INTERNATIONAL CRIMINAL COURT

An Analysis of Prosecutor Bensouda's Legacy

fidh

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Cover Picture: ICC Prosecutor Fatou Bensouda at the UN Security Council – Statement to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011), 5 November 2015. © UN Photo/Kim Haughton

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PREFACE

On 15 June 2021, Fatou Bensouda stepped down after a nine-year mandate as the Prosecutor of the International Criminal Court, passing this great responsibility to Karim Khan. At a time when the Office of the Prosecutor faces significant challenges to comply with its mandate, including lack of State cooperation and limited financial and human resources, and with the Court embarking on a process of profound changes to bolster its performance, this transition constitutes a key opportunity to reflect on the Office of the Prosecutor's progress and setbacks over the past decade.

FIDH decided to carry out a stock taking exercise and to look at the Office of the Prosecutor's work during Prosecutor Bensouda's term (2012-2021) on three key areas particularly relevant to our mandate: accountability for sexual and gender-based crimes; preliminary examinations; and outreach to victims, affected communities, and civil society organisations. The goal of this review is to provide Prosecutor Khan with a detailed analysis of the work conducted by the Office of the Prosecutor in these areas, and to identify best practices and opportunities for improvement.[1] Each topic was analysed independently, and the related findings were made publicly available over the course of 2021. The first paper on accountability for sexual and gender-based crimes was published on FIDH's website in June 2021, and formally presented during an online event with Prosecutors Bensouda and Khan marking the International Day for the Elimination of Sexual Violence in Conflict.[2] The second paper on preliminary examinations was published in September 2021,[3] and the third on outreach in November 2021. The present report is a compilation of the three papers and their respective recommendations.

The three identified areas have been at the forefront of FIDH's work since the International Criminal Court's inception. Among other activities, and in close collaboration with its national member and partner organisations, FIDH conducts fact-finding missions; supports victims in seeking justice and reparations at national, regional and international levels; carries out advocacy to raise awareness among civil society organisations; contributes through research to the development of policy and investigative frameworks; and strengthens the capacity of member and partner organisations so they can meaningfully engage with accountability mechanisms. With a permanent representation in The Hague since 2004, FIDH closely monitors proceedings at the Court as early as the preliminary examination stage. Together with member organisations that are based in situation countries and work directly with victims and affected communities, FIDH documents allegations of crimes and provides these materials to the Office of the Prosecutor.

For the purpose of this stocktaking exercise, FIDH collaborated with two partner organisations with long-standing experience in their respective areas of focus: Women's Initiatives for Gender Justice (WIGJ) on the accountability for sexual and gender-based crimes, and No Peace Without Justice (NPWJ) on outreach to victims, affected communities, and civil society organisations. The paper on preliminary examinations was produced solely by FIDH, benefiting from extensive consultation with

1. A similar exercise was undertaken by FIDH at the end of the first ICC Prosecutor, Luis Moreno Ocampo's term. FIDH. See *The Office of the Prosecutor of the ICC – 9 years on. Analysis of the prosecutorial strategy and policies of the Office of the Prosecutor (2003-2011) and recommendations to the next ICC Prosecutor*, December 2011.
2. FIDH-WIGJ, *Accountability for Sexual and Gender-based Crimes at the ICC: An Analysis of Prosecutor Bensouda's Legacy*, June 2021.
3. FIDH, *Preliminary Examinations at the ICC: An Analysis of Prosecutor Bensouda's Legacy*, September 2021.

FIDH member and partner organisations from relevant countries. The research in this report therefore builds upon FIDH's, WIGJ's, and NPWJ's collective and individual expertise, and continuous monitoring of and engagement with the International Criminal Court.

WIGJ is an international women's human rights organisation that advocates for gender justice and accountability and prosecution of sexual and gender-based crimes at the International Criminal Court. WIGJ's work includes legal monitoring of the Court's cases, including analysis of cases from a gender justice perspective; strategic advocacy with the Office of the Prosecutor for the investigation and prosecution of sexual and gender-based crimes and the implementation of the Office's Policy Paper on Sexual and Gender-Based Crimes; advocacy for the participation of sexual and gender-based crimes survivors; facilitation of a pool of experts on sexual and gender-based violence; filing observations before the Court, and issuing publications on gender justice related issues. It builds upon the tireless work of the Women's Caucus for Gender Justice, a movement of women's human rights advocates from around the world who came together to enshrine principles of gender justice and gender equality in the framework and functioning of the International Criminal Court.

NPWJ was founded in the early 1990s to support the work of the International Criminal Tribunal for the former Yugoslavia and to advocate for the establishment of a permanent International Criminal Court. Since the establishment of the International Criminal Court, NPWJ has been at the forefront of advocating with the Court and with its States Parties for efficient, effective, and genuine outreach. It monitors the work of the International Criminal Court and undertakes strategic advocacy with all organs, including the Office of the Prosecutor, on how to improve and strengthen its outreach work from the earliest possible opportunity. NPWJ has issued several policy papers and statements on outreach and individual staff members have contributed to academic journals and books on the topic.

Part 1

Accountability for Sexual and Gender-Based Crimes

Paper published in June 2021 / N° 772a

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WOMEN'S INITIATIVES FOR GENDER JUSTICE

Introduction

With the adoption of the Rome Statute of the International Criminal Court (ICC or "the Court"), the international community expressed its will to put an end to impunity for sexual and gender-based crimes. The Rome Statute codifies the broadest range of sexual and gender-based crimes in the history of international law, explicitly proscribing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and any other form of sexual violence as war crimes and crimes against humanity. Gender is also defined and included as a basis for the crime against humanity of persecution.[4]

As the body responsible for the investigation and prosecution of crimes under the jurisdiction of the ICC, the Office of the Prosecutor (OTP) plays a key role in implementing the Rome Statute's provisions and securing accountability for sexual and gender-based crimes.[5] In accordance with this mandate, during her nine-year tenure, the ICC's second Prosecutor Fatou Bensouda has made the investigation and prosecution of these crimes a key priority.[6] She demonstrated this commitment from the outset in spearheading and publishing the ground-breaking OTP Policy Paper on Sexual and Gender-Based Crimes (SGBC Policy), with the aim of "guid[ing] the [OTP] in its work in fighting against impunity for sexual and gender-based crimes, and promot[ing] transparency and clarity, as well as predictability in the application of the legal framework of the Rome Statute to such crimes".[7]

Through the application of its SGBC Policy, the OTP has made significant inroads in advancing accountability for sexual and gender-based crimes, setting important precedents both within the Court and in the broader field of international criminal law. Prosecutor Bensouda leaves behind an important legacy of achievements and lessons learned in the investigation and prosecution of sexual and gender-based crimes, paving the way for the new Prosecutor, Karim Khan, to carry on this critical task.[8]

Survivors of sexual and gender-based violence, and the international community at large, are now looking to Prosecutor Khan to build upon Prosecutor Bensouda's legacy in confronting these crimes. It is only with the OTP's renewed commitment and continued resolve that the ICC can realize the Rome Statute's promise of delivering gender-inclusive justice.

Bearing this in mind, this report takes stock of the OTP's progress in addressing sexual and gender-based crimes under Prosecutor Bensouda's mandate, covering the period from 15 June 2012 to 15 June 2021.[9]It highlights the OTP's most significant achievements, as well as key challenges and opportunities that can be capitalised upon to advance the OTP's work. The report also includes recommendations to Prosecutor Khan for addressing ongoing challenges and carrying on Prosecutor Bensouda's work.

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4. Moreover, a number of crimes against humanity, war crimes and crimes of genocide are recognised in the Rome Statute to have a sexual and/or gender-based component. An example is the crime of enforcing "measures intending to prevent birth" that may constitute an act of genocide. Similarly, rape has been recognised to constitute the underlying genocidal act of causing 'serious bodily or mental harm'.
5. Article 54(1)(b) of the Rome Statute requires the Prosecutor to "[t]ake appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so […] take into account the nature of the crime, in particular where it involves sexual violence [and] gender violence".
6. ICC, Press Release, "The Prosecutor of the International Criminal Court, Fatou Bensouda, publishes comprehensive Policy Paper on Sexual and Gender-Based Crimes" (hereafter "ICC Press Release on the publishing of SGBC Policy Paper"), ICC-OTP-20140605-PR1011, 5 June 2014.
7. *Ibid.*
8. Prosecutor Khan was elected by the Assembly of States Parties on 12 February 2021. He took office on 16 June 2021.
9. The information in this report is based on publicly available information as of the time of writing on 15 June 2021.

I. Prosecutor Bensouda's Strategy to Address Sexual and Gender-Based Crimes

After assuming office, Prosecutor Bensouda took immediate action to strengthen the OTP's performance in addressing sexual and gender-based crimes, drawing upon lessons learned from the first decade of its work, as well as the work of the international ad hoc tribunals, notably the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. In the OTP's first Strategic Plan for 2012-2015,[10] "[e]nhanc[ing] the integration of a gender perspective in all areas of [the OTP's] work and continu[ing] to pay particular attention to sexual and gender-based crimes and crimes against children" was elevated as a strategic goal.[11] The finalization of a Sexual and Gender Based Crimes Policy by 2013, to address the challenges to effectively prosecuting these crimes, was included as a key priority of the Strategic Plan.[12]

This objective was met on 5 June 2014, when Prosecutor Bensouda published the OTP's Policy Paper on Sexual and Gender Based Crimes – the first of its kind to be produced by an international court or tribunal.[13] In launching the SGBC Policy, Prosecutor Bensouda emphasized: "[t]he message to perpetrators and would-be perpetrators must be clear: sexual violence and gender-based crimes in conflict will neither be tolerated nor ignored by the ICC".[14]

The five objectives of the SGBC Policy are to:

1. Affirm the commitment of the Office to paying particular attention to sexual and gender-based crimes in line with Statutory provisions;
2. Guide the implementation and utilization of the provisions of the Statute and the RPE, so as to ensure the effective investigation and prosecution of sexual and gender-based crimes from preliminary examination through to appeal;
3. Provide clarity and direction on issues pertaining to sexual and gender-based crimes in all aspects of operations;
4. Contribute to advancing a culture of best practice in relation to the investigation and prosecution of sexual and gender-based crimes; and
5. Contribute, through its implementation, to the ongoing development of international jurisprudence regarding sexual and gender-based crimes.[15]

Following adoption of the SGBC Policy, any decision made not to investigate sexual and gender-based crimes must be internally justified and reported to the Prosecutor.[16] Another important contribution of

10. OTP, Remarks to the 25th Diplomatic Briefing by Fatou Bensouda, Prosecutor of the International Criminal Court, 26 March 2015.
11. OTP, Strategic Plan June 2012-2015, 11 October 2013, paras. 5 and 32.
12. *Ibid.*, para. 63.
13. OTP, Policy Paper on Sexual and Gender-Based Crimes (hereafter "SGBC Policy"), June 2014. The SGBC Policy was developed through an extensive consultative process, gathering input from OTP staff, the Prosecutor's Special Gender Adviser, and a range of other stakeholders, including States Parties, international organisations, civil society, academia and individual experts.
14. ICC Press Release on the publishing of SGBC Policy Paper.
15. SGBC Policy, para. 6.
16. OTP, "The Prosecution of Sexual and Gender-Based Crimes by International Courts", Speech given at the international conference organised by His Excellency, Mr Sidiki Kaba, President of the Assembly of States Parties to commemorate the Day of International Criminal Justice (2016), by Ms Fatou Bensouda, Prosecutor of the International Criminal Court, 16 July 2016, p. 5.

the SGBC Policy is that it provides awaited clarification regarding the OTP's interpretation of the term gender,[17] defined under Article 7(3) of the Rome Statute as "the two sexes, male and female, within the context of society", signalling how it will be applied in the course of the OTP's work. It clarifies that this definition "acknowledge[s] the social construction of gender and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and girls and boys".[18] As such, gender-based crimes may be committed against persons "because of their sex and/or socially constructed gender roles".[19] Significantly, it also underscores that the OTP "will apply and interpret [the definition] in accordance with internationally recognized human rights".[20]

The OTP restated its commitment to effectively address sexual and gender based-crimes in its following Strategic Plans,[21] and in its September 2016 Policy Paper on Case Selection and Prioritization, in which it states that the OTP "will pay particular attention to crimes that have been traditionally under-prosecuted, such as […] rape and other sexual and gender-based crimes."[22]

17. Valerie Oosterveld, *The ICC Policy Paper on Sexual and Gender-Based Crimes: A Crucial Step for International Criminal Law*, 24 Wm. & Mary J. Women & L. 443 (2018), pp. 444, 447-448, 450-452.
18. This understanding of gender narratives assigned to "men" and "women" should be viewed from the perpetrator's intent to enforce prescribed narratives, and not taken as a presumption that the OTP views the construct of gender as limited to a binary. See Lisa Davis, *Dusting off the Law Books: Recognizing Gender Persecution in Conflicts and Atrocities*, 20 NW. J. HUM RTS. 2. pg. 11 (June 2021) (citing a conversation with Patricia Viseur-Sellers, Special Advisory for Gender for the Office of the Prosecutor of the International Criminal Court).
19. SGBC Policy, para. 15.
20. *Ibid.*
21. OTP, Strategic Plan 2016-2018, 16 November 2015, para. 4, p. 5 and 57 (listing as a strategic goal "to refine and reinforce its approach to victims, in particular for victims of sexual and gender-based crimes […]); OTP, Strategic Plan 2019-2021, 17 July 2019, p. 5.
22. OTP, Policy Paper on Case Selection and Prioritisation, September 2016, para. 46.

II. The SGBC Policy in Practice – Progress and Setbacks

The OTP has made notable strides in advancing the objectives of the SGBC Policy, as reflected in its preliminary examinations, investigations, and cases. However, it also continues to face challenges in securing accountability for these crimes. This section highlights key OTP achievements under Prosecutor Bensouda's mandate, as well as core setbacks faced, which reveal areas warranting further focus.

Preliminary Examinations and Investigations

		Inherited by Bensouda	Initiated by Bensouda	To be inherited by Khan
Preliminary Examinations	All	7 Afghanistan, Colombia, Georgia, Guinea, Honduras, Korea, Nigeria	13 Bangladesh/Myanmar, Bolivia, Burundi, CAR II, Gabon, Iraq/ United Kingdom, Mali, Palestine, Philippines, Ukraine, Union of the Comoros, Venezuela, Venezuela II	6 Bolivia, Colombia, Guinea, Philippines, Venezuela I, Venezuela II
	SGBC	6 Afghanistan, Colombia, Georgia, Guinea, Honduras, Nigeria	9 Bangladesh/Myanmar, Bolivia, Burundi, CAR II, Iraq/United Kingdom, Mali, Philippines, Ukraine, Venezuela	5 Bolivia, Colombia, Guinea, Philippines, Venezuela I
Investigations	All	7 CAR I, Côte d'Ivoire, Darfur, the DRC, Kenya, Libya, Uganda	7 Afghanistan, Bangladesh/ Myanmar, Burundi, CAR II, Georgia, Mali, Palestine	14 Afghanistan, Bangladesh/Myanmar, Burundi, CAR I, CAR II, Côte d'Ivoire, Darfur, the DRC, Georgia, Kenya, Libya, Mali, Palestine, Uganda
	SGBC Allegations	7 CAR I, Côte d'Ivoire, Darfur, the DRC, Kenya, Libya, Uganda	6 Afghanistan, Bangladesh/ Myanmar, Burundi, CAR II, Georgia, Mali	13 Afghanistan, Bangladesh/Myanmar, Burundi, CAR I, CAR II, Côte d'Ivoire, Darfur, the DRC, Georgia, Kenya, Libya, Mali, Uganda

** Key features of the investigations opened under Prosecutor Bensouda's mandate, which involve allegations of sexual and gender-based crimes, are included in the Annex.*

Prosecutor Bensouda's undertaking to "pay particular attention to the commission of sexual and gender-based crimes at all stages of its work" and to apply a gender analysis to all crimes within the Court's jurisdiction is evident in the preliminary examinations and investigations her Office has advanced and initiated.[23]

These examinations and investigations encompass allegations of a broad range of sexual and gender-based crimes, including rape and other forms of sexual violence against men and gender-based persecution,[24] providing a foundation upon which the new Prosecutor can draw to address sexual and gender-based crimes inclusively and comprehensively.

23. SGBC Policy, p. 5, paras. 4, 14 and 20.

24. See Annex 1.

Preliminary Examinations

When Prosecutor Bensouda assumed office, she inherited seven ongoing preliminary examinations, and sexual and gender-based crimes featured in six, namely, Afghanistan, Colombia, Georgia, Guinea, Honduras, and Nigeria.[25] Prosecutor Bensouda initiated 13 new preliminary examinations, of which nine included sexual and gender-based crimes: Mali, CAR II, Ukraine, Iraq/United Kingdom, Burundi, Philippines, Venezuela, Bangladesh/Myanmar, and Bolivia.[26] She initiated four of these *proprio motu* (Iraq/United Kingdom, Burundi, Philippines, Bangladesh/Myanmar) pursuant to Article 15 of the Rome Statute, all of them incorporating sexual and gender-based crimes under the scope of analysis.

The OTP has advanced several of these preliminary examinations to the investigation stage and closed others. At the time of writing, the new Prosecutor is set to inherit six ongoing preliminary examinations in Colombia, Guinea, Philippines, Venezuela I, Venezuela II, and Bolivia. Sexual and gender-based crimes are under examination in all but Venezuela II.

During Prosecutor Bensouda's tenure, the OTP also concluded the preliminary examinations in Nigeria and Ukraine, finding in each instance that the criteria to proceed with investigations into war crimes and crimes against humanity, including sexual and gender-based crimes, have been met.[27] Alleged crimes committed in Nigeria by Boko Haram and the Nigerian Security Forces include rape, sexual slavery, forced pregnancy, forced marriage as an other inhumane act, and persecution on gender, religious and political grounds[28] for further detail regarding the gender-based persecution charge, see section IV].[29] Rape and other forms of sexual violence are also alleged to have been committed in Eastern Ukraine.[30] The Prosecutor indicated that she will hand these two files over to the incoming Prosecutor.[31]

Investigations

Prosecutor Bensouda inherited from her predecessor seven ongoing situations under investigation in Uganda, the DRC, CAR I, Darfur, Libya, Kenya and Côte d'Ivoire. Each involved allegations of sexual and gender-based crimes. Under her leadership, the OTP has opened seven new investigations in Mali, CAR II, Georgia, Burundi, Bangladesh/Myanmar, Afghanistan, and the State of Palestine. All but the Situation in the State of Palestine encompass allegations of sexual and gender-based crimes. Of these, three followed preliminary examinations she initiated *proprio motu.*[32]

Thus, in total, Prosecutor Khan is set to take charge of 14 investigations, all of which include allegations of sexual and gender-based crimes—with the exception of Palestine.

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25. The Preliminary Examination in Korea did not feature sexual and gender-based crimes.
26. The Preliminary Examination in Union of the Comoros, Palestine, Gabon, and Venezuela II did not feature sexual and gender-based crimes.
27. OTP, Report on Preliminary Examination Activities 2020, 14 December 2020, paras. 265 and 289.
28. *Ibid.*, paras. 253-257.
29. See *infra*, p. 13.
30. Notably, in 2018, the International Federation for Human Rights (FIDH) and its Kyiv-based partner organization, the Eastern-Ukrainian Center for Civic Initiatives (EUCCI), submitted an Article 15 Communication to the OTP asking the Court to open an investigation into rape and other forms of sexual violence committed against women and men in illegal detention facilities in Eastern Ukraine. FIDH Press Release, "Two NGOs Call for an IC Investigation into Conflict-Related Sexual Crimes in Eastern Ukraine", 25 September 2018.
31. The Prosecutor has also reported the anticipated conclusion of preliminary examinations in the Philippines and Venezuela I by mid-2021. Report on Preliminary Examination Activities 2020, paras. 197 and 214.
32. These include CAR II, Burundi, and Bangladesh/Myanmar.

