



**Cour
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**International
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Court**

Le Bureau du Procureur
The Office of the Prosecutor

Mrs Fatou Bensouda
Prosecutor, International Criminal Court

SAIFAC Conference: International Law and Justice for Victims of the Gross Human Rights Violation of Sexual and Gender-Based Violence

“Prosecuting Sexual and Gender-Based Crimes at the International Criminal Court”

Keynote Remarks

Venue: Women’s Gaol, Johannesburg, South Africa | *Date:* 27 November 2019

Your Excellencies,
Distinguished Guests,
Ladies and Gentlemen,
Colleagues and Friends,

It is an honour and a privilege to be with you today. I wish to express my sincere gratitude to the South African Institute for Advanced Constitutional, Public, Human Rights and International Law at the University of Johannesburg for inviting me to address you, and for organising this timely conference.

I also wish to thank the South African Research Chair in International Law, the Konrad Adenauer Stiftung Rule of Law Program for Sub-Saharan Africa, and all of those who have contributed to convening this important event.

I am truly delighted to be in the company of so many trailblazing sisters, and committed allies in our collective struggle to eradicate sexual and gender-based violence. I am deeply humbled to be standing on the site of the Women's Jail at Constitution Hill, a place that symbolises the legacy of women in history who have inspired us with their courage, resilience and survival. Of the women who were detained here, some, like Albertina Sisulu, defied injustice and triumphed - they lived on to share with us, their remarkable stories of resistance. However, throughout history there have been millions of silenced women and girls, like Uyinene Mrwetyana, who, despite their best efforts, did not survive to tell us of the horrors that they endured.

Our outrage at Uyinene's brutal death, and over the suffering of so many others, must unite us in confronting the pervasive scourge of sexual and gender-based violence against the most vulnerable members of our societies. Her tragic demise highlights the urgent need for us to scale up our collective efforts. We can and must put an end to the culture of impunity for sexual and gender-based violence, we can and must use the law to disrupt this cycle of violence. Joint and consistent efforts at the domestic and international levels are needed to have a real impact.

As the Prosecutor of the International Criminal Court ("ICC" or "Court"), I am committed to using international criminal law to its full extent to expose, prosecute and deter sexual and gender-based crimes ("SGBC").

Ladies and gentlemen, from Uganda to Colombia, from Nigeria to Myanmar - sexual and gender-based violence pervade the contexts in which the Court operates. Sexual and gender-based crimes are committed against men and women, boys and girls. This occurs within a global context of relentless denial – denial that these crimes are taking place, and shaming of victims.

Too often, there is a tacit agreement to look the other way when women and men, girls and boys are sexually violated and abused – minimising, trivialising, denigrating, and silencing the victims. It requires

tremendous courage for a survivor of sexual violence to share their most private and painful memories of what happened to them under cover of darkness.

The ICC was created to ensure that perpetrators of crimes that shock our collective conscious are held accountable. The Court was established in 1998 as a permanent, independent court, mandated to investigate and prosecute the most serious crimes of concern to the international community – genocide, crimes against humanity, war crimes – and the crime of aggression.

The Rome Statute (“Statute”) that created the Court did not simply create a lone institution – rather, the Statute has galvanised a vast global coalition of States, international organisations, civil society and victims – who share a collective vision to combat impunity for Rome Statute crimes.

Today, 123 States are party to the Statute, with the Pacific Island of Kiribati having just joined the Court as early as yesterday. These States have all taken on the duty to prevent and punish Rome Statute crimes. The Statute defines my mandate as Prosecutor - to investigate and prosecute crimes under the Statute, and thus contribute to preventing them.

Genocide, war crimes and crimes against humanity have a particularly devastating effect on women and children. Women and children may be direct victims; they may be forced to participate in the commission of crimes; or they may witness the commission of these crimes against others, including their own families.

There has been a remarkable evolution over time in the international commitment to ensure accountability for sexual violence in conflict. Robert Jackson, the Chief Prosecutor of the Nuremberg Tribunal, did not present sexual crimes in the cases against Nazi leaders.

