



AJC Submission on ICC Office of the Prosecutor (OTP)'s 2014 Policy Paper on Sexual and Gender-based Crimes

The Asia Justice Coalition (AJC) secretariat¹ welcomes the OTP's call for input towards the revision of its 2014 Policy Paper on Sexual and Gender-based Crimes (2014 Policy Paper).

We thank the OTP for the opportunity to participate in further developing appropriate charging and sentencing practices which acknowledge the complexity and breadth of harm caused by such crimes.

Most importantly, developing and implementing this Policy to greatest effect can only be achieved by also prioritising institutional development and gender equality at the Court as a whole.

To this end, this submissions focuses on three issues: (1) cumulative charging as a way to ensure accountability for the full range of gender-based crimes; (2) clarification of how modes of liability other than direct perpetration may differ in sexual and gender-based crimes; and, (3) the importance of gender equality at the Court and greater institutional development to support the successful implementation of the policy as a whole.

1. Effective use of cumulative charging to ensure accountability for the full range of gender-based crimes.

Paragraph 9 of the "General introduction" to the Elements of the Crimes of the ICC states that "[a] particular conduct may constitute one or more crimes." However, this is otherwise unaddressed in the Rome Statute and the Rules of Procedure and Evidence. In the 2014 Policy Paper, the OTP recognises the importance of cumulative charging as a way to "reflect the severity and multi-faceted character of these crimes fairly, and to enunciate their range supported by the evidence in each case."²

The manner in which charges are brought by the Prosecutor are influenced by a number of factors, including developments in the jurisprudence of the Court in relation to cumulative convictions. Cumulative charging must be utilized more effectively, in order to ensure the full range of gender-based crimes are prosecuted.

¹ This submission shall be attributed to the Asia Justice Coalition secretariat; its contents may not necessarily reflect the position of a specific Member and/or all Members of this Coalition.

² 2014 Policy Paper, para. 72.

Multiple or cumulative charging serve to describe the full culpability of a particular accused or provide a complete picture of their criminal conduct.³ As the ICC Trial Chamber demonstrated in the *Ongwen* case, cumulative convictions can be utilised as a way to ensure accountability for the full range of gender-based crimes. Cumulative convictions were entered for the analogous crimes against humanity and war crimes of sexual slavery, murder, torture, rape, and forced pregnancy. The Trial Chamber applied the *Čelebići* test for cumulative convictions for the same crime that was both a crime against humanity and a war crime, as well as with respect to rape and sexual slavery as war crimes and crimes against humanity.⁴

In *Ongwen*, the Trial Chamber rejected the relevance of Article 20 of the Statute to cumulative convictions. Article 20 of the Statute deals with the principle of *ne bis in idem*, namely the prohibition of consecutive trials for conduct which formed the basis of crimes for which a person has already been convicted or acquitted. The Trial Chamber noted that nothing in the Rome Statute excludes permissibility of entering cumulative convictions.⁵ The Appeals Chamber confirmed the Trial Chamber's interpretation and factual findings concerning sexual and gender-based crimes, including the crime of forced marriage as a form of other inhumane acts and the crime of forced pregnancy. The Appeals Chamber further confirmed the cumulative convictions entered by the Trial Chamber, noting that each provision which has a "materially distinct" element protects different legal interests.⁶

As *amici* have submitted in the *Ongwen* appeal proceedings, entering cumulative convictions under certain conditions and the test for establishing permissibility has been applied by other *ad hoc* tribunals such as the SCSL and the ECCC.⁷ This test was articulated by the ICTY in *Čelebići* and states that "reasons of fairness to the accused and the consideration that only distinct crimes may justify multiple convictions, lead to the conclusion that multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other."⁸

The *Ongwen* appeals judgment constituted a milestone in the prosecution of sexual and gender-based crimes as part of international crimes. It recognized the nuances and distinctive components of the crime of forced marriage and forced pregnancy. The Court recognised that sexual and gender-based crimes are not all the same and that there are distinctive elements to each crime and that each crime protects separate interests. For example, the Appeal Chamber in discussing the distinct legal interests behind certain SGBV crimes found that "Forced marriage as a form of other

³ *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Trial Judgment)*, IT-96-23-T & IT-96-23/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 22 February 2001, para. 169.

