.npwj.org/sites/default/files/ressources/NPWJSubmissionDraftPolicyCaseSelectionPrioritisation01APR16.pdf>.



Clarifying that the Rome Statute refers specifically to “attack” is an important distinction (para 33) and further reconciling these two different thresholds (attacks vs. destruction), including through thorough reviews of applicable case law, could enrich the draft Policy.

19. Sections of the draft Policy that refer to the cultural heritage of groups whose cultural heritage is linked to their territory and to natural formations (paras 67 and 81 on extermination and genocide respectively) could be expanded as this might be the case for indigenous groups around the world. Through its case law in particular, the Inter-American Human Rights system can provide practical ways to approach this type of cultural heritage that could usefully be considered by the OTP in this draft Policy.
20. The overall perspective of the draft Policy seems to privilege direct harm, without taking into consideration attacks against cultural heritage that could be carried out in more indirect ways and through more subtle policies, as it is the case with natural, intangible elements. While addressing the relationship between cultural heritage and forced displacement (para 70), the draft Policy could clarify, for instance, whether the contamination or pollution of land or sacred waters could be included among the causes. The same applies to para 67, where the OTP's position could usefully be clarified in the case of indirect attacks such as pollution or contamination.
21. The draft Policy includes key provisions on the importance of State cooperation. While important aspects of the obligation to cooperate are included within this draft Policy (including preservation of evidence), more could be said with regards to other elements such as State obligations to hand over relevant documentation and evidence, access to archives and relevant sites, etc. The draft Policy mentions it will work on collecting and protecting data or information on cultural heritage, but it is still not very clear what this broad concept really comprises in the practical sense. It may be useful to clarify further what could be considered to be relevant evidence, especially considering that in some countries there is lack of documentation, titles, registrations, etc. (cf. paras 102 and 103), so as to provide guidance for potential collaborators on the type of information the Office may seek in implementing this draft Policy.



22. On the issue of cooperation, while there is important mention of collaboration by other actors, such as UNESCO, we also encourage a broader reference to collaboration with affected and vulnerable groups, including indigenous communities, and also to environmental actors who may assist in considerations relating to natural heritage, attacks against it and its destruction.
23. Throughout the draft Policy, the Office refers, in various stages, to positive complementarity. We are aware that over the course of the years, the Office has signalled its limited or secondary role with regards to a positive complementarity mandate (or, rather, an evolving mandate on this issue). Language like that included in paragraph 9 on a “central role” of the office in galvanising documentation and preservation of cultural heritage at risk of destruction seems to point to a more active role on positive complementarity. Paragraphs 10 and 18 of the draft Policy, on the other hand, seem to refer to a more limited role that the Office would plan take. While we could welcome a more pro-active role of the OTP in positive complementarity, it may be beneficial to revisit these two paragraphs so they may be harmonised and avoid confusion.

Suggestions for additions

24. We welcome the Office’s efforts and acknowledgement of the need to widen its institutional capacity in carrying out its mandate with regards to acts that may affect cultural heritage (para 12). This includes its reference, in section VIII, of specific language on the need to enhance the Office’s institutional capacity and the need to bring on specific expertise on the issue of cultural heritage. We encourage the Office to include within the draft Policy a specific call for increased resources and funding on the issue and reflect this draft Policy in the Office’s proposed budget for the next budgetary period.
25. As noted, the draft Policy’s analysis of the relationship between sexual and gender-based crimes to cultural heritage is crucial, including the need to take into account the cultural heritage of victims and survivors of these crimes. We call on the Office to reflect on all



forms of sexual violence in implementing this policy and encourage the Office to review the *Hague Principles on Sexual Violence*, which, in its *Civil Society Declaration*, includes examples of acts of sexual violence as per the view of survivors, including “marking a person as sexually deviant, sexually impure, or as survivor of sexual violence, by using culturally significant methods, such as by removing their hair, requiring them to wear sexually suggestive symbols, or branding their body”.⁴

26. While aware that issues relating to modes of liability is developed in other OTP Policy Papers and documents, we encourage the Office to reflect on the complex nature of crimes against or affecting cultural heritage and to recognise that these crimes can be committed by different actors, through different means, with varying natures and levels of responsibility and participation. This is particularly relevant in relation to crimes against humanity and the recognition in the draft Policy of links between the existence of a State or organisational policy to the evidence of an underlying motivation for an attack against cultural heritage, which is particularly positive and relevant for attacks on natural heritage determined by States’ or companies’ policies (para 64). We therefore encourage the Office to include reflections on modes of liability in the draft Policy, especially in the context of indirect attacks like pollution or contamination, as mentioned in para 19 of this submission.
27. We note that the draft Policy refers to the Office monitoring implementation of the draft Policy once adopted (para 134). We encourage the OTP to engage with relevant stakeholders both in that monitoring and in a regular review of the policy after a period of years of operation, including also the perspective of indigenous persons, children and young people and women, as well as civil society and other relevant groups.

⁴ The Civil Society Declaration on Sexual Violence, part 4 “Examples of acts of sexual violence”, section 4(o), available from <https://4genderjustice.org/ftp-files/publications/The-Hague-Principles-on-Sexual-Violence.pdf>.



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Conclusion

28. NPWJ and WIGJ remain committed to supporting the work of the International Criminal Court, and the Office of the Prosecutor, including through participating in consultations such as these. We would find it very useful to receive feedback on this submission, so we can tailor our contribution to future consultations to be as beneficial as possible. NPWJ and WIGJ stand ready to provide any further information or clarifications.⁵
29. We conclude as we began, by thanking you again for this opportunity and for your willingness to consult with civil society on these issues of mutual importance and concern.

⁵ Please contact Alison Smith, NPWJ Director for International Criminal Justice, on asmith@npwj.org.