



## **AJC SUBMISSION ON THE ICC OFFICE OF THE PROSECUTOR'S POLICY ON SLAVERY CRIMES**

The Asia Justice Coalition (AJC) secretariat<sup>1</sup> welcomes the [call for input](#) towards the new Policy on Slavery Crimes of the Office of the Prosecutor (“OTP”/ “the Office”) of the International Criminal Court (“ICC”).

We welcome this initiative by the OTP and we support the affirmation by the Prosecutor that such a policy will help guide the OTP “in taking a survivor-centred, trauma-informed and gender-competent approach to slavery crimes”.<sup>2</sup>

While the documented and contemporary forms of slavery in Asia are numerous and warrant extensive discussion, our submission is focussed on highlighting specific examples in the region. We wish to highlight the historical legacy of slavery in the region, including the sexual enslavement of ‘comfort women’ by the Imperial Japanese armed forces, and enslavement by the Khmer Rouge regime in Cambodia. Regarding contemporary forms of slavery, we highlight the enslavement of workers in the fishing industry in South-East Asia, as well as the forced conscription of the Rohingya in Myanmar.

### **A. HISTORICAL LEGACY OF SLAVERY IN ASIA**

#### **(i) World War II Sexual Slavery Victims: ‘Comfort Women’**

1. The sexual slavery perpetrated in the course of the Second World War to those euphemistically called ‘comfort women’ by the Imperial Japanese military from 1932 – 1945 is one of the prime examples of state-sponsored sexual slavery.<sup>3</sup> Hundreds of thousands of girls and women were trafficked and forced into sexual slavery in military ‘comfort stations’ supervised and controlled by the Japanese. While the majority of

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<sup>1</sup> 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.

<sup>2</sup> [ICC Office of the Prosecutor launches public consultation on Policy on Slavery Crimes](#), ICC (19 March 2024).

<sup>3</sup> See ["Military Sexual Slavery, 1931-1945"](#), Columbia Law School Center for Korean Legal Studies, accessed on 30 April 2024.

those enslaved were Korean and Chinese, victims also came from Japan, Indonesia, Vietnam, Cambodia, East Timor, Taiwan, the Philippines, Malaysia, and the Dutch East Indies.<sup>4</sup>

2. The Japanese armed forces, in the course of conquest and occupation across Asia, implemented and maintained a formal system of sexualised slavery. The state-sponsored 'comfort women' system was set up across each military unit exclusively for its civilian staff and military officers to boost the morale of the officers and instil discipline, control the spread of sexually transmitted and venerable diseases, limit the incidence of rape within the military-controlled facilities, reduce the anti-Japanese sentiments in the occupied territories, and prevent espionage.<sup>5</sup>
3. The Japanese armed forces and its private agents recruited girls and women through deception, coercion, use of threat of force, kidnapping and abduction, debt-bondage, and prostitution.<sup>6</sup> In doing so, women and girls suffered physical, sexual, and psychological violence, including repeated beatings, rape, and inadequate access to food, water, and healthcare. Attempts to resist or escape were met with torture, public execution, and killings.<sup>7</sup>
4. The 'comfort women' system reflects both chattel slavery and forced labour constituting enslavement and sexual slavery. The women were systematically raped, beaten, tortured, and forced to satisfy and serve men daily without any real possibility of refusal.<sup>8</sup> The exercise of control over 'comfort women's' bodies and their sexual autonomy and integrity, coupled with forced detainment and constant surveillance, reduced women into slaves.
5. The establishment of the International Military Tribunal for the Far East (IMTFE) in 1946 to prosecute Japanese war criminals for crimes against peace, conventional war

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<sup>4</sup> Such 'comfort stations' were established across Japan, China, Indonesia, Thailand, Burma, Japan, the Philippines, Hongkong, Korea, Cambodia, Burma, East New Guinea, Macau, French Indochina, etc. See Cheeyun Kwon, "[Sexual Violence, Imperialism, and Museum Activism: The Case of War & Women's Human Rights Museum](#)", *Museum International* 72 (2020), p.45.

<sup>5</sup> See Carmen M. Argibay, "Sexual Slavery and the "Comfort Women" of World War II", *Berkley Journal of International Law*, Vol 21, 376.

<sup>6</sup> *Ibid*, pp. 377-379.

<sup>7</sup> Klea Ramaj, "[The 2015 South Korean-Japanese Agreement on 'Comfort Women': A Critical Analysis](#)", *International Criminal Law Review* 22 (2022), p.481.

