



## ***The International Criminal Court's New Chief Prosecutor:***

### ***Challenges and Opportunities***

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#### ***Introduction***

The International Criminal Court (ICC), the world's first and only permanent body set up to investigate and prosecute the international crimes of genocide, crimes against humanity, war crimes and aggression, is currently conducting investigations in [14 situations, prosecuting 30 cases, and considering whether to open formal investigations in another 8 situations](#). Although there were doubts about its viability when the Rome Statute establishing the Court came into force in July 2002, it is now clearly an indispensable part of the architecture of international justice. Indeed, "[\[t\]housands of victims and survivors around the world see in the ICC their last resort for justice](#)." Yet, the Court faces a number of serious challenges. While [123 states are party to the Rome Statute](#), major powers such as the U.S., Russia, China and India are not among them. Moreover, the Court faces limited [financial and human resources](#) and a number of institutional issues, many of them raised in an [Independent Expert Review](#) of the Court released in September of last year. Since the [Rome Statute](#) establishing the ICC came into force 19 years ago, only five persons have been convicted of the ICC's core crimes (four of [them final convictions](#) and [one still subject to appeal](#)). At the same time, the Office of the Prosecutor (OTP) has opened (or indicated an intention to seek authorization to open) investigations into several situations – namely [Afghanistan, Palestine](#) and [Ukraine](#) – that implicate conduct committed by nationals of states not party to the Rome Statute – namely the U.S., Israel and Russia – triggering [unprecedented hostility](#) toward the Court, which had already been the subject of [waning global support](#). It is against this backdrop that about three months ago the Court's third prosecutor, Karim Kahn, appointed in February for a nine-year term, [assumed his post](#).

The OTP has a responsibility [to select which situations to investigate, to investigate those situations, and to select, investigate and prosecute individual cases arising out of those investigations](#) (at arts. 13, 15, 53, 54). It is, as others have put it, "[the engine of the court](#)." How the next prosecutor navigates the challenges and opportunities he faces – and what kind of leadership he offers – will, therefore, have a considerable impact on how the Court functions and how it is perceived. Others – both in [discussion forums](#) and in the context of the more formal [Independent Expert Review](#) – have raised a number of challenges and

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offered important recommendations that the new prosecutor would do well to take into account, particularly regarding the OTP's working environment and culture (see, for instance, [The Next ICC Prosecutor Must Embody Integrity in the #MeToo Era](#) and [ICC Prosecutor Symposium: The Prosecutor's Commitment to Ensuring Gender Equality](#)). In the face of limited successes and institutional inefficiencies, however, another critical aspect of the new prosecutor's job will be to (re)inspire confidence in the Court, both among states as well as victims and survivors. This post will focus on the challenges and opportunities for Mr. Kahn raised by a number of decisions and policy papers issued by the outgoing prosecutor, Fatou Bensouda, in her very last week that might well have an impact on whether he is able to engender a renewed sense of engagement with and support for the Court.

## ***Preliminary Examinations: Benchmarking Framework for the Situation in Colombia***

On June 15, 2021, Ms. Bensouda issued an invitation to stakeholders to consult on the development of a [benchmarking framework](#) with respect to the Office's ongoing preliminary examination into the situation in Colombia. A preliminary examination is the process by which the OTP determines whether a situation meets the legal criteria established by the article 53(1) of the Rome Statute to warrant an investigation. Much has been written about preliminary examinations and the potential of those examinations to catalyze prosecutions at the domestic level (see, e.g., [Pressure Point: The ICC's Impact on National Justice: Lessons from Colombia, Georgia, Guinea, and the United Kingdom](#)). But the situation in Colombia is the Court's longest running preliminary examination, having been initiated by the OTP 17 years ago. While, by some accounts, [the Court's engagement has kept accountability for international crimes on the agenda and helped to counter some obstacles to prosecution](#) as Colombia moved through its peace process, critics have pointed out that its [influence has been limited](#). At the same time, prolonged examinations may impair the collection of evidence, frustrate victims as they wait for justice for the crimes perpetrated against them years – if not decades – earlier, and ultimately reduce the willingness of states to cooperate with the OTP (see [Independent Expert Review](#), at paras. 706, 711-71). As one commentator put it, [“it seems troublesome to potential targets of prosecution, affected communities in general, as well as the victims and survivors of international crimes, to let preliminary examinations drag on indefinitely.”](#)

Ms. Bensouda's call for a consultation on benchmarks that would help it reach a final determination in Colombia is, therefore, a welcome development. Not only is it consistent with the recommendation of the [Independent Expert Review](#) (Recommendations 255), but it may free up much needed resources for the OTP to focus on ongoing investigations and prosecution of cases. As one commentator has noted, [“The ICC needs cases, meaning](#)

[successful cases. More of them. Without more successful cases, none of the hopes for the ICC — deterrent, expressivist, symbolic — will be achieved.](#)” The closing of long-term, resource-intensive preliminary examinations may therefore allow the OTP to focus more of its resources on improving its investigative and other strategies necessary to improve its prosecution record (see, e.g. [What can and should the next Chief Prosecutor do to improve the ICC’s investigation techniques?](#)), engendering renewed confidence and support in the Court.