Charges for Sexual and Gender-Based Crimes

		Inherited by Bensouda	Initiated by Bensouda	To be inherited by Khan
Cases	All	17	6	25
	SGBC Charges	12	3	12

** A detailed analysis of the charges of sexual and gender-based crimes brought before the Court can be found in Annex 2.*

When Prosecutor Bensouda assumed office, sexual and gender-based crimes charges had been brought in 12 out of 17 cases[33] against 18 of 31 suspects and accused.[34] During her tenure, the OTP has brought sexual and gender-based crimes charges in 3 out of 6 new cases[35] against 3 out of 7 suspects and accused.[36] The OTP also brought new charges for sexual and gender-based crimes in the Bosco Ntaganda case,[37] as well as in the case against Dominic Ongwen, significantly expanding the scope of such crimes being prosecuted before the ICC.[38] From the Court's inception to date, sexual and gender-based crimes charges have been brought in a total of 18 out of 26 cases,[39] against 22 out of 38 accused.[40]

33. Charges for sexual and gender-based crimes were included in: the Joseph Kony *et al* case in the Uganda Situation; the Germain Katanga & Mathieu Ngudjolo Chui, Bosco Ntaganda, Callixte Mbarushimana and Sylvestre Mudacumura cases in the DRC Situation; the Jean-Pierre Bemba Gombo case in the CAR Situation; the Omar Al'Bashir, Ahmad Harun & Ali Kushayb and Abdel Hussein cases in the Darfur Situation; the Francis Kirimi Muthaura & Uhuru Kenyatta case in the Kenya Situation; and the Laurent Gbagbo & Charles Blé Goudé and Simone Gbagbo cases in the Côte d'Ivoire Situation. They were not brought in the Thomas Lubanga Dyilo case in the DRC Situation; the Bahr Idriss Abu Garda or Abdallah Banda & Saleh Jerbo cases in the Darfur Situation; the William Ruto & Joshua Arap Sang case in the Kenya Situation; or the M. & S. Gaddafi & Abdullah Al-Senussi case in the Libya Situation. See Women's Initiatives for Gender Justice (WIGJ), *Gender Report Card on the International Criminal Court* (hereafter "Gender Report Card 2012"), 2012, p. 103. Pre-Trial Chamber III issued an arrest warrant for Blé Goudé, under seal, on 21 December 2011, which was unsealed on 30 September 2013. See ICC, *The Prosecutor v. Charles Blé Goudé*, Warrant Of Arrest for Charles Blé Goudé, ICC-02/11-02/11-1, 25 December 2011; WIGJ, *The Compendium. An overview of Situations and cases before the International Criminal Court* (hereafter "Compendium"), 2017, p. 122. Pre-Trial Chamber III issued an arrest warrant for Simone Gbagbo, under seal, on 29 February 2012, which was unsealed on 22 November 2012. See ICC, *The Prosecutor v. Simone Gbagbo*, Warrant of Arrest for Simone Gbagbo, ICC-02/11-01/12-1, 29 February 2012; Compendium, p. 124.
34. Charges for sexual and gender-based crimes were brought against: Kony, Otti, Katanga, Ngudjolo, Ntaganda, Mbarushimana, Mudacumura, Bemba, Al'Bashir, Harun, Kushayb, Hussein, Muthaura, Kenyatta, Ali, L. Gbagbo, Blé Goudé, and S. Gbagbo. They were not brought against Lubanga, Abu Garda, Banda, Jerbo, Ruto, Sang, Kosgey, M. Gadaffi, Al-Senussi, S. Gadaffi, Raska Lukwiya, Okot Odhiambo, and Dominic Ongwen.
35. Charges for sexual and gender-based crimes were brought in: the Al-Tuhamy case in the Libya Situation; the Al-Hassan case in the Mali Situation; and the Yekatom & Ngaïssona case in the CAR II Situation. They were not brought in the Mahmoud Al-Werfalli case in the Libya Situation; the Ahmad Al-Mahdi case in the Mali Situation; and the Abdel Said case in the CAR II Situation.
36. Charges for sexual and gender-based crimes were brought against: Mohamed Al-Tuhamy, Al-Hassan, and Ngaïssona. It is unclear from the arrest warrant against Al-Tuhamy which charges are inclusive of gender-based crimes, specifically, "acts of sexual violence and rape". See ICC, *The Prosecutor v. Al-Tuhamy Mohamed Khaled*, Warrant of Arrest for Al-Tuhamy Mohamed Khaled with under seal and ex parte Annex, ICC-01/11-01-13-1, 18 April 2013, paras. 7-8. They were not brought against Al-Werfalli, Al-Mahdi, Yekatom and Said. While the arrest warrant against Said includes alleged acts of rape, specifically referring to the rape of women and girls, some of whom died from their injuries, rape as a war crime or crime against humanity is not included amongst the charges. See ICC, The Prosecutor v. Mahamat Said Abdel Kani, Public Redacted Version of 'Warrant of Arrest for Mahamat Said Abdel Kani', 7 January 2019, ICC-01/14-01/21-2-US-Exp, ICC-01/14-01/21-2-Red2, 7 January 2019, paras. 2, 8, 17, and 19.
37. Compendium, p. 71.
38. The proceedings against Ongwen were severed from Kony *et al*. case on 6 February 2015. Compendium, p. 81.
39. The figures in this publication relate to cases involving core international crimes under Article 5 of the Statute. They do not cover the four cases alleging offences against the administration of justice under Article 70 of the Statute: Walter Barasa, Bemba *et al.*, Philip Bett and Paul Gicheru.
40. Trial Chamber II severed the Katanga and Ngudjolo case on 21 November 2012. See ICC, *The Prosecutor v. Germain Katanga*, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, ICC-01/04-01/07-3319-tENG/FRA, 21 November 2012; Compendium, p. 68. The Katanga and Ngudjolo cases are thus included separately. Pre-Trial Chamber II severed the Harun and Kushayb case on 13 June 2020, following Kushayb's transfer into ICC custody. See ICC, *The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*, Decision on the Prosecution Application under Article 58(7) of the Statute (2), ICC-02/05-01/07, 29 April 2007. The Harun and Kushayb cases are thus listed separately. Pre-Trial Chamber II severed the proceedings against

Prior to the adoption of the SGBC Policy, the OTP had not secured any convictions for sexual and gender-based crimes. The OTP did not bring charges in its first case against Thomas Lubanga Dyilo, despite compelling evidence presented in UN and NGO reports and during testimony at trial. When brought, charges for sexual and gender-based crimes, relative to other crimes, had been particularly susceptible to being dismissed, or in some instances recharacterized, in the arrest warrant/summons to appear and confirmation of charges phases.[41] This discouraging state of affairs has been attributed, in part, to factors such as lack of prioritization of sexual and gender-based crimes in OTP early investigation plans, inadequate investigations, weak case strategies and evidence, inadequate explanation and contextualization of the crimes by the OTP to the judiciary, and lack of expertise and sensitization amongst ICC Judges.[42]

While charges for sexual and gender-based crimes remain vulnerable and challenges to securing accountability persist, notable improvements are evident since adoption of the SGBC Policy. The OTP has successfully brought:

- a wide variety of sexual and gender-based crime charges, reflecting the multidimensional harm experienced by victims;
- charges for sexual and gender-based crimes explicitly "as crimes *per se*", in addition to charging these acts as other crimes within the Court's jurisdiction (war crimes, crimes against humanity and genocide);[43] and
- cumulative charges to reflect the range, severity and multifaceted character of sexual and gender-based crimes in a case.[44]
- The OTP has supplemented initial charges with additional charges for sexual and gender-based crimes.
- It has also vastly improved its explanation and contextualization of sexual and gender-based crimes before the Court.[45]

These reforms have contributed to the steady increase in the proportion of sexual and gender-based crimes that have been confirmed for trial.[46] Further, following discouraging setbacks, in 2021 the OTP secured its first final conviction for sexual and gender-based crimes in the Ntaganda case. including for charges unprecedented before the Court and in international law. Convictions for unprecedented sexual and gender-based crime charges were also secured, at first instance, in the Ongwen case.

Progress – Recent Achievements in Cases

The OTP has secured notable success in three cases, which is testament to the positive impact of its application of the SGBC Policy. These achievements reflect the OTP's interpretation of the evidence through a gender-lens and have generated results that bring the law more accurately in line with the survivors' experience and reflective of the purpose of sexual violence in conflict.

Ongwen from the Kony *et al.* case on 6 February 2015. See ICC, *The Prosecutor v. Joseph Kony and Vincent Otti*, Decision Severing the Case Against Dominic Ongwen, ICC-02/04-01/05-424, 6 February 2015. The Kony *et al.* and Ongwen cases are thus listed separately.

41. WIGJ, *Gender Report Card on the International Criminal Court*, 2013, p. 66.

42. FIDH, *Unheard, Unaccounted: Towards Accountability for Sexual and Gender-Based Violence at the ICC and Beyond* (hereafter "Unheard, Unaccounted" Report), November 2018, p. 14. Oosterveld 2018, pp. 445-446.

43. SGBC Policy, para. 72.

44. *Ibid.*

45. Oosterveld 2018, p. 446.

46. Rosemary Grey, *Prosecuting Sexual and Gender-Based Crimes at the International Criminal Court. Practice, Progress and Potential*, 2019, Cambridge University Press, pp. 273-274, based on statistics as of 17 July 2018. Since this time, sexual and gender-based crimes have been confirmed in two additional cases. In the Al Hassan case, all six sexual and gender-based crime charges were confirmed. In the Yekatom and Ngaïssona case, two out of eight sexual and gender-based crime charges were confirmed.

Ntaganda – Ground-Breaking Charges Yield Landmark Conviction

The initial arrest warrant issued 22 August 2006 against Ntaganda, deputy chief of staff and commander of operations of the rebel group Forces Patriotiques pour La libération du Congo (FPLC),[47] did not include charges for sexual and gender-based crimes.[48] However, applying lessons learned from the Lubanga trial,[49] on 14 May 2012, the OTP filed an application for an additional warrant of arrest,[50] adding 9 charges, including rape and sexual slavery as war crimes and crimes against humanity.[51] Pre-Trial Chamber II granted the OTP's application on 13 July 2012.[52]

Following Ntaganda's surrender and transfer to the Court, on 10 January 2014, in its Document Containing the Charges, the OTP added further sexual violence charges for the war crimes of rape and sexual slavery against FPLC child soldiers, which were not included in either of the two arrest warrants.[53] This is the first ICC case in which a senior military figure has been charged with acts of rape and sexual slavery committed against child soldiers within his own militia group. In June 2014, Pre-Trial Chamber II unanimously confirmed all charges against Ntaganda, marking the first case in which all sexual and gender-based crimes charges brought against an accused were unanimously confirmed by an ICC Pre-Trial Chamber.

As Prosecutor Bensouda argued: "[c]hild soldiers are afforded general protections against sexual violence under the fundamental guarantees applicable to persons affected by non-international armed conflict. They also have special protections because of their vulnerability as children. Both of these levels of protections support the recognition of child soldiers as victims of sexual violence".[54]

The day before the start of trial, the Defence challenged the Court's jurisdiction over crimes of sexual violence against child soldiers who are members of the same armed group as the accused.[55] On 15 June 2017, in an unprecedented decision, the Appeals Chamber accepted the OTP's position, unanimously confirming that rape and sexual slavery by members of an armed group against members of that same armed group may be charged as war crimes.[56] This decision represents an important contribution to international criminal law, triggered by the Prosecutor's pioneering charges that reflected the multifaceted use of sexualised violence in armed conflict and emblematic of its application of the SGBC Policy, including the application of a gender analysis to all crimes within its jurisdiction.[57]

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47. The FPLC is the military wing of the Union des Patriotes Congolais ("UPC"). See ICC, *The Prosecutor v. Bosco Ntaganda*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, ICC-01/04-02/06-309, 14 June 2014, para. 15.
48. The warrant, which was unsealed on 28 August 2008, charged Ntaganda with three counts of war crimes, including enlistment, conscription, and use of children under the age of 15 to participate actively in hostilities, as punishable under Article 8(2)(b)(xxvi) or Article 8(2)(e)(vii) of the Rome Statute. See ICC, *The Prosecutor v. Bosco Ntaganda*, Warrant of Arrest, ICC-01/04-02/06-2-tENG, 24 August 2006.
49. WIGJ, *Gender Report Card 2012*, p. 114.
50. ICC, *Situation in the Democratic Republic of the Congo*, Second Corrigendum of the Public Redacted Version of Prosecutor's Application under Article 58 filed on 14 May 2012 (ICC-01/04-611-Red), ICC-01/04-611-Red-Corr2, 16 May 2012.
51. The warrant also charged Ntaganda with murder and persecution as crimes against humanity, as well as murder, attacks against the civilian population and pillaging as war crimes. See ICC, *The Prosecutor v. Bosco Ntaganda*, Public redacted version - Decision on the Prosecutor's Application under Article 58, ICC-01/04-02/06-36-Red, 13 July 2012.
52. *Ibid.*
53. ICC, *The Prosecutor v. Bosco Ntaganda*, Prosecution's submission of document containing the charges and the list of evidence, ICC-01/04-02/06-203-AnxA, 10 January 2014, paras. 100-108,156, and pp. 57-58.
54. *Ibid.*, para. 107.
55. ICC, *The Prosecutor v. Bosco Ntaganda*, Application on behalf of Mr Ntaganda challenging the jurisdiction of the Court in respect of Counts 6 and 9 of the Document containing the charges, ICC-01/04-02/06-804, 1 Ssseptember 2015, paras. 7-10, p. 12.
56. ICC, *The Prosecutor v. Bosco Ntaganda*, Judgment on the appeal of Mr Ntaganda against the "Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9", ICC-01/04-02/06-1962, 15 June 2017, paras. 57, 70, p. 3.
57. SGBC Policy, para. 20.

On 8 July 2019, the Trial Chamber convicted Ntaganda of all 18 counts of war crimes and crimes against humanity charged by the Prosecutor,[58] including rape and sexual slavery committed against child soldiers, as well as both female and male civilians, sentencing him to 30 years' imprisonment, the heaviest sentence handed down by the ICC to date.[59] On 30 March 2021, the Appeals Chamber upheld the conviction and sentence.[60]

The Ntaganda conviction is the first final ICC conviction for sexual and gender-based crimes and represents an important step in the development of international criminal law jurisprudence on sexual and gender-based violence.

Ongwen – Advancing Accountability for Victims of Forced Marriage and Forced Pregnancy

The Prosecutor's charges brought in the case against Ongwen, a former Lord's Resistance Army commander, further demonstrate the impact of the SGBC Policy in practice. Like in the Ntaganda case, the initial arrest warrant against Ongwen of 8 July 2005 did not include any charges for sexual and gender-based crimes. Yet, after Ongwen was arrested and transferred to the ICC, on 22 December 2015, the Prosecutor raised the number of charges from seven to 70. Nineteen charges relate to sexual and gender-based crimes, including rape, sexual slavery, forced pregnancy, forced marriage as an inhumane act, enslavement, outrages upon personal dignity and torture as war crimes and crimes against humanity.[61] On 23 March 2016, Pre-Trial Chamber II unanimously confirmed all counts against Ongwen, representing the highest number of sexual and gender-based crimes confirmed by an ICC Pre-Trial Chamber to date.

On 4 February 2021, the Trial Chamber found Ongwen guilty of 61 counts of war crimes and crimes against humanity, including all 19 counts relating to 11 charges of sexual and gender-based crimes. He was thereafter sentenced to 25 years' imprisonment.[62] This conviction and sentence represents an important milestone in the advancement of gender justice.

Ongwen is the first ICC case in which the Prosecutor brought the charge of forced marriage as an inhumane act, amounting to crimes against humanity, although the Rome Statute does not explicitly include this crime. Further, it is the first time that the crime of forced pregnancy has been prosecuted by an international court.

If this conviction is upheld on appeal, it will mark the ICC's second final conviction for sexual and gender-based crimes.

Al-Hassan – Trailblazing Charge for Persecution on the Basis of Gender

The case against Al-Hassan, alleged member of the Ansar Eddine armed group and *de facto* chief of the Islamic police, is the second to arise from the Mali Situation. While the first case, against Al Mahdi, resulted in a final conviction, it did not include charges for sexual and gender-based crimes, sparking

58. ICC, *The Prosecutor v. Bosco Ntaganda*, Judgment, ICC-01/04-02/06-2359, 8 July 2019.

59. ICC, *The Prosecutor v. Bosco Ntaganda*, Sentencing judgment, ICC-01/04-02/06-2442, 7 November 2019.

60. ICC, *The Prosecutor v. Bosco Ntaganda*, Public redacted version of 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-01/04-02/06-2666-Red, 30 March 2021; ICC, *The Prosecutor v. Bosco Ntaganda*, Public redacted version of Judgment on the appeal of Mr Bosco Ntaganda against the decision of Trial Chamber VI of 7 November 2019 entitled 'Sentencing judgment', ICC-01/04-02/06-2667-Red, 30 March 2021.

61. ICC, *The Prosecutor v. Dominic Ongwen*, Public redacted version of "Document Containing the Charges", 21 December 2015, ICC-02/04-01/15-375-Conf-AnxA, ICC-02/04-01/15-375-AnxA-Red2, 25 May 2016, pp. 35-56.

62. ICC, *The Prosecutor v. Dominic Ongwen*, Sentence, ICC-02/04-01/15-1819-Red, 6 May 2021.

concern amongst human rights advocates.[63] By contrast, the Prosecutor's charges against Al-Hassan include several sexual and gender-based crimes, including the crime against humanity of persecution on gender grounds – an unprecedented charge before the ICC at the confirmation stage.[64]

In addition to gender-based persecution as a crime against humanity, the arrest warrant[65] and Document Containing the Charges[66] include sexual and gender-based violence charges of rape and sexual slavery as war crimes and crimes against humanity, and the crime against humanity of forced marriage as an other inhumane act. Pre-Trial Chamber I confirmed the charges on 30 September 2019,[67] and the trial commenced on 14 July 2020.

In the Document Containing the Charges, the OTP provides a detailed description of how gender-based persecution manifested in the case, aligned with the SGBC Policy's interpretation of the Rome Statute's definition of gender as "acknowledging the social construction of gender."[68] The OTP alleges that Al Hassan and other members of Ansar Eddine particularly targeted women and young girls on the basis of gender, imposing restrictions on them motivated by discriminatory opinions regarding gender roles.[69] Women and girls were allegedly required to follow a strict dress code, segregated from men to whom they were not married, could not leave their homes freely, and some were prohibited from working.[70] Violations of these rules were severely sanctioned, with the intention of forcing conformity.[71] They were also subjected to rape, sexual slavery and other inhumane acts within the framework of forced marriages and forced pregnancies.[72] The OTP alleges that these persecutory acts constituted severe deprivations of fundamental rights, including the rights not to be held in slavery or servitude, to privacy, physical integrity, health, marry and found a family, a fair trial, freedom of association and movement, and freedom of expression, religion, thought and conscience, as well as to be free from torture and cruel, inhuman treatment or punishment and from gender discrimination, including with regard to marriage.[73]

As the ICC is the first international tribunal with jurisdiction over this crime, Al Hassan is the first individual to be prosecuted for the crime against humanity of gender-based persecution in international law.[74]

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63. FIDH, Press Release, Mali: The hearing of Al Mahdi before the ICC is a victory, but charges must be expanded, 30 September 2015 (expressing concern that the lack of sexual and gender-based crimes charges in the Al Mahdi case suggested a return to a more limited approach to charging, despite advancements made following the adoption of the SGBC Policy, and calling on the OTP to further consider credible allegations of his responsibility for sexual and gender-based crimes).
64. The OTP has brought the charge of gender-based persecution in one other case against one accused in the DRC Situation, Callixte Mbarushimana, at the arrest warrant stage but did not include the charge in the Document Containing the Charges. See ICC, *The Prosecutor v. Callixte Mbarushimana*, Prosecution's Application under Article 58, ICC-01/04-01/10-11-Red2, 20 August 2010, p. 17 and para. 97.
65. ICC, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Warrant of Arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, ICC-01/12-01/18-2-tENG, 27 March 2018.
66. ICC, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Version publique expurgée de la « Version amendée et corrigée du Document contenant les charges contre M. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud » (hereafter "Al Hassan DCC"), ICC-01/12-01/18-335-Corr-Red, 2 July 2019.
67. ICC, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, ICC-01/12-01/18-461-Conf, 13 November 2019.
68. See Al Hassan DCC.
69. *Ibid.*, paras. 947-948.
70. *Ibid.*, para. 960.
71. *Ibid.*, paras. 949, 963-964.
72. *Ibid.*, paras. 947-949.
73. *Ibid.*, paras. 971-972.
74. The ICC is the first international tribunal with jurisdiction over the crime against humanity of persecution on the basis of gender.

