

**Submission to the
OFFICE OF THE PROSECUTOR**

PUBLIC CONSULTATION ON

**POLICY INITIATIVE TO ADVANCE ACCOUNTABILITY FOR THE CRIME AGAINST HUMANITY OF
PERSECUTION ON THE GROUNDS OF GENDER UNDER THE ROME STATUTE**

17 March 2022

Submitted by Dr Kcasey McLoughlin, Scientia Professor Louise Chappell, Ms Suzanne Varrall and Ms Sarah Easy (*Feminist Judgments: Re-imagining the ICC* (forthcoming with Cambridge University Press))

Contact: Dr Kcasey McLoughlin

Title: Senior Lecturer, Newcastle Law School, Australia

Email: Kcasey.McLoughlin@newcastle.edu.au

Phone: +61 2 49215510

About the Feminist Judgments ICC Project

The Editorial Team for the forthcoming book with Cambridge University Press: *Feminist Judgments: Re-imagining the ICC*, makes the following submissions as part of the broader Feminist Judgments ICC Project (FJP-ICC). This project focuses on a significant gap in International Criminal Court research: the contribution of judges to the ICC's poor conviction record for sexual and gender-based crimes and their application of gender-sensitive judging in general.

Significantly, it aims to provide new knowledge for judges, legal experts, and scholars to improve accountability for sexual and gender-based crimes and for adopting a gender-sensitive approach to adjudication. Finally, the project will produce a groundbreaking book reimagining ICC cases through a feminist judgement approach and provide a valuable online toolbox for judges and academics, advancing Australia's commitment to gender justice internationally.

The following submissions draw liberally from the 2021 article 'Gender and judging at the International Criminal Court: Lessons from 'feminist judgment projects'', published in *Leiden Journal of International Law* by three of the editors of the FJP-ICC: Rosemary Grey, Kcasey McLoughlin and Louise Chappell. As such, we would like to acknowledge Dr Grey's intellectual contribution to this submission, who will be making her own submission.

1. The need for gender-sensitive adjudication in conjunction with prosecutorial policies to advance accountability for Gender Persecution

- 1.1 The Editors of the FJP-ICC welcome the opportunity to provide comments on the proposed policy initiative to advance accountability for gender persecution under the Rome Statute, prior to the first draft being produced. We hold serious concerns that any efforts to reform the existing 2014 Policy Paper on Sexual and Gender-Based Crimes ('Policy Paper'),¹ will be of limited efficacy unless accompanied by gender-sensitive training of the judiciary, and the development of a gender-sensitive practice manual by the Court.
- 1.2 The Editors attribute the Court's poor conviction record for sexual and gender-based crimes primarily to the *adjudication process* and less to prosecutorial practices. The Office of the Prosecutor ('OTP') has prioritised the effective investigation and charging of sexual and gender-based crimes under its Strategic Plan 2016-2018,² whilst demonstrating a concerted commitment to the implementation of this Plan. By the Rome Statute's twentieth anniversary in July 2018, sexual and gender-based crimes (against both male and female victims) accounted for almost half of all crimes charged at the ICC.³ By comparison, the Court has upheld but one conviction for sexual and gender-based crimes to date,⁴ overturning its only other conviction for this category of crimes in 2018.⁵ Accordingly, we submit that a new prosecutorial policy initiative can only go so far in addressing the prevailing culture of impunity for sexual and gender-based crimes. Without an equal effort to improve judicial understanding and acceptance of the scope of sexual and gender-based crimes in the Rome Statute, the effectiveness of the prosecutors efforts will be limited.
- 1.3 Furthermore, the Editors consider the 2014 Policy Paper to be a comprehensive and sophisticated strategic approach to prosecuting gender persecution, and sexual and gender based crimes more broadly and should form the basis for judicial training. In particular, we submit that the following aspects of the Policy Paper should form the basis of a similar gender-sensitive practice manual to be implemented by the judiciary:

¹ ICC Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes* (June 2014).

² ICC Office of the Prosecutor, *Strategic Plan 2016-2018* (November 2015) 19.

³ Rosemary Grey, *Prosecuting Sexual and Gender-Based Crimes in the International Criminal Court* (Cambridge University Press, 2019), 253.

⁴ *Prosecutor v. Bosco Ntaganda (Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled 'Judgment')* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-02/06-2359, 30 March 2021) [1164].

⁵ *Prosecutor v. Jean-Pierre Bemba Gombo (Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute")* (International Criminal Court, Appeals Chamber, Case No ICC-01/05-01/08-3636, 8 June 2018) [196].