Of course, the devil is in the details. While Ms. Bensouda proposed a set of factors that may assist the OTP in reaching a final determination in Colombia ([ICC-OTP, Situation in Colombia: Benchmarking Consultation](#), at paras. 35-42), it will be up to the Mr. Kahn to see this process through in a way that addresses the negative effects of indefinite examinations without triggering new impediments to accountability. As commentators have noted, implementing benchmarks may, for instance, [“lead to less cooperation as states under scrutiny would choose to ‘wait out the clock’”](#) or inhibit the ability of the prosecution to [strategically time the opening of its investigations](#). Thus, leading these consultations and implementing a preliminary examination closure plan will be one of the most daunting challenges facing the new prosecutor.

## ***New Investigations: Request for Authorization to Proceed with Investigation of Situation in the Philippines***

In addition to Afghanistan and Palestine, during her tenure Ms. Bensouda opened [investigations](#) in Bangladesh/Myanmar, Burundi, Georgia, and Mali, and a second investigation in the Central African Republic. She also indicated that there was a reasonable basis to believe that crimes within the jurisdiction of the ICC were committed in [Nigeria](#) and [Ukraine](#), suggesting they too warranted full investigation. And in her last week in office, she requested [authorization to proceed with an investigation of the situation in the Philippines](#).

The Philippines situation is the first to address impunity for extreme violence committed in the context of a government’s “war on drugs” campaign, violence that has affected [“between several thousand and tens of thousands of civilians.”](#) President of the Philippines, Rodrigo Duterte, [responded](#) to the ICC’s efforts by withdrawing from the Rome Statute in 2019 and by indicating that he would not cooperate with the investigation. Thus, as with some of the other investigations she has opened, the request to proceed with the Philippines investigation may be interpreted as a bold commitment to end impunity for grave crimes while safeguarding the independence and impartiality of the OTP.

Yet, some critics have suggested the Court already has an [“overambitious”](#) docket, and argue the new prosecutor should limit and [“prioritize a few investigations,”](#) which would allow for more cases per situation and potentially increase the Court’s impact on situation

countries (see [Independent Expert Review](#), para. 644). Of course, this argument raises the question of *which* claims for justice should be selected and prioritized, particularly given the limited human and financial resources of the Court.

In deciding which situations to move from preliminary examination to investigation, the OTP considers whether a crime within the jurisdiction of the Court has been or is being committed; admissibility under Article 17 (consisting of complementarity and gravity); and the interests of justice ([Rome Statute](#), arts. 53(1), 15 and 17). One of the possible answers to the question of how the OTP should select among various claims for justice was given by the Independent Expert Review, which was to “narrow... the standards for admissibility by applying a higher threshold for gravity.” ([Independent Expert Review](#), para. 645, Recommendation 227). While there is no formal threshold for assessing gravity, in making this assessment, the OTP has indicated it will evaluate [the scale, nature, manner of commission of the crimes, and their impact](#). If the new prosecutor wishes to (re)inspire global confidence in the Court is, a key question for him will be how to interpret these terms, particularly in light of current critiques of international justice – and even the broader field of transitional justice. Critics have argued, for instance, that transitional justice efforts, among other things, do “[too little to disturb the postconflict status quo, treating symptoms rather than causes](#)” and are “[oblivious to multiple forms of economic, structural, cultural, everyday and gender-based violence](#).” While the Court faces obvious jurisdictional limits in how far it might be able to expand its work to address these critiques, the real-world relevance of the Court and stakeholders’ perception of the Court’s success (and presumably increased confidence in the Court) may well depend on whether the situations selected by the OTP reflect even an attempt to address these issues. Thus, one of the challenges facing the next prosecutor is whether to interpret gravity (and other relevant Rome Statute criteria) so as to allow for selection of situations that would ensure greater access to justice for victims of crimes that reflect these broader forms of violence, such as perhaps economic or transnational environmental crimes.

## ***New Crime Emphasis: Policy on Cultural Heritage***

In addition to the selection of situations, the OTP selects and prioritizes specific *cases* within situations, defined as “[specific incidents during which one or more crimes within the jurisdiction of the Court may have been committed, and whose scope are defined by the suspect under investigation and the conduct that gives rise to criminal liability under the Statute](#).”