⁴ *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-1762-Red, Trial Judgment, paras. 2874, 2927, 2973, 3062, 3080, 3100.

⁵ *Ongwen* Trial Judgment, para. 2792.

⁶ Summary of Appeals Chamber judgment in *Ongwen* case, para 71.

⁷ *Amici Curiae Observations on Sexual- and Gender-Based Crimes, Particularly Sexual Slavery, and on Cumulative Convictions Pursuant to Rule 103 of the Rules of Procedure and Evidence*, <https://www.icc-cpi.int/court-record/icc-02/04-01/15-1934>

⁸ *Prosecutor v. Čelebići*, Case No. IT-96-21-A, Appeals Chamber Judgement, para. 412.

inhumane acts is a continuing crime and, as such, it criminalises not only the conduct of entering into a conjugal relationship, but the entire continued forced relationship. The crime of forced pregnancy seeks to protect, among others, the woman’s reproductive health and autonomy and the right to family planning.”⁹ This sets a precedent and sends a strong message to victims who seek justice for such sexual and gender-based crimes, and allows for a deeper understanding of gender-based crimes beyond those which are “sexual” in nature.

However, while the *Ongwen* appeals judgement made significant progress towards cumulative charging and convictions, there was room for improvement, in light of its finding that the crime against humanity of enslavement was entirely encompassed within the crime and definition of sexual slavery. As *amici* submitted, sexual slavery should not be seen as a “form” of enslavement. Instead, all acts of a sexual nature, including control over sexuality, sexual integrity and sexual and reproductive autonomy, should constitute indicia of the exercise of powers of ownership of enslavement in all its forms.¹⁰ Therefore, enslavement as a crime against humanity should not be regarded as “in the abstract entirely encompassed within sexual slavery.”¹¹

The International Criminal Tribunal for Rwanda, as well as several national jurisdictions, similarly accept that cumulative charging is appropriate and necessary as it helps to capture the different and multiple harms experienced by victims and survivors, especially those who have suffered from sexual violence.¹²

Understanding the context in which gender-based harms occur, and not considering them in isolation, can support achieving inclusive justice. A single incident of sexual violence could be part of a pattern of enslavement, persecution or genocide. Therefore, cumulative charging and subsequent convictions can fully encompass the broader context of violence and harm in order to achieve inclusive justice.¹³

Recommendation

The OTP should increasingly consider the effective use of cumulative charging for sexual and gender-based crimes, and, upholding the precedent set in the *Ongwen* case, ensure the full range of gender-based crimes are prosecuted.

2. Importance of modes of liability other than direct perpetration in sexual and gender-based crimes.

Regarding modes of liability at paragraph 78, the present Policy notes that the OTP will “as appropriate, increasingly explore the potential of bringing charges on the basis of article 28

⁹ *Ongwen* Appeals Judgment, paras. 17-18.

¹⁰ *Amici Curiae* Observations on Sexual- and Gender-Based Crimes, at note 7, para. 2.

¹¹ *Ongwen* Trial Judgment, para. 3051.

¹² Women’s Initiatives for Gender Justice, “Statement on the ICC decision to omit charges for gender-based crimes against Jean-Pierre Bemba Gombo”, <http://www.iccwomen.org/news/docs/Statement---PTC- Decision-on-Bemba.pdf>.

¹³ IIM Gender Strategy and Implementation Plan, pg. 9.

[command or superior responsibility] as well as article 25 [individual criminal responsibility].”¹⁴ This is extremely important for highlighting the prevalence of sexual and gender-based crimes in conflict and the role superiors play in permitting, fostering, or preventing them.

In practice, however, the Court’s history indicates that indirect co-perpetration or command or superior responsibility for such crimes is rarely charged and, where it was, the accused either was acquitted or had conviction reversed on appeal. However, for cases that are *not* related to sexual and gender-based crimes, command or superior responsibility has been investigated and prosecuted successfully.