Application of a gender analysis

- 1.4 The Editors submit that the judiciary should be guided by a directive comparable to paragraph 20 of the Policy Paper, outlining the application of a 'gender analysis' to all crimes within its jurisdiction.⁶
- 1.5 To date, none of the three practice manuals adopted by the judiciary has referred to the importance of interpreting the law in a gender-sensitive manner.⁷ The Court's oversight of the gendered aspects of crime has led to deleterious gendered outcomes, such as: interpreting the term 'sexual violence' so as to exclude instances of forced nudity,⁸ and forced circumcision,⁹ seeming to require a higher threshold in establishing foresight of sexual violence than of other offences,¹⁰ and refusing to admit the testimonies of male victims of sexual violence that were potentially relevant to the charges.¹¹ Unless the judiciary itself accounts for gender bias and the patterns of privilege in its interpretation of the law, the OTP's efforts to apply a gender analysis will be of limited value.

Cumulative charging

- 1.6 The Editors submit that, where legally permissible, the judiciary should favour cumulative charging, as adopted by the OTP under paragraph 72 of the Policy Paper.¹² Whilst the OTP has made substantial progress in cumulatively charging sexual and gender-based crimes, the judiciary has been largely unreceptive to these charges. For instance, the Pre-Trial Chamber ('PTC') has failed to recognise the distinctive harms of rape, torture and outrages upon personal

⁶ ICC Office of the Prosecutor, above n 1, 13.

⁷ In the practice manuals, the only reference to 'gender' is a direction that, if witnesses who claim to have experienced sexual or gender-based crimes have not disclosed that experience to their family, then participants in the ICC proceedings should take particular caution in investigating these alleged crimes. See Chambers Practice Manual, February 2016, 30; Chambers Practice Manual, May 2017, 34; Chambers Practice Manual, 2019, 4.

⁸ *Prosecutor v. Jean-Pierre Bemba Gombo (Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo)* (International Criminal Court, Pre-Trial Chamber III, Case No ICC-01/05-01/08-14, 10 June 2008) [39]–[40].

⁹ *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute)* (International Criminal Court, Pre-Trial Chamber II, Case no ICC-01/09-02/11-382, 3 January 2012) [260]–[266].

¹⁰ *Prosecutor v. Germain Katanga (Judgment pursuant to Article 74 of the Statute)* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07-3436, 7 March 2014) [1663]–[1664]. See also Brigid Inder, 'A Critique of the Katanga Judgment', *ICC Women*, 11 June 2014, available at <http://www.iccwomen.org/documents/Global-Summit-Speech.pdf>; Kelly Askin, 'Katanga Judgment Underlines Need for Stronger ICC Focus on Sexual Violence', *IJMonitor*, 11 March 2014, available at <https://www.ijmonitor.org/2014/03/katanga-judgment-underlines-need-for-stronger-icc-focus-on-sexual-violence/>; Grey, above n 3, at 270-272; Louise Chappell, *The Politics of Gender Justice at the International Criminal Court: Legacies and Legitimacy* (Oxford University Press, 2016), 51–86.

¹¹ R. Grey, J. O'Donohue and L. Krasny, 'Evidence of sexual violence against men and boys rejected in the Ongwen case', *Amnesty International*, 10 April 2018, available at <https://hrij.amnesty.nl/evidence-sexual-violence-men-boys-rejected-ongwen/>

¹² ICC Office of the Prosecutor, above n 1, 29.

dignity as a war crime, holding that ‘the prosecutorial practice of cumulative charging is detrimental to the rights of the Defence since it places an undue burden on the Defence.’¹³The PTC’s reasoning defies the general and widely accepted practice applied by other international criminal courts permitting cumulative charges on the same conduct and resolving issues of double penalisation at sentencing.¹⁴ Similarly, the Trial Chamber has held that enslavement as a crime against humanity is entirely encompassed within the crime of sexual slavery, denying recognition of the dual harms of forced labour and sexual subjugation.¹⁵

- 1.7 In dismissing cumulative charges brought by the OTP, the Court fails to recognise the true extent of the criminal conduct of the accused, as well as the gravity of sexual and gender-based crimes.¹⁶Such an approach obstructs the expressive function of international law to shape social norms in a way that reduces the occurrence of sexual violence.¹⁷The OTP’s commitment to the cumulative charging of sexual and gender-based crimes under any new policy will be in vain until it is supported by a judiciary who fully appreciates the importance of this approach for achieving gender justice.