Setbacks – Establishing Liability for Sexual and Gender-based Crimes

Establishing the criminal responsibility of the accused continues to be one of the biggest challenges the OTP faces in advancing accountability for sexual and gender-based crimes, despite the adoption of the SGBC Policy. Recent successes in the Ntaganda and Ongwen cases suggest this trend is improving. However, in two previous cases the Trial Chambers determined that although sexual and gender-based crimes had been committed, there was insufficient evidence to link the crimes to the accused under the requisite mode of liability. This has had a profound impact on victims and affected communities, who are ultimately left without redress for the harm they have suffered.

Katanga and Ngudjolo – Unchallenged Acquittal for Sexual and Gender-Based Crimes

The case against Germain Katanga and Mathieu Ngudjolo Chui signified the first in which charges for sexual and gender-based crimes, namely rape and sexual slavery, were confirmed before the Court. In November 2012, six months into the deliberations phase, the Trial Chamber issued a decision severing the case and giving notice that it would likely recharacterize the mode of liability with which Katanga was charged from indirect co-perpetration under Article 25(3)(a) to common purpose liability under Article 25(3)(d).[75] Ngudjolo was thereafter acquitted of all charges.[76]

On 7 March 2014, the Trial Chamber convicted Katanga under Article 25(3)(d) for the war crimes of directing an attack against a civilian population, pillaging and destruction of property, as well as murder as a war crime and crime against humanity. However, Katanga was acquitted of all sexual and gender-based crimes. He was also acquitted of the war crime of using child soldiers. While the Trial Chamber determined that combatants from the militia group Katanga led had committed rape and sexual slavery, it found there was insufficient evidence to show that these crimes fell within the common purpose of the group and thus to establish Katanga's liability.[77]

On 9 April 2014, Prosecutor Bensouda notified the Appeals Chamber of the OTP's intention to appeal Katanga's acquittal, specifically for the crimes of rape and sexual slavery.[78] However, on 25 June 2014, following Katanga's discontinuance of his appeal against the Judgment and Sentence, the Prosecutor withdrew the appeal, based on Katanga's "acceptance of the conclusions reached" in the Judgment and "expression of sincere regret".[79]

The decision to withdraw the appeal caused confusion and disappointment amongst victims and sparked criticism amongst advocates, who identified flaws in the Trial Chamber's analysis, suggesting solid grounds for appeal.[80] As stated by Women's Initiatives for Gender Justice, "[the] statement by Katanga accepting the judgment, along with his expression of regret to victims, does not seem like an obvious or compelling basis for withdrawing the appeal on Katanga's acquittal of charges for rape and sexual slavery. These concessions […] do not readily explain or justify a decision not to pursue

75. ICC, *The Prosecutor v. Germain Katanga*, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, ICC-01/04-01/07-3319-tENG/FRA, 21 November 2012, para. 7 and p. 29.

76. ICC, *The Prosecutor v. Mathieu Ngudjolo Chui*, Judgment pursuant to article 74 of the Statute, ICC-01/04-02/12-3-tENG, 18 December 2012, p. 197.

77. ICC, *The Prosecutor v. Germain Katanga*, Judgment pursuant to article 74 of the Statute, ICC-01/04-01/07-3436-tENG, 7 March 2014, paras. 1663-1664 and pp. 658-660.

78. ICC, *The Prosecutor v. Germain Katanga*, Prosecution's Appeal against Trial Chamber II's "Jugement rendu en application de l'article 74 du Statut", ICC-01/04-01/07-3462, 9 April 2014, para. 3.

79. ICC, *The Prosecutor v. Germain Katanga*, Notice of Discontinuance of the Prosecution's Appeal against the Article 74 Judgment of Conviction of Trial Chamber II dated 7 March 2014 in relation to Germain Katanga, ICC-01/04-01/07-3498, 25 June 2014.

80. WIGJ, Statement of the Women's Initiatives for Gender Justice, Appeals Withdrawn by Prosecution and Defence, *The Prosecutor vs. Germain Katanga* (ci-après dénommé « WIGJ Statement on Appeals Withdrawn in Katanga »), 26 June 2014; See FIDH, "Unheard, Unaccounted" Report, pp. 17, 26.

accountability for acts of sexual violence in this case, and not to invest in sound jurisprudence in relation to these crimes".[81]

Although no further information is available regarding the reasoning behind the withdrawal, on its face, the decision appears incompatible with the spirit and purpose of the SGBC Policy, including the objectives to "ensure the effective investigation and prosecution of sexual and gender-based crimes from preliminary examination through to appeal," to "provide clarity and direction on issues pertaining to sexual and gender-based crimes in all aspects of its operations"; to "[c]ontribute to advancing a culture of best practice in relation to the investigation and prosecution of sexual and gender-based crimes"; and to "[c]ontribute […] to the ongoing development of international jurisprudence regarding sexual and gender-based crimes."

Bemba – First Conviction for Sexual and Gender-Based Crimes Overturned

In March 2016, the OTP secured its first conviction for charges of sexual and gender-based crimes in the case against Jean-Pierre Bemba Gombo. Bemba, founder and commander in chief of the Mouvement de Liberation du Congo (MLC), was unanimously found guilty, *inter alia*, of rape against women and men as a war crime and a crime against humanity committed by MLC troops[82] and sentenced to 18 years' imprisonment.[83] Bemba was the first individual to be convicted by the Court under the doctrine of command responsibility. It is also the first time in the history of international criminal law that sexual violence against men was charged as the crime of rape[84] and the first case before the Court in which testimony from male victims of sexual violence was heard in support of the charge of rape.[85]

However, this success was short-lived. On 8 June 2018, a majority of the Appeals Chamber overturned the Trial Chamber's conviction on two grounds.[86] First, although the fact that the crimes had been committed was not challenged, the Chamber held that the Trial Chamber erred in convicting Bemba of certain criminal acts it deemed exceeded the scope of the charges.[87] With regard to the remaining criminal acts, including "one murder, the rape of 20 persons and five acts of pillaging",[88] the Appeals Chamber held that the Trial Chamber erred when it found that Bemba "had failed to take all necessary and reasonable measures within his power to prevent or repress the crimes", as required to establish liability as a commander under Article 28.[89] Bemba was therefore acquitted of all charges.

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The Chambers' appraisal of the modes of liability was decisive in the acquittals for sexual and gender-based crimes in the Bemba and Katanga cases. In the case of Katanga, it appears that the Judges measured culpability for sexual violence against a higher standard than that applied to other crimes.[90]

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81. WIGJ, Statement on Appeals Withdrawn in Katanga.
82. ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/08-3343, 21 March 2016, para. 752.
83. ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/05-01/08-3399, 21 June 2016, paras. 95, 97.
84. Niamh Hayes, *The Bemba Trial Judgement – A Memorable Day for the Prosecution of Sexual Violence by the ICC*, PhD Studies in Human Rights, 21 March 2016.
85. See WIGJ, "ICC first conviction for acts of sexual violence", 21 March 2016.
86. ICC, *The 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", ICC-01/05-01/08-3636-Red, 8 June 2018, paras. 196-198.
87. *Ibid.*, paras. 116, 197-197.
88. *Ibid.*, paras. 118-119.
89. *Ibid.*, paras. 194, 196.
90. WIGJ, "Partial Conviction of Katanga. Acquittals for Sexual Violence and Use of Child Soldiers. *The Prosecutor vs. Germain Katanga*" (hereafter "WIGJ Statement on Katanga partial conviction"), 7 March 2014; WIGJ, *Gender Report Card on the International Criminal Court* (hereafter "Gender Report Card 2018"), 2018, p. 147.

As noted by the Women's Initiatives for Gender Justice, "[t]his creates a challenge for the Prosecution to argue more persuasively in support of individual criminal responsibility in relation to acts of [sexual violence], taking into account the prevailing approach to these crimes and the associated evidence required by the ICC Judges".[91] These outcomes require that the OTP critically examine their strategy in investigating the criminal responsibility of the accused and charging modes of liability, applying any lessons that can be drawn from the jurisprudence.

91. WIGJ, Statement on Katanga partial conviction.

III. Opportunities to Broaden the Reach of Accountability

Advancing Accountability for Gender-Based Persecution – an Intersectional Approach

As the first international criminal instrument to prohibit persecution on gender grounds as a crime against humanity,[92] the Rome Statute provides a distinct opportunity to deliver gender-inclusive justice. While to date, this novel provision has been underutilized,[93] the confirmation of the charge of gender-based persecution against Al Hassan for acts targeting women and girls represents a positive step towards realization of its potential. Further opportunity has been presented in the groundwork laid by Prosecutor Bensouda in preliminary examinations and investigations she has initiated and concluded.

The recently concluded preliminary examination in Nigeria involves allegations that members of Boko Haram targeted females and males "based on gender and perceived traditional social roles", as well as on religious grounds. It is alleged that women and girls were abducted and subjected to forced marriage, rape, sexual slavery and other forms of sexual violence. Girls were targeted for attending public schools and used as suicide bombers. Men and boys were forcibly conscripted and executed for refusing to participate in hostilities. Allegations against the NSF include persecution of military aged males suspected of being Boko Haram members or supporters on gender and political grounds.[94]

In Afghanistan, the OTP is investigating alleged persecution by the Taliban and its affiliates of women and girls, in particular female politicians, public servants and students, based on gender and political grounds. Women and girls considered to have transgressed the Taliban's ideology and rules have been subjected to intimidation, death threats, and abducted and killed to prevent them from studying, teaching, working or participating in public affairs.[95]

The OTP also recently brought charges of persecution in the case against Ali Muhammad Ali Abd-Al-Rahman, alleged senior leader of the Militia/Janjaweed in Darfur, Sudan. Abd-Al-Rahman and other perpetrators allegedly targeted males perceived to be associated with rebel armed groups, based on political, ethnic and gender grounds, specifically "the socially-constructed gender role presuming males to be fighters".[96] The Pre-Trial Chamber's decision on the confirmation of charges is pending.

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92. Rome Statute, Article 7(1)(h) proscribes the crime against humanity of "[p]ersecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law […]".

93. Grey 2019.

94. OTP, *Report on Preliminary Examination Activities 2018*, 5 December 2018, para. 225; OTP, *Report on Preliminary Examination Activities 2019*, 5 December 2019, paras. 186-187; OTP, *Report on Preliminary Examination Activities 2020*, 14 December 2020, paras. 254, 256.

95. ICC, *Situation in the Islamic Republic of Afghanistan*, Public redacted version of "Request for authorisation of an investigation pursuant to article 15", 20 November 2017, ICC-02/17-7-Conf-Exp, ICC-02/17-7-Red, 20 November 2017, paras. 72, 115-121.

96. ICC, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*, Public redacted version of "Second Corrected Version of 'Document Containing the Charges', 29 March 2021, ICC-02/05-01/20-325-Conf-Anx1'", 22 April 2021, ICC-02/05-01/20-325-Conf-Anx1-Corr2, ICC-02/05-01/20-325-Anx1-Corr2-Red, 22 April 2021, para 93.

In line with the SGBC Policy, each of these instances demonstrate the OTP's application of the concept of intersectionality, recognizing "the intersection of factors such as gender, […] religion or belief, political or other opinion, […] sex, sexual orientation, and other status or identities which may give rise to multiple forms of discrimination and social inequalities".[97]

These developments are to be applauded and replicated. At the same time, the OTP has yet to extend its accountability efforts to the full range of civilians who are persecuted on account of gender during conflict. Thus far, preliminary examinations, investigations and charges have not addressed allegations of gender-based persecution, including discrimination based on sexual orientation and gender-identity, against individuals perceived to be lesbian, gay, bisexual, transgender or intersex (LGBTI).

Advocates have sought to address this impunity gap through filing an Article 15 communication to the OTP, urging the OTP to investigate, *inter alia*, gender-based persecution, including discrimination based on gender due to real or perceived sexual orientation and gender-identity, committed by ISIS against women, men and individuals perceived to be LGBTI.[98] Action by the OTP in addressing this form of gender-based persecution aligns with its commitment, as expressed in the SGBC Policy, to "take into account the evolution of internationally recognized human rights", which includes the right to be free from discrimination based on sexual orientation or gender identity.[99] It also presents an opportunity to "set a new precedent for prosecuting gender-based crimes and create a new tool for human rights advocates worldwide".[100]

Recognising Male Survivors of Sexual and Gender-Based Crimes

The prosecution and recognition of sexual violence against men and boys before the ICC has been an ongoing challenge due to factors including stigma among affected communities, persistent underreporting, and regressive interpretations of the law.[101] The SGBC Policy has sought to address this issue by recognizing gender-based crimes as both sexual and non-sexual acts "committed against persons, whether male or female, because of their sex and/or socially constructed roles"; applying a gender analysis to all crimes within the Court's jurisdiction; and strengthening its in-house expertise on sexual and gender-based crimes relating to men and boys.[102]

The Ntaganda case represents a high point in the recognition of sexual violence against men and boys. In convicting Ntaganda for the war crime and crime against humanity of rape against civilians, the Trial Chamber accepted evidence of acts against both men and women.[103]

By contrast, the OTP did not bring evidence of sexual violence against men and boys to support its charges for sexual violence crimes in the Ongwen case. The Legal Representatives of Victims (LRV) sought to introduce evidence discovered during the course of the trial that indicated how a "significant

97. SGBC Policy, para. 27.

98. See Human Rights & Gender Justice Clinic (HRGJ) of CUNY Schol of Law, Madre & the Organization of Women's Freedom in Iraq (OWFI), Communication to ICC Prosecutor Pursuant to Article 15 of the Rome Statute Requesting a Preliminary Examination into the Situation of: Gender-Based Persecution and Torture as Crimes Against Humanity by the Islamic State of Iraq and the Levant in Iraq, 8 November 2017; Lisa Davis, Reimagining Justice for Gender-Based Crimes at the Margins: New Legal Strategies for Prosecuting ISIS Crimes Against Women and LGBTIQ Persons, *24 William & Mary Journal of Race, Gender and Social Justice*, March 2018, pp. 515-516, 518.

99. SGBC Policy, para. 27 and fns 23, 25. See also Oosterveld 2018, pp. 451-452.

100. Davis 2018, p. 518.

101. See e.g. *Gender Report Card 2018*, pp. 149-153.

102. SGBC Policy, pp. 3, 7, 13-14.

103. See e.g. ICC, *The Prosecutor v. Bosco Ntaganda*, Judgment, ICC-01/04-02/06-2359, 8 July 2019, paras. 623, 940-942.

number of male participating victims were either victims of rape, forced to carry out rapes, or forced to abuse the corpses of killed abductees in sexualized ways".[104] The Trial Chamber denied the request, finding the acts to go beyond the scope of the charges.[105]

The LRV advanced compelling arguments as to the importance of addressing allegations of sexual and gender-based crimes committed against men and boys, which apply beyond the Ongwen case. They highlighted that hearing the evidence would assist the Chamber in forming a holistic understanding of the forms of violence used by the perpetrators, and that addressing such crimes in public proceedings would give necessary recognition to this type of harm, which is underreported due to stigma and shame.[106]

While the reason why the OTP had not brought such evidence or supported the LRV request remains unclear, the Ongwen case appears to have been a missed opportunity to address sexual and gender-based crimes against men and boys. It underscores the importance of thoroughly investigating sexual and gender-based crimes against all gender groups from the earliest stages. There are positive indicators that the OTP is pursuing a holistic understanding of sexual and gender-based crimes. The preliminary examination in Ukraine and investigations in CAR II, Burundi, Bangladesh/Myanmar, and Afghanistan include allegations of sexual and gender-based crimes against men and boys.[107] It will be essential for the new Prosecutor to draw upon this foundation to ensure that male survivors of sexual violence, too, ultimately have access to justice.

Investigating and Contextualising "Any Other Form of Sexual Violence"

The Rome Statute is the first international criminal instrument to codify the war crime and crime against humanity of any other form of sexual violence. This crime serves as a "catch-all", covering acts of sexual violence that may not fit neatly within the other enumerated sexual and gender-based crimes. The use of this provision has great potential to address acts of sexual violence that might otherwise go unrecognized and undeterred. However, despite its promise, this crime has seldom been charged, and charges that have been brought have not led to successful results.

In Bemba's warrant of arrest, in June 2008, the Pre-Trial Chamber dismissed the OTP's request to bring charges of other forms sexual violence as a crime against humanity and war crime. The Judges were not convinced by the OTP's argument that forced undressing was sufficiently grave to constitute a crime against humanity—instead considering it to be subsumed within the outrage upon personal dignity charge.[108] They however accepted the charge of torture as a crime against humanity and war crime, as well as the war crime of outrages upon personal dignity, based on underlying acts that included rape and other forms of sexual violence against women, men and children.[109]

Similarly, the OTP sought to bring charges of other forms of sexual violence as a crime against humanity in the Kenyatta et al. case for underlying acts of forced male circumcision and penile amputation.[110]

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104. ICC, *The Prosecutor v. Dominic Ongwen*, Victims' requests for leave to present evidence and to present victims' views and concerns in person (hereafter "LRV request to present evidence, Ongwen"), ICC-02/04-01/15-1116, 2 February 2018, para. 16.
105. ICC, *The Prosecutor v. Dominic Ongwen*, Public Redacted Version of Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests, ICC-02/04-01/15-1199-Red, 6 March 2018, para. 57.
106. LRV request to present evidence, Ongwen, paras. 18-20.
107. See Annex.
108. ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-14-tENG, 12 June 2008, paras. 29, 39-40. See also para. 63.
109. *Ibid.*, paras. 41-42, 58-59.
110. ICC, *Situation in the Republic of Kenya*, Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ICC-01/09-31-Red, 15 December 2010; ICC, *The Prosecutor v. Francis Kirimi*

However, in both issuing the summonses to appear and confirming the charges, the Pre-Trial Chamber did not accept such acts as sexual in nature and requalified them as other inhumane acts.[111]

Charges for the crime against humanity of other forms of sexual violence were also brought in the arrest warrants against Laurent Gbagbo[112] and Charles Charles Blé Goudé[113] in November and December 2011, however, they subsequently were not brought in the Documents Containing the Charges in January and August 2014.[114] The charge was also brought in the arrest warrant for Simone Gbagbo issued in March 2012.[115]

While no charges have been successful to date, allegations of any other form of sexual violence as war crimes and crimes against humanity are included in several ongoing preliminary examinations and investigations, including in Ukraine, CAR II, Burundi, Bangladesh/Myanmar, and Afghanistan.[116] The Pre-Trial Chambers' previous dismissals and requalifications of the acts underlying such charges suggest the need for improved explanation and contextualization of the crime to the Chambers—similar to how the OTP contextualized the charge of rape and sexual slavery against child soldiers in the Ntaganda case.[117] Moving forward, The Hague Principles on Sexual Violence,[118] which provide guidance on what makes violence "sexual" from the perspective of survivors, can serve as a valuable resource for the new Prosecutor.

Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Prosecution's Amended Document Containing the Charges and List of Evidence Submitted Pursuant to Article 61(3) and Rule 121(3), (4) and (5), ICC-01/09-02/11-280, 2 September 2011, paras. 30, 33, 63, 74, and pp. 40-43.

111. ICC, *The Prosecutor v. Uhuru Muigai Kenyatta*, Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ICC-01/09-02/11-1, 8 March 2011, paras. 27; ICC, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11-373, 23 January 2012, paras. 260-266, 270. See also note 56, *Gender Report Card 2012*, pp. 108, 129.