Therefore, an updated policy must take into consideration factors that are unique to sexual and gender-based crimes which nevertheless warrant addressing liability as an indirect co-perpetrator or as a commander or superior. This also includes taking into account, and debunking, perceptions about SGBV crimes as being more likely to be individual crimes, motivated by “passion” or lust” or loss of control for example, making them unresponsive to command control and influence. The reality is that the tone set by commanders can at least help to shape how troops under their control can understand what treatment is acceptable when it comes to civilians, including SGBV crimes. Accordingly, commanders cannot claim that these types of crimes are uniquely outside their realm of influence, nor potential criminal responsibility.

To elaborate, in *Katanga*, the Trial Chamber unanimously acquitted the accused of being an accessory to rape, sexual slavery and the use of child soldiers. Although the Chamber did find that the rape of three women had taken place, it declined to hold Katanga responsible for the crimes as it did not find convincing evidence to conclude that such crimes formed part of the common purpose of the attack.¹⁵ In fact, in both *Katanga* and *Ntaganda*, the Trial Chamber found that the decisive factor for sexual slavery was the exercise of ownership powers over a person’s sexual autonomy.¹⁶ However, in *Ntaganda*, the Trial Chamber also found that there was no exhaustive list of situations or circumstances that delimited how ownership powers were exercised and unfortunately limited “acts of a sexual nature” to acts of rape, and this was affirmed on appeal.¹⁷

In the *Akayesu* case at the International Criminal Tribunal for Rwanda (ICTR), the accused was found responsible for sexual violence, including rape, committed by others within the commune under his authority. While the ICTR statute on criminal liability permits holding a man individually responsible for sexual acts other men committed as if he committed them himself¹⁸, this finding was also made possible due to the nuanced approach of the chamber, which defined rape as any act of a sexual nature which is committed on a person under circumstances which are coercive.¹⁹

¹⁴ 2014 Policy Paper, para. 78.

¹⁵ *Prosecutor v. Katanga*, ICC-01/04-01/07-3436, Judgement Pursuant to Article 74 of the Statute (Mar. 14, 2014), para. 1693.

¹⁶ *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Decision Pursuant to Art. 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, ¶ 172 (June 9, 2014), paras. 960 and 1204; *Katanga Trial Judgment*, paras. 975, 981, 1013.

¹⁷ *Ntaganda Trial Judgment*, paras. 955-975.

¹⁸ Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. Doc. S/RES/955/Annex (Nov. 8, 1994), articles 6(1) and 6(3).

¹⁹ *Akayesu trial judgement*, ICTR, para. 688.

However, at the ICC, the Appeals Chamber in *Bemba* reverted to a mechanical definition of rape, which does not address the nature of sexual violence as an act of both physical and *psychological* violence in the same way as *Akayesu*. Adopting the strict approach as elaborated in *Bemba* makes it difficult to hold commanders accountable as an indirect co-perpetrator for sexual and gender-based crimes unless the accused themselves were physically committing said crimes. However, “if only superiors of the immediate rapists are going to be charged with sexual violence committed by subordinates, on the theory that they will prevent the attacks if held responsible for them, then it becomes particularly important *that they be held responsible for them*...Otherwise, international justice confirms for the subordinate men of the world, who commit most of the rapes, not only that there is no chance they will be held responsible for each rape they commit, but also that there is only a small chance that their superiors will be.”²⁰ Therefore, higher ranking civilian and military officials must continue to be investigated and prosecuted for these crimes.

The ICC’s jurisprudence on modes of liability remain a major obstacle to the successful prosecution of cases involving SGBV crimes, especially for high-ranking accused who either did not clearly order the crimes or were not physically present during the commission of those crimes.²¹ Yet, specifically command or superior responsibility *exists* in international criminal law precisely because persons in an hierarchical position have power and legal obligations that could prevent, halt, and/or account for sexual and gender-based crimes. Furthermore, the prosecution of high-ranking officials (military and civilian) for such crimes is crucial in recognizing the widespread prevalence and encouragement of such crimes, and for achieving a deterrent effect.