<sup>8</sup> See Christine M. Chinkin, "Women's International Tribunal on Japanese Military Sexual Slavery." *American Journal of International Law* 95, no. 2 (2001): 335-341.

crimes, and crimes against humanity, including enslavement<sup>9</sup> failed to prosecute any military officer for the crime against ‘comfort women’<sup>10</sup> i.e., enslavement and sexual slavery despite prosecuting military commanders and officers for sexual violence, including rape as war crimes.<sup>11</sup> To rectify this glaring omission, a people’s tribunal, the Women’s International War Crimes Tribunal was held from 8 - 12 December 2000 in Tokyo, Japan. The tribunal was to establish the criminal culpability of high-ranking Japanese military leaders and political officials, as well as state responsibility for rape and sexual slavery as crimes against humanity.<sup>12</sup> The tribunal was viewed as a continuation of the Tokyo Trials, indicting and prosecuting the perpetrators, including Emperor Hirohito, for the detention and sexual slavery of ‘comfort women’.<sup>13</sup> The public pronouncement of the judgment broke the silence on the plight of ‘comfort women’, provided a historical record, and held leaders to be criminally responsible.<sup>14</sup>

6. Since the 1990s, the ‘comfort women’ brought multiple lawsuits against Japan in various jurisdictions seeking an official apology, reparations for victims, investigation and prosecution of its military and civilian officers, revision of Japanese school textbooks reflecting the subjugation and enslavement of ‘comfort women’, and establishment of a memorial museum, among others.<sup>15</sup> However, most of the lawsuits were dismissed for the reasons of statute of limitations; sovereign immunity; non-

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<sup>9</sup> Article 5, Jurisdiction Over Persons and Offenses, [International Military Tribunal for the Far East \(IMTFE\) Charter](#)

<sup>10</sup> See Erika Miyamoto, [“The Decades-Long Struggle of ‘Comfort Women’ for Justice”](#), *Proceedings of the 6<sup>th</sup> International Conference on Gender Research* 6.1 (2023).

<sup>11</sup> No charge on sexual slavery of comfort women was brought during the Tokyo Trial despite documented information, including testimony and affidavits and knowledge of the widespread enslavement and violence against girls and women, including the report of the United Nations War Commission. The systemic overlooking of the crime against ‘comfort women’ is also argued as a convenient priority of the Allied Powers and the ‘victors justice’ exhibited at Tokyo Trials. The use of ‘comfort women’ stations by Allied Powers also reflected complicity. See, Nicola Henry, “*Memory of an Injustice: The “Comfort Women” and the Legacy of the Tokyo Trial*”, *Asian Studies Review* (2013), 37(3), 362–380. See more, Yuki Tanaka, Tim McCormack and Gerry Simpson (eds.), *Beyond victor’s justice? The Tokyo War Crimes Trial revisited* (2011, Leiden/Boston: Martinus Nijhoff).

<sup>12</sup> The tribunal was motivated to have accountability for the sexual and gender-based crimes that were overlooked at the Tokyo Trials. “[t]hese failures must not be allowed to silence the voices of survivors, nor obscure accountability for such crimes against humanity. [The tribunal] was established to redress the historic tendency to trivialize, excuse, marginalize and obfuscate crimes against women, particularly sexual crimes, and even more so when they are committed against non-white women”. See more Wui Ling Cheah, “Walking the long road in solidarity and hope: A case study of the comfort women movement’s deployment of human rights discourse”, *Harvard Human Rights Journal* (2009), 22(1), pp. 63–107.

<sup>13</sup> During the course of three days, over 64 women survivors participated and presented evidence (oral and documentary). See, Henry (n 11) 374.

<sup>14</sup> Chinkin (n 8), pp.340-341.

<sup>15</sup> See more, [“Lawsuits brought against Japan by former Korean “Comfort Women”](#), Columbia Law School Center for Korean Studies, accessed 30/4/2024.

retrospective application of State Redress Law<sup>16</sup>, extinguishment of legal right with the passage of bilateral agreement between Japan and Korea<sup>17</sup>; and post-war peace treaties, including the 1951 San Francisco Peace Treaty. In January 2021, however, the Seoul Central District Court ruled in favour of the ‘comfort women’, rejecting the blanket sovereign immunity argument and holding that the Korean court could exercise jurisdiction over the Japanese government and that State immunity does not extend to militarised sexual slavery.<sup>18</sup> Japan refused to comply with the verdict, strongly protesting and holding it to be a violation of its state immunity.<sup>19</sup> In April 2021, in another case brought by a group of ‘comfort women’, the Seoul Central District Court rejected the claims by taking a narrow view that the *jus cogens* exception to the principle of State Immunity has not crystallised in customary international law and holding otherwise would lead to a diplomatic clash.<sup>20</sup> In a welcome move, the High Court of Seoul, in November 2023, reversed the district court’s verdict and ordered Japan to pay compensation to victims.<sup>21</sup> As earlier, Japan viewed the judgment as contrary to international law.<sup>22</sup>

7. The plight of ‘comfort women’ is a stark reminder of the frequent, systematic, and widespread commission of sexual and gender-based crimes during armed conflicts and the importance of appropriate legal characterisation of a crime during a trial. The selectivity and prioritisation – both of which are inherent parts of prosecutorial discretion – on bringing the charges against the perpetrators must ensure that no crime

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<sup>16</sup> State Redress Act (Act No. 125 of 1947). For full text in English, see, < <https://www.japaneselawtranslation.go.jp/en/laws/view/3785/en>>, accessed 30 April 2024.

<sup>17</sup> See, “2015 Japan – Korea Agreement on Comfort Women” <<https://www.wsj.com/articles/BL-JRTB-21354>>, accessed on 30 April 2024.

<sup>18</sup> See Asia Justice Coalition ‘[Jurisdictional Brief on South Korea](#)’ (2023), pp. 24-25; See, Asia Justice Coalition, ‘[Jurisdictional Brief on Japan](#)’ (2023), See Seoul Central District Court Decision, [2016Ga-Hap505092](#) decided on January 8, 2021 (unofficial translation).

