



Comments on the OTP Draft Policy Paper on Sexual and Gender Based Crimes

February 2014

1. Introduction

REDRESS is an international nongovernmental organisation with a mandate to seek justice for victims of torture and related international crimes. It has expertise in representing individual survivors at national and international levels and in providing legal assistance to representatives of survivors, including in cases where rape and sexual violence amount to torture.

REDRESS welcomes this opportunity to comment on the OTP Draft Policy Paper on Sexual and Gender Based Crimes, and commends the OTP for developing this policy paper. An OTP policy on sexual and gender based crimes should be seen within the wider context of the OTP's work in general and within the framework of its existing prosecutorial strategies, including as a vehicle to implement its third strategic goal to "[e]nhance the integration of a gender perspective in all areas of our work and continue to pay particular attention to sexual and gender based crimes and crimes against children."¹

The Draft Policy Paper constitutes an important public commitment by the Prosecutor to ensure that her Office addresses in a holistic manner the investigation and prosecution of gender-based crimes. Positively, it should also be seen in light of the Prosecutor's prior expressions of commitment to combat these crimes² and her appointment of a Special Gender Advisor.³ REDRESS encourages the OTP to ensure that the policy document once finalised, is capable of being fully implemented in the daily work of the OTP.

¹ See OTP Strategic Plan June 2012 – 2015, 11 October 2013, p. 27, available at: http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Documents/OTP%20Strategic%20Plan.pdf.

² See, e.g., Statement Prosecutor Elect of the International Criminal Court at Sydney Conference: "Gender Justice and the ICC: Progress and Reflections", 14 February 2012: "... I have endeavoured to ensure that the gender perspective is always taken into account in our investigations and prosecutions. These are crimes that have gone un-reported and un-punished for so long, with so much shame and misconceptions involved. It is my belief that the law and judicial proceedings are a powerful tool to shed light on these crimes, give a voice to the victims and punish their perpetrators. The law will help to change behaviour." ... "In short, this Office will make sure that victims of sexual and gender crimes see the crimes they have suffered from being punished; their perpetrators being arrested and prevented from committing additional crimes. This is a commitment that I make as the new incoming Prosecutor of the ICC." Available at: <http://www.icc-cpi.int/NR/rdonlyres/FED13DAF-3916-4E94-9028-123C4D9BB0C9/0/StatementgenderSydney140212.pdf>.

³ http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/news%20and%20highlights/Pages/pr833.aspx

REDRESS' comments below focus on only some of the areas considered by the text.

Comments on the Draft Policy

II. General Policy

REDRESS welcomes the OTP's commitment to "consider sexual and gender crimes among the gravest under the Statute for purposes of its analysis during the preliminary examination phase, prioritisation of its activities during investigation and prosecution phases, and sentencing"⁴ and to "apply a gender analysis to all of the crimes within its jurisdiction."⁵

REDRESS recognises that sexual and gender based crimes are among the most serious crimes and that they require specific strategies of investigation and prosecution to address consistent and well-documented practices of discrimination, biases and imbalances. Furthermore, sexual and gender based crimes most certainly fall within any gravity criteria employed by the Office. Nonetheless, the OTP policy on sexual and gender based violence should be seen within the context of the Prosecutor's more general mandate to investigate and prosecute the most serious crimes of concern to the international community.⁶ There is potentially a risk that this kind of policy might have the unintended result of privileging the prosecution of sexual and gender based violence to the exclusion or detriment of other crimes. We would respectfully submit that the OTP overall policy of selecting crimes on the basis of their prevalence and/or gravity should be maintained, regardless of the crimes at issue. We would recommend that while the OTP actively seeks to investigate sexual and gender based violence allegations and actively seeks to bring the relevant charges where the evidence is present, this should not impact on any other charges that are appropriate in light of the evidence collected.

Furthermore, REDRESS notes the OTP's reference to "[o]ther crimes such as mutilation and outrages upon personal dignity under articles 8(2)(b)(x), 8(2)(b)(xxi), 8(2)(c)(i), 8(2)(c)(ii) [that] may also have a sexual and/or gender element."⁷ Here, it would be useful for the Policy paper to reflect that several other crimes can have a sexual and gender-based dimension, as attested for instance by the evolution of the notion and definition of torture.⁸

⁴ OTP Draft Policy Paper, para. 4.

⁵ OTP Draft Policy Paper, para. 15.

⁶ See Article 5 Rome Statute.

⁷ OTP Draft Policy Paper, para. 12.