The Statute, however, expressly proscribes various forms of sexual and gender-based violence – including rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, and other forms of sexual violence, as underlying acts of both crimes against humanity and war crimes. The Statute also criminalises persecution based on gender as a crime against humanity.

In my Office, we are conscious that at all times, victims must remain at the heart of our work. The Court’s Rules of Procedure and Evidence reflect progressive advancements at the international level in protecting victims of SGBC. Article 54 of the Statute specifically mandates me, as Prosecutor, to ensure effective investigations and prosecutions by *taking into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children.*

Article 68(1) of the Statute states that the Prosecutor of the Court shall take measures to protect the safety, physical and psychological well-being, dignity, and privacy of victims and witnesses, particularly in relation to sexual and gender-based crimes and crimes against children.

Additionally, article 21(3) requires that the application and interpretation of the Statute must be consistent with internationally recognised human rights, and therefore without any adverse distinction founded on grounds such as gender.

Yet another ground-breaking feature of the Statute is the central role of victims as participants in the Court's proceedings and the recognition of the interests of victims.

During my tenure as Prosecutor, I have devoted special attention to enhancing the effectiveness of my Office's investigations and prosecutions of these crimes. The task of achieving tangible results in court for the prosecution of SGBC is replete with challenges.

At both the national and international level, these crimes are systemically under-reported. It requires tremendous courage for a survivor of sexual violence to push through feelings of shame, and to testify before an international court. Social stigma, combined with the passage of time, and limited forensic or documentary evidence due to inadequate support services at the national level, make it very challenging to effectively prosecute SGBC.

As such, when I became Prosecutor of the ICC in 2012, I made a personal commitment to develop and put in place a comprehensive policy to guide my Office's investigations and prosecutions of these crimes. In June 2014, I launched the Office's landmark Policy on Sexual and Gender-Based Crimes. The Policy contains key directives to enhance the ability of my Office to obtain the evidence required to secure convictions for SGBC.

This Policy was the outcome of extensive consultations within my Office, as well as with UN agencies, States Parties to the Court, civil society and academia. My Office's implementation of this Policy has helped to advance a culture of "best practice" in the investigation and prosecution of these crimes.

Following the launch of this Policy, my Office has intensified training of staff to ensure they are fully integrating a "gendered" perspective and victim-responsive approach in all aspects of our work. We have sought to be innovative in utilising the Statute's legal framework to ensure that we fully present to the judges the gendered aspects of the conflicts we investigate. We are also systematically implementing the Policy to ensure we bring charges of SGBC across our cases where the evidence supports doing so.

Gender Analysis Guidelines

The Policy underscores the importance of applying a **gender analysis** in all areas of our work.¹ By paying special attention to how gender impacts the way in which victims experience harm, we are able to conduct investigations and prosecutions that more fully reflect victims' harm.

In the context of our preliminary examinations, we are analysing, for example, allegations of sexual violence in detention against male detainees in Ukraine and in Iraq. In Nigeria, we have been analysing whether there is a reasonable basis to believe that Boko Haram committed the crime of persecution on the basis of gender grounds against women and girls, men and boys. In Colombia, we determined that there is a reasonable basis to believe that members of the armed forces, guerrilla and paramilitary groups committed SGBC. We have been monitoring relevant national proceedings in Colombia, including those relating to the investigation and prosecution of such crimes.

Children's Policy

In November 2016, I launched a Policy on Children, to highlight the plight of millions of children who are trapped by conflict, and to enable my Office to more robustly address crimes against and affecting children.

The Statute recognises as international crimes, several acts directed specifically against children, such as the war crimes of child recruitment and use, the forcible transfer of children as an act of genocide, and the trafficking of children as a form of the crime against humanity of enslavement or sexual slavery.

This Policy on Children reinforced my Office's child-sensitive approach in all aspects of our activities involving children. During the investigation and prosecution of crimes against and affecting children, every decision pertaining to their involvement in the judicial process is made with the specific child's best interest as a primary consideration.