On June 14, 2021, Ms. Bensouda officially published the OTP’s [Policy on Cultural Heritage](#), noting that the policy is in line with the OTP’s Strategic Plan “[to pay particular attention to crimes against or affecting cultural heritage and the commitment to systematically investigate and prosecute such crimes](#).” According to Ms. Bensouda, “[the degradation and destruction of cultural heritage constitutes a great loss to those communities which are directly affected, as well as to the international community as a](#)

whole.” Thus, the policy also seems to be in line with the OTP’s [Policy Paper on Case Selection and Priorisation](#), which notes that the OTP prefers “[charges that offer a representative sample of the main types of victimisation and the communities affected by the crimes in a situation.](#)”

The Policy on Cultural Heritage comes about five years after the conviction of [Ahmad al-Faqi al-Mahdi](#), an Islamist radical who plead guilty to destroying ancient shrines in the historic Malian city of Timbuktu. The conviction was touted as a breakthrough for the ICC, sending “[a powerful signal that the ICC takes cultural crimes as seriously as it does any other war crime.](#)” Yet Al-Mahdi’s conviction and the new policy raise questions about the kinds of crimes the Court will focus on, particularly in light of its limited human and financial resources. As with the selection of situations, the selection and prioritization of cases (and crimes) will remain a significant challenge for the new prosecutor. Indeed, as with the selection of situations, which cases (and crimes) he chooses to concentrate on – and whether he can successfully prosecute them – is likely to affect stakeholders’ perception of and confidence in the Court.

## ***Current Situations: Policy on Situation Completion***

As the Court’s docket expands, observers have pointed out that [too many open investigations remain open without conclusive findings](#). This issue has also been a subject of the [Independent Expert Review \(at paras. 684-694\), which strongly encouraged the adoption of a completion strategy, in view of the “increasing OTP workload and increasingly scarce resources.”](#) On her last day in office, Ms. Bensouda published the OTP’s [Policy on Situation Completion](#).

The policy essentially advocates an approach similar to that taken in the completion strategy adopted by the *ad hoc* tribunals for the former Yugoslavia and Rwanda. That strategy set “[a deadline for completion of investigations leading to new indictments, and then progressively concluding the remaining cases;](#)” scaled down resources as the tribunals “[transitioned to residual activities;](#)” and sought “[to support national or regional processes aimed at building and enhancing domestic capacity to address international crimes](#)” (at para. 10). Thus, the adoption of this strategy not only has the potential to free up much needed resources to support the OTP’s current priorities, but also presents an opportunity for the new prosecutor to ensure that the Court’s work has a positive impact in the relevant situation country and to demonstrate that impact to the Court’s stakeholders. Indeed, as the [Independent Expert Review notes \(at paras. 694\), a completion strategy presents an opportunity to “consider how best the positive impact in situations countries can be achieved, and how it might be measured.”](#)

[While the Policy on Situation Completion is somewhat thin on details here, it does note that the Office will continue “to identify opportunities to emphasize and support the primary responsibility of States to exercise their jurisdiction over crimes within the jurisdiction of the Court,” including through “cooperating with national jurisdictions](#)

[conducting investigations on serious crimes, \[such as\] by responding positively as far as possible to requests received under article 93\(10\) of the Statute](#)” (at para. 29). However, it also cautions that efforts to contribute or cooperate with broader legacy initiatives carried out by the Court or its partners will not form part of its strategy, as such activities “[do not directly relate to the completion of the Office’s own mandate](#)” (at para. 30). While this limitation may be a product of resource concerns expressed by states during the prosecutor’s consultation process, it appears inconsistent with the relevant recommendations of [the Independent Expert Review](#), which include that “[s]trategies to...support...local justice processes” – as well as the development of a joint outreach strategy for completion situations – be incorporated into the OTP policy on completion ([Recommendation 247](#)). Support to local justice processes, like capacity-building efforts, and outreach initiatives are precisely the kinds of activities that are likely to leave a lasting positive impact on affected communities. Thus, whether and how the new prosecutor implements these recommendations – within or beyond the OTP’s completion policy – will no doubt have an impact on affected communities’ perception and confidence in the Court.

## **Conclusion**

As I have laid out, the decisions and policies made by the former prosecutor in her last week in Office will provide Mr. Kahn with a number of opportunities to (re)inspire confidence in the Court. That said, realistically, what he will be able to accomplish will likely be determined by the human and financial resources that states have made available to the OTP. As others have pointed out, while the Court’s docket has expanded significantly over the last five years, the states that fund its budget “[have limited it to more or less zero growth since 2017](#).” Indeed, as Ms. Bensouda herself warned in her statement accompanying her request for authorization to open an investigation into The Philippines, “[\[t\]here is a serious mismatch between situations where the Rome Statute demands action by the Prosecutor and the resources made available to the Office](#).” Thus, one of Mr. Kahn’s essential tasks will be to press states and other stakeholders to increase the budget to meet the needs of his office. Without this, Mr. Kahn will be constrained in his ability to seize the opportunities presented by Ms. Bensouda’s actions and will have a difficult time engendering a renewed sense of engagement with and support for the Court.