A gender-inclusive approach to reparations

- 1.8 The Editors submit that the judiciary should align its approach to reparations to reflect the commitment of the OTP to gender-inclusivity, as per paragraph 102 of the Policy Paper.¹⁸Despite the Court’s assertion that ‘gender parity in all aspects of reparations is an important goal of the Court’,¹⁹the approach taken by the judiciary in certain cases has directly subverted this goal. For instance, by limiting the scope of individual reparations for consequential economic loss in *Al Mahdi* to ‘those whose livelihoods exclusively depended upon the Protected Buildings’, the Court failed to protect women and girls working in the informal economy.²⁰ Furthermore, by declining to apply a ‘proximate cause’ standard when determining reparations in *Lubanga*, the Court

¹³ *Prosecutor v. Jean-Pierre Bemba Gombo (Decision Pursuant to Article 61(7)(1) and (b) of the Rome Statute on the Charges against Jean-Pierre Bemba Gombo)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC/01/05-01/08-424, 15 June 2009) [202].

¹⁴ Laurie Green, ‘First Class Crimes, Second-Class Justice: Cumulative Charges for Gender-Based Crimes at the International Criminal Court’ (2011) 11 *International Criminal Law Review* 529, 534.

¹⁵ *Prosecutor v. Dominic Ongwen (Trial Judgment)* (International Criminal Court, Trial Chamber IX, Case No ICC-02/04-01/15, 4 February 2021) [3051].

¹⁶ Laurie Green, ‘First Class Crimes, Second-Class Justice: Cumulative Charges for Gender-Based Crimes at the International Criminal Court’ (2011) 11 *International Criminal Law Review* 529, 535.

¹⁷ Fiona O’Regan, ‘Prosecutor vs. Jean-Pierre Bemba Gombo: The Cumulative Charging Principle, Gender-Based Violence, and Expressivism’ (2012) 43 *Georgetown Journal of International Law* 1323, 1351.

¹⁸ ICC Office of the Prosecutor, above n 1, 38.

¹⁹ *Prosecutor v. Thomas Lubanga Dyilo (Decision establishing the principles and procedures to be applied to reparations)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06-2904, 7 August 2012) [202].

²⁰ *Prosecutor v. Ahmad Al Faqi Al Mahdi (Reparations Order)* (International Criminal Court, Trial Chamber VIII, Case No ICC-01/12-01/15, 17 August 2017) [81].

excluded harms resulting from sexual violence on the basis that Mr. Lubanga was not convicted of the crime of sexual violence.²¹

- 1.9 The ICC has been criticised for failing to project a cohesive approach to its reparative framework which has, in turn, precluded victims of sexual and gender-based violence from realising their rights to remedy, restoration and transformation.²² As such, policy directives specifying a gender-inclusive approach to reparations must be instituted at both the prosecutorial and judicial level in order to be impactful.

Institutional development and expertise

- 1.10 The Editors submit that the judiciary should be required to undergo gender-sensitivity training in a manner similar to the staff of the OTP under paragraph 112 of the Policy Paper, to ensure the competent performance of its functions in relation to sexual and gender-based crimes. To date, there have been no public reports of judges undergoing training in gender analysis. As such, we are concerned that there has been no systematic attempt by the ICC to integrate gender competence within the Chambers.
- 1.11 The Editors further submit that, during judicial elections at the ICC, state parties strive to balance the over-representation of male judges and prioritise the appointment of gender-competent judges. The requirement for gender parity as well as ‘legal expertise on specific issues, including, but not limited to, violence against women and children’, is supported by the non-binding election criteria of the Rome Statute.²³ In the lead-up to the 2020 judicial election, Open Society Justice Initiative similarly recommended that states conduct a more rigorous assessment of the candidates’ qualifications, including, asking each candidate to explain their ‘specific experience in gender and children matters’.²⁴ An analogous view is reflected in the 2020 questionnaire for judicial candidates, developed by the Coalition for the International Criminal Court, which asked candidates to describe any experience in addressing misconceptions relating to sexual and gender-based crimes, to share examples of applying a gender perspective in their professional career, and to reflect on the expectation that judges of the ICC will not condone nor manifest any bias based on gender.²⁵

²¹ *Prosecutor v. Thomas Lubanga Dyilo (Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations of 7 August 2012”)* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06, 3 March 2015) [196].

²² Andrea Durbach, Louise Chappell & Sarah Williams, ‘Foreword: special issue on ‘transformative reparations for sexual violence post-conflict: prospects and problems’ (2017) 21 *International Journal of Human Rights* 1185, 1186.

²³ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) Art. 36(8).

²⁴ Open Society Justice Initiative, *Raising the Bar: Improving the Nomination and Election of Judges to the International Criminal Court*, 2019, at 7, available at www.justiceinitiative.org/uploads/a43771ed-8c93-424f-ac83-b0317feb23b7/raisingthe-bar-20191112.pdf.

²⁵ Coalition for the ICC, ‘Questionnaire for candidates to the 2020 ICC Judicial Election’, available at www.coalitionfortheicc.org/sites/default/files/cicc_documents/ICC%20Judicial%20elections%20questionnaire%202020.pdf.