112. ICC, *The Prosecutor v. Laurent Gbagbo*, Warrant Of Arrest For Laurent Koudou Gbagbo, ICC-02/11-01/11-1, 30 November 2011, p. 7.

113. *Ibid.*, p. 8.

114. ICC, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Annex 1: Prosecution's Submission of Document amendé de notification des charges, l'Inventaire amendé des éléments de preuve à charge, and le Tableau amendé des éléments constitutifs des crimes, and Response to issues raised by Pre-Trial Chamber I', ICC-02/11-01/11-592-Anx1, 13 January 2014; ICC, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Annex 1 to the Prosecution's Submission of Document de notification des charges and l'Inventaire des éléments de preuve à charge, ICC-02/11-01/11-124-Anx1-Corr, 28 August 2014.

115. ICC, *The Prosecutor v. Simone Gbagbo*, Public redacted version - Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Simone Gbagbo, ICC-02/11-01/12-2-Red, 2 March 2012.

116. See Annex.

117. See *supra*, p. 8.

118. WIGJ, The Hague Principles on Sexual Violence, 2020.

Recommendations

Review guiding documents, in particular:

1. The SGBC Policy and its implementation to date, to identify and incorporate lessons learned and best practices in investigating and prosecuting sexual and gender-based crimes. This should include an evaluation of the OTP's strategy for addressing the criminal responsibility of the accused and charging modes of liability.

2. Implementation of the OTP's Strategic Plan 2019-2021's Strategic Goal 4 "To refine and reinforce its approach to victims, in particular as regards victims of SGBC and crimes against or affecting children" to inform and strengthen the OTP's strategic goals to enhance accountability for SGBC in the development of the next OTP Strategic Plan.

3. Existing outreach and communications plans and activities, to strive for transparent and effective communication to external stakeholders, including victims and affected communities, regarding constraints faced in addressing sexual and gender-based crimes and reasons underlying any decisions not to pursue charges.

Continue advancing the Rome Statute's progressive legal framework governing sexual and gender-based crimes by:

4. Ensuring preliminary examination teams undertake a gender analysis of each situation. The analysis should include a mapping of relevant actors and explanation of the situation from a gendered perspective, including possible markers for sexual and gender-based crimes. This analysis should be provided to the investigation team once appointed to facilitate the early consideration of possible sexual and gender-based crimes and linkage to relevant actors.

5. Bringing, as supported by the evidence, charges for a wide variety of sexual and gender-based crimes; charges for sexual and gender-based crimes explicitly as crimes per se, and as other crimes such as torture or persecution; charges pertaining to different categories of crimes within the court's jurisdiction (war crimes, crimes against humanity, and genocide) should the contextual elements be met; and charges highlighting the gender-related aspects of sexual and other crimes within the Court's jurisdiction.

6. Adoptinganintersectionalapproachinallprosecutions,particularlythoseinvolvingsexualand gender-based violence.

7. Pursuing, as appropriate, strategic litigation with the aim of developing and advancing jurisprudence relating to sexual and gender-based crimes.

Build upon the foundation laid by Prosecutor Bensouda and:

8. Reinforce regular, ongoing internal seminars and trainings at which knowledge can be shared and strengthened on gender, sexual violence, intersectionality, and the investigation and prosecution of sexual and gender-based crimes within all OTP units.

9. Allocate sufficient resources to enable early and thorough investigation of sexual violence, including staff time, in preliminary examinations teams and investigations teams, which may be able to provide a gender analysis and mapping of relevant actors to fast-track initial stages of investigations.

10. Seize the opportunity to advance inclusive justice by prosecuting sexual and gender-based crimes that include other forms of sexual violence and also reach gender-based crimes beyond sexual violence that are committed against women and girls, men and boys, and individuals based on their gender, including their actual or perceived sexual orientation, gender identity or expression.

Annex 1 – Key Features of Investigations Opened under Prosecutor Bensouda

1. Mali

The Prosecutor announced the opening of an investigation into the Situation in Mali on 16 January 2013.[119] Based on an initial assessment of evidence, she determined there were reasonable grounds to believe that since January 2012, war crimes, including rape, were committed in northern Mali, during hostilities in which armed groups seized the area.[120] While the scale of acts remained unclear, the number of cases of rape ranged from 50 to 100.[121] Sexual violence also appeared to be accompanied "systematically […] by racial insults".[122] The OTP has brought two cases in the Mali Situation. While the first case – Al Mahdi – did not include charges for sexual and gender-based crimes, the second case – Al Hassan – contains groundbreaking charges [see section III].

2. CAR II

The Prosecutor opened the second investigation into the Situation in CAR on 24 September 2014, finding reasonable grounds to believe that war crimes and crimes against humanity, including widespread rape, as well as persecution perpetrated through rape, were committed by Seleka and Anti-Balaka organized armed groups.[123] She emphasized that while sources indicate the commission of sexual violence is widespread, factors such as insecurity, fear of reprisals, stigmatization that deters victims from reporting or seeking help following rapes, and lack of medical and psychosocial support to victims have hindered research into the incidence of these crimes.[124] Alleged victims reportedly include adult women, one adult male and numerous minors.[125]

Thus far, the OTP has brought two cases in the CAR II Situation. The first case, against Alfred Yekatom & Patrice-Edouard Ngaïssona, contains allegations of sexual and gender-based crimes against one accused- alleged National General Coordinator of the Anti-Balaka, Ngaïssona; it does not include such allegations against Yekatom, alleged Anti-Balaka commander. In the second case, against alleged Seleka commander Said, the arrest warrant includes allegations of rape; however, it does not include charges for sexual and gender-based crimes.[126]

119. OTP, *Situation in Mali*, Article 53(1) Report, 16 January 2013, paras. 173-175.

120. *Ibid.*, paras. 118-119, 126.

121. *Ibid.*, para. 166.

122. *Ibid.*, para. 168.

123. OTP, *Situation in the Central African Republic II*, Article 53(1) Report, 24 September 2014, paras. 22-23, 103, 117, 154, 175-180, 267-269.

124. *Ibid.*, paras. 146, 176.

125. *Ibid.*, paras. 180, 262.

126. ICC, *Situation in the Central African Republic II*, Public Redacted Version of 'Warrant of Arrest for Mahamat Said Abdel Kani', ICC-01/14-01/21-2-US-Exp, 7 January 2019, paras. 8, 17 and p. 21. The opening of the confirmation of charges hearing is provisionally scheduled for 5 October 2021. See ICC, *Situation in Central African Republic II, The Prosecutor v. Mahamat Said Abdel Kani*, Case no. ICC-01/14-01/21, Case Information Sheet, ICC-PIOS-CIS-CARII-004-001/21_Eng, updated March 2021.

3. Georgia

On 27 January 2016, the Prosecutor was authorized to open a proprio motu investigation into alleged crimes against humanity and war crimes committed in and around South Ossetia, Georgia, between 1 July and 10 October 2008.[127] In her request for authorization, the Prosecutor indicated that the OTP had gathered limited reports of sexual and gender-based violence, including rape, but that no clear information had yet emerged on the alleged perpetrators or the link between the crimes and the armed conflict or wider context.[128] She highlighted that limited figures could be the result of insecurity and existing social stigma attached to sexual violence in Georgia, which deterred victims from reporting alleged sexual violence crimes.[129] The Pre-Trial Chamber agreed that these allegations could be included in the investigation.[130] No cases have yet been brought in the Georgia Situation.

4. Burundi

On 25 October 2017, the Prosecutor received authorization to open an investigation proprio motu into alleged crimes against humanity committed in Burundi or by Burundian nationals outside Burundi from 26 April 2015 until 26 October 2017.[131] The Prosecutor had alleged that members of the Burundian government, military, police and intelligence service, as well as the youth wing of the ruling party, carried out attacks against the civilian population, entailing the commission crimes against humanity, including widespread rape of women and girls, as well as sexual assaults against men in detention, constituting other forms of sexual violence.[132] The Prosecutor also indicated that persecution appeared to have been committed by means including rape and other forms of sexual violence.[133]

Although the Prosecutor determined that "acts targeting the sexuality of [male] victims" in detention constituted other forms of sexual violence,[134] Pre-Trial Chamber II qualified the acts as torture.[135] It indicated, however, that the investigation was "not restricted to the incidents and crimes set out in the present decision but [the Prosecutor] may, on the basis of the evidence, extend her investigation to other crimes".[136] No cases have yet been brought in the Burundi Situation.

127. ICC, *Situation in Georgia*, Decision on the Prosecutor's request for authorization of an investigation, ICC-01/15-12, 27 January 2016, paras. 34-35. The Prosecutor had requested authorization to open an investigation on 13 October 2015. See ICC, *Situation in Georgia*, Request for authorization of an investigation pursuant to article 15 (hereafter "Request for authorization of an investigation in Georgia"), ICC-01/15-4, 13 October 2015.

128. *Ibid.*, Request for authorization of an investigation in Georgia, para. 4.

129. *Ibid.*, para. 231.

130. *Ibid.*, paras. 34-35.

131. ICC, *Situation in the Republic of Burundi*, Public Redacted Version of "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi", ICC-01/17-X-9-US-Exp, 25 October 2017 (hereafter "Decision on the Authorization of an Investigation in Burundi"), ICC-01/17-9-Red, 9 November 2017. The Prosecutor had requested authorization to open an investigation on 5 September 2017.

132. ICC, *Situation in the Republic of Burundi*, Public redacted version of "Request for authorisation of an investigation pursuant to article 15", 6 September 2017, ICC-01/17-5-US-Exp, ICC-01/17-5-Red, 15 novembre 2017, paras. 2, 34, 68-69, 123-129.

133. *Ibid.*, para. 135.

134. *Ibid.*, paras. 123, 129.

135. Decision on the Authorization of an Investigation in Burundi, paras. 2, 95, 99, 102, 104, 105, 106, 116, 188.

136. *Ibid.*, para. 193.

5. Bangladesh/Myanmar

On 14 November 2019, the Prosecutor received authorization to open an investigation into the situation in Bangladesh/Myanmar.[137] The Prosecutor had determined there was a reasonable basis to believe that crimes against humanity of deportation, other inhumane acts and persecution on the grounds of ethnicity and/or religion, had been committed against the Rohingya people from Myanmar by Myanmar armed forces and other authorities during two waves of violence in 2016 and 2017.[138] The Prosecutor characterized alleged acts of rape and other forms of sexual violence as among the coercive acts through which Rohingya were forcibly displaced within the context of the crime of deportation.[139] The main victims of rape and other forms of sexual violence were female, including pregnant women and girls, however, men and boys were also subjected to rape and other forms of sexual violence, including genital mutilation.[140] No cases have yet been brought in the Bangladesh/Myanmar Situation.

6. Afghanistan

The investigation into the Situation in Afghanistan, authorized on 5 March 2020,[141] involves allegations of crimes against humanity, including persecution on gender and political grounds, and war crimes including rape and other forms of sexual violence, committed in Afghanistan, as well as Poland, Romania and Lithuania by the Taliban and affiliated armed groups, Afghan National Security Forces (ANSF), and the United States (U.S.) armed forces and Central Intelligence Agency.[142] The Taliban and affiliated armed groups allegedly committed persecution against women and girls on gender and political grounds, as detailed in section IV. Sexual violence was allegedly committed by the ANSF and U.S. armed forces against predominately male detainees, characterized as the war crimes of rape, other forms of sexual violence, torture, cruel treatment, and outrages upon personal dignity.[143] No cases have yet been brought in the Afghanistan Situation.

137. ICC, *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19-27, 14 November 2019.

138. ICC, *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, Request for authorisation of an investigation pursuant to article 15, ICC-01/19-7, 4 July 2019, paras. 4-6.

139. *Ibid.*, 116(a).

140. *Ibid.*, paras. 94-101, 204.

141. ICC, *Situation in the Islamic Republic of Afghanistan*, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, ICC-02/17-138, 5 March 2020, para. 79. The Appeals Chamber granted the Prosecutor's appeal and overturned Pre-Trial Chamber III's decision, which rejected the Prosecutor's request for authorization to open an investigation on the basis that it would not be in the interests of justice. See ICC, *Situation in the Islamic Republic of Afghanistan*, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of anInvestigation into the Situation in the Islamic Republic of Afghanistan, ICC-02/17-33, 12 April 2019.

142. ICC, *Situation in the Islamic Republic of Afghanistan*, Public redacted version of "Request for authorisation of an investigation pursuant to article 15", 20 November 2017, ICC-02/17-7-Conf-Exp (hereafter "Request for authorization of an investigation in Afghanistan"), ICC-02/17-7-Red, 20 November 2017, paras. 42-43, 49, 53-71.

143. See Request for authorization of an investigation in Afghanistan, paras. 161, 166, 179-183, 187, 189, 193, 204-217, 228, 244.

Annex 2 – Charges of Sexual and Gender-Based Crimes in ICC Cases

N°	Case	Arrest Warrant / Summons to Appear	Document Containing the Charges	Confirmation of Charges Decision	Judgment	Appeal
1	**The Prosecutor v. Germain Katanga**	**2 out of 9 counts:** - sexual slavery as crime against humanity; and - sexual slavery as war crime	**5 out of 13 counts:** - sexual slavery as crime against humanity; - sexual slavery as war crime; - rape as crime against humanity; - rape as war crime; and - outrages upon personal dignity as war crime	**4 out of 10 counts:** - sexual slavery as crime against humanity; - sexual slavery as war crime; - rape as crime against humanity; and - rape as war crime	**Found not guilty for all SGBC charges** on 7 March 2014	**Appeals discontinued** on 24 June 2014, judgment is final.
2	**The Prosecutor v. Mathieu Ngudjolo Chui**	**2 out of 9 counts:** - sexual slavery as crime against humanity; and - sexual slavery as war crime	**5 out of 13 counts:** - sexual slavery as crime against humanity; - sexual slavery as war crime; - rape as crime against humanity; - rape as war crime; and - outrages upon personal dignity as war crime	**5 out of 10 counts:** - sexual slavery as crime against humanity; - sexual slavery as war crime; - rape as crime against humanity; and - rape as war crime	**Acquitted of all charges** on 18 December 2012	**Acquittal decision confirmed** on 27 February 2015

N°	Case	Arrest Warrant / Summons to Appear	Document Containing the Charges	Confirmation of Charges Decision	Judgment	Appeal
3	**The Prosecutor v. Bosco Ntaganda**	*First Arrest Warrant* – 0 out of 3 counts *Second Arrest Warrant* – 5 out of 9 charges (3 out of 7 counts): - rape as crime against humanity; - rape as war crime; - sexual slavery as crime against humanity; - sexual slavery as war crime; and - persecution as crime against humanity [on ethnic grounds with underlying acts of murder, rape and sexual slavery]	7 out of 18 counts: - rape of civilians as crime against humanity; - sexual slavery of civilians as crime against humanity; - persecution as crime against humanity; - rape of civilians as war crime; - sexual slavery of civilians as war crime; - rape of child soldiers as war crime; and - sexual slavery of child soldiers as war crime	7 out of 18 counts [all charges confirmed]: - rape of civilians as crime against humanity; - sexual slavery of civilians as crime against humanity; - persecution as crime against humanity; - rape of civilians as war crime; - sexual slavery of civilians as war crime; - rape of child soldiers as war crime; and - sexual slavery of child soldiers as war crime	7 out of 18 counts [convicted on all counts]: - rape as crime against humanity; - rape as war crime; - sexual slavery as crime against humanity; - sexual slavery as war crime; - persecution as crime against humanity; - rape against child soldiers as war crime; and - sexual slavery against child soldiers as war crime	**Conviction confirmed on all counts** on 30 March 2021
4	**The Prosecutor v. Callixte Mbarushimana**	7 out of 11 counts: - torture as crime against humanity; - torture as war crime; - rape as crime against humanity; - rape as war crime; - other inhumane acts as crime against humanity; - persecution as crime against humanity; and - inhuman treatment as war crime	8 out of 13 counts: - torture as crime against humanity; - torture as war crime; - rape as crime against humanity; - rape as war crime; - other inhumane acts as crime against humanity; - persecution as crime against humanity; - cruel treatment as war crime; and - mutilation as war crime.	**Declined to confirm, released from ICC custody** on 23 December 2011		

N°	Case	Arrest Warrant / Summons to Appear	Document Containing the Charges	Confirmation of Charges Decision	Judgment	Appeal
5	**The Prosecutor v. Sylvestre Mudacumura**	3 out of 9 counts (compared to 6 out of 14 counts in the Application for Arrest Warrant): - rape as war crime; - torture as war crime; and - mutilation as war crime The suspect is still at large.				
6	**The Prosecutor v. Joseph Kony and Vincent Otti**	**Kony** 3 out of 11 counts: - sexual slavery as crime against humanity; - rape as crime against humanity; and - inducing rape as war crime. **Otti** 2 out of 10 counts: - sexual slavery as crime against humanity; and - inducing rape as war crime. The suspects are still at large.				

N°	Case	Arrest Warrant / Summons to Appear	Document Containing the Charges	Confirmation of Charges Decision	Judgment	Appeal
7	**The Prosecutor v. Dominic Ongwen**	0 out of 7 counts	19 out of 70 counts: - forced marriage as crime against humanity (2 counts); - torture as crime against humanity (2 counts); - rape as crime against humanity (2 counts); - sexual slavery as crime against humanity (2 counts); - enslavement as crime against humanity (2 counts); - forced pregnancy as crime against humanity (1 count); - rape as war crime (2 counts); - torture as war crime (2 counts); - sexual slavery as war crime (2 counts); - forced pregnancy as war crime (1 count); and - outrages upon personal dignity as war crime (1 count)	19 out of 70 counts (11 out of 23 charges, all charges confirmed): - forced marriage as crime against humanity (2 counts); - torture as crime against humanity (2 counts); - rape as crime against humanity (2 counts); - sexual slavery as crime against humanity (2 counts); - enslavement as crime against humanity (2 counts); - forced pregnancy as crime against humanity (1 count); - rape as war crime (2 counts); - torture as war crime (2 counts); - sexual slavery as war crime (2 counts); - forced pregnancy as war crime (1 count); and - outrages upon personal dignity as war crime (1 count)	19 out of 61 counts: - forced marriage as crime against humanity (2 counts); - torture as crime against humanity (2 counts); - rape as crime against humanity (2 counts); - sexual slavery as crime against humanity (2 counts); - enslavement as crime against humanity (2 counts); - forced pregnancy as crime against humanity (1 count); - rape as war crime (2 counts); - torture as war crime (2 counts); - sexual slavery as war crime (2 counts); - forced pregnancy as war crime (1 count); and - outrages upon personal dignity as war crime (1 count)	On 21 May 2021, the defence submitted a notification of intent to appeal.

N°	Case	Arrest Warrant / Summons to Appear	Document Containing the Charges	Confirmation of Charges Decision	Judgment	Appeal
8	**The Prosecutor v. Jean-Pierre Bemba Gombo**	5 out of 8 counts (compared to 7 out of 10 counts in the Application for Arrest Warrant): - rape as crime against humanity; - rape as war crime; - torture as crime against humanity; - torture as war crime; and - outrages upon personal dignity as war crime	5 out of 8 counts: - rape as crime against humanity; - rape as war crime; - torture as crime against humanity; - torture as war crime; and - outrages upon personal dignity as war crime	2 out of 5 counts: - rape as crime against humanity; and - rape as war crime	2 out of 5: - rape as crime against humanity; and - rape as war crime	Acquitted of **all charges** on 8 June 2018
9	**The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun")**	4 out of 13 charges (7 out of 42 counts): - rape as crime against humanity (2 counts); - rape as war crime (2 counts); - persecution as crime against humanity (2 counts); and - outrages upon personal dignity as war crime (1 count). The suspect is still at large.				

