



# ACCOUNTABILITY FOR SEXUAL AND GENDER-BASED CRIMES AT THE ICC: AN ANALYSIS OF PROSECUTOR BENSOUDA'S LEGACY

**fidh**

Women's Initiatives  
for Gender Justice





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# Preface

After a nine-year mandate as the Prosecutor of the International Criminal Court, Fatou Bensouda stepped down on 16 June 2021. This paper is part of a stocktaking exercise, conducted by FIDH, on progress and setbacks during Prosecutor Bensouda's term (2012-2021). The research will be published as a series of three papers, each of them focusing on an area key to the work of the Office of the Prosecutor: sexual and gender-based crimes, preliminary examinations, and outreach to victims and affected communities. This paper is the first one of the series, and has been prepared in partnership with Women's Initiatives for Gender Justice (WIGJ). The goal of this review is to provide Prosecutor Bensouda's successor, Karim Khan, with a detailed analysis of the work conducted by the OTP in these three areas, identifying best practices and opportunities for improvement. The full report will be launched at the 20<sup>th</sup> Assembly of States Parties in December 2021.

The fight against sexual and gender-based violence has been at the forefront of FIDH's international justice work for many years. Among other activities, and in close collaboration with its national members 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 the normative framework on sexual and gender-based violence; 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 also monitors closely the investigation and prosecution of sexual crimes at the International Criminal Court, in particular any advancements since the adoption of the Office of the Prosecutor's Policy Paper on Sexual and Gender-Based Crimes in 2014. Together with member organisations that are based in "situation countries" and work directly with victims and affected communities, FIDH documents sexual and gender-based crimes allegations and provides evidence to the Office of the Prosecutor. For many years and to date, FIDH and its members continue to advocate in various fora for the allocation of more human, technical and financial resources towards accountability for sexual and gender-based crimes.

As a result of 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, the legal framework of the Court integrates gender in its structures, substantive jurisdiction, and procedures. Women's Initiatives for Gender Justice continues this work by advocating for accountability and prosecution of sexual and gender-based crimes and gender justice 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.

# I. 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.<sup>1</sup>

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.<sup>2</sup> 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.<sup>3</sup> 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”.<sup>4</sup>

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.<sup>5</sup>

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.<sup>6</sup> 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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1. 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”.

2. 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”.

3. 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.

4. *Ibid.*

5. Prosecutor Khan was elected by the Assembly of States Parties on 12 February 2021. He took office on 16 June 2021.

6. The information in this report is based on publicly available information as of the time of writing on 15 June 2021.

## II. 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,<sup>7</sup> "[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.<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup> 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".<sup>11</sup>

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.<sup>12</sup>

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.<sup>13</sup> Another important contribution of the SGBC Policy is that it provides awaited clarification regarding the OTP's interpretation of the term gender,<sup>14</sup> 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,

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7. OTP, [Remarks to the 25<sup>th</sup> Diplomatic Briefing by Fatou Bensouda, Prosecutor of the International Criminal Court](#), 26 March 2015.

8. OTP, [Strategic Plan June 2012-2015](#), 11 October 2013, paras. 5 and 32.

9. *Ibid.*, para. 63.

10. 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.

11. [ICC Press Release on the publishing of SGBC Policy Paper](#).

12. [SGBC Policy](#), para. 6.

13. 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.

14. 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.

activities, and attributes assigned to women and men, and girls and boys”.<sup>15</sup> As such, gender-based crimes may be committed against persons “because of their sex and/or socially constructed gender roles”.<sup>16</sup> Significantly, it also underscores that the OTP “will apply and interpret [the definition] in accordance with internationally recognized human rights”.<sup>17</sup>

The OTP restated its commitment to effectively address sexual and gender based-crimes in its following Strategic Plans,<sup>18</sup> 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.”<sup>19</sup>

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15. 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).

16. [SGBC Policy](#), para. 15.

17. *Ibid.*

18. 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.

19. OTP, [Policy Paper on Case Selection and Prioritisation](#), September 2016, para. 46.



### III. 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.

#### 3.1. 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 Annex 1.*

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.<sup>20</sup>

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,<sup>21</sup> providing a foundation upon which the new Prosecutor can draw to address sexual and gender-based crimes inclusively and comprehensively.