Let me say a few words about our crucial first case, against militia leader, Mr Thomas Lubanga Dyilo. We used the Statute's legal framework to highlight the issue of child soldiers through our successful prosecution of that case. Mr Lubanga was convicted of committing the war crimes of enlisting and conscripting children under the age of 15 into his *Patriotic Forces for the Liberation of Congo*, and using them to participate actively in hostilities. The case also highlighted the broader impact of crimes against children on entire communities, depriving these communities of their future potential and greatest resource. Even children who were not recruited suffered from the traumatic experience of living amid conflict, insecurity and with a constant fear of being attacked, harmed or abducted.

¹ "Gender analysis examines the underlying differences and inequalities between women and men, and girls and boys, and the power relationships and other dynamics which determine and shape gender roles in a society, and give rise to assumptions and stereotypes. In the context of the work of the Office, this involves a consideration of whether, and in what ways, crimes, including sexual and gender-based crimes, are related to gender norms and inequalities."

While the Office can only bring a select number of cases, each of those cases can have a significant deterrent impact; by changing the behaviour and choices of political and military leaders around the world. The former Special Representative of the Secretary-General for Children in Armed Conflict, Radhika Coomaraswamy, stated that the Lubanga trial had established “*a crucial precedent.*” She testified in 2010 that the prosecution of child recruitment had had a chilling, deterrent effect on armed groups across the world, and she cited in this regard the release of 3 000 child soldiers in Nepal.

We also learnt important lessons from the Lubanga trial, which we have implemented in our ensuing cases. An effective Office of the Prosecutor must be a continuously learning Office, which engages in regular self-assessment, and pursues innovative strategies to overcome challenges.

Just recently, on 8 July 2019, ICC trial judges unanimously issued a conviction in my case against Mr Bosco Ntaganda, another rebel commander from the Democratic Republic of the Congo (“DRC”). Ntaganda is widely known as “the Terminator.” I prosecuted him for crimes against civilians in the DRC, and for the recruitment, use, rape and sexual slavery of children under the age of 15 in his armed group. This is another ground-breaking case, because it pushed the envelope of international humanitarian law by confirming that rape and sexual slavery of soldiers by members of the same armed group against their own members is a war crime which the ICC is empowered to prosecute. Ntaganda was convicted for SGBC committed against both female and male civilian victims, and female militia members under the age of 15. On 7 November 2019, the Trial Chamber sentenced Mr Ntaganda to 30 years of imprisonment, and highlighted the long-term physical, psychological and social harm experienced by victims of sexual violence and crimes against children.² He has appealed his convictions, and is expected to appeal his sentence.

My case against a former commander of the Lord’s Resistance Army (“LRA”), Dominic Ongwen, also highlights best practices that we have honed over time. This is the first case before the ICC to include charges of forced pregnancy and forced marriage. During the conflict in Northern Uganda, hundreds of young women were abducted from their family homes as children, and conscripted into the LRA, where they were used as child soldiers and forced wives. The abducted girls were distributed amongst LRA fighters, as prizes. They could not refuse sexual advances from the men they had been awarded to. They were beaten and caned for trying to escape. For years, they were subjected to repeated rape. Some were as young as seven years old, when their childhood was disrupted and shattered.

“I felt like my whole body was being torn apart.” These are the devastating words that a young woman used to describe to the Court, the night that she says she was raped as a child, by a commander from the LRA. She was a school girl at the time, who was abducted from her home by rebels.

² See *Prosecutor v. Ntaganda*, Sentencing judgment, ICC-01/04-02/06-2442, 7 November 2019 (“*Ntaganda Sentencing Judgment*”), Disposition, p. 117. See also para. 246, sentencing Mr Ntaganda to 28 years of imprisonment for rape of civilians as a crime against humanity and a war crime, 17 years of imprisonment for rape of children under the age of 15 incorporated into the UPC/FPLC as a war crime, 12 years of imprisonment for sexual slavery of civilians as a crime against humanity and a war crime and 14 years of imprisonment for sexual slavery of children under the age of 15 incorporated into the UPC/FPLC as a war crime.