N°	Case	Arrest Warrant / Summons to Appear	Document Containing the Charges	Confirmation of Charges Decision	Judgment	Appeal
10	**The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")**	4 out of 13 charges (8 out of 50 counts): - rape as crime against humanity (2 counts); - rape as war crime (2 counts); - persecution as crime against humanity (2 counts); and - outrages upon personal dignity as war crime (2 counts)	5 out of 31 counts: - rape as crime against humanity; - rape as war crime; - outrages upon personal dignity as war crime (1 count); and - persecution as crime against humanity (2 counts)	The confirmation of charges hearing took place on 24 -27 May 2021 and the Pre-Trial Chamber is set to deliver its written decision within 60 days of the end date of the hearing.		
11	**The Prosecutor v. Omar Hassan Ahmad Al Bashir**	*First Arrest Warrant* – 1 out of 7 counts (compared to 2 out of 10 counts in the Application for Arrest Warrant): - rape as crime against humanity *Second Arrest Warrant* – 1 out of 3 counts: - causing serious bodily or mental harm as genocide The suspect is still at large.				

N°	Case	Arrest Warrant / Summons to Appear	Document Containing the Charges	Confirmation of Charges Decision	Judgment	Appeal
12	**The Prosecutor v. Abdel Raheem Muhammad Hussein**	4 out of 13 counts: - rape as crime against humanity; - rape as war crime; - persecution as crime against humanity; and - outrages upon personal dignity as war crime. The suspect is still at large.				
13	**The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali**	**Kenyatta** 3 out of 5 counts (4 out of 6 charges): - rape as crime against humanity; - other inhumane acts as crime against humanity; and - persecution as crime against humanity **Muthaura** 3 out of 5 counts (4 out of 6 charges): - rape as crime against humanity; - other inhumane acts as crime against humanity; and - persecution as crime against humanity **Ali** 3 out of 5 counts (4 out of 6 charges): - rape as crime against humanity; - other inhumane acts as crime against humanity; and - persecution as crime against humanity	**Kenyatta** 3 out of 5 counts (4 out of 6 charges): - rape and other forms of sexual violence as crime against humanity; - other inhumane acts as crime against humanity; and - persecution as crime against humanity **Muthaura** 3 out of 5 counts (4 out of 6 charges): - rape and other forms of sexual violence as crime against humanity; - other inhumane acts as crime against humanity; and - persecution as crime against humanity **Ali** 3 out of 5 counts (4 out of 6 charges): - rape and other forms of sexual violence as crime against humanity; - other inhumane acts as crime against humanity; and - persecution as crime against humanity	**Kenyatta** 3 out of 5 counts: - rape as crime against humanity; - other inhumane acts as crime against humanity; and - persecution as crime against humanity **Muthaura** 3 out of 5 counts: - rape as crime against humanity; - other inhumane acts as crime against humanity; and - persecution as crime against humanity **Ali** **Declined to confirm all charges** on 23 January 2012	The Prosecution withdrew the charges against Muthaura and Kenyatta. The Trial Chamber terminated proceedings on 13 March 2015.	

N°	Case	Arrest Warrant / Summons to Appear	Document Containing the Charges	Confirmation of Charges Decision	Judgment	Appeal
14	**The Prosecutor v. Al-Tuhamy Mohamed Khaled**	Unclear which of the 7 charges include SGBV but rape and other acts of sexual violence are also present among the various forms of mistreatment of victims mentioned in the arrest warrant. The suspect is still at large.				
15	**The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé**	**L. Gbagbo** **3 out of 5 counts (2 out of 4 charges):** - rape as crime against humanity; - other forms of sexual violence as crime against humanity; and - persecution as crime against humanity **Blé Goudé** **3 out of 5 counts (2 out of 4 charges):** - rape as crime against humanity; - other forms of sexual violence as crime against humanity; and - persecution as crime against humanity	**L. Gbagbo** **2 out of 4 counts:** - rape as crime against humanity; and - persecution as crime against humanity **Blé Goudé** **2 out of 4 counts:** - rape as crime against humanity; and - persecution as crime against humanity	**L. Gbagbo** **2 out of 4 counts:** - rape as crime against humanity; and - persecution as crime against humanity **Blé Goudé** **2 out of 4 counts:** - rape as crime against humanity; and - persecution as crime against humanity	**Acquitted of all charges** on 15 January 2019	**Acquittal decision confirmed by Appeals Chamber** on 31 March 2021

N°	Case	Arrest Warrant / Summons to Appear	Document Containing the Charges	Confirmation of Charges Decision	Judgment	Appeal
16	**The Prosecutor v. Simone Gbagbo**	2 out of 5 counts (1 out of 4 charges): - rape as crime against humanity; and - other forms of sexual violence as crime against humanity. The suspect is not in ICC custody.				
17	**The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud**	6 out of 11 counts: - rape as crime against humanity; sexual slavery as crime against humanity; - persecution on gender and religious grounds as crime against humanity; - other inhumane acts (forced marriage) as crime against humanity; - rape as war crime; and - sexual slavery as war crime	6 out of 13 counts: - other inhumane acts (forced marriage) as crime against humanity; - sexual slavery as crime against humanity; - sexual slavery as war crime; - rape as crime against humanity; - rape as war crime; and - persecution on gender and religious grounds as crime against humanity	6 out of 13 counts: - other inhumane acts (forced marriage) as crime against humanity; - sexual slavery as crime against humanity; - sexual slavery as war crime; - rape as crime against humanity; - rape as war crime; and - persecution on gender and religious grounds as crime against humanity	The case is currently on trial.	
18	**The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona**	**Yekatom** 0 out of 15 counts **Ngaïssona** 0 out of 16 counts	**Yekatom** 0 out of 21 counts **Ngaïssona** 8 out of 111 counts: - rape as crime against humanity (4 counts); and - rape as war crime (4 counts)	**Yekatom** 0 out of 20 counts **Ngaïssona** 2 out of 30 counts: - rape as crime against humanity (1 count); and - rape as war crime (1 count)	The case is currently on trial.	

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Part 1 Cover Picture: International Criminal Court Prosecutor Fatou Bensouda and representatives of her Office at a hearing in an ICC Courtroom, 2 September 2015. © ICC-CPI

Part 2

Preliminary Examinations

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fidh

Introduction

Preliminary examinations are an essential activity at the Office of the Prosecutor (hereinafter "the Prosecution" or "the OTP"), representing the first step of any potential justice process at the International Criminal Court (hereinafter "the ICC" or "the Court"). It is during this stage that the Prosecution decides whether the necessary criteria are met to open an investigation into a given situation. Despite this fundamental role within the Court's mandate, preliminary examinations are not regulated in great detail by the Rome Statute (hereinafter "the Statute").

The Statute merely sets parameters around the Prosecution's investigative powers, the scope of its analysis, and the legal standard of proof during this initial stage.[144] Preliminary examinations must be carried out at the seat of the Court and the OTP is restricted to information and evidence that is submitted to it, because its investigative powers are not triggered until an investigation is formally opened.[145] The objective is simply to determine whether there is "a reasonable basis to believe" that the statutory criteria are met to open a formal investigation.[146] When the Prosecutor has initiated a preliminary examination on its own initiative, using *propio motu* powers, the decision to launch an investigation must be authorised by the Pre-Trial Chamber.[147] Conversely, if the OTP chooses not to proceed with an investigation because it is deemed "not in the interests of justice," the Pre-Trial Chamber may also review this decision.[148]

Beyond these sparse guidelines, the Prosecution has a great deal of discretion in determining the policies, processes, and timelines for carrying out preliminary examinations. While this flexibility is necessary to maintain the independence of the OTP and accommodate the breadth of situations that may come under the jurisdiction of the Court, the OTP's activities have delivered mixed results. This report identifies the OTP's practices, as well as achievements and opportunities for the Office to improve its working methods, transparency, and communication with civil society at the preliminary examination stage. The report is circumscribed by Prosecutor Bensouda's time in office (15 June 2012 to 15 June 2021) and includes recommendations to Prosecutor Khan that build upon Prosecutor Bensouda's work.

Since 2004, FIDH has engaged with the OTP, providing regular feedback on the Prosecution's policies, strategies, and practices through its permanent representation in The Hague. FIDH engaged in a similar activity in 2011, at the end of Luis Moreno Ocampo's tenure as first Prosecutor of the ICC.[149] At that time, FIDH acknowledged that while Prosecutor Bensouda would inherit an established office, with set policies and procedures, she would be tasked with reviewing the impact of these policies and procedures, and making important decisions on how to optimise the work of the OTP moving forward.[150] With respect to preliminary examinations in particular, FIDH's main concerns in 2011 were (1) the transparency of the Prosecution's activities; (2) the consistency of the Prosecution's policies across all preliminary examinations; and (3) the length of preliminary examinations.

144. Articles 15, 51 and 53(1) Rome Statute.
145. Article 15(2) Rome Statute.
146. Article 53(1) Rome Statute.
147. Articles 15(3) and (4) Rome Statute.
148. Article 53(3)(b) Rome Statute.
149. FIDH, *The Office of the Prosecutor of the ICC – 9 Years On* (hereafter "Ocampo Report"), December 2011.
150. *Ibid.*, p. 9.

In 2021, FIDH acknowledges that the Prosecution has made important strides. Nevertheless, numerous concerns persist regarding the effectiveness of the OTP's preliminary examination activities, as relayed to FIDH by its member and partner organisations.

Methodology

The research in this report builds upon FIDH's first-hand experience conducting documentation, outreach, and legal analysis at the preliminary examination stage, as well as FIDH's monitoring activities of the OTP's work over the past nine years. More recently in 2020, FIDH and its member organisations from situation countries worked on a joint submission to the Independent Experts, highlighting progress and concerns in relation to preliminary examinations.[151] Additionally, FIDH carried out consultations in June and July 2021 to help identify the key achievements of Prosecutor Bensouda's tenure and the enduring challenges the Prosecution faces with respect to preliminary examinations. These consultations involved 28 national organisations from 13 countries where the Prosecution has been carrying out preliminary examination activities, or that are closely connected to the preliminary examination for jurisdictional reasons (Afghanistan, Bangladesh, Burundi, Colombia, Georgia, Guinea, Israel, Mali, Mexico, Myanmar, Palestine, Ukraine and Venezuela). FIDH also consulted other legal professionals who either have submitted information to the Court under Article 15 of the Statute (hereinafter "Article 15 communications"), have been directly involved in matters related to preliminary examinations during the relevant period (15 June 2012 to 15 June 2021), or are former staff members of the OTP.

The consultations followed a semi-structured format, with a pre-defined set of questions for all interviews, along with questions tailored to the particularities of each situation. These discussions informed the recommendations put forward in this report, which have been categorised into three thematic groupings: (1) the OTP's working methods; (2) transparency; and (3) communication with civil society. All participants—and a selected number of FIDH's partners and organisations who did not attend the interviews but expressed interest in sharing their views—received in writing the initial list of recommendations that FIDH identified through the consultations and had the opportunity to rephrase them and provide additional comments.

151. While the full text is confidential, an excerpt is available here: https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/independent-expert-review-a-chance-to-strengthen-icc-s-impact-on, 22 June 2020.

I. Prosecutor Bensouda's Approach to Preliminary Examinations

The 2013 Policy Paper on Preliminary Examinations

The Prosecution has a great deal of discretion and flexibility in determining the policies, processes, and timelines for carrying out preliminary examinations. In the ICC's early years, the OTP maintained a "low profile" and often refrained from communicating publicly about preliminary examinations.[152] After much public advocacy for greater transparency, including by FIDH, the OTP shifted its policy in 2007 and increased public communications on situations under analysis.[153] Despite this improvement, civil society expressed persistent concerns that the increase in general communication on situations under analysis had not necessarily revealed much about the way preliminary examinations are handled by the OTP.

In 2010, then Prosecutor Moreno Ocampo published a draft policy on preliminary examinations, describing the relevant factors and procedures applied by the OTP in the conduct of its preliminary examination activities.[154] In response to the Prosecution's call for feedback, FIDH reiterated the need for clarity, consistency, and timeliness in the OTP's approach to preliminary examinations.[155]

Since then, and especially since Prosecutor Fatou Bensouda assumed the leadership in 2012, the OTP has increasingly engaged in the practice of publishing regular reports on the status of preliminary examinations, including occasional situation specific reports.[156] In her first year in office, Prosecutor Bensouda finalised the *Policy Paper on Preliminary Examinations* (hereinafter "the 2013 PE Policy"). Although the 2013 PE Policy largely resembles the original 2010 draft, particularly in its guiding principles of independence, impartiality, and objectivity,[157] there are some notable modifications in the final paper.

For instance, Prosecutor Bensouda expanded upon the "interests of justice" criteria, highlighting the importance of considering the interests of victims,[158] and clarified that feasibility is not – and should not be – a self-standing factor in determining whether or not to open an investigation.[159] She also elucidated the types of activities the OTP can engage in without investigative powers, such as sending information requests to sources and carrying out trips to the territories concerned.[160] Markedly, Prosecutor Bensouda underscored the importance of assessing the existence of national and international institutions that can offer information and support to victims, particularly of sexual

152. Ocampo Report, p. 15.

153. Ocampo Report, p. 16.

154. OTP, Draft Policy Paper on Preliminary Examinations 2010, 4 October 2010.

155. Ocampo Report, p. 19-23.

156. See OTP, Annual Reports on Preliminary Examinations 2012-2020; OTP, Situation in Colombia Benchmarking Consultation, June 2021; OTP, Situation in Colombia Interim Report, November 2012.

157. OTP, Policy Paper on Preliminary Examinations 2013 (hereafter "Policy Paper 2013"), November 2013, para. 25.

158. *Ibid.*, para. 68.

159. *Ibid.*, para. 70.

160. *Ibid.*, para. 85.

and gender-based crimes.[161] She also added that the OTP will seek to perform an "early warning" function by "systematically and proactively" collecting open-source information.[162]

The 2013 PE Policy specifies that if all the legal criteria are met that establish a reasonable basis to open an investigation, the OTP has an obligation to proceed.[163] In addition, the policy highlights the role of preliminary examinations in contributing to two overarching objectives of the Rome Statute: (1) the ending of impunity, "by encouraging genuine national proceedings" through positive complementarity,[164] and (2) the prevention of crimes, "by performing an early warning function."[165] Importantly, the 2013 PE Policy also sets out a sequential procedure for analysing situations under preliminary examination. There are four phases for filtering preliminary examinations, derived from the legal criteria established under Article 53(1)(a)-(c) of the Statute, as detailed below.

Phase 1 consists of an initial assessment of all communications received under Article 15 of the Rome Statute. During this stage, the OTP analyses the seriousness of information received and filters out situations that are considered "manifestly outside the jurisdiction of the Court."[166]

Phase 2 seeks to establish whether the Court has subject matter jurisdiction over the situation and includes a factual legal assessment on the crimes alleged to have been committed, with a view to identifying potential cases.[167] According to the OTP, this stage represents the formal and public commencement of a preliminary examination.

Phase 3 addresses the admissibility of potential cases in terms of complementarity and gravity. In this phase, the OTP will also continue to collect information on subject-matter jurisdiction, especially when new or ongoing crimes are alleged to have been committed within the situation.[168]

Phase 4 examines the interests of justice. This phase closes out the preliminary examination, culminating in a final recommendation to the OTP on whether there is a reasonable basis to initiate an investigation.[169]

161. *Ibid.*, para. 86.
162. *Ibid.*, paras. 104-106.
163. *Ibid.*, para. 2.
164. *Ibid.*, para. 93.
165. *Ibid.*, para. 104.
166. *Ibid.*, para. 78.
167. *Ibid.*, para. 81.
168. *Ibid.*, para. 82.
169. *Ibid.*, para. 83.

Preliminary examinations in practice from 2012 to 2021

Since 2011, the OTP has published annual reports describing preliminary examinations from Phase 2 onward. Additionally, it has published several situation specific reports for example on Colombia, Comoros, Greece and Cambodia (hereinafter "Comoros"), and UK/Iraq, among others.[170] Phase 1 was historically confidential but in 2019 and 2020, the OTP published information about select Phase 1 analyses in its annual reports, indicating a potential shift in policy.[171] Various stakeholders, including civil society organisations, welcomed this additional transparency.

Since Prosecutor Bensouda assumed her role in 2012, the OTP has engaged in 20 public preliminary examinations. Of these preliminary examinations, seven were inherited by Bensouda, of which she concluded five (Afghanistan, Georgia, Honduras, Nigeria, and Republic of Korea). The other 13 preliminary examinations were initiated under her leadership, of which 10 were completed during her tenure (Bangladesh/Myanmar, Burundi, Central African Republic II, Comoros, Gabonese Republic, Mali, Palestine, Philippines, UK/Iraq, and Ukraine). At the time of writing, there are five preliminary examinations underway, of which two were inherited from Moreno Ocampo (Colombia and Guinea), another two are state referrals (Bolivia and Venezuela II), and one was initiated proprio motu (Venezuela I).[172]

In addition to these preliminary examinations, since mid-2012 the OTP has evaluated at least 50 situations that warranted further analysis (hereinafter "WFA") but did not ultimately make it past Phase 1.[173] The OTP began publishing these analyses in 2019, hence the public has only been privy to nine WFAs during Prosecutor Bensouda's mandate (Australia, Canada/Lebanon, Madagascar, North Korea I and II, Philippines II, Tajikistan/China/Cambodia, Uganda, and Yemen).[174] The Prosecution has indicated that in 2021 it will finalise its response to at least five additional WFAs (Mexico, Cyprus, Yemen II, Cambodia and Syria/Jordan).[175]

In sum, of the 20 preliminary examinations publicly announced by Prosecutor Bensouda, her office opened eight investigations (Afghanistan, Bangladesh/Myanmar, Burundi, Central African Republic, Georgia, Mali, Palestine and Philippines), and recommended the opening of two investigations (Nigeria and Ukraine). Five preliminary examinations are ongoing (Bolivia, Colombia, Guinea, Venezuela I and II) and five were concluded with the decision not to investigate (Gabonese Republic, Honduras, Republic of Korea, Comoros and UK/Iraq). In three situations, the OTP decided that the Court did not have subject matter jurisdiction (Gabonese Republic, Honduras, and Republic of Korea), while two other examinations ended in Phase 3 after an evaluation of complementarity and gravity (Comoros and UK/Iraq).[176]

Although Prosecutor Bensouda has made considerable progress in completing several protracted preliminary examinations, the two longest examinations, spanning 17 years (Colombia) and almost

170. See OTP, Situation in Colombia Benchmarking Consultation, 15 June 2021; OTP, Situation in Colombia Interim Report, November 2012; OTP, Situation on Registered Vessels of Comoros, Greece and Cambodia, 6 November 2014; OTP, Situation in Iraq Final Report, 9 December 2020.

171. See OTP, Report on Preliminary Examination Activities 2020, 14 December 2020; OTP, Report on Preliminary Examination Activities 2019, 5 December 2019.

172. Although Venezuela I was originally triggered by Prosecutor Bensouda's *proprio motu* authority, it was later referred by a coalition of States under Article 14 Rome Statute.

173. OTP, Report on Preliminary Examination Activities 2020, 14 December 2020, para. 32.

174. See OTP, Report on Preliminary Examination Activities 2020, 14 December 2020; OTP, Report on Preliminary Examination Activities 2019, 5 December 2019.

175. OTP, Report on Preliminary Examination Activities 2020, 14 December 2020, para. 35.

176. See Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the situation in Iraq/United Kingdom, 9 December 2020; Statement of the Prosecutor, Fatou Bensouda, on concluding the preliminary examination of the situation in Comoros, 6 November 2014.

12 years (Guinea), are still ongoing. Of the 15 completed preliminary examinations, two required more than 10 years to complete (Nigeria and Afghanistan) and six were under assessment for more than five years (Comoros, Honduras, UK/Iraq, Ukraine, Georgia, and Palestine). It is important to note that five of the longest preliminary examinations focused most of their analysis on admissibility under Phase 3 (all but Comoros).[177] Nigeria, Georgia, and Iraq/UK spent several years in Phase 3 before their conclusion, while Colombia and Guinea have been stuck in Phase 3 for the better part of a decade.