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

21. See Annex 1.



## a) 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.<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup> 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<sup>25</sup> [for further detail regarding the gender-based persecution charge, see section IV].<sup>26</sup> Rape and other forms of sexual violence are also alleged to have been committed in Eastern Ukraine.<sup>27</sup> The Prosecutor indicated that she will hand these two files over to the incoming Prosecutor.<sup>28</sup>

## b) 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*.<sup>29</sup>

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.

## 3.2. 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.

22. The Preliminary Examination in Korea did not feature sexual and gender-based crimes.

23. The Preliminary Examination in Union of the Comoros, Palestine, Gabon, and Venezuela II did not feature sexual and gender-based crimes.

24. OTP, [Report on Preliminary Examination Activities 2020](#), 14 December 2020, paras. 265 and 289.

25. *Ibid*, paras. 253-257.

26. See *infra*, p. 13.

27. 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.

28. 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.

29. These include CAR II, Burundi, and Bangladesh/Myanmar.

When Prosecutor Bensouda assumed office, sexual and gender-based crimes charges had been brought in 12 out of 17 cases<sup>30</sup> against 18 of 31 suspects and accused.<sup>31</sup> During her tenure, the OTP has brought sexual and gender-based crimes charges in 3 out of 6 new cases<sup>32</sup> against 3 out of 7 suspects and accused.<sup>33</sup> The OTP also brought new charges for sexual and gender-based crimes in the Bosco Ntaganda case,<sup>34</sup> as well as in the case against Dominic Ongwen, significantly expanding the scope of such crimes being prosecuted before the ICC.<sup>35</sup> 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,<sup>36</sup> against 22 out of 38 accused.<sup>37</sup>

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.<sup>38</sup> 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.<sup>39</sup>

While charges for sexual and gender-based crimes remain vulnerable and challenges to securing

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30. 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 et 124. 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.

31. 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.

32. 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 & Ngaissona 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.

33. Charges for sexual and gender-based crimes were brought against: Mohamed Al-Tuhamy, Al-Hassan, and Ngaissona. 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, 19.

34. *Compendium*, p. 71.

35. The proceedings against Ongwen were severed from Kony *et al.* case on 6 February 2015. *Compendium* p. 81.

36. 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.

37. 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 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.

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

39. 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.

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);<sup>40</sup> and
- cumulative charges to reflect the range, severity and multifaceted character of sexual and gender-based crimes in a case.<sup>41</sup>
- 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.<sup>42</sup>

These reforms have contributed to the steady increase in the proportion of sexual and gender-based crimes that have been confirmed for trial.<sup>43</sup> 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.

### 3.3. 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.

#### *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),<sup>44</sup> did not include charges for sexual and gender-based crimes.<sup>45</sup> However, applying lessons learned from the Lubanga trial,<sup>46</sup> on 14 May 2012, the OTP filed an application for an additional warrant of arrest,<sup>47</sup> adding 9 charges, including rape and sexual slavery as war crimes and crimes against humanity.<sup>48</sup> Pre-Trial Chamber II granted the OTP’s application on 13 July 2012.<sup>49</sup>

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

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40. [SGBC Policy](#), para. 72.

41. *Ibid.*

42. Oosterveld 2018, p. 446.

43. 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.

44. 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.

45. 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.

46. WIGJ, [Gender Report Card 2012](#), p. 114.

47. 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.

48. 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.

49. *Ibid.*

sexual slavery against FPLC child soldiers, which were not included in either of the two arrest warrants.<sup>50</sup> 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.<sup>51</sup>

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.<sup>52</sup> 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.<sup>53</sup> 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.<sup>54</sup>

On 8 July 2019, the Trial Chamber convicted Ntaganda of all 18 counts of war crimes and crimes against humanity charged by the Prosecutor,<sup>55</sup> 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.<sup>56</sup> On 30 March 2021, the Appeals Chamber upheld the conviction and sentence.<sup>57</sup>

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.<sup>58</sup> 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.

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50. 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.

51. *Ibid.*, para. 107.

52. 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 September 2015, paras. 7-10, p. 12.

53. 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.

54. SGBC Policy, para. 20.

55. ICC, *The Prosecutor v. Bosco Ntaganda*, [Judgment](#), ICC-01/04-02/06-2359, 8 July 2019.

56. ICC, *The Prosecutor v. Bosco Ntaganda*, [Sentencing judgment](#), ICC-01/04-02/06-2442, 7 November 2019.

57. 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.

58. 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.