⁸ In relation to the evolution of the notion and understanding of torture, see REDRESS and Amnesty International "GENDER AND TORTURE Conference report", October 2011: <http://www.redress.org/downloads/publications/GenderandTortureConferenceReport-191011.pdf>. For an analysis of torture in international criminal law, see REDRESS' Report "REDRESS for Rape, October 2013, available at [http://www.redress.org/downloads/publications/FINAL%20Rape%20as%20Torture%20\(1\).pdf](http://www.redress.org/downloads/publications/FINAL%20Rape%20as%20Torture%20(1).pdf)

III. The Regulatory Framework

REDRESS welcomes the OTP's commitment to "being sensitive to the interests and circumstances of victims and witnesses and taking a mainstreamed approach to dealing with sexual and gender based crimes".⁹ However, in relation to decisions taken by the OTP in accordance with Article 54(1)(b) (concerning the interests and personal circumstances of victims and witnesses), it may not be advisable for the OTP to presume these interests as not all victims will have a predictable or homogeneous set of interests or concerns. We would therefore stress the importance of consulting with victims on the ground in order to determine their interests and concerns.

Furthermore, victims may have a number of interests, e.g., to pursue justice *and* to have their security, privacy and integrity assured. These are not incompatible objectives and it would be important for the OTP to proactively ensure in its policy that it has the capacity to pursue prosecutions while assuring victims' other interests, whatever these may be.

IV. Preliminary Examinations

REDRESS welcomes the OTP's approach regarding admissibility, which underscores the importance of considering States' willingness and ability to investigate and prosecute sexual and gender based violence cases in particular. This is a key statement of policy, given the range of discriminatory practices and inequities at play in many domestic contexts, which might well lead to the scenario where a particular country is fully willing and able to investigate and/or prosecute other crimes under the jurisdiction of the Rome Statute, but not sexual or gender based violence. As part of this admissibility review, it would be important for the OTP to consider the way in which sexual and gender based violence is characterised at the national level. For instance, if at the domestic level acts of rape are characterised as outrages upon personal dignity, this may be insufficient to address the gender dimension. It may also be relevant for the OTP to consider the way in which sexual and gender based crimes are investigated and prosecuted, e.g., are there sufficient protections in place for victims of such crimes to come forward in safety and dignity; do the evidentiary standards include discriminatory elements (e.g., higher levels of proof; a certain number of witnesses) which impede victims from coming forward?

V. Investigations

REDRESS welcomes the OTP's tailored approach to the investigation of sexual and gender-based crimes through the mobilisation of specific resources.

In relation to the preparation of investigations, we would stress:

⁹ OTP Draft Policy Paper, para. 21.

- The need to train local intermediaries who may engage with victims and witnesses of sexual and gender based violence.¹⁰ When the OTP avails itself of local intermediaries, these individuals should themselves comply with the OTP's policies;
- The need to take into account the concern about victims/witnesses' exposure to a wide range of actors in the field and multiple interview processes which can expose victims/witnesses to the risk of re-traumatisation and can potentially create issues with the consistency of their testimony.

VI. Prosecutions

*Charging policy*¹¹

REDRESS welcomes the OTP's approach of bringing cumulative charges "in order to fairly reflect the severity and multi-faceted character of sexual violence and to enunciate the range of sexual and gender crimes supported by the evidence in each case."¹²

Cumulative charging has been consistently adopted by international tribunals since Nuremberg and allows multiple charges to be brought for the same underlying conduct. As stressed by the ICTY jurisprudence, the rationale of this practice is that prior to the presentation of all of the evidence, it is not possible to determine with certainty which of the charges brought against an accused will be proven. The Trial Chamber is better placed to evaluate which of the charges may be retained, based upon the sufficiency of the evidence.¹³ The practice of bringing cumulative charges also aims to reflect the multi-faceted aspects of different crimes. As explained by the ICTY Appeals Chamber, "multiple convictions serve to describe the full culpability of a particular accused or provide a complete picture of his criminal conduct."¹⁴

In cases where cumulative charges are brought, potential issues of unfairness to the convicted person may be addressed at the sentencing stage, where sentences for crimes based on the same act might be served concurrently, rather than consecutively: the overriding principle being that the overall sentence should reflect the totality of the culpable conduct.¹⁵ Regulation 55 of the ICC Regulations of the Court¹⁶ does not obviate the

¹⁰ Para. 94 of the OTP Draft Policy Paper: "[s]uch intermediaries who are likely to engage with victims and witnesses of sexual and gender based crimes will be specifically *briefed* to ensure that they have an understanding of the possible effects of trauma in relation to the crime as well as the investigative process" (emphasis added). A briefing may not be sufficient given the sensitivity of their work and role.

¹¹ OTP Draft Policy Paper, paras 26-27 and 66-69.

¹² OTP Draft Policy Paper, para. 67.

¹³ *Čelebići* Appeal Judgment, Case No. IT-96-21-A, 20 February 2001, para. 400. In this sense see also *Kupreškić et al.* Appeal Judgment, Case No. IT-95-16-A, 23 October 2001, para. 385; *Kunarac et al.* Appeal Judgment, Case No. IT-96-23&IT-96-23/1-A, 12 June 2002, para. 167; *Naletilić & Martinović* Appeal Judgment, Case No. IT-98-34-A, 3 May 2006, para. 103; *Galić* Appeal Judgment, Case No. IT-98-29-A, 30 November 2006, para. 161.