<sup>19</sup> Ministry of Foreign Affairs of Japan, Statement by Foreign Minister MOTEGI Toshimitsu, “Regarding the Confirmation of the Judgment of the Seoul Central District Court of the Republic of Korea in the Lawsuit Filed by Former Comfort Women and Others (23 January 2021)” <[https://www.mofa.go.jp/press/danwa/press6e\\_000269.html](https://www.mofa.go.jp/press/danwa/press6e_000269.html)> accessed on 30 April 2024.

<sup>20</sup> Jurisdictional Brief on South Korea (n 18); see Seoul Central District Court Decision, 2016Ga-Hap 580239 decided on April 21, 2021; See, also, Amnesty International, “[Disappointing Japan ruling fails to deliver justice to ‘comfort women’](#)” (April 2021), accessed on 30 April 2024.

<sup>21</sup> Daniel Mandell, “Another Blow to the Sovereign Shield: South Korean Court Rejects Japan’s Sovereign Immunity Defense in “Comfort Women” Case”, Insights, *American Society of International Law* (2024) Vol. 28, Issue 5 < <https://www.asil.org/insights/volume/28/issue/5>>, accessed 30 April 2024.

<sup>22</sup> Ministry of Foreign Affairs of Japan, Statement by Foreign Minister KAMIKAWA Yoko, “Regarding the Judgment of the Seoul High Court of the Republic of Korea in the Lawsuit Filed by Former Comfort Women and Others” (23 November 2023), <[https://www.mofa.go.jp/press/release/press1e\\_000489.html](https://www.mofa.go.jp/press/release/press1e_000489.html)>, accessed on 30 April 2024.

is invisibilised. The harm suffered by the victims must be truly reflected, accounted for, and become a part of a historical record. The inclusion of sexual slavery as a crime against humanity as well as a war crime in the Rome Statute is a welcome development of international law. The Court, however, must distinguish between the two analogous but distinct crimes of enslavement and sexual slavery. Sexual slavery is encompassed within the crime of enslavement, much like those other crimes like forced pregnancy, forced marriage, and sexualised torture as all acts of a sexual nature form *indicia* of the exercise of powers of ownership.<sup>23</sup>

**(ii) Forced Labour and Enslavement: ECCC**

8. The Extraordinary Chambers in the Courts of Cambodia (ECCC), an internationalised tribunal established by the Cambodian government and the United Nations (UN), was mandated to investigate and prosecute senior leaders of the Khmer Rouge and those most responsible for atrocity crimes committed from 17 April 1975 to 6 January 1979. The reign of Pol Pot and the Khmer Rouge regime resulted in the killings of over 3 million people.
9. Over 4 million people – men, women, and children – were forcibly detained in concentration and security camps to undertake forced labour (like digging canals and dykes, planting rice, erecting dams) for the “benefit of the Party and for the production of rice”.<sup>24</sup> The camp maintained strict control and ownership over the lives of the inmates, limited their movement, kept them under constant surveillance, prevented and deterred any escape.<sup>25</sup> Failure to meet daily targets, becoming sick, or any attempt to escape was met with severe beatings, cruel treatment, torture, disappearance, and killings. In the camps, “punitive hard labour” was the norm so “[t]hat they cannot oppose or fight against the Party”.<sup>26</sup> The detainees were made to work extremely long hours, excruciating physical labour, faced shortages of food, water, and health services,

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<sup>23</sup> See, ICC, *Prosecutor v. Dominic Ongwen*, [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](#), ICC-02/04-01/15 A A2, Appeals Chamber, 23 December 2021.

<sup>24</sup> ECCC, *Prosecutor v. Duch*, Trial Judgment, 001/18-07-2007/ECCC/TC (26 July 2010), para. 226.

<sup>25</sup> *Ibid*, para. 231.

<sup>26</sup> *Prosecutor v. Duch* (n 24), paras. 226 – 227.

and could not air any criticism or talk to other inmates. The detainees were arrested, detained, imprisoned, and transported across the country for forced labour.

10. The ECCC statute codified and exercised jurisdiction on enslavement as a crime against humanity.<sup>27</sup> The first case of the ECCC resulted in the conviction of Kaing Guek Eav (alias “*Duch*”) for the killing and torture of 15000+ prisoners at the Tuol Sleng security center or “S-21”. The Chamber held that “forced or involuntary labour may also constitute enslavement” and “enslavement is characterised by the perpetrator’s exercise of power”.<sup>28</sup> While consent of victims is not a legal requirement for enslavement as crimes against humanity, according to the Chamber, “[t]he absence of consent may be presumed in situations where the expression of consent is impossible”.<sup>29</sup> Accordingly, the Chamber found that the ‘deliberate’ exercise of total power and control by the S-21 staff over the detainees and “that their forced or involuntary labour, coupled with their detention, amounted to enslavement”.<sup>30</sup>
11. The ECCC contribution to international criminal law jurisprudence is significant as it holds that forced labour meeting certain conditions would fall within the crime of enslavement as a crime against humanity. As an Asia-based hybrid tribunal, the judgment is an important judicial statement on the commission of crime of enslavement in the region. The judgment adds to the growing jurisprudence on contemporary forms of slavery, especially recognising all forms of slavery wherever the exercise of any or all of the powers attaches to the right of ownership.