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.<sup>59</sup> 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 concern amongst human rights advocates.<sup>60</sup> 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.<sup>61</sup>

In addition to gender-based persecution as a crime against humanity, the arrest warrant<sup>62</sup> and Document Containing the Charges<sup>63</sup> 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,<sup>64</sup> 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."<sup>65</sup> 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.<sup>66</sup> 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.<sup>67</sup> Violations of these rules were severely sanctioned, with the intention of forcing conformity.<sup>68</sup> They were also subjected to rape, sexual slavery and other inhumane acts within the framework of forced marriages and forced pregnancies.<sup>69</sup> 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,

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

60. 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).

61. 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.

62. 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.

63. 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.

64. 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.

65. See Al Hassan DCC.

66. *Ibid*, paras. 947-948.

67. *Ibid*, para. 960.

68. *Ibid*, paras. 949, 963-964.

69. *Ibid*, paras. 947-949.



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.<sup>70</sup>

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.<sup>71</sup>

### 3.4. 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).<sup>72</sup> Ngudjolo was thereafter acquitted of all charges.<sup>73</sup>

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.<sup>74</sup>

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.<sup>75</sup> 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".<sup>76</sup>

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.<sup>77</sup> 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

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70. *Ibid*, paras. 971-972.

71. The ICC is the first international tribunal with jurisdiction over the crime against humanity of persecution on the basis of gender.

72. 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.

73. 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.

74. 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.

75. 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.

76. 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.

77. WIGJ, *Statement of the Women's Initiatives for Gender Justice, Appeals Withdrawn by Prosecution and Defence, The Prosecutor vs. Germain Katanga* (hereafter "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".<sup>78</sup>

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<sup>79</sup> and sentenced to 18 years' imprisonment.<sup>80</sup> 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<sup>81</sup> 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.<sup>82</sup>

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.<sup>83</sup> 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.<sup>84</sup> With regard to the remaining criminal acts, including "one murder, the rape of 20 persons and five acts of pillaging",<sup>85</sup> 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.<sup>86</sup> Bemba was therefore acquitted of all charges.

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.<sup>87</sup> 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".<sup>88</sup> 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.

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78. WIGJ Statement on Appeals Withdrawn in Katanga.

79. 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.

80. 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.

81. 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.

82. See WIGJ, "ICC first conviction for acts of sexual violence", 21 March 2016.

83. 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.

84. *Ibid.*, paras. 116, 197-197.

85. *Ibid.*, paras. 118-119.

86. *Ibid.*, paras. 194, 196.

87. 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.

88. WIGJ Statement on Katanga partial conviction.



## IV. Opportunities to Broaden the Reach of Accountability

### 4.1. 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,<sup>89</sup> the Rome Statute provides a distinct opportunity to deliver gender-inclusive justice. While to date, this novel provision has been underutilized,<sup>90</sup> 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.<sup>91</sup>

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.<sup>92</sup>

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”.<sup>93</sup> The Pre-Trial Chamber’s decision on the confirmation of charges is pending.

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”.<sup>94</sup>

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).

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89. 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 [...]”.

90. Grey 2019.

91. 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.

92. 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.

93. 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.

94. [SGBC Policy](#), para. 27.

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.<sup>95</sup> 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.<sup>96</sup> 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”.<sup>97</sup>

## 4.2. 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.<sup>98</sup> 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.<sup>99</sup>

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.<sup>100</sup>

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 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”.<sup>101</sup> The Trial Chamber denied the request, finding the acts to go beyond the scope of the charges.<sup>102</sup>

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.<sup>103</sup>

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.<sup>104</sup> 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.

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95. See Human Rights & Gender Justice Clinic (HRGJ) of CUNY School 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.

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

97. *Davis 2018*, p. 518.

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

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

100. See e.g. ICC, *The Prosecutor v. Bosco Ntaganda*, [Judgment](#), ICC-01/04-02/06-2359, 8 July 2019, paras. 623, 940-942.

101. 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.

102. 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.

103. [LRV request to present evidence, Ongwen](#), paras. 18-20.