Interestingly, several Phase 1 WFAs that were publicised in 2019 and 2020 had been under analysis for as long as four years (Australia, Canada/Lebanon, and Uganda). Others lasted between two to three years (Madagascar, North Korea I and II, and Yemen). These situations were not considered to fall "manifestly" outside the jurisdiction of the Court; hence the Prosecution analysed and corroborated the information received on these situations against open-source information such as reports from the United Nations, NGOs, and other reliable sources.[178] Ultimately, the OTP concluded that the Court did not have jurisdiction to further examine these situations and did not formally open corresponding preliminary examinations.

The chart below contains all public preliminary examinations from 2012-2021. The number of reports in the table includes any report produced by the Prosecution that elaborates on the status or legal analysis of the preliminary examinations. The number of Article 15 communications has been retrieved from the OTP's annual reports. In some cases, the Prosecution has not updated these figures in subsequent reports, so they should be used as approximations only. Notably absent from the chart is Mexico. While a preliminary examination has not officially been announced, FIDH, in partnership with Mexican organisations, has been submitting information to the OTP regarding crimes allegedly committed by public authorities and criminal networks since 2014.

Ongoing preliminary examinations

Country	Initiated by	Dates	Length	Number of reports	Number of Article 15 communications
Bolivia	Bensouda State referral	2020- (Phase 2)	< 1 year	1	Information not available
Colombia	Moreno Ocampo *proprio motu*	2004- (Phase 3)	17 years	1	229+
Guinea	Moreno Ocampo *proprio motu*	2009- (Phase 3)	> 11 years	9	35
State referral	Bensouda *proprio motu* and State referral	2018- (Phase 3)	> 3 years	3	110
Venezuela II	Bensouda State referral	2020- (Phase 2)	> 1 year	1	Information not available

177. The decision not to proceed for the situation in Comoros was made in Phase 3. However, this decision was made quickly. The reason why it has taken so long to conclude Comoros is because the State appealed, and the Pre-Trial Chamber ordered the OTP to review its decision.

178. Policy Paper 2013, para. 79.

Preliminary examinations concluded without an investigation

Country	Initiated by	Dates	Length	Number of reports	Number of Article 15 communications
Submissions marked as WFA but concluded with no investigation after Phase 1					
Australia	Bensouda *proprio motu*	2016-2020	4 years	1	1
Canada/Lebanon	Bensouda *proprio motu*	2016-2020	4 years	1	1
Madagascar	Bensouda *proprio motu*	2018-2020	2 years	1	1
North Korea I	Bensouda *proprio motu*	2016-2019	3 years	1	1
North Korea II	Bensouda *proprio motu*	2017-2019	2 years	1	1
Philippines II	Bensouda *proprio motu*	2019	< 1 year	1	1
Tajikistan/China/ Cambodia	Bensouda *proprio motu*	2020	< 1 year	1	1
Uganda	Bensouda *proprio motu*	2016-2020	4 years	1	1
Yemen	Bensouda *proprio motut*	2017-2019	2 years	1	1
Preliminary examinations concluded with no investigation after Phase 2					
Gabonese Republic	Bensouda State referral	2016-2018	2 years	4	18
Honduras	Moreno Ocampo *proprio motu*	2010-2015	5 years	6	32
Republic of Korea	Moreno Ocampo *proprio motu*	2010-2014	4 years	4	8
Preliminary examinations concluded with no investigation after Phase 3					
Comoros	Bensouda *proprio motu* re-examination	2013-2020	7 years	9	5
UK/Iraq	Bensouda *proprio motu* re-examination	2014-2020	7 years	8	33
Preliminary examinations concluded with no investigation after Phase 4					
None					

Preliminary examinations concluded with the opening of an investigation

Country	Initiated by	Dates	Length	Number of reports	Number of Article 15 communications
Investigation recommended					
Nigeria	Moreno Ocampo *proprio motu*	2010-2020	11 years	11	59
Ukraine	Bensouda Article 12(3) Rome Statute declaration	2014-2020	7 years	7	86
Investigation opened					
Afghanistan	Moreno Ocampo *proprio motu*	2006-2017	11 years	6	125
Bangladesh/Myanmar	Bensouda *proprio motu*	2018-2019	< 1 years	2	34
Burundi	Bensouda *proprio motu*	2016-2017	1 years	2	34
Central African Republic II	Bensouda State referral	2014	< 1 year	1	7
Georgia	Moreno Ocampo *proprio motu*	2008-2015	7 years	4	3 854
Mali	Bensouda State referral	2012-2013	< 1 year	3	Information not available
Palestine II	Bensouda Article 12(3) Rome Statute declaration and State referral	2015-2019	5 years	6	125
Philippines	Bensouda *proprio motut*	2018-2021	3 years	3	52+

II. Achievements and opportunities for improving preliminary examinations

Bensouda's transition into the role of Prosecutor ushered in a new age at the OTP, marked by greater standardisation, transparency, and openness with civil society groups. Despite the Prosecution's great strides in specific areas, such as the investigation of sexual and gender-based crimes – which are explored in depth in the first paper of this series[179] – there continue to be ongoing challenges with respect to preliminary examinations, both extrinsic (e.g., budget, cooperation) and intrinsic to the OTP.[180]

The OTP has itself acknowledged challenges that hinder its efficacy, including during preliminary examinations activities. Along with the ICC's President and Registrar, the Prosecutor requested that the Assembly of States Parties (hereinafter "the ASP") establish an Independent Expert Review (hereinafter "the IER") to study and identify the causes of the Court's performance shortcomings.[181] In December 2019, the ASP established the IER with the objective of making "concrete, achievable and actionable recommendations" to enhance the "performance, efficiency and effectiveness of the Court."[182] The experts dedicated a significant portion of their assessment to the OTP, including how the office handles preliminary examinations.[183] As part of the IER's consultations with stakeholders, FIDH and its member organisation, the Kenya Human Rights Commission (hereinafter "KHRC") submitted a confidential joint report in April 2020.[184]

The IER published its final report in September 2020 and focused on five key areas related to preliminary examinations: (1) the selection process for opening a preliminary examination; (2) the working methods of the Preliminary Examination Section (PES); (3) the length of the preliminary examinations; (4) the Prosecution's approach to complementarity; and (5) transparency.[185] At the time of writing, the OTP had already begun implementing some of the reforms suggested by the IER.

Building from this progress, FIDH carried out consultations with national civil society organisations operating in countries where the OTP has conducted preliminary examinations during Prosecutor Bensouda's mandate. The intention of these consultations was to take stock of both past achievements and enduring challenges under her leadership. FIDH has consolidated this feedback into three thematic groupings: (1) the OTP's working methods; (2) transparency; and (3) communication. To the extent possible, FIDH has avoided duplicating the recommendations of the IER.

179. FIDH and WIGJ, *Accountability for Sexual and Gender-based Crimes at the ICC: An Analysis of Prosecutor Bensouda's Legacy*, June 2021.

180. OTP, Strategic Plan 2019-2021, para. 18.

181. Richard Dicker, *Time to Step Up at the ICC: No Time to Trim the Sails*, Promise Institute for Human Rights at UCLA, 2020, p. 4.

182. ICC, Review of the International Criminal Court and the Rome Statute System, ICC-ASP/18/Res.7, 6 December 2019, Annex 1, A, para. 1.

183. IER, Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report, 30 September 2020, paras. 633-655, 695-740.

184. FIDH and KHRC, *The victims' mandate of the International Criminal Court: disappointments, concerns and options for the way forward*, June 2020.

185. FIDH has not taken yet a position on all these recommendations. See IER, Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report, 30 September 2020, pp. 163-168, 226-229, 251-253, 254-261, 262- 265, 266-267.

The working methods of the Office of the Prosecutor

Achievements

Prosecutor Bensouda's greatest achievement with respect to preliminary examinations has been the establishment and implementation of a clear procedural framework for conducting analyses during this stage. Prior to Bensouda's tenure, preliminary examination activities occurred in a very *ad hoc* manner. During her leadership, the OTP standardised methods and practices, introducing internal policies, guidelines, and templates. As such, Prosecutor Bensouda's legacy comprises the establishment of a defined procedure for preliminary examinations.

In addition to the 2013 PE Policy, the OTP also published three-year strategic plans and placed greater emphasis on internal peer review.[186] These strategic plans include specific objectives to improve preliminary examinations. For example, in the OTP's last strategic plan for 2019-2021, it acknowledged the continued need to "increase the speed, efficiency and effectiveness of preliminary examinations."[187] One facet of this optimisation has been the development of performance indicators. Not to be confused with the performance indicators for ICC proceedings, which appear to have been abandoned,[188] the OTP has developed internal performance indicators for Article 15 communications and Phase 1 preliminary examinations.[189] Although we have yet to see the impact of these more recent internal directives, FIDH welcomes data-informed performance standards.

Opportunities for improvement

There is a consensus among civil society groups that the various organs of the ICC should coordinate better among themselves to ensure that activities during the preliminary examinations stage are being clearly and appropriately distributed among the relevant organs of the Court, as mandated by the Statute. This is especially true in contexts where the Victims Participation and Reparations Section (hereinafter "the VPRS") and the Registry may play a more proactive role as early as the preliminary examination stage. Virtually all groups FIDH consulted seemed to lack clarity on the specific activities that correspond to each organ.

FIDH recognises that the divergent mandates of each organ require different activities and forms of engagement with external parties. However, certain approaches can appear contradictory to affected communities. For instance, on one hand, the Registry may be interested in reaching the widest number of people who may be granted victim status should a case be brought to trial. On the other hand, in the early stages, the Prosecution may be inclined to minimise their interactions with victims and manage communities' expectations, in case the statutory criteria for opening an investigation are not met.

The reality is that local communities and many civil society groups may not have the in-depth ICC knowledge required to differentiate between the mandates and working methods of each organ and section. Victims and communities often see representatives of the Court as a monolith, regardless of how ICC staff present themselves. When they receive conflicting information from representatives of different organs, this can lead to confusion, the raising of expectations, and the heightened risk

186. Richard Dicker, *Time to Step Up at the ICC: No Time to Trim the Sails*, Promise Institute for Human Rights at UCLA, 2020, p. 6.

187. OTP, Strategic Plan 2019-2021, p. 5.

188. ICC, Third Court's report on the development of performance indicators for the International Criminal Court, 15 November 2017.

189. Interview with former ICC staff member.

of disappointment should an investigation not be opened. The onus of better coordination in public-facing activities is not solely on the OTP; it requires structural and systemic changes across all ICC organs. Nevertheless, to the extent possible within the Prosecution's authority, there should be a clearer delineation of roles and responsibilities between the OTP and other ICC organs.

It is also evident to civil society organisations that the OTP's Preliminary Examination Section (hereinafter "the PES") does not include enough experts on the relevant countries. For example, in Georgia, OTP staff who were not linguistically or culturally proficient were sent to the country. This absence deprives the PES from valuable expertise on the domestic context, preventing it from creating tailored strategies for each preliminary examination. For example, activities that would benefit from local contextual knowledge include external communications, engagement with local civil society organisations, security risk assessments, factual and pattern analyses, and the planning of trips. Given the changing nature of relevant countries during this stage, FIDH understands the drawbacks to hiring permanent country specialists when needs continue to evolve. However, fixed-term, local consultants, internal or third-party secondments, and paid visiting professionals can temporarily bring specialised capacity, as FIDH has previously argued.[190] To enable the swift and efficient recruitment of suitable candidates, the Prosecution should indicate adequate human resource needs in its budget proposal, including a flexible pool of funds designated specifically for geographic and linguistic experts.

Another pressing issue relates to the confidentiality of communications with the Prosecution. There is little to no information available on the ICC website describing the Prosecution's confidentiality policy, leaving many civil society groups with the fear that their information may be shared with governments, including those targeted by preliminary examinations. Many civil society groups currently work in an environment that is hostile to the ICC, for example in Myanmar, Palestine/Israel, or Venezuela, where even the most basic information is sensitive, such as the name of the organisation or individual submitting the information, let alone information related to victims or witnesses. FIDH has been informed that in some of these situations, organisations who may have valuable information have decided against transmitting it to the OTP.

The Prosecution may very well be operating with the strictest and narrowest confidentiality limits, as reflected in the Rome Statute, but without more accessible materials about how the information submitted is stored and shared, doubts will persist. While some groups have more direct access to the OTP and obtain ad hoc assurances about confidentiality, a public document would benefit a much wider demographic. As such, the Prosecution should publish its confidentiality policy in a clear and accessible location on the website, and emphasise it in their interactions with civil society. This confidentiality policy should clearly explain who has access to the information shared with the OTP, how the information is used, with which external stakeholders it is shared (if any), and any other relevant details.

In this vein, civil society groups are equally concerned about the security of communications and correspondence with the OTP. In the context of increasing surveillance and cyber-intelligence capabilities by governments and other actors,[191] especially in Venezuela, Mexico, and Palestine/Israel, civil society groups have expressed a growing fear of engaging with the ICC, particularly when submitting information that may be probative of a crime. Indeed, the Court has disclosed an increase in the "frequency, diversity, stealth, and complexity of cyber-threats targeting the Court's computers

190. FIDH and KHRC, *The victims' mandate of the International Criminal Court: disappointments, concerns and options for the way forward*, June 2020, paras. 63-77; FIDH, The justice survivors deserve: Open letter to the new ICC Prosecutor Karim Khan, 23 June 2021.

191. See Amnesty International, Citizen Lab, and Forensic Architecture, Digital Violence : How the NSO Group Enables State Terror, interactive platform launched July 2021.

and communication systems."[192] While the Court invested 160,000 euros in 2016 to strengthen its cyber-security capacity, there is very little information available about how these funds were used, which information technologies were adopted, and how much support was directed to the Prosecution in particular.[193]

FIDH notes with concern that none of the organisations consulted for this report seemed to feel confident about the security of the communications with the OTP. The OTP has a Cyber Unit, however, no one consulted was aware if the Prosecution has dedicated staff with the requisite expertise and authority to manage the office's information security, particularly to monitor and neutralise potential breaches. If such a role or team does not yet exist, within the existing Cyber Unit, the OTP should recruit a cyber-security expert to (1) develop an information security protocol, (2) adopt appropriate technologies to enable a safer exchange of information with civil society groups, and (3) train staff in the basics of digital communications security. If these measures have not yet been taken, the Prosecution must be clear and transparent with civil society groups about the limitations of its information security systems, so that decisions to transmit information to the OTP are made with full and informed consent.

Finally, it is important to address the length of preliminary examinations, particularly as they relate to the Prosecution's working methods. As revealed in the overview of preliminary examinations above, the average length of time for the OTP to ascertain whether the statutory criteria are met to open a formal investigation is approximately 5.3 years. Despite the 2013 PE Policy and the Prosecution's strategic plan to use preliminary examinations to "obviate ICC intervention through prevention and complementarity" and to "perform an early warning function,"[194] FIDH has observed that this function is inoperative in practice. States are not responding to the "early warning" in a timely fashion and the preliminary examinations are becoming protracted due to states' failure to carry out timely and independent investigations.[195]

Although the OTP has established "soft" deadlines for receiving information from states to complete its complementarity analysis, these deadlines do not appear to be standardised across all situations.[196] FIDH understands that each preliminary examination faces unique challenges and must be assessed on a case-by-case basis, however the imposition of standardised "soft" time-limits does not prevent the Prosecution from reviewing each situation when circumstances change. Additionally, FIDH has previously asserted that where crimes continue being committed while the Prosecution is considering the opening of an investigation, this should, at a minimum, serve as a strong indication that domestic efforts towards accountability are not genuine and do not bear any prospect of success in the near future.[197] The OTP should incorporate this input into its forthcoming Benchmarking Consultations, as it develops clear indicators for completing Phase 3 analyses.

192. ICC, Second Court's report on the development of performance indicators for the International Criminal Court, 11 November 2016, para. 69.

193. *Ibid.*, para. 75.

194. OTP, Full Statement of the Prosecutor, Fatou Bensouda, on external expert review and lessons drawn from the Kenya situation, 26 November 2016, p. 13.

195. FIDH and KHRC, *The victims' mandate of the International Criminal Court: disappointments, concerns and options for the way forward*, June 2020, para. 22.

196. Interview with former OTP staff member.

197. FIDH and KHRC, *The victims' mandate of the International Criminal Court: disappointments, concerns and options for the way forward*, June 2020, para. 30.

Transparency

Achievements

A great deal of progress has been made since 2012 on the issue of transparency. Notably, the 2013 PE Policy shed light on how the Prosecution sees its role during preliminary examinations. This policy was a consolidation of the OTP's practices, but also introduced important modifications, as noted earlier. In addition to the foundational 2013 PE Policy, the OTP also introduced a series of thematic policy papers that impact and interact with preliminary examinations. While the policy paper on "interests of justice" was published in 2007 under Ocampo, Prosecutor Bensouda added a trailblazing policy paper on sexual and gender-based crimes in 2014,[198] a policy paper on children in 2016,[199] and a policy paper on case selection and prioritisation in 2016,[200] among others.[201] These policy papers reveal how the OTP is guided to analyse the relevant facts against the legal criteria during preliminary examinations. For example, these policies outline how the OTP should assess the genuineness of national proceedings while determining admissibility, or the gravity threshold considering the seriousness of sexual and gender-based crimes, as well as crimes against children.[202]

In tandem with these policy papers, civil society groups acknowledge that the OTP's annual reports, along with situation-specific reports, have fostered a better understanding of the status of ongoing preliminary examinations. For example, in 2012, the OTP published a detailed interim report on Colombia, covering both subject matter and admissibility issues.[203] Since 2013, it has also published its internal Article 5 reports when moving between phases or when concluding a preliminary examination without opening an investigation (e.g. Nigeria, Republic of Korea, and Honduras).[204] Moreover, the OTP also began publishing reports regarding decisions to open investigations which were previously only circulated internally (e.g. Mali, and Central African Republic II).[205]

Finally, the Prosecution has recently acknowledged the need for clear, objective, and timely criteria in the assessment of complementarity, particularly for protracted preliminary examinations. Prosecutor Bensouda recently published a Benchmarking Consultation report, in which the OTP concedes that it must "reflect on the goals and duration of the Office's preliminary examination activities when faced with long-term, multi-layered domestic accountability processes" given that the issue of national accountability could otherwise "take years to answer."[206] While the report invites civil society and other stakeholders to participate in the creation of a benchmarking framework to be applied in Colombia specifically, the suggested framework could be applied to Guinea, and future preliminary examinations as well.

198. OTP, Policy Paper on Sexual and Gender-Based Crimes, June 2014.

199. OTP, Policy Paper on Children, November 2016.

200. OTP, Policy Paper on Case Selection and Prioritisation, September 2016.

201. During this period, the OTP also published another policy paper that had less impact on the preliminary stage of the proceedings. See OTP, Draft Policy on Situation Completion, 15 June 2021.

202. OTP, Policy Paper on Sexual and Gender-Based Crimes, June 2014, paras. 41, 45; OTP, Policy Paper on Children, November 2016, paras. 57, 59; Sara Wharton and Rosemary Gray, *The Full Picture: Preliminary Examinations at the International Criminal Court*, 56 Can YIL (2019), p. 8.

203. OTP, Situation in Colombia Interim Report, November 2012.

204. See OTP, Situation in Nigeria Article 5 Report, 5 August 2013; OTP, Situation in the Republic of Korea Article 5 Report, June 2014; OTP, Situation in Honduras Article 5 Report, October 2015.

205. See OTP, Situation in Mali Article 53(1) Report, 16 January 2013; OTP, Situation in the Central African Republic II Article 53(1) Report, 24 September 2014.

206. OTP, Situation in Colombia Benchmarking Consultation, 15 June 2021, para. 21.

Opportunities for improvement

Although Prosecutor Bensouda's leadership has shepherded significant progress with respect to transparency, there is still room for improvement, particularly vis-à-vis civil society groups involved in the documentation of crimes and preservation of information. FIDH recognises that the OTP, as an investigative body tasked with building criminal cases, is bound by legal and ethical restrictions that prevent it from revealing too much information, particularly at the preliminary examination stage. Nevertheless, as the prosecutorial body of a publicly accountable, international court, the OTP inevitably operates in an environment fraught with competing, and sometimes conflicting, demands.