It remains to be seen how the ICC will handle the prosecution of sexual and gender-based crimes in the *Al Hassan* case, and whether such charges will be included in a number of situations related to ICC’s ongoing investigations, such as in Afghanistan, Colombia, Mali, Myanmar, Nigeria and Uganda for example, although forms of sexual and gender-based violence constitute some of the core crimes perpetrated by the accused persons in these situations. More attention in any revision to the nuances of how this power can be used, or should have been used, to address such crimes should be included in the updated policy.

Recommendation

The OTP should include charges of command or superior responsibility in more cases to hold commanders and civilian officials responsible for the full range of gender-crimes committed and to analyse sexual violence evidence through a gender-competent lens.

²⁰ Catharine A. MacKinnon, The ICTR’s Legacy on Sexual Violence, *New England Journal of International & Comparative Law*, Volume 14:2, pg. 106.

²¹ Susana SáCouto and Patricia Viseur Sellers, The Bemba Appeals Chamber Judgment: Impunity for Sexual and Gender-Based Crimes?, 27 *William & Mary Bill of Rights Journal*, 2019, <https://scholarship.law.wm.edu/wmbrj/vol27/iss3/2>, pg. 17.

3. Centre gender equality and institutional development for successful implementation of the policy

a. Gender Equality at the Court

The 2014 Policy Paper is an opportunity to better reflect the institution’s commitment to ensuring gender equality. This issue remains especially critical in light of findings by the Independent Expert Review of the International Criminal Court and the Rome Statute System (IER Report), which highlighted serious findings across their report on gender-related and work culture aspects.

This submission would like to emphasise the need to recruit staff and intermediaries who are from, or deeply understand, intersectional identities and systems of oppression that motivate atrocity crimes. This intersectional understanding is critical and will ideally benefit from close consultation with local partners as well as other experts from a wide range of disciplines such as history, sociology, psychology, public health, and social work.²²

There are two issues here we would like to highlight.

The first is that there is a lack of gender equality in terms of the number of women staff at the Court, leading to gender inequality throughout the Court. This especially includes inadequate representation from women staff at more senior and managerial levels. Currently, 50% of justices at the ICC are women, although this figure sat much lower at just 33% between 2015 and 2020.²³ The need to maintain a gender balance amongst ICC staff was assigned “high priority” in a recommendation on the election of the Registrar, adopted by the ASP on the last day of the 21st session.²⁴

The IER Report stated that:

“decisive action needs to follow the ASP’s and Court’s commitment to ensuring gender equality and providing a welcoming environment for all individuals affiliated with the Court. The Experts make a number of findings and recommendations throughout the Report addressing gender inequality, particularly in senior positions, through measures relating to elections, recruitment, working environment, training and professional development. Targeted interventions for gender equality should be complemented by gender mainstreaming”²⁵

²² Kim Thuy Seelinger, Sexual and Gender-Based Crimes: Observations on the ICC Office of the Prosecutor, *Völkerrechtsblog*, 15.07.2022, doi: [10.17176/20220715-113338-0](https://doi.org/10.17176/20220715-113338-0).

²³ The Coalition for the ICC Elections Team, “Gender Representation on the ICC Bench”, (2020) https://coalitionfortheicc.org/sites/default/files/cicc_documents/CICC%20Elections%20Team%20statement%20gender%20.

²⁴ Recommendation ICC-ASP/21/Rec.1, (2022) <https://asp.icc-cpi.int/sites/asp/files/2022-12/ICC-ASP-21-Rec.1-ENG.pdf>.

²⁵ Independent Expert Review of the International Criminal Court and the Rome Statute System, <https://asp.icc-cpi.int/Review-Court>, para. 64.