¹⁴ *Naletilić & Martinović* Appeal Judgement, Case No. IT-98-34-A, 3 May 2006, para. 585 quoting *Kunarac et al.* Appeal Judgement, para. 169 (citing the Partial Dissenting Opinion of Judge Shahabuddeen in the *Jelisić* Appeal Judgement, para. 34); *Brima et al.*, Appeal Judgment, Case No. SCSL-2004-16-A, 22 February 2008, para. 215.

¹⁵ *Čelebići* Appeal Judgment, Case No. IT-96-21-A, 20 February 2001, para. 429.

¹⁶ Regulation 55 of the Regulations of the Court.

need for cumulative charging as such a provision does not *require* trial chambers to re-characterise facts but only provides them with a *possibility* to do so.¹⁷

REDRESS therefore encourages the OTP to resort to cumulative charges where appropriate in order to reflect the multidimensional nature of *any* crimes under the jurisdiction of the Court, not only those with a sexual and gender based aspect.¹⁸ Despite the OTP policy statement in favour of cumulative charging, such an approach does not appear to have been taken in the Document Containing the Charges (DCC) in the Ntaganda case, where the OTP appears to have privileged charges of rape in and over instances of rape which may amount to torture, thus not taking into account, on one hand, the evolution of the definition of torture, and, on the other, the distinct features of the crimes of torture and rape.¹⁹

Furthermore, should evidence of sexual and gender based violence come to light after the charges are confirmed, we encourage the OTP to affirm its commitment to proactively seek to add additional charges as appropriate, in accordance with Article 61(9).

Reparations

REDRESS welcomes the OTP's support for a gender-inclusive approach to reparations, which takes into account "the gender-specific impact, harm and suffering of the victims affected by the crimes"²⁰. The best ways in which to foster such an approach are by ensuring that when the evidence is present, sexual and gender-based violence crimes are charged and prosecuted, so that upon conviction, they can form part of the Trial Chamber's reparations orders, and by supporting the early intervention of the Trust Fund for Victims in situation countries.

In view of the particular investigative role of the OTP, it would be important for the OTP to underscore its commitment to carrying out full and effective investigations into suspects'/perpetrators' assets in relation to all cases it pursues as well as to trace those assets which may constitute the instrumentalities of the offences. A specialised financial investigation unit should be envisaged within the Investigation Division for this purpose.²¹

¹⁷ See "The Practice of Cumulative Charging at the International Criminal Court", War Crimes research Office, May 2010, pp. 26-28. In this sense, REDRESS respectfully disagrees with the holding of Pre-Trial Chamber II in the Bemba case that "the ICC legal framework differs from that of the ad hoc tribunals, since under regulation 55 of the Regulations, the Trial Chamber may re-characterise a crime to give it the most appropriate legal characterisation. *Therefore, before the ICC, there is no need for the Prosecutor to adopt a cumulative charging approach and present all possible characterisations in order to ensure that at least one will be retained by the Chamber.*" Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424, para. 203.

¹⁸ REDRESS notes the OTP's commitment to a policy of charging 'to the full extent possible' mentioned in relation to war crimes at para. 27 of the OTP Draft Policy Paper.

¹⁹ REDRESS is aware that Pre-Trial Chamber II in the Bemba case held that the material elements of the act of torture as a crime against humanity are also the inherent specific material elements of the act of rape and that therefore, the crime of torture should be subsumed in the crime of rape (the latter having, in the Pre-Trial Chamber's view the "additional specific material element of penetration"). See Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424, para. 204. However, in REDRESS' view, the *actus reus* and *mens rea* elements of torture are different from those of rape, despite the fact that rape will typically amount to torture. The infliction of severe pain and suffering is a consequence of rape, not an element to be proven for rape. See in this respect REDRESS and Amnesty International "GENDER AND TORTURE Conference report", October 2011, <http://www.redress.org/downloads/publications/GenderandTortureConferenceReport-191011.pdf>.

²⁰ OTP Draft Policy Paper, para. 93.

²¹ See REDRESS' Paper "Victims' central role in fulfilling the ICC's mandate", prepared for the 8th Assembly of States Parties, The Hague, 18-26 November 2009, p. 3 available at <http://www.redress.org/downloads/publications/ASP%208%20Paper%20FINAL%20Nov%202009.pdf>

Equally, in the context of its investigations, it would be important for the OTP to be sensitive to any evidence that might emerge in relation to the harm suffered by victims. The OTP should be encouraged to develop protocols for the sharing of evidence of harm, which may be essential for an eventual reparations process, with the VPRS, OPCV or private counsel as appropriate.²²

²² Article 75(1) of the Rome Statute.