## **B. CONTEMPORARY FORMS OF SLAVERY**

### **(i) Enslavement in the Fishing Industry in South-East Asia**

12. Thailand is a major player in the global fishing market, with the sixth largest sea fleet in the world.<sup>31</sup> However, the Thai fishing industry has long been associated with illegal

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<sup>27</sup> Article 5, [Statute of Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments](#) as promulgated on 27 October 2004 (NS/RKM/1004/006), Extraordinary Chambers in the Courts of Cambodia, accessed on 30 April 2024.

<sup>28</sup> *Prosecutor v. Duch* (n 24), para. 345.

<sup>29</sup> *Prosecutor v. Duch* (n 24), para. 343.

<sup>30</sup> *Prosecutor v. Duch* (n 24), para. 346.

<sup>31</sup> In 2022, Thailand exported seafood products, mainly farmed shrimp and canned tuna, valued at 641 million USD. See, [“Scourge of the Seas: Analysing the impact of bottom trawling on Thailand’s marine ecosystems”](#),



fishing practices. Rampant human rights violations of workers engaged in the fishing industry have received warnings from the International Labour Organisation (ILO)<sup>32</sup>, and top seafood importers including the United States (US) and the European Union (EU).<sup>33</sup>

13. This submission demonstrates how the fishing industry in South-East Asia has become a site for enslavement, and that must be taken into consideration when addressing slavery crimes within the Rome Statute. There are particular facets of this form of enslavement that are distinct from other forms of enslavement – such as enslavement at sea, with no recourse for escape – and some of these distinct features may also inform the formulation of the policy. It must also be noted that while some sites of enslavement within the fishing industry may fall within the Rome Statute, linked to jurisdiction, as well as meeting contextual requirements of Article 7<sup>34</sup> (chapeau requirements of crimes against humanity) or of Article 8 (existence of an armed conflict, international or non-international), others may not. However, it is still important to highlight the issues that arise from this specific situation.

14. The Rome Statute addresses slavery and slave-related practices as crimes against humanity through Article 7(1)(c) enslavement and 7(1)(g) sexual slavery. The Statute, however, does not criminalise the slave trade as a distinct crime.

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Environmental Justice Foundation (2023), p.3; See, more, [“Thai seafood processing industry agrees new steps to improve working conditions”](#), International Labour Organisation (16 June 2022), accessed on 30 April 2024.

<sup>32</sup> See, Report of the Director-General, [“Sixth Supplementary Report: Report of the Committee set up to examine the representation alleging non-observance by Thailand of the Forced Labour Convention, 1930 \(No. 29\)”](#), International Labour Organisation, GB.329/INS/20/6, (20 March 2017).

<sup>33</sup> The US State Department downgraded Thailand to a tier 3 trafficking destination in light of reports about the fishing industry. See [“US State Department downgrade Thailand to Tier 3”](#), *Seafood Source* (June 20 2014); The EU issued a ‘yellow card’, warning of a trade ban if Thailand did not curb Illegal, Underreported, and Unregulated (“IUU”) fishing. See, [“EU acts on illegal fishing: Yellow card issued to Thailand while South Korea & Philippines are cleared”](#) (22 April 2015).

<sup>34</sup> The crime of enslavement and slave trade to be prosecuted as crimes against humanity within the Rome Statute must meet the contextual requirements under Article 7. It must be established that there is an attack directed against a civilian population, and such an attack is widespread or systematic and pursuant to or in furtherance of a State or organisational policy. See ICC, *Prosecutor v. Germain Katanga*, Judgment pursuant to article 74 of the Statute, Trial Chamber, ICC-01/04-01/07, 7 March 2014, para. 1123-24 (widespread or systematic attack); ICC, *Prosecutor v. Bosco Ntaganda*, Judgment, ICC-01/04-02/06, Trial Chamber, 8 July 2019, paras. 673-4 (pursuant to or in furtherance of a State or organisational policy); ICC, *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’, ICC-01/04-02/06 A A2, Appeals Chamber, 30 March 2021, para 418, 423-4, 430 (attack directed against a civilian population).

15. The definition of enslavement in the Rome Statute under Article 7(2)(c) is largely based on the 1926 Convention<sup>35</sup>, except for reference to human trafficking.

“Enslavement” means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power *in the course of trafficking in persons, in particular women and children* (emphasis added).

16. The ‘exercise of power of ownership’, under the Elements of Crimes, provides further insight on the conduct constituting enslavement as follows: “The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a *similar deprivation of liberty* (emphasis added)”.<sup>36</sup>

17. This definition is non-exhaustive with the inclusion of phrase ‘similar deprivation of liberty’ and covers contemporary forms of slavery, including servitude, forced labour, serfdom etc. The Trial Chamber affirmed it in the *Katanga* judgment “[p]owers attaching to right of ownership must be construed as the use, enjoyment and disposal of a person who is regarded as property, by placing him or her in a situation of dependence which entails his or her *deprivation of any form of autonomy* (emphasis added).<sup>37</sup>

18. In *Prosecutor v. Kunarac*, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) affirmed that the concept of slavery had evolved beyond the traditional ‘chattel slavery’ context described in the 1926 Convention, encompassing “various contemporary forms of slavery” also based on “the exercise of any or all of the powers attaching to the right of ownership”.<sup>38</sup>

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<sup>35</sup> Article 1(1), 1926 Slavery Convention: “(1) Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised”.