1.12 To date, the electing body, the Assembly of State Parties ('ASP'), has failed to put in place requirements with regard to legal expertise in 'violence against women or children' as part of its 'minimum requirements' for judicial elections. This reflects the limited importance state parties place upon this criterion and the adjudication of sexual and gender-based crimes more broadly. Without direct guidance from the ASP or a commitment within the ICC Chambers, expertise on gendered issues will remain underdeveloped, despite the policies adopted by the OTP.

2. Gender-sensitive approach under the ICC framework

2.1 The gender-sensitive approach to adjudication, for which we advocate above, has a firm foothold in the framework of the Rome Statute. Indeed, instances of 'feminist judging' are already evident within ICC case law.²⁶ Gender sensitivity was incorporated into the design of the ICC at its inception, through the advocacy of the international feminist legal community.²⁷ As a result, the Rome Statute:

- recognises a wider range of sexual and gender-based crimes than any previous instrument of international law;²⁸
- refers to special measures to protect the dignity and wellbeing of victims of sexual and gender-based violence;²⁹
- requires that all sources of law applicable within the ICC are interpreted and applied without adverse distinction (discrimination) on gender grounds;³⁰
- urges states to elect a 'fair representation of female and male judges';³¹ and
- includes provisions aimed at securing gender expertise in the Chambers, Office of the Prosecutor, and Registry.³²

3. Implementing a gender-sensitive approach

3.1 The existing Policy Paper gives some general guidance as to what a "gender analysis" entails.³³ In particular, it directs the OTP to examine the ways in which gendered inequalities, power

²⁶ See for example Judge Elizabeth Odio Benito's gender-sensitive dissent in the Lubanga case.

²⁷ Chappell, above n 14; B. Bedont and K. Hall-Martinez, 'Ending Impunity for Gender Crimes under the International Criminal Court' (1999) 6 *Brown Journal of World Affairs* 65; V. Oosterveld, 'The Definition of Gender in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?' (2005) 18 *Harvard Human Rights Journal* 55 .

²⁸ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) Arts 7(1)(g), 7(1)(h), 8(2)(b)(xxii), 8(2)(e)(vi).

²⁹ *Ibid*, Arts 54(1)(b), 68(1), 68(2).

³⁰ *Ibid*, Art. 21(3).

³¹ *Ibid*, Art. 36(8)(a)(iii).

³² *Ibid*, Arts 36(8)(b), 42(9), 43(6).

³³ ICC Office of the Prosecutor, above n 1, 13.

relationships and stereotypes in different societal contexts relate to crimes.³⁴Without linking this approach to the specific duties of the OTP, the Policy Paper is somewhat abstract and vague in how a gender analysis might be implemented in practice. The article which forms the basis of these submissions, details how a gender analysis can be incorporated into the three main spheres of judicial activity: interpreting the law, making findings of fact, and making procedural decisions.³⁵We submit that the following guidance from the article, and the Feminist Judgment Project ICC more widely, equally applies to the duties of the OTP, and should form part of a bolstered policy initiative on sexual and gender-based crimes:

- 3.2 When deciding whether alleged conduct satisfies the definition of a crime within the Court's jurisdiction, the OTP should consider the gendered consequences of a particular interpretation: will it have a discriminatory effect in practice, and if so, can this be avoided?³⁶The OTP can also minimize gender discrimination by thinking carefully about whose experiences will be excluded when the crime is applied in the real world.³⁷
- 3.3 When developing a case hypothesis and how facts will be presented to the Court, the OTP should consider the experiences of people at the margins of the case who are often overlooked.³⁸This should include indirect victims such as children born of rape and the relatives of child soldiers, for example. The OTP should further consider the gendered context in which the crimes occurred.

4. Recommendations

- 4.1 Reflecting the arguments above, the Editors make the following recommendations:

Recommendation 1: that the new policy initiative issued by the OTP be accompanied by a strong recommendation that the Chamber institute gender-sensitive training for the judiciary and develop its own gender-sensitive practice manual, outlining:

- a) the application of a gender analysis;
- b) cumulative charging; and
- c) a gender-sensitive approach to reparations.

Recommendation 2: that the new policy initiative issued by the OTP recommend an amendment to the minimum requirements for judicial elections set out by the ASP to include legal expertise on violence against women and children.

³⁴ Ibid.

³⁵ Rosemary Grey, Kcasey McLoughlin and Louise Chappell, 'Gender and judging at the International Criminal Court: Lessons from 'feminist judgment projects' (2021) 11 *Leiden Journal of International Law*.

³⁶ Ibid 11.

³⁷ Ibid 13.

³⁸ Ibid 15.

Recommendation 3: that the new policy initiative issued by the OTP indicates how a gender analysis should be implemented into its duties.