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*Presentation of the 2020 Annual Report on Preliminary
Examination Activities*

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Opening remarks

Good afternoon, Excellencies, Ladies and Gentlemen, dear colleagues.

Thank you all for being here in these unique, extraordinary circumstances, as we hold our presentation remotely. I thank you for joining.

We are here today for the presentation of the annual Preliminary Examinations Activities Report of the Office of the Prosecutor (“Office” or “OTP”), which was published online yesterday.

Before moving to the report, however, allow me to note that this has been a difficult year for my Office, as it has been for all of you. I cannot deny that the COVID-19 pandemic and other events have impacted on my Office’s capacity and resources to carry out all planned activities. My Office’s work had to be moved to a fully remote set-up. Many planned activities that required travel could not take place. My staff – and indeed you, our interlocutors working with us during the preliminary examination stage – all had to adapt to new ways of working. Despite these challenges, the results we obtained this year, demonstrate that even in the face of adversity, my staff and my Office carried out our mandate under the Statute to the best of their abilities with dedication and resolve, under difficult circumstances. This is something I am proud to say as I launch the final Preliminary Examinations Activities Report of my mandate.

Now let me turn to the report. As you can see, we have been busy delivering on the pledge, I made this time last year, to bring as many preliminary examinations as possible to a determination before the end of my term, to the extent possible and following our rigorous examination process in accordance with the Statute.

Specifically, last year, I announced my intention to reach determinations with respect to all files that have been under preliminary examination during my tenure. That is, to decide: (1) whether the criteria are met to open investigations, (2) whether a decision should be taken not to proceed with an investigation because the statutory criteria have not been met, or (3) if, exceptionally, a situation is simply not ripe for a determination, to issue a detailed report stating why I believe that a particular situation should remain under preliminary examination and to indicate relevant benchmarks that would guide the process.¹

I had also announced last year my Office’s projection that several preliminary examinations would likely end in 2020, and that several of those would progress to the stage where investigations were warranted.

Although the impact of COVID-19 has not allowed my Office to fully achieve all projections made last year, we have brought a number of preliminary examinations to completion, while for a number of others, I expect to make a determination before the end of my mandate on whether to proceed or not. We are committed to this task, and this is a priority I have set for the Office.

¹ [Remarks of ICC Prosecutor Fatou Bensouda at the Presentation of the 2019 Annual Report on Preliminary Examination Activities](#), 6 December 2019, p. 9.

As we have just announced, during the latest reporting period, four preliminary examinations have concluded. Three situations have been slated for investigation: Palestine, announced at the end of last year, and Nigeria and Ukraine, both announced last week, while the preliminary examination concerning Iraq/UK did not, in my Office's assessment, meet the criteria under the Statute for proceeding.

I can further confirm that in the course of 2021, on current projections, one or more other preliminary examinations will also likely conclude with the criteria being met to open investigations.

This brings me to a theme I have emphasised throughout my term, and which I characterised yesterday as one of my Office's most pressing challenges - that is the chronic mismatch between our resources and the demands placed upon us.

As I stated yesterday with great candour, the dilemma that we face - given the Court's foundational goals, the expectations of States, civil society, and victims, among other stakeholders, as well as my Office's very real concerns - will only intensify going forward unless it is properly addressed.

It is a situation that requires not only prioritisation on behalf of the Office, to which we remain firmly committed, but also open and frank discussions with the Assembly of States Parties, and other stakeholders of the Rome Statute system, on the real resource needs of my Office in order to effectively execute its statutory mandate.

As I stated in my remarks last year, while 'prioritisation' has rightly become a key term, we must be clear on what we mean by prioritisation and how it might be *applied* in practice.² Prioritisation cannot simply mean that the Office should abandon its mandate because of resource constraints, when it is required by law to act. Of course, we have and will continue to judiciously manage resources, to pace and prioritise. But no amount of responsible prioritisation can address the real resource gap that the Office and the International Criminal Court will increasingly face as new situations become ripe for investigation.

While I will continue to exercise my prosecutorial discretion to select and prioritise cases for investigation, in line with our policy paper,³ the sheer scale of crimes requiring a response, new referrals by States Parties, new incidents of notorious crimes, as well as unpredictable and sudden arrest and transfer operations of suspects in cases that had not seen activity for some time, mean that the human and financial resources of my Office are perennially stretched beyond bearing.