<sup>36</sup> This definition of enslavement enlists some of the slave trade conduct but omits any reference to the slave trade. The footnote in the Elements of Crimes further widens the definition as follows: “It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children”. Article 7(1)(c), ICC, Elements of Crimes.

<sup>37</sup> *Prosecutor v. Katanga* (n 34) para. 976.

<sup>38</sup> See ICTY, *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Appeals Judgment, IT-96-23/1-A, 12 June 2002, para. 117.



19. The Rome Statute does not provide an exhaustive list of factors or indicia of where power of ownership could be exercised by the perpetrator. The Court ascertains the extent of control exercised by factoring the following (non-exhaustive): “control of the victim’s movement, the nature of the physical environment, psychological control, measures taken to prevent or deter escape, use of force or threats of use of force or other forms of physical or mental coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality, forced labour, and the victim’s vulnerability”.<sup>39</sup>
20. The imposition of situations of ‘similar deprivation of liberty’ expands the definition of enslavement and encompasses circumstances beyond physical confinement. In *Prosecutor v. Ongwen*, Trial Chamber IX established that the deprivation of liberty “may take various forms” in the context of enslavement, including situations in which “victims may not have been physically confined, but were *otherwise unable to leave as they would have nowhere else to go and fear for their lives*” (emphasis added).<sup>40</sup>
21. While the duration of detention is not an element, since the “question turns on the relationship between the accused and the victim”, it may be relevant.<sup>41</sup> The fishermen are usually held for an indefinite period.<sup>42</sup> Once trafficked men are brought on board, they are made to work on the vessel until the boat returns to the shore. Thereafter, the crew are transferred to another boat (usually within the same fleet) and continue to be in the sea and work.
22. According to the ICTY in *Kunarac*, though acquisition and disposal of an individual for the purpose of ‘monetary gain’ is not a legal element to establish enslavement, it provides “a prime example of the exercise of the right of ownership over someone”.<sup>43</sup> The Thai fishing industry is a multi-billion player in the global market and forced

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<sup>39</sup> SCSL, *Prosecutor v. Charles Ghankay Taylor*, Judgment, Trial Chamber, SCSL-03-01-T, 18 May 2012, paras. 420, 447-448; ICTY, *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Trial Judgment, IT-96-23-T & IT-96-23/1-T, 22 February 2001, para. 542; *Prosecutor v. Kunarac et al Appeals Judgment*. (n 38) para.119.

<sup>40</sup> ICC, *Prosecutor v. Dominic Ongwen*, Judgment, Trial Chamber, ICC-02/04-01/15, 4 February 2021, para. 2713; See also *Prosecutor v. Katanga* (n 34), para. 977; *Prosecutor v. Taylor* (n 39), para. 420.

<sup>41</sup> *Prosecutor v. Ongwen* (n 40), para. 2714, *Prosecutor v. Kunarac et al. Appeals Judgment*. (n 38) para.120.

<sup>42</sup> See [Hidden Chains: Rights Abuses and Forced Labour in Thailand's Fishing Industry](#), Human Rights Watch (2018), accessed on 30 April 2024.

<sup>43</sup> *Prosecutor v. Kunarac et al.*, Trial Judgment (n 39) para. 542.

labour, involuntary servitude and enslavement form an intrinsic part of the structure to sustain the export demands of the market.<sup>44</sup>

23. While some of the workers might have been aware of the type of work involved and conditions and still accepted the job on the boat, the consent of the individual is immaterial for the crime against humanity of enslavement even though it may be relevant from an evidential perspective. Jurisprudence has held that lack of consent is not an element of the crime, as “enslavement flows from claimed rights of ownership”.<sup>45</sup>
24. Further, forced or compulsory labour are indicators of enslavement and must be factored in while determining enslavement.<sup>46</sup> Often such forced labour is without pay and is accompanied by physical hardship, human trafficking, prostitution.<sup>47</sup> The definition of enslavement under the Elements of Crimes of the Rome Statute includes ‘exacting forced labour’ under ‘similar deprivation of liberty’. The ECCC Trial Chamber has held previously that forced or involuntary labour, combined with arbitrary detention constitutes enslavement.<sup>48</sup> The two essential tests, for the ECCC, were that the victims had ‘no real choice’ in whether to work, and their detention was ‘of similar gravity and seriousness’ as other crimes against humanity.<sup>49</sup>
25. The *mens rea* requirement of Article 30 of the Rome Statute applies to Article 7 and thus, both knowledge and intent constitute the mental element. According to the ICC Trial Chamber in *Katanga*, the perpetrator “must have been aware that he or she was exerting such powers and have meant to engage in the conduct... have been aware that such a consequence would occur in the ordinary course of events”, i.e., to reduce a person into slavery.<sup>50</sup>
26. In the absence of formal recruitment of crew on Thai trawlers, fishing boats, especially the ones which tread foreign waters, make use of men trafficked from the region

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<sup>44</sup> The Chamber articulated a ‘gain element’ as the ‘purpose implicit in the ownership powers’, concluding “the requisite element [...] is an effort to accrue some gain through the exercise over the victim of the powers that attach to the right of ownership”. See, ECCC, *Prosecutor v. Duch*, Appeal Judgment, 001/18-07-2007-ECCC/SC, Supreme Court Chamber, 3 February 2012, para 158.