104. See Annex 1.

### 4.3. 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.<sup>105</sup> 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.<sup>106</sup>

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.<sup>107</sup> 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.<sup>108</sup>

Charges for the crime against humanity of other forms of sexual violence were also brought in the arrest warrants against Laurent Gbagbo<sup>109</sup> and Blé Goudé<sup>110</sup> in November and December 2011, however, they subsequently were not brought in the Documents Containing the Charges in January and August 2014.<sup>111</sup> The charge was also brought in the arrest warrant for Simone Gbagbo issued in March 2012.<sup>112</sup>

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.<sup>113</sup> 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.<sup>114</sup> Moving forward, The Hague Principles on Sexual Violence,<sup>115</sup> which provide guidance on what makes violence “sexual” from the perspective of survivors, can serve as a valuable resource for the new Prosecutor.

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105. 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.

106. *Ibid.*, paras. 41-42, 58-59.

107. 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 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.

108. 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, para. 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 Gender Report Card 2012, pp. 108, 129.

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

110. *Ibid.*, p. 8.

111. 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.

112. 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.

113. See Annex 1.

114. See *supra*, p. 8.

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

## V. 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:

1. 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.
2. 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.
3. Adopting an intersectional approach in all prosecutions, particularly those involving sexual and gender-based violence.
4. 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:

1. 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.
2. 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.
3. 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.<sup>116</sup> 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.<sup>117</sup> While the scale of acts remained unclear, the number of cases of rape ranged from 50 to 100.<sup>118</sup> Sexual violence also appeared to be accompanied “systematically [...] by racial insults”.<sup>119</sup> 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].<sup>120</sup>

## 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.<sup>121</sup> 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.<sup>122</sup> Alleged victims reportedly include adult women, one adult male and numerous minors.<sup>123</sup>

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.<sup>124</sup>

## 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.<sup>125</sup> 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.<sup>126</sup> She highlighted that limited figures could be

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116. OTP, Situation in Mali, [Article 53\(1\) Report](#), 16 January 2013, paras. 173-175.

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

118. *Ibid*, para. 166.

119. *Ibid*, para. 168.

120. See *supra*, p. 10.

121. 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.

122. *Ibid*, paras. 146, 176.

123. *Ibid*, paras. 180, 262.

124. 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.

125. 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.

126. *Ibid*, [Request for authorization of an investigation in Georgia](#), para. 4.



the result of insecurity and existing social stigma attached to sexual violence in Georgia, which deterred victims from reporting alleged sexual violence crimes.<sup>127</sup> The Pre-Trial Chamber agreed that these allegations could be included in the investigation.<sup>128</sup> 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.<sup>129</sup> 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.<sup>130</sup> The Prosecutor also indicated that persecution appeared to have been committed by means including rape and other forms of sexual violence.<sup>131</sup>

Although the Prosecutor determined that “acts targeting the sexuality of [male] victims” in detention constituted other forms of sexual violence,<sup>132</sup> Pre-Trial Chamber II qualified the acts as torture.<sup>133</sup> 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”.<sup>134</sup> No cases have yet been brought in the Burundi Situation.

#### 5. Bangladesh/Myanmar

On 14 November 2019, the Prosecutor received authorization to open an investigation into the situation in Bangladesh/Myanmar.<sup>135</sup> 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.<sup>136</sup> 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.<sup>137</sup> 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.<sup>138</sup> No cases have yet been brought in the Bangladesh/Myanmar Situation.

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127. *Ibid*, para. 231.

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

129. 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.

130. ICC, Situation in 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 November 2017, paras. 2, 34, 68-69, 123-129.

131. *Ibid*, para. 135.

132. *Ibid*, paras. 123, 129.

133. [Decision on the Authorization of an Investigation in Burundi](#), paras. 2, 95, 99, 102, 104, 105, 106, 116, 188.

134. *Ibid*, para. 193.

135. 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.

136. 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.

137. *Ibid*, 116(a).

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

## 6. Afghanistan

The investigation into the Situation in Afghanistan, authorized on 5 March 2020,<sup>139</sup> 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.<sup>140</sup> The Taliban and affiliated armed groups allegedly committed persecution against women and girls on gender and political grounds, as detailed in section IV.<sup>141</sup> 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.<sup>142</sup> No cases have yet been brought in the Afghanistan Situation.

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139. 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 an Investigation into the Situation in the Islamic Republic of Afghanistan](#), ICC-02/17-33, 12 April 2019.

140. 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.

141. See *supra*, p. 13

142. 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

Nr	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 SGBG charges on 7 March 2014.	Appeals discontinued on 24 June 2014, judgment is final.
2	The Prosecutor v. Mathieu Ngujolo 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.
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.