The report further highlighted severe gaps in addressing bullying and harassment, including sexual harassment, the inadequacy of existing internal justice mechanisms, the overrepresentation of males in managerial positions, and the impact on leadership, managerial approaches and the culture in the workplace.²⁶

The second point is targeted towards recruitment policies at the ICC, specific to staff members who are likely to engage with victims and witnesses of sexual and gender-based crimes. The 2014 Policy Paper does address how staff will receive briefings on relevant cultural issues, traditional and religious practices, and other considerations relevant to conducting investigations, and also states that in the course of preparations for missions, relevant staff are required to familiarise themselves with local traditions, customs, and cultural issues, including the status of females and males within this context, and any other factors that may impact on the investigation mission and the interview process.²⁷ Staff and intermediaries will be specifically briefed to ensure that they have an understanding of the possible effects of trauma in relation to both these particular crimes and to the investigative process.²⁸ However, how this has been operationalised remains unclear.

Furthermore, ensuring recruitment of women staff with relevant skills and background, especially those with intersectional experience, from relevant countries and situations under investigation, has several important positive effects. This is critical because when the experiences and perspectives of women and girls in conflict are absent from the judicial record, the effectiveness of ICL in addressing international crimes is weakened. This then in turn reduces the prospect of gender factors being taken into account in any subsequent reparations proceedings.

Such intersectional and deliberate recruitment from situations under investigations firstly fortifies the Court against criticism that it is a predominantly “Western” institution with little lived knowledge of the countries where abuses have occurred and investigations are being pursued.²⁹ Second, it ensures relevancy from staff and intermediaries and brings in a high level of local knowledge, and sensitivities to local customs, traditions, religious practices, and status of females and males working in this context. Given that the historical underrepresentation of female investigators may have resulted in seeking out fewer female witnesses³⁰, this heightens standards for investigations and strengthens the Court’s practices, and eventually, evidence and documentation practices.

As women’s voices and experiences are still significantly underrepresented in the ICL context, reflected in disproportionately lower number of female witnesses before international courts and

²⁶ Ibid, paras. 205-214.

²⁷ 2014 Policy Paper, pg. 27.

²⁸ 2014 Policy Paper, pg. 26.

²⁹ The first withdrawal notification was received from South Africa in October 2016, and three further notifications have been received from Burundi, The Gambia and the Philippines since. South Africa and The Gambia revoked their notifications of withdrawal prior to their taking effect due to internal parliamentary procedural obstacles, and a change in policy after presidential elections, respectively. Burundi and the Philippines have since effectively withdrawn. Gender Report Card on the International Criminal Court, 2018, Women’s Initiative for Gender Justice, pg. 12.

³⁰ IIM Gender Strategy and Implementation Plan, pg. 10.

tribunals³¹, the third beneficial outcome from such targeted recruitment will then help develop knowledge and expertise in international law, specifically international criminal law and expertise on SGBV, in the predominantly global south contexts that the Court is investigating.

b. Operationalising the commitment to accountability for SGBV

To avoid relying heavily on gender experts and focal points alone, the policy should look to integrate gender expertise and competence throughout OTP teams in the ICC. This can be done by requiring a level of gender-competency for all staff, as well as the integration of a gender-sensitive approach and gender analysis, which as a strategy, will help inform gender expertise and competence throughout the Court. Integrating such a strategy, instead of just having specific gender roles and expertise, will raise the importance and nuances in sexual and gender-based crimes. This submission therefore humbly suggests that, like the IIM for Syria has adopted, a gender analysis at the ICC would help to highlight and address harms that are often obscured by SGBV crimes, and allows for correcting imbalances that disproportionately reflect a male perspective in judicial proceedings.³² A gender analysis has been defined as “a systematic analytical process that uses sex-disaggregated and other relevant information to understand how gendered inequalities, and related social norms and power relationships, may affect the commission, experience, consequences and impact of crimes and violations.”³³ This can build off the work already done by the IER and this upcoming policy revision, to incorporate having an intersectional analysis to address harms at the overlap that could be overlooked.

The ICC has already taken steps to formalise its commitment to this through the Policy Paper on Sexual and Gender-Based Crimes, and the 2022 Gender Persecution Policy. A commitment to gender parity was reinforced by the launch of the Court’s new Strategy on Gender Equality and Workplace Culture³⁴ driven by the Registry of the ICC.