<sup>45</sup> *Prosecutor v. Kunarac et al.*, Appeals Judgment. (n 38) para.120.

<sup>46</sup> *Prosecutor v. Kunarac et al.*, Trial Judgment (n 39), para. 543, 2712.

<sup>47</sup> *Prosecutor v. Kunarac et al.*, Trial Judgment (n 38) paras. 542-543.

<sup>48</sup> See *Prosecutor v. Duch* (n 24) para. 346.

<sup>49</sup> *Ibid*; *Prosecutor v. Milorad Krnojelac*, Judgement, Trial Chamber, IT-97-25-T, 15 March 2002, para. 359.

<sup>50</sup> *Prosecutor v. Katanga* (n 34) para. 981.

(Myanmar, Laos, Thailand, Cambodia, etc).<sup>51</sup> Once sold, the men work for months and years without pay for the owners until the amount for which they were bought is paid off. This practice often leads to debt bondage as workers are often kept in the dark about the exact value or nature of their debt by brokers. In some cases, employers seize identity documents for the duration of the debts, withhold wages, apply compound interest, and enforce onerous repayment schedule.<sup>52</sup> The men are physically trapped and detained on the boat and have limited mobility when at sea. The men are under constant surveillance by the boat captain. The fear of arrest, when on land, by immigration officials due to lack of proper documentation also restricts movement.

27. Living conditions on the vessel are dismal. Workers sleep in cramped rooms, designed purposely to allow only a handful of individuals to rest at a given time. There is a shortage of access to fresh water and food and a poor state of hygiene and sanitation.

28. Once onboarded, the fishermen work throughout the day except for a few hours of rest.<sup>53</sup> The repercussions of under-delivering or contributing less during a day result in beatings, and other form of mistreatment, including torture, and killing. The coercive environment maintained by the boat owners and the captain instils fear of retribution amongst the fishermen.<sup>54</sup> The working conditions exclude any possibility of free consent or free will and affect fishermen both physiologically and psychologically. Likewise, no real possibility exists to escape from the boat and the brutal living conditions.<sup>55</sup> Labour undertaken by the fishermen on the boat in the dangerous work environment, without any real payment may constitutes forced labour<sup>56</sup> and consequently, enslavement.

29. While mistreatment is rampant, the lack of torture or mistreatment of workers does not negate enslavement. According to *Pohl et al*:

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<sup>51</sup> See [“Trafficking of Fishermen in Thailand”](#), International Organisation for Migration, IOM (14 January 2011).

<sup>52</sup> See Article 1a, 1956 Supplementary Convention on the Abolition of Slavery.

<sup>53</sup> See [Thailand’s Seafood Slaves](#), Environmental Justice Foundation (2015), p.16; Hidden Chains (n 42), p.61, 71, 84, 88, 89, 99.

<sup>54</sup> The ill-treatment forms a part of a wider coercive atmosphere, designed to keep workers from escaping. See [Thailand’s Seafood Slaves](#) (n 53) pp.18-19; Hidden Chains (n 42), pp.83-87.

<sup>55</sup> *Prosecutor v. Milorad Krnojelac*, Judgement, Appeal Chamber, IT-97-25-A, 17 September 2003, paras. 194-195; Factors such as unclear legal status and language barriers exacerbate conditions like debt bondage and further foreclose avenues for escape. See Hidden Chains (n 42), pp.36-40.

<sup>56</sup> *Ibid*.

“Slavery may exist even without torture. Slaves may be well fed, well clothed, and comfortably housed, but they are still slaves if without lawful process they are deprived of their freedom by forceful restraint. We might eliminate all proof of ill-treatment, overlook the starvation, beatings, and other barbarous acts, but the admitted fact of slavery – compulsory uncompensated labour – would still remain. There is no such thing as benevolent slavery. Involuntary servitude, even if tempered by humane treatment, is still slavery”.<sup>57</sup>

30. The exercise of power by the boat owners over the workers – selling, buying, using a person, managing the use of a person, profiting from the use of a person – signals the deliberate reduction of the worker on the boat to a slave. The control exercised by the boat owner over the workers related to their movement, working and living conditions, and physical and mental well-being, and detention, takes away the agency of the workers and leaves them at the mercy of the skipper/captain. The workers enjoy no right or freedom to refuse to undertake work assigned and thus, such forced labour with detention amounts to enslavement.