Nr	Case	Arrest Warrant/Summons to Appear	Document Containing the Charges	Confirmation of Charges Decision	Judgment	Appeal
4	<b>The Prosecutor v. Callixte Mbarushimana</b>	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.		
5	<b>The Prosecutor v. Sylvestre Mudacumura</b>	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	<b>The Prosecutor v. Joseph Kony and Vincent Otti</b>	<i>Kony</i> 3 out of 11 counts: - sexual slavery as crime against humanity; - rape as crime against humanity; and - inducing rape as war crime.  <i>Otti</i> 2 out of 10 counts: - sexual slavery as crime against humanity; and - inducing rape as war crime.  The suspects are still at large.				

Nr	Case	Arrest Warrant/Summons to Appear	Document Containing the Charges	Confirmation of Charges Decision	Judgment	Appeal
7	<b>The Prosecutor v. Dominic Ongwen</b>	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); - 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); - 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.
8	<b>The Prosecutor v. Jean-Pierre Bemba Gombo</b>	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.

Nr	Case	Arrest Warrant/Summons to Appear	Document Containing the Charges	Confirmation of Charges Decision	Judgment	Appeal
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.			
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.			

Nr	Case	Arrest Warrant/Summons to Appear	Document Containing the Charges	Confirmation of Charges Decision	Judgment	Appeal
12	The Prosecutor v. Abdel Raheem Muhammad Hussein	<p>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.</p> <p>The suspect is still at large.</p>				
13	The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali	<p><i>Kenyatta</i>  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.</p> <p><i>Muthaura</i>  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.</p> <p><i>Ali</i>  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.</p>	<p><i>Kenyatta</i>  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.</p> <p><i>Muthaura</i>  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.</p> <p><i>Ali</i>  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.</p>	<p><i>Kenyatta</i>  3 out of 5 counts:  - rape as crime against humanity;  - other inhumane acts as crime against humanity; and  - persecution as crime against humanity.</p> <p><i>Muthaura</i>  3 out of 5:  - rape as crime against humanity;  - other inhumane acts as crime against humanity; and  - persecution as crime against humanity.</p> <p><i>Ali</i>  Declined to confirm all charges on 23 January 2012.</p>	<p>The Prosecution withdrew the charges against Muthaura and Kenyatta. The Trial Chamber terminated proceedings on 13 March 2015.</p>	

Nr	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	<i>L. Gbagbo</i> 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.  <i>Blé Goudé</i> 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.	<i>L. Gbagbo</i> 2 out of 4 counts: - rape as crime against humanity; and - persecution as crime against humanity.  <i>Blé Goudé</i> 2 out of 4 counts: - rape as crime against humanity; and - persecution as crime against humanity.	<i>L. Gbagbo</i> 2 out of 4 counts: - rape as crime against humanity; and - persecution as crime against humanity.  <i>Blé Goudé</i> 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.
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.				



Nr	Case	Arrest Warrant/Summons to Appear	Document Containing the Charges	Confirmation of Charges Decision	Judgment	Appeal
17	<b>The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud</b>	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	<b>The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaissona</b>	Yekatom 0 out of 15 counts  Ngaissona 0 out of 16 counts	Yekatom 0 out of 21 counts  Ngaissona 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  Ngaissona 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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The Worldwide Movement for Human Rights acts at national, regional and international levels in support of its member and partner organisations to address human rights abuses and consolidate democratic processes. Its work is directed at States and those in power, such as armed opposition groups and multinational corporations.

Its primary beneficiaries are national human rights organisations who are members of the Movement, and through them, the victims of human rights violations. FIDH also cooperates with other local partner organisations and actors of change.

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FIDH/CB

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## Women's Initiatives for Gender Justice



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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FIDH is an  
**international human rights  
NGO**  
federating **192** organisations  
from **117** countries

**fidh**

## ABOUT FIDH

FIDH takes action for the protection of victims of human rights violations, for the prevention of violations and to bring perpetrators to justice.

### **A broad mandate**

FIDH works for the respect of all the rights set out in the Universal Declaration of Human Rights: civil and political rights, as well as economic, social and cultural rights.

### **A universal movement**

FIDH was established in 1922, and today unites 192 member organizations in 117 countries around the world. FIDH coordinates and supports their activities and provides them with a voice at the international level.

### **An independent organisation**

Like its member organizations, FIDH is not linked to any party or religion and is independent of all governments.