Ensuring staff are equipped with gender expertise can be achieved by ensuring all staff receive training on how to integrate a gender perspective in their work. As suggested by the IIM Syria’s gender strategy, staff and candidates can be asked to demonstrate gender competence, and by signing a Statement of Commitment to illustrate how gender equality is a core value of the ICC, integrating such principles into work plans and performance appraisals.³⁵ Adopting and implementing a gender training programme for the ICC is in line with paragraphs 64 and 213-214 and recommendation 88 of the IER Report.³⁶

³¹ Ibid.

³² IIM Gender Strategy and Implementation Plan, pg. 4.

³³ IIM Gender Strategy and Implementation Plan, pg. 6.

³⁴ Zero Draft Strategy on Gender Equality and Workplace Culture for the International Criminal Court, (2022), <https://www.icc-cpi.int/news/zero-draft-strategy-gender-equality-and-workplace-culture-international-criminal-court>.

³⁵ IIM Gender Strategy and Implementation Plan, pg. 4.

³⁶ Zero Draft Strategy on Gender Equality and Workplace Culture for the International Criminal Court, (2022), <https://www.icc-cpi.int/news/zero-draft-strategy-gender-equality-and-workplace-culture-international-criminal-court>.

For example, the IIIM Syria mechanism looks at how the intersection of gender and other factors can exacerbate exposure to crimes and their impact.³⁷ Operationalising gender equality through recruitment also means engaging with local groups on strategies and working methods to address harms inflicted on the intersecting bases of crimes. Doing so acknowledges that women and girls from affected communities are effective advocates and empowering leaders; and local groups and organisations can provide unique insights into intra-group dynamics and intersectional experiences that are not available to external/foreign groups and organisations.³⁸

c. Reporting

Operationalising the commitment to accountability for SGBV crimes also involves having regular reporting and updates to this Policy and other connected policies at the Court. Yearly reviews or reporting mechanisms can be incorporated into the Policy, and will allow the Court to ensure it is on track to the commitments contained within it. This way, the Policy can be monitored regularly via the Court's Focal Point for Gender Equality and the ICC's Staff Wellbeing and Engagement Committee, similar to what is stated in the Strategy on Gender Equality and Workplace Culture.³⁹

Recommendations

The Policy should make explicit its commitment to gender equality, both for staff and intermediaries who are likely to engage with victims and witnesses of sexual and gender-based crimes.

Gender equality should be prioritised especially in more senior and managerial positions, with recruitment reflecting a policy towards equality.

The ICC should adopt a Gender Analysis for the Court's work and a Statement of Commitment to gender equality.

The ICC should integrate gender expertise and competence throughout the Court, and ensure all staff receive training on how to integrate a gender perspective in their work, regardless of which teams they sit in. Incoming staff should be asked to demonstrate gender competence.

The OTP should ensure reporting structure for the Policy, with regular updates and reports worked into the Policy.

About the Asia Justice Coalition

The aim of the Asia Justice Coalition (AJC or the Coalition) is to ensure justice and accountability for grave crimes in Asia, and to strengthen capacity and collective advocacy of Asian civil society actors, legal actors and their allies in regard to international accountability for serious violations of

³⁷ IIIM Gender Strategy and Implementation Plan, pg. 7.

³⁸ Ibid.

³⁹ Strategy on Gender Equality and Workplace Culture for the International Criminal Court, pg. 5.

international human rights and humanitarian law committed in Asia. The AJC secretariat is central to and supports the Coalition's work.

AJC recognises that prioritising the building of women's professional leadership in the law opens up possibilities for legal empowerment and further access to justice, further contributing to the aims of the Coalition. The AJC secretariat is embarking on a four year project entitled "Women Leaders In International Justice and Accountability" which will develop women's leadership in international law by building expertise and facilitating constructive dialogue around critical issues of international justice and accountability in three focus jurisdictions in Asia.