## **(ii) Forced Conscription in Myanmar**

31. 2024 marks the third year of the military coup in Myanmar. Since 1 February 2021, the Myanmar military (Tatmadaw) has committed widespread as well as systematic human rights violations, including crimes against humanity and war crimes across the country. The Myanmar military has killed at least 4,957 people including women and children, with 26, 578 arbitrarily arrested.<sup>58</sup> In October 2023, the internal armed conflict between the military junta and the Ethnic Armed Organisations (EAO) and the People’s Defense Forces (PDF) intensified and further exacerbated the humanitarian catastrophe.<sup>59</sup>

32. On 10 February 2024, the Myanmar military enforced the 2010 People’s Military Service Law, enabling the conscription of Burmese citizens - men ages 18 to 35 and

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<sup>57</sup> *US v. Pohl et al.*, Judgment, US Military Tribunal Nuremberg (3 November 1947), p. 970.

<sup>58</sup> ‘[Daily Briefing in Relation to the Military Coup](#)’ (Assistance Association for Political Prisoners (Burma)), 29 April 2024, accessed on 30 April 2024.

<sup>59</sup> Richard Horsey, ‘[A new Escalation of Armed Conflict in Myanmar](#)’, *Crisis Group* (17 November 2023); ‘[UN shows Conflicting Approaches to Myanmar Crisis](#)’, *Human Rights Watch* (4 April 2024).

women ages 18 to 27 for up to two years.<sup>60</sup> The activation of the forced military services to recruit over 60,000 individuals annually is due to reported severe shortage in military personnel due to defection, and civil disobedience and resistance.<sup>61</sup>

33. In Rakhine State, where over 600,000 Rohingya continue to live under *de facto* indefinite detention and apartheid-like conditions<sup>62</sup>, the armed conflict between the Myanmar military and the Arakan Army (AA) has escalated, disproportionately affecting the Rohingya.<sup>63</sup> The November 2023 breakdown of an agreed ceasefire has led to heightened hostilities between the parties. In light of the activation of the April 2024 conscription law, the military junta is forcefully recruiting the Rohingya to fight the Arakan Army in Rakhine State. By April, over 1000 Rohingya men have been reported to be forcibly recruited by the Myanmar military with the use and threat of force, abductions and kidnappings and on the pretext of securing freedom of movement and grant of citizenship.<sup>64</sup> While the 2010 Conscription Law applies only to Burmese citizens, the forceful use of the Rohingya men (deprived of nationality through the 1982 Citizenship Law) against the Arakan Army is a reflection of the military's indifference to Rohingya lives and a tactical ploy to cause internal strife.

34. On refusing to enlist Rohingya men in the Myanmar military, the Rohingya camp management was threatened with mass arrests, ration cuts, further restrictions on movement, and death.<sup>65</sup> Once recruited, the Rohingya are provided with two weeks of military training and 50,000 kyats (approx. 24 USD). The greater efforts by the Myanmar military to have the Rohingya fight its proxy war with the Arakan Army have already resulted in casualties on the frontlines.<sup>66</sup> It further increases the possibility of

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<sup>60</sup> Ingying Naing, "[Myanmar Junta enforces Conscription Law Amid Backlash, Exodus](#)", *VOA News* (19 February 2024), accessed on 30 April 2024.

<sup>61</sup> Ye Myo Hein, "[Myanmar's fateful conscription law](#)", *United States Institute of Peace* (26 February 2024), accessed on 30 April 2024.

<sup>62</sup> See "[The World Must Stand Up For The Rohingya - Lest We Forget!](#)", Asia Justice Coalition, 2 August 2023, accessed on 30 April 2024.

<sup>63</sup> "[As Crisis in Myanmar Worsens, Security Council Must Take Resolute Action to End Violence by Country's Military. Address Humanitarian Situation, Speakers Urge](#)", 9595th Meeting, United Nations Security Council, 4 April 2024, accessed on 30 April 2024.

<sup>64</sup> See, M. Sakhawat Hossain, "[Myanmar poses new geopolitical challenge for Bangladesh](#)", *Prothomalo* (8 February 2024), accessed on 30 April 2024; MD. Himel Rahman, "[Myanmar: The junta's forced conscription of Myanmar](#)", *The Interpreter* (2 April 2024), accessed on 30 April 2024.

<sup>65</sup> "[Myanmar: Military forcibly recruiting Rohingya](#)", Human Rights Watch (9 April 2024), accessed on 30 April 2024.

<sup>66</sup> "[Genocide against Rohingya is Intensifying](#)", Burmese Rohingya Organisation UK (2 April 2024), accessed on 30 April 2024.

the recruitment and forced usage of Rohingya men and boys by the Arakan Army as well.

35. The Rohingya are highly vulnerable due to their situation in Rakhine State – caught between the military and the Arakan Army.<sup>67</sup> The Rohingya already face severe restrictions namely, freedom of movement including extortion and curfews, arbitrary detention and arrest. The situation is further compounded by limited access to food, water, healthcare, education, employment, and justice. Consequently, the Rohingya have nowhere to run to escape forced conscription. The Burmese armed forces have imposed a humanitarian blockade on Rohingya villages as a response to attempts to flee conscription.<sup>68</sup>
36. The general conscription of adults into a State’s armed forces is permitted under international law.<sup>69</sup> In the absence of an analogous provision criminalizing enslavement as a war crime, the contextual reading of the situation of the Rohingya in Rakhine State and the forceful conscription contributes to forced labour amounting to enslavement as crimes against humanity.
37. The Myanmar military exercises control – both *de facto* and *de jure* – over the lives of Rohingya men in the following ways: a) involuntary or forced military service; b) coercive measures or retaliation against individuals and their families on escaping conscription; c) arbitrary and open-ended duration of conscription; d) limitations on freedom of movement; e) forced confrontation with Arakan Army; f) limited access to food, water, and healthcare; and, g) continuing statelessness of the Rohingya.
38. Rohingya men and boys have no real choice or ability to refuse forced conscription in the military-controlled Rakhine State.<sup>70</sup> The intentional recruitment and use of Rohingya men by the Myanmar military as its extension on the frontlines and as human shields is emblematic of the exercise of any or all of the powers attached to the right of