Among many civil society groups that have submitted Article 15 communications, there is a sentiment that the lack of feedback on specific submissions during the preliminary examination phase is unduly prolonging and convoluting their work while also depleting their resources. For example, in Georgia, civil society groups submitted over 3,854 Article 15 communications. Civil society groups believe that there may be a duplication of effort; hence knowing whether information submitted was useful or not, as well as the type of information still required to fill gaps in the Prosecution's analysis, would allow them to focus their limited resources on the most valuable activities.

FIDH appreciates that it is not standard practice for investigative bodies or prosecutorial agencies to share detailed, and often sensitive, information on working prosecutorial theories. However, there are several ways in which the OTP can address these concerns, short of sending confidential and sensitive information to external stakeholders. The options range from making more efforts to explain how the OTP conducts its factual and legal analysis, to providing standardised guidance on the format and structure of Article 15 communications, or shortening the timeframes for preliminary examinations – thereby triggering more substantial and detailed feedback upon the closure of a preliminary examination.

For instance, a common concern by civil society groups – particularly in Mexico and Venezuela – is the absence of clear instructions by the OTP on how to best present and submit information. Although some international NGOs have created manuals, guides and even apps that explain the process of drafting Article 15 communications,[207] these are unofficial documents. Based on FIDH's consultations, there seem to be two ways forward to assist external parties, particularly local civil society, in submitting evidence of crimes. In the first model, the OTP can create its own template on how to submit Article 15 communications, including accompanying text that clarifies the purpose of the information with corresponding statutory provisions. Alternatively, the OTP can curate and collate existing guides, instructions, and templates created by credible civil society groups and make them available in a single location on the ICC website.

Another concern of civil society echoes FIDH's continued critiques of the length of preliminary examinations and the perceived discrepancies between the activities carried out during the complementarity assessment. In general, there appear to be continued inconsistencies in how different situations are handled in terms of the number and regularity of trips taken to the country, as well as the prioritisation and analysis of complementarity matters. Greater transparency of the Prosecution's analysis of complementarity could help accelerate Phase 3 assessments. If it is undesirable for diplomatic purposes to publish state submissions on complementarity, the Prosecutor could instead publish a periodic update on its findings during Phase 3, so that civil society groups that have deep, practical knowledge of the national legal system and domestic proceedings are given an opportunity to provide comments.

207. Global Rights Compliance, A Guide to Conducting Article 15 Communications Is Now Available on GRC's BIS App, 28 September 2019; Global Rights Compliance, International Criminal Court Article 15 Communication Guide, 29 September 2019.

Communication with civil society

During the consultations, FIDH received significant feedback on the Prosecution's outreach and communication activities. Since the third paper in this series will address outreach and engagement with affected communities in detail, this grouping focuses on the OTP's broader communications. This section does not examine the OTP's trips to relevant countries, nor its direct engagement with affected communities, including victims, survivors, or witnesses.

Achievements

While the Prosecution's communication strategy has varied depending on the preliminary examination and situation country, most FIDH member and partner organisations, as well as FIDH staff, acknowledge that Prosecutor Bensouda fostered a much more open and collaborative relationship with civil society groups. Although much of the OTP's work during preliminary examinations is geographically limited to The Hague, civil society organisations have had numerous opportunities to meet with the Prosecution during ICC-NGO roundtables, the annual ASP and related side events, and during visits carried out to situation countries. In these meetings, Prosecutor Bensouda and her team have engaged sincerely with civil society, within the limits of confidentiality, and have made local groups feel much more seen and heard than in prior years.

Opportunities for improvement

Despite Prosecutor Bensouda's well-meaning attitude towards communicating with civil society, the frustrations expressed in the consultations reveal serious structural gaps in the current approach. While the office has, at times, been reactive to media requests and in-country developments (e.g., statements in response to national developments in Guinea, Burundi or Palestine),[208] there is no clear, proactive communication strategy built into the Prosecution's handling of preliminary examinations. For example, it is unclear why the OTP did not include any mention of Mexico in their annual preliminary examinations report until 2020, despite having received submissions since at least 2014.

Far from a cohesive message, civil society groups that interact with members of the OTP receive varied information about preliminary examinations, and often feel as though they need to decode the words and body language of staff members in order to decipher the information being communicated. The ambiguity conveyed in these interactions gives the impression that the OTP lacks internal clarity about what staff can communicate to civil society, particularly to groups that have submitted information to the OTP.

Moreover, as mentioned earlier, the lack of coordination among ICC organs, including the Registry and VPRS, further complicates the role of the Prosecution when it comes to communications related specifically to preliminary examinations. Without a clear delineation of responsibilities across ICC organs, civil society groups will inevitably expect the Prosecution to lead all communication and outreach efforts, as the OTP is the first organ of the Court with whom many of them interact.

208. See OTP, Statement of ICC Prosecutor, Fatou Bensouda, regarding the situation in Guinea, 23 January 2020; OTP, Statement of ICC Prosecutor, Fatou Bensouda, on pre-election violence and growing ethnic tensions, 9 October 2020; OTP, Statement of ICC Prosecutor, Fatou Bensouda, regarding the worsening situation in Gaza, 8 April 2018; OTP, Statement of ICC Prosecutor, Fatou Bensouda, regarding the situation in Palestine, 17 October 2018; OTP, Statement of ICC Prosecutor, Fatou Bensouda, regarding the recent pre-election violence in Burundi, 8 May 2015.

The failure to effectively communicate the OTP's activities is ultimately a systemic problem and must be addressed holistically. First, the Prosecution should adequately staff its media team, both in terms of the quantity and quality of communication specialists. Lawyers, analysts, and other technical members of the OTP should not be given *ad hoc* responsibilities for communication. Instead, the dedicated media team should be responsible for both proactive communication strategies, including media talking points, and reactive strategies when there are important developments in relevant countries. These strategies should be developed with the guidance and expertise of technical staff members, including the leadership, but must remain the responsibility of trained and experienced communication specialists, (e.g. a spokesperson).

Recommendations

The working methods of the Office of the Prosecutor

1. The OTP should clearly delineate its role and responsibilities, particularly with victims and affected communities, in relation to other ICC organs (e.g. VPRS and the Registry at large) during preliminary examinations.

2. The Preliminary Examinations Section should include experts on the relevant countries, who can be selected through swift and efficient hiring procedures, as either local consultants or paid visiting professionals.

3. The OTP should codify and publish its confidentiality policy on the ICC website and in all responses to Article 15 communications.

4. The OTP should appoint a dedicated cyber-security expert or team to (1) develop a more robust information security protocol; (2) adopt appropriate technology; and (3) train staff to implement the protocol and use the technology effectively. In the meantime, the OTP must be clear and transparent with CSOs about the limitations of its information security systems.

5. The OTP should standardise its "soft" deadlines for receiving information from States to complete its complementarity analyses and reduce the length of preliminary examinations.

Transparency

6. The Prosecution should publish and promote guidelines for CSOs when submitting Article 15 communications.

7. The OTP should publish periodic updates on its complementarity assessment and invite the input of civil society with knowledge of national proceedings.

Communication with civil society

8. The OTP should adequately and appropriately staff its media team, both in terms of the quantity and quality of staff members, including a spokesperson position. The dedicated media team should be responsible for both proactive and reactive communication strategies.

9. All OTP staff members should be informed of communication strategies and receive talking points for engagement with external stakeholders.

10. The OTP should coordinate their communication activities with other relevant ICC organs, such as the Registry, to ensure that each organ is conducting complementary activities, with cohesive messaging, within the structures of their mandate.

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Part 2 Cover Picture: ICC Prosecutor Fatou Bensouda at the 18th session of the Assembly of the States Parties, The Hague, 2 December 2019. © ICC-CPI

Part 3

Outreach to Victims, Affected Communities and Civil Society

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fidh

No Peace Without Justice

Introduction

The overarching goals of the International Criminal Court (hereinafter "the ICC" or "the Court") are to ensure that the "most serious crimes of concern to the international community as a whole" do not go unpunished, and to prevent more "unimaginable atrocities that deeply shock the conscience of humanity" being committed.[209] While the Rome Statute is a progressive text in terms of the rights of the victims and their participation in Court proceedings, the ICC's location in The Hague (Netherlands) creates a distance between the Court's activities and the people impacted by them. Bridging the gap with the survivors, victims, and communities affected by Rome Statute crimes is essential for the Court to remain relevant and credible.

We understand outreach as a constructive and sustainable two-way interaction and information-sharing between the ICC, and communities affected by Rome Statute crimes, as well as civil society from countries under preliminary examination, investigation, or prosecution. The purpose of such interaction is to promote understanding of the ICC and its work, to clarify misperceptions and misunderstandings, and to enable survivors, victims, and affected communities to access, follow, and understand judicial proceedings.[210] This implies an active engagement of the Court with communities and civil society in situation countries, and requires mutual and constructive dialogue. It is also one of the most effective ways for the Court to understand the reality in the countries under its jurisdiction, and the diverging perceptions of justice that different groups within and across communities may have.

Outreach is multifaceted, and includes public information, which is a "process of delivering accurate and timely information about the principles, objectives and activities of the Court to the public at large and target audiences, through different channels of communication, including media, presentations, and the web site".[211] However, delivering information without meaningful communication with the recipient of the information is not outreach. "Two-way interaction" requires information to address the concerns of the specific audience in a clear and accessible way. These interactions must be reciprocal, e.g. on one hand, survivors, victims, and affected communities can communicate with the Court, and on the other hand, the ICC is in a position to receive and consider any views and concerns from the communities.

Engagement with survivors, victims, and affected communities has a chequered history at the ICC – in part due to the numerous actors involved in these efforts, which produces confusion about their respective roles. A variety of organs and units of the Court have a mandate to conduct outreach, including the Office of the Prosecutor (hereinafter "the Prosecution" or "the OTP"), the Trust Fund for Victims, and the Registry's Outreach Unit and Victims' Participation and Reparations Section, among others. Despite the wider involvement of the Court in outreach matters, some activities can only be conducted by the OTP, such as providing information on the progress of preliminary examinations and investigations, or case selection and prioritisation, as well as giving details on what the OTP does with the information it receives, how the OTP intends to organise its work in any given country, or how it intends to overcome challenges in investigations or prosecutions.

209. Preamble, Rome Statute of the International Criminal Court.

210. ICC, Integrated Strategy for External Relations, Public Information and Outreach, Context and Conceptual Framework, July 2005, para IV. See also NPWJ, Outreach and the International Criminal Court, September 2004.

211. *Ibid.*

Over the past nine years, there have been notable efforts to improve the OTP's outreach strategy and outreach at the Court as a whole. When Prosecutor Bensouda took office in 2012, she dedicated particular attention to expand the in-country presence and local engagement of the OTP, and to deepen its knowledge about the situation countries. Nevertheless, many challenges persist, particularly regarding the implementation of a Court-wide strategy, as relayed to FIDH and No Peace Without Justice (hereinafter "NPWJ") by the organisations consulted.

Methodology

The research in this report builds upon FIDH's and NPWJ's monitoring activities of the OTP's work over the past nine years, as well as FIDH's and NPWJ's first-hand experience conducting outreach to communities in situation countries, often times in partnership with local civil society organisations or legal professionals.[212] This research also follows previous consultations conducted by FIDH and the Kenya Human Rights Commission (KHRC) in the context of the Independent Expert Review Process.[213] For this report, FIDH and NPWJ consulted 38 civil society groups from 16 countries under preliminary examination or investigation at the ICC (Afghanistan, Bangladesh/Myanmar, Central African Republic, Colombia, Democratic Republic of Congo, Georgia, Ivory Coast, Kenya, Mali, Nigeria, Palestine/Israel, Philippines, Sudan, Uganda, Ukraine, and Venezuela). NPWJ also consulted international NGOs and other relevant stakeholders for background information.

The consultations followed a semi-structured format, with a pre-defined set of questions for all interviews and other questions tailored to the particularities of each situation. These discussions informed the recommendations put forward in this report, which have been categorised into three thematic areas: (1) policies, strategies and guidelines, (2) communications and materials, and (3) in-country presence and contextual understanding. All participants from situation countries received in writing the initial list of recommendations that FIDH and NPWJ identified through the consultations, and had the opportunity to rephrase them and provide additional comments.

212. Voir NPWJ, Outreach, for some of NPWJ's activities and publications on outreach, both at the ICC and in general.

213. FIDH and KHRC, *The victims' mandate of the International Criminal Court: disappointments, concerns and options for the way forward*, June 2020

Prosecutor Fatou Bensouda's Approach to Outreach

Strategic plans and their overall implementation

The first ICC Prosecutor, Luis Moreno Ocampo, adopted a "low profile" approach—purportedly for security reasons—and devoted minimal resources to outreach and engagement with affected communities. This practice generated rumours and misunderstandings about the work of the ICC.[214] During Prosecutor Bensouda's mandate, the OTP worked on improving its policies and strategic thinking on outreach and engagement with survivors, victims, affected communities, and civil society. The 2012-2015 Strategic Plan[215] recognised the value of the OTP's in-country presence, and acknowledged that engaging with civil society and affected groups is key given their knowledge of the situation and access to evidence.[216] The subsequent Strategic Plans for 2016-2018,[217] and for 2019-2021,[218] confirmed again the OTP's objective of improving engagement with survivors, victims, and affected communities, its commitment to provide regular updates on OTP's activities, and its intention to increase its in-country presence.

While the overall policies, strategies, and conceptual approaches on outreach developed significantly under the tenure of Prosecutor Bensouda, there is little reference to outreach in the OTP's dedicated strategies on Preliminary Examinations, Case Selection and Prioritisation, and Situation Completion.[219] For instance, while the OTP (and the wider ICC) engage to a certain extent with communities at the preliminary examination stage, outreach activities do not start until an investigation has been opened.[220] In this regard, despite strategic improvements made on the different policies, those consulted for the purpose of this report expressed numerous frustrations with the OTP's transfer of information, especially during the preliminary examination stage, which reveal the lack of a clear, effective, and proactive communications strategy. Participants also indicated that for the most part, they were not aware of the OTP's outreach or communications policies and strategies, nor had they been consulted on their development.

With some exceptions, the consultations carried out for this report showed that the OTP's overall strategies on outreach and engagement are not implemented efficiently by the Office's practices in situation countries. Participants described shortcomings in relation to the scope and content of outreach, OTP's in-country presence, regularity of engagement and outreach with all stakeholders, relationships with civil society, and OTP knowledge of local conditions.

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214. FIDH, *The Office of the Prosecutor of the ICC – 9 Years On*, December 2011, p. 14.

215. OTP, Strategic Plan 2012-2015, 11 October 2013.

216. *Ibid.*, para. 48.

217. OTP, Strategic Plan 2016-2018, 16 November 2015. In particular, the Office affirmed that it would continue to "take a victim-responsive approach throughout all aspects of its work, by (1) taking into accounts their views; (2) communicating, where possible together with the Registry, with the affected communities about the role of the Court and the Office's decisions, and (3) ensuring that their well-being is duly taken care of when they interact with the Office".

218. OTP, Strategic Plan 2019-2021, 17 June 2019. In particular, the OTP reaffirms the need to connect with the country, to prepare operations in terms of languages, staffing, logistics, security, etc., in order to improve the speed, efficiency and effectiveness of preliminary examinations, investigations, and prosecutions. The OTP additionally pledges to continue to develop its communication strategy and the ability "to effectively communicate with its stakeholders, with the victims and affected communities, and the general public" to maximise transparency.

219. See OTP, Policy Paper on Preliminary Examinations, November 2013 ; OTP, Policy Paper on Case Selection and Prioritisation, 15 September 2016 ; OTP, Policy on Situation Completion, 15 June 2021.

220. IER, Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report, 30 September 2020, para. 393. See also ICC, Decision on Information and Outreach for the Victims of the Situation, 13 July 2018.

Modalities of engagement with the OTP

Most of the organisations consulted acknowledge that Prosecutor Bensouda fostered a more open and collaborative relationship with civil society groups. While during preliminary examinations much of the Prosecution's work is geographically limited to The Hague, virtually all organisations consulted confirmed that contact with the OTP did tend to increase as the proceedings moved from preliminary examination to investigation, once authorised by the Chambers. Those consulted also acknowledged that the Office usually responds positively when requested to meet with civil society organisations.

For instance, civil society organisations consulted for this report noted that they have had numerous opportunities to meet with the Prosecution during the annual ICC-NGO roundtables, and the Assembly of States Parties to the Rome Statute (also known as the ASP) in The Hague and New York City. Participants also noted that during the visits carried out to situation countries, Prosecutor Bensouda and her team have engaged with civil society, within the limits of confidentiality, and made local groups feel much more seen and heard than in prior years.

However, the perception of those consulted was that there are still not enough or adequate opportunities for direct engagement by affected communities with the OTP. The meetings organised usually seem to be initiated by civil society and not by the OTP, and while valuable, the organisations consulted expressed concern and frustration over a lack of clarity and responsiveness on the part of the OTP during those meetings. Access to the OTP by the communities is further complicated by a lack of knowledge about who specifically to contact within the OTP, via which medium, and the security of these communications. While the OTP already has a Cyber Unit, it is worrying that none of the participants seemed to know about the steps the OTP takes to develop secure communication channels. If communication guidelines are already in place internally, the OTP should consider sharing them, to the extent possible.

In person meetings are an important medium for safely obtaining information from the OTP beyond what is on the website and social media platforms. Unfortunately, the Covid19 pandemic has resulted in even fewer in-country visits and more dependency on virtual meetings. For instance, the ICC-NGO roundtables in 2020 and 2021 have been held virtually due to the pandemic. This has had the benefit of expanding participation from civil society in situation and preliminary examination countries who otherwise may not have been able to travel to The Hague. However, and more generally, for those in situation countries where the internet is often unstable, using digital means of communication has proven a big obstacle for their engagement. The virtual format also did not allow for bilateral discussions or exchanges between civil society representatives and the OTP, which can often be arranged during the roundtables in The Hague.

Furthermore, participants from several countries, including Francophone and Spanish-speaking countries, noted that meetings with the OTP—both virtual and in person—are generally in English. Even if some civil society organisations can count on staff that speak English, this is not always the case and can create a barrier between the ICC and civil society, in particular survivors and victims. While engaging interpreters is always welcomed, internal capacity to speak local languages within the OTP's teams would be an asset in the dissemination of information and in communications to affected communities.

The role of civil society organisations in the OTP's outreach

In situations where communities live in challenging locations, such as areas with conflict or political instability, in refugee camps, or where the use of mobile devices is restricted, like in Libya and Bangladesh, the exchanges between communities and the OTP are often indirect, relying on the mediation of local and international civil society organisations (hereinafter, "CSOs"). These groups play a critical role in transmitting information to affected communities on ICC processes, frequently filling the gap left by the Court. By doing so, they help raise awareness on the institution and its work and manage expectations of affected groups. This involvement of international NGOs as intermediaries between the OTP and communities was seen as a positive asset by many local organisations, as it allows survivors and victims to understand ICC processes. It can also help focus the attention of the OTP or the international community on a given situation—particularly when the international NGOs are well-known.

However, engaging organisations as mediators to conduct outreach is not without risks. If the organisation leading the engagement lacks cultural and social understanding, or cannot communicate effectively with the communities, the mediator may put them in danger. For instance, a representative of the Rohingya population described how a civil society group representing victims and in contact with the OTP engaged with Rohingya victims without the knowledge to present the issue properly and failed to take adequate security precautions.

Relying too much on CSOs for disseminating information can also lead to gaps between the communities and the OTP, creating confusion and lack of transparency. To mitigate some of these risks, the Prosecution should develop a strategy to engage more effectively with diaspora communities (beyond just The Hague) to communicate information to a broader audience, including from the preliminary examination phase. For example, the OTP can announce news and information through diaspora news and radio channels that have a large following both inside and outside affected countries.

Most importantly, many local and international CSOs in situation countries who undertake this task are not officially recognised as intermediaries. While the ICC does have Guidelines on Intermediaries, which cover organisations assisting "with outreach and public information in the field",[221] most of the groups consulted were not aware of their existence. The few participants who had knowledge of the guidelines lacked clarity on how the OTP selects organisations to act as intermediaries with survivors, victims and affected groups, and what their respective rights and obligations are.