The women who survived these forced relationships were profoundly traumatised, physically and emotionally, by their life in captivity. After the conflict, many were considered ineligible for marriage. And their forced marriages generated yet another category of victims – children born from those forced relationships.

In order to reflect the range, severity and multifaceted character of the SGBC in this case, we brought cumulative charges on the basis of the evidence we were able to collect. We brought a wide variety of charges for SGBC to reflect the multidimensional harm experienced by victims in this case. Our charges against Ongwen include forced marriage, torture, rape, sexual slavery, enslavement, forced pregnancy, and the war crime of outrages upon personal dignity.

In keeping with best practices at the national level for securing and preserving sexual and gender-based evidence, my Office employed a special procedure under the Statute, article 56, to present, record and thus preserve the testimony of sexual and gender-based victims, during the pre-trial phase of the case. This helped to minimise the distress that these vulnerable witnesses may have had to face on account of a prolonged lapse of time between providing their accounts to my Office and testifying before the judges at the eventual trial. During this process, we requested, and the Pre-Trial Chamber granted corollary protective measures for these vulnerable witnesses.

Turning to the Mali Situation, this year my Office requested and was granted an arrest warrant against Mr Al Hassan, member of Ansar Eddine and *de facto* chief of its Islamic police, on charges that he allegedly participated in implementing a policy of forced marriages in Timbuktu, leading to repeated rapes and sexual enslavement of women and girls. This case represents the first time that gender persecution is charged at an international criminal court or tribunal. My Office argued that the imposition of a dress code and other restrictions on freedom of movement and association which disproportionately affected women violated their fundamental rights, and with the commission of several crimes, constituted persecution.

On 30 September 2019, the Pre-Trial Chamber unanimously confirmed charges against Mr Al Hassan for the crimes against humanity of rape and sexual slavery, persecution of the inhabitants of Timbuktu on religious and gender grounds, other inhumane acts, and torture, and the war crimes of rape and sexual slavery, cruel treatment and outrages upon personal dignity, amongst others. Proceedings in that case are ongoing.

In closing, I wish to reiterate two crucial practices that we are applying across the board relating to charging and sentencing. Where appropriate, we are charging acts of SGBC as different categories of crimes within the Court's jurisdiction, in order to properly describe the nature, manner of commission, intent, and impact of the sexual violence.

We are also proposing sentences which give due consideration to the sexual and gender dimensions of the crimes charged, including the impact on victims, families, and communities, as an aggravating factor and reflective of the gravity of the crimes committed.

Ladies and gentleman, there is *still* a great deal of work for us to do to close the impunity gap for SGBC. Academics, civil society and policy makers can play a critical role in supporting and enhancing the Office's efforts to investigate and prosecute these crimes: by amplifying the voices of victims, and conveying critical information about the Court's cases to communities around the world.

The Court's jurisprudence, and the Office's strategies, tools and practices can provide important guidance to national jurisdictions, and to other actors who are investigating and prosecuting these crimes.

Archbishop Desmond Tutu said, "If you are neutral in situations of injustice, you have chosen the side of the oppressor." More than ever before, the most vulnerable amongst us need allies and advocates for justice - when they are abused, exploited and discarded by the powerful.

Ultimately, this is at the heart of what my Office is doing – we are striving to use the Rome Statute to secure justice for the most vulnerable, when they are subjected to the worst crimes.

The ICC is however not a panacea. We are committed to doing our part, with full respect for the principle of complementarity. It is equally vital that SGBC are vigorously pursued through national criminal justice systems to punish the perpetrators of such abhorrent crimes and through deterrence prevent further victimisation.

Ladies and gentleman, we cannot bring Uyinene back to life. However, her death must mark a clear red line for all of us – there must be no tolerance for sexual and gender-based violence.

Thank you. | OTP