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<sup>67</sup> [“Myanmar: Türk sounds alarm amid rising tensions in Rakhine”](#), UN OHCHR (19 April 2024), accessed on 30 April 2024.

<sup>68</sup> [“World Leaders must speak out for Rohingya in Arakan”](#), Burma Human Rights Network (2 April 2024), accessed on 30 April 2024.

<sup>69</sup> Rome Statute criminalised forceful recruitment and use of children as both crimes against humanity (7(1)(c)) and war crimes (international (8(2)(b)(xxvi)) and non-international armed conflict (8(2)(e)(vii))).

<sup>70</sup> See *Prosecutor v. Krnojelac*, (n 49) para. 359; SCSL, *Prosecutor v. Issa Hassan Sesay et. al*, Judgment, SCSL-04-15-T, Trial Chamber, 2 March 2009, para. 202.

ownership.<sup>71</sup> Humane treatment, if at all, or payment of remuneration to the Rohingya on account of their military service does not affect the involuntary servitude performed by them for the Myanmar military.<sup>72</sup>

39. The instance highlighted in Rakhine state is a distinct factual situation that needs to be taken into consideration when formulating the policy. When ethnic-religious minorities are targeted by those in power during an armed conflict, their vulnerability is exacerbated because of lack of control over their existence and movement, and this may amount to enslavement. Forced conscription, in isolation, may not necessarily constitute crimes against humanity *per se*. However, when contextualised in a situation where the conscripted individuals do not possess any choice to refuse to undertake forced labour, it may amount to enslavement as a crime against humanity, as well as a war crime.

### C. RECOMMENDATIONS

40. The Asia Justice Coalition secretariat recommends:

- (i) **Comprehensive reflection on slavery crimes:** In alignment with the OTP's goals of "seek[ing] justice for those enslaved in the context of armed conflict, crimes against humanity, or genocide"<sup>73</sup>, the Prosecutor must be alive to the sensitivities attached to the slave trade, modern forms of slavery and its linkage with transnational crimes, including trafficking in persons, forced labour, among others. It is crucial for our region, in Asia, where only a handful of States are party to the Rome Statute.
  
- (ii) **Intersectional lens:** The instances highlighted in this submission indicate that the most vulnerable – for reasons of minority status, gender, membership of a particular group – are at the most risk of enslavement and contemporary forms of slavery. It is those who are most marginalised that are targeted for these

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<sup>71</sup> Kunarac et al. Appeals Judgment. (n 38) para.116.

<sup>72</sup> Pohl et. al (n 57).

<sup>73</sup> '[ICC Office of the Prosecutor launches public consultation on Policy on Slavery Crimes](#)', ICC (19 March 2024).



particular crimes. The policy should reflect this reality and context, bringing an intersectional lens to bear on these crimes.

- (iii) Cumulative charging:** In order to fully reflect the criminality of acts and responsibility of an alleged perpetrator before the ICC, it is recommended that the OTP operationalises its cumulative charging policy. Keeping with its 2023 Gender-Based Crimes<sup>74</sup> Policy, and the Policy on Children<sup>75</sup>, the OTP should seek to charge cumulatively and seek convictions “if the evidence meets the materially distinct elements of the different crimes.”<sup>76</sup> This could be relevant, for example in situations where there is an overlap between forced conscription as enslavement, as well as torture or other inhumane acts. It will also better capture the full range of harms suffered by the victims, including women and children and provide them with breadth of accountability options.

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<sup>74</sup> See, The Office of the Prosecutor, International Criminal Court, ‘Policy on Gender-Based Crimes’, (2023) <<https://www.icc-cpi.int/sites/default/files/2023-12/2023-policy-gender-en-web.pdf>>

<sup>75</sup> The Office of the Prosecutor, International Criminal Court, ‘Policy on Children’, (2023), para. 127 <<https://www.icc-cpi.int/sites/default/files/2023-12/2023-policy-children-en-web.pdf>>

<sup>76</sup> Policy on Gender-Based Crimes (n 74) para. 58.

## **ABOUT THE ASIA JUSTICE COALITION**

Founded in 2018, the Asia Justice Coalition's purpose is to improve the legal landscape in Asia to ensure justice and accountability for gross violations of international human rights law and serious violations of international humanitarian law. The Coalition operates through collaboration, resource-sharing, and coordinating efforts between local and international civil society organizations working in the region. Its work is accomplished by undertaking joint activities relating to justice and accountability and engaging in collective advocacy. The AJC secretariat is central to and supports the Coalition's work.