Frequency and content of communications

Organisations consulted for this report characterised OTP outreach as irregular communications that are either too spread out or concentrated on a specific moment of the proceedings. Outreach by the OTP, indeed, often seems to be geared towards major developments, such as the opening of an investigation and key judicial decisions in the course of a trial, rather than being conducted in a sustained, ongoing, dynamic and fluid way. Participants mentioned they often had a perception of outreach "saturation", with intense engagement for a few weeks at a time, then silence until the next major event at the Court, often months later. At the same time, information about those key developments is often not communicated properly, or in a timely manner.

221. ICC, Guidelines Governing the Relations between the Court and Intermediaries, March 2014.

Participants regretted the lack of clear information about the capacity of the OTP to engage with different stakeholders across the different phases of the proceedings, from preliminary examination to trial and beyond, especially in terms of victims' participation. As a result, CSOs may lack time to deal with a significant amount of information and be confused about the messaging and the specific activities the OTP is carrying out. This approach can also raise unrealistic expectations or contribute to misinformation campaigns. Additionally, far from a cohesive message, CSOs that had the opportunity to interact with the OTP appear to have received conflicting information. They reported feeling as though they needed to decode the words and body language of OTP staff members in order to decipher the information being communicated. The ambiguity and lack of clarity conveyed in these interactions gives the impression that the OTP lacks internal clarity about what can be communicated to civil society and by whom, including to groups that have submitted information to the OTP.

This issue is particularly evident around the conclusion of preliminary examinations and the OTP's decisions about whether to request the opening of an investigation. Participants from Nigeria and Ukraine noted that very little information was communicated to affected groups and CSOs in those countries about the OTP's decisions not to request the opening of an investigation. This made them feel abandoned in a crucial moment of the proceedings. Similar points were raised about the OTP's request to the Pre-Trial Chamber on territorial jurisdiction in the situation in the State of Palestine. The perception among affected groups on the opening of an investigation in Afghanistan is particularly telling. They noted that since the opening of the investigation, no outreach was done and no information was provided on the Afghan authorities' request for deferral, which complicated an already complex situation in Afghanistan. The fact that no explanation was provided was perplexing, especially since Afghan and international NGOs had been engaged in the proceedings and had been conducting outreach for the Court. Information being given only to some locations and not to others contributed to distrust towards the Court in general and the OTP in particular, and to a feeling of abandonment.

We acknowledge that there is a need to maintain confidentiality over certain aspects of the work of the OTP. However, without a proper explanation and framing of the work of the Court, the potential results, and the time the process will take, communities may fill in the gaps about the impact that the ICC can have for them. This confusion increases further when other international institutions or investigative missions are working in the same context—such as in Bangladesh/Myanmar[222] – or in those countries where State actors seem to be behind the spreading of dis- and misinformation about the Court, such as in Israel/Palestine, Ukraine and Georgia.[223] In Kenya and the Philippines, the lack of outreach meant there was insufficient reliable information to dispel myths and negative coverage about the ICC being reported in the media. In these situations, the Prosecution should actively and publicly counter misinformation about the OTP's work.

Media and public information strategy

Direct and public OTP engagement with media and the public is of utmost importance in countries where civil society is being repressed and faces risks for engaging with the ICC. The Prosecution should adequately and appropriately staff its media team, both in terms of the quantity and quality of staff members. Lawyers, analysts, and other technical members of the Prosecution should not

222. See ICJ, The Republic of The Gambia institutes proceedings against the Republic of the Union of Myanmar and asks the Court to indicate provisional measures, 11 November 2019; United Nations Human Rights Council, The independent Investigative Mechanism for Myanmar (IIMM), September 2018.

223. See Neve Gordon, The ICC and Israel's Charge of Anti-Semitism, 12 March 2021; Valentyna Polunina, If the Ukraine Wants for the ICC's Help, It Must Play by the ICC's Rules, 24 July 2016; Nika Jeiranashvili, How the ICC can still be meaningful in Georgia, 28 May 2019.

be given *ad hoc* responsibilities for communications. Instead, the dedicated media team should be responsible for both proactive communication strategies, including media talking points, and reactive strategies when there are important developments in relevant countries.

These strategies can and should be developed with the guidance and expertise of technical staff members, including the leadership, but must remain the responsibility of trained and experienced communications specialists. For situations under preliminary examination, the OTP should release tailored press releases related to each preliminary examination as an accompaniment to the annual reports. This will have more impact in local media and result in greater reporting on preliminary examination developments in affected countries.

Once these communications strategies have been developed, and the boundaries around the information that can be shared publicly are established, all staff members must be informed of the strategy and talking points. In this way, staff members that engage with the public, including CSOs and other stakeholders, are empowered to speak clearly and freely within the appropriate parameters set by the Prosecution. This clarity removes the unnecessary ambiguity in communications with CSOs, and encourages more consistent, accurate, and detailed messaging.

Outreach materials

Annual reports and other communications from the OTP provide important information on the work of the Office. Their impact is however considerably reduced by their very legalistic nature, making them clearly not aimed at CSOs – some of which may not have a legal background or a pre-existing understanding of the ICC's inner workings – or affected communities, some of whom may have basic education levels or be illiterate. The Prosecution should create an "education" team with the requisite pedagogical skills to translate complex concepts into everyday language for affected communities.

Currently, this burden is on the shoulder of CSOs without the requisite expertise or human and financial capacity to translate the Prosecution's legalistic reports into more accessible information. The OTP should produce more accessible materials (beyond written documents) and present them in a forum where interaction is possible. For example, videos, audios, and other formats that can be dubbed in local languages should be considered for the dissemination of key information about the proceedings, including from the preliminary examination phase.

Additionally, groups from Myanmar, Bangladesh, Georgia, Uganda, and Nigeria noted that information was oftentimes not available in local languages, referring both to the country's official language, and to languages commonly used in different parts of the country. CSOs are often left to translate documents into local languages, a task for which they lack means or staff with the technical knowledge to do so. Colleagues from Sudan had noticed an improvement in the availability of Arabic-language information, including on the ICC's website, but those from Palestine said there was still a lack of information in Arabic designed specifically for survivors, victims, and communities.

Cross-organ coordination

Without a clear delineation of responsibilities across ICC organs, CSOs will inevitably expect the Prosecution to lead all communications and outreach efforts, as it is the first organ of the Court with

whom the vast majority of them interact. As such, some of the suggestions by CSOs reflected in this document may or may not fall within the mandate of the Prosecution. While certain activities can and should be addressed by a well-staffed and dedicated media team within the Prosecution, other actions may fall within the ambit of the Registry and/or necessitate concerted collaboration with CSOs.

Outreach is a cross-organ activity. As such, and in order to be conducted successfully, there must be a clear and coherent strategy among the various organs laying down their respective roles according to their mandates. The 2005 *Integrated Strategy for External Relations, Public Information, and Outreach* ("Integrated Strategy) is the only Court-wide strategic document on outreach.[224] Other texts touch on the roles of the different organs, though. For instance, the Registry's 2006 *Strategic Plan for Outreach of the International Criminal Court* contains elements about coordination between different organs of the Court.[225] The 2012 *Court's Revised Strategy in Relation to Victims* sets as an objective that victims "receive clear communications about the ICC, its mandate and activities, as well as their right as victims in relation to the elements of the ICC system and at all steps of the judicial process".[226] It also specifies that at the preliminary examination stage, the OTP is the "leading actor" in terms of communication with victims.[227]

Nonetheless, the Integrated Strategy has not been properly implemented, neither has been kept step with the aforementioned strategies and policies developed by Prosecutor Bensouda and other organs of the Court, or other developments at the ICC[228] – like the reorganisation of the Registry in 2016 which was meant to address some of the shortcomings in coordination across its different sections.[229] The experts mandated in 2019-2020 to review the performance of the Court highlighted this lack of implementation of the Integrated Strategy. They also pointed out the need for better coordination among the various organs of the Court and recommended that "[a]n outreach plan, at least for every situation country, if not also per region, should be devised and then implemented from the PE [preliminary examination] stage of every situation".[230]

The lack of coordination and clarity generates confusion about the different ICC personnel involved in outreach efforts. Many of the organisations consulted raised that it is often difficult for people who do not have an in-depth understanding of how the ICC works to untangle the different roles of people who, for them, are simply "the Court", irrespective of which organ or unit they represent, and who often do not even convey the same message or coordinate among themselves on their respective activities. For example, there are two judicial decisions (State of Palestine, and Bangladesh/Myanmar) that order the Registry to establish a system of public information and outreach activities for those two situations, echoing civil society demands that outreach activities start at an earlier phase. At the time of writing, there does not seem to be a public implementation plan for these decisions, much less a coordinated effort across organs.

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224. ICC, Integrated Strategy for External Relations, Public Information and Outreach, Context and Conceptual Framework, July 2005.
225. ICC-ASP/5/12, Strategic Plan for Outreach of the International Criminal Court, 29 September 2006.
226. ICC-ASP/11/38, Court's Revised Strategy in relation to Victims, 5 November 2012, para. 18. Despite the request from States Parties that the Court submit an updated and more comprehensive approach to victims' issues, to date, the Victims Strategy has not been revised: ICC-ASP/19/Res.6, Strengthening the International Criminal Court and the Assembly of State Parties, 16 December 2020, para. 111.
227. ICC-ASP/11/38, Court's Revised Strategy in relation to Victims, 5 November 2012, paras. 15, 18.
228. IER, Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report, 30 September 2020, para. 394.
229. ICC Registry, Comprehensive Report on the Reorganisation of the Registry of the International Criminal Court, August 2016, p. 13.
230. IER, Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report, 30 September 2020, R163, para. 394.

All of these issues have contributed to the spread of misinformation and a lack of understanding about what the Court is doing and why. They also hinder the capacity of civil society to convey accurate and timely information to survivors, victims, and affected communities.

In-country presence and contextual knowledge

The OTP does not have a continuous or stable presence in any country under preliminary examination or where investigations have commenced. The Prosecution deploys investigators to situation countries on a rotational basis, usually for short missions that last two to three weeks but does not have its own dedicated in country offices – the "field offices" are established and run by the Registry once an investigation commences.[231] This model is neither efficient nor effective in the eyes of CSOs and victims' representatives. The lack of a stable OTP in-country presence has a negative effect on the OTP's relationship and engagement with survivors, victims, affected communities, and CSOs. It contributes to a lack of clarity and transparency, aggravating the problems about outreach described above. A stable presence would enhance communications with communities, and their trust in the Court and the results the ICC can yield—delivering more meaningful justice for survivors of Rome Statute crimes.

Additionally, the lack of a stable OTP in-country presence reduces the OTP's understanding about issues such as language and safety, or political, social, and cultural matters. The disconnect from realities in the situation countries has a negative impact on the Office's investigative capacities, outreach, cases in the courtroom, and ultimately its overall legitimacy. Some of these issues could be partly addressed by employing staff from the situation countries for outreach activities. For instance, in the context of investigations, the 2003 OTP Policy Paper outlines a commitment to include in its investigative teams nationals of the countries where the ICC is conducting investigations. According to that policy, this would allow the Office to "have a better understanding of the society on which its work has the most direct impact" and "interpret social behaviour and cultural norms as the investigation unfolds".[232] The same reasoning can be applied to outreach activities.

The lack of personnel from situation countries in OTP teams hampers the Office's ability to engage and interact with local actors, even where the OTP uses interpreters. This can create barriers to building trust between the OTP and the people with whom they interact, which is complicated by the difficulties of sharing stories about past trauma. In some situations, like Georgia, the groups consulted indicated that communities may not trust people who do not speak their language, making engagement with them difficult in other languages. For instance, in Bangladesh/Myanmar, the OTP relied on an NGO to reach out to the Rohingya population, but the interpreter did not speak the Rohingya language, only Bengali. Despite some similarities between the two languages, the translation was not always correct and the fine lines of some of the communications were lost.

The lack of contextual knowledge can also have potential negative implications for survivors' and victims' safety. For example, according to those who participated in the consultations, the OTP engaged with victims situated in the Administrative Boundary Line, a buffer area between Georgia-controlled territory and South Ossetia, where law enforcement is lacking, and victims could have been exposed to kidnapping or other forms of violence because of their engagement with the ICC.

231. The ICC website states that "[t]he ICC has offices in several of the countries in which investigations are being conducted", albeit not in all situation countries.

232. See OTP, Policy paper on some policy issues before the OTP, 1 September 2003, p. 8-9.

Recommendations

Policies, strategies and guidelines

1. The OTP should clarify its outreach mandate by clearly stating the definition, purpose, and scope of the activities this entails, and reviewing existing policies and strategies.

2. The OTP should cooperate with relevant organs and units of the Court to clarify their respective roles in the organisation of outreach activities, and review and update the Integrated Strategy on External Relations, Public Information and Outreach.

3. The OTP should ensure that the Guidelines on Intermediaries are known to local CSOs and, where appropriate, better define the criteria that determine the choice of a particular intermediary, following a strong and reliable selection process.

4. If not yet developed by the Cyber Unit, the OTP should implement guidelines and tools to safeguard the security of communications and contact with survivors and victims – covering both the OTP and intermediaries – and ensure that they are known to and understood by all relevant stakeholders.

Communications and materials

5. The OTP should create a dedicated team responsible for both proactive and reactive communications. This team can also help inform OTP staff about strategies and messaging, including how technical information can be explained in an accessible manner.

6. In its communications to victims and affected communities, the OTP should provide honest, comprehensive, and understandable information and explain key documents and judicial decisions in fora that facilitate interaction with affected communities.

7. The OTP should regularly share information on the scope of crimes and investigations, how victims can provide their views and concerns to the Office, what their participation will entail, an idea of what the Court can and cannot achieve, and general timeframes – from the preliminary examination stage and for all situation countries.

8. The OTP, in coordination with the Court's dedicated information section (PIOS) and other relevant sections of the Registry, should produce more accessible materials in a format that is most suitable for each specific country, such as infographics, comics, videos, annotated decisions with explanations, and voice note updates. These tools and written documents should be produced in local languages, including dialects and indigenous languages in relevant regions.

In-country presence and contextual understanding

9. The OTP should establish an in-country presence from the earliest possible opportunity, and proactively develop direct and continuous communication channels with victims, affected communities and civil society in their local languages.

10. The OTP should incorporate people from the situation country within the OTP's teams to facilitate engagement with victims and affected communities, and to increase its contextual understanding.

11. The OTP should increase its direct engagement with affected communities and civil society organisations, especially in countries where civil society faces risks for engaging with the ICC.

12. If the OTP needs to collaborate with external parties, it should try (to the extent possible), to engage local actors who speak the relevant language/s and are trusted by the affected communities. When relying on external parties, the OTP should consider recognising them as intermediaries, and monitor that their engagement is conducted according to the Court's standards.

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Part 3 Cover Picture: ICC Prosecutor Fatou Bensouda is received by local officials as she disembarks from her plane upon arrival in Nyala, the state capital of Sudan's South Darfur, during a visit on May 31, 2021. © Abdelmonim MADIBU/AFP

WOMEN'S INITIATIVES FOR GENDER JUSTICE

WOMEN'S INITIATIVE FOR GENDER JUSTICE (WIGJ)

Women's initiatives for gender Justice (WIGJ) is an international women's rights organisation that advocates for gender justice through domestic mechanisms as well as the International Criminal Court. WIGJ works toward the inclusion of women in the international justice process as well as accountability for sexual and gender-based crimes within international and national procedures. We work with people most affected by conflict situations under investigation by the ICC, and closely collaborate with grassroots partners, associates, and members. Survivors of sexual and gender-based violence inform the voice of Women's Initiatives to ensure inclusive gender justice in international and domestic laws, policies, practices, adjudications, and jurisprudence.

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No Peace Without Justice

NO PEACE WITHOUT JUSTICE (NPWJ)

No Peace Without Justice (NPWJ) s an international non-profit organisation that works for the protection and promotion of human rights, democracy, the rule of law and international justice. NPWJ raises awareness and fosters public debate through explicitly political campaigns and the implementation of key programs. NPWJ has acquired unique field experience in conflict mapping and wide-scale documentation of violations of international humanitarian law in areas affected by conflicts and in implementing outreach programs engaging local communities in conflict and post-conflict areas on issues of international criminal justice.

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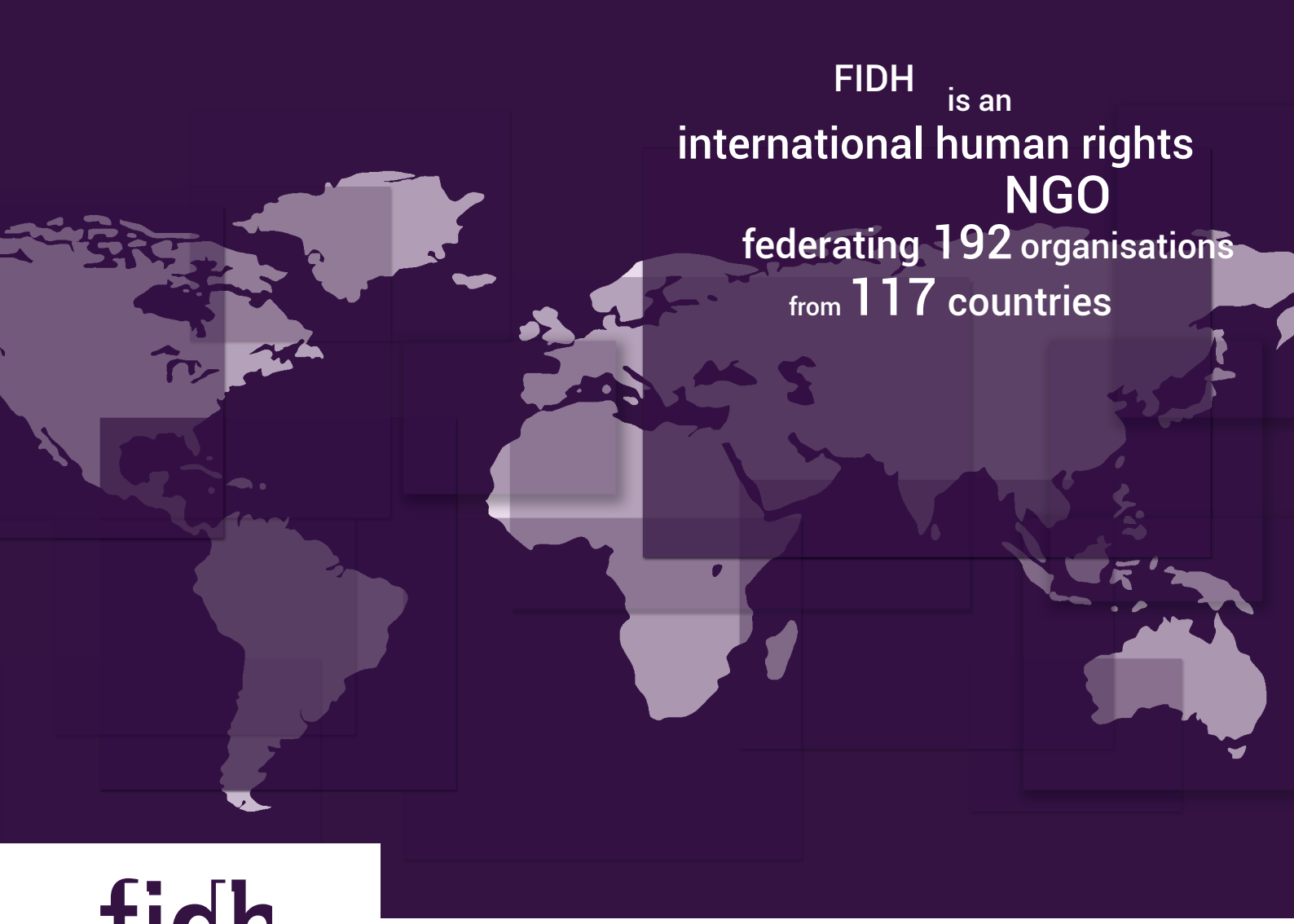

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