This is not theoretical. This is already my Office's painful experience.

Hence, I call upon States Parties to recognise the heavy burdens and complex challenges before my Office, and to equip my staff and my successor with the means necessary to deliver results.

² [Remarks of ICC Prosecutor Fatou Bensouda at the Presentation of the 2019 Annual Report on Preliminary Examination Activities](#), 6 December 2019, pp. 11-12.

³ ICC-OTP, [Policy paper on case selection and prioritisation](#), 15 September 2016, paras. 50-51 noting that, in the light of the broad discretion enjoyed in deciding which cases to bring forward to investigation and prosecution, the Prosecutor may consider a range of strategic and operational prioritisation factors, in addition to case selection criteria.

In the remainder of my term, I and my team intend to take the necessary strategic and operational decisions to manage the Office's workload, bearing in mind the legitimate expectations of victims and affected communities, amongst others. I also intend to consult the incoming Prosecutor, once elected, on these varied and complex issues.

And in the interim, we will continue to take measures to ensure the integrity of future investigations. These measures, a number of which we take during preliminary examinations as they progress, include the identification and implementation of evidence preservation needs; securing potential leads; identifying potential witnesses who may be at risk, including for the purpose of pursuing unique investigative opportunities; as well as conducting advance operational planning to identify threats and opportunities, the prospects for cooperation, a concept of operations, provisional case hypotheses, witness management and witness protection considerations, as well as resource implications.

Now turning to the situations covered in our report, I will not detail these at length as you have the document before you, but I will provide some brief remarks, followed by some reflections on the steps the Office has taken during the past year to enhance the effectiveness and efficiency of the preliminary examination process, some of which touch upon themes treated in the Independent Expert Review report.

With respect to **Palestine**, as you know, at the end of last year I announced that we had concluded the preliminary examination and determined there was a reasonable basis to proceed. I determined that war crimes have been or are being committed in the West Bank, including East Jerusalem, and the Gaza Strip; that the potential cases arising from the situation would be admissible; and that there were no substantial reasons to believe that an investigation would not serve the interests of justice.

Since there was a referral from the State of Palestine, I did not need to seek authorisation to open an investigation. Nonetheless, I proceeded to file a request with the Pre-Trial Chamber asking for a ruling on the jurisdictional scope of the Court's competence – more specifically, I asked the Pre-Trial Chamber to confirm that the Court may exercise its jurisdiction with respect to any alleged ICC crime occurring in the Occupied Palestinian Territory, that is the West Bank, including East Jerusalem, and Gaza. In other words, we asked the judges to confirm the territorial jurisdiction where we can investigate.⁴

I have been criticised by some for seeking this ruling – and I appreciate the frustrations caused by the resultant delay in opening investigations. My intention was to secure a swift resolution of this complex question, as you know.

I sought the request because this matter is of such fundamental importance that it will be litigated, at some point, during the life cycle of the situation. Better now, at the outset, where its resolution can pave the way for an effective investigation on a judicially tested ground, rather than years down the line when a suspect is in the dock. Moreover, because my powers to require cooperation from

⁴ Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, [ICC-01/18-12](#), 22 January 2020.

States Parties are linked to the Court's jurisdictional competence, the lack of clarity and even conflict among some States Parties as to the extent of that authority raised the very real prospect of early disputes on the legality of my cooperation requests.

Resolving this issue at the outset clears the path for effective investigations. Since this issue could not be avoided, I asked for a ruling as early as possible, to be delivered expeditiously.

I am aware of the pace of proceedings, almost a year hence. But I also recognise that the question posed is a highly complex one which has divided scholars, practitioners and States. I remain hopeful of a ruling early in 2021.

With respect to **Afghanistan**, as you know, this situation is now at the investigation stage. We have received a request for deferral under article 18 of the Statute from the Government of Afghanistan – and given the extraordinary circumstances of the COVID-19 pandemic, I agreed to provide additional time to the Afghan authorities to submit their request and supporting documentation.⁵ Since then we have been interacting with the authorities to obtain additional information, as foreseen in the Rules, to allow us to form a view on whether we should revert to the Pre-Trial Chamber to seek authorisation to proceed – a decision which I intend to reach early in the new year.⁶

With respect to the **Iraq/United Kingdom** (“UK”), last week I issued a lengthy [report](#) setting out the reasons why we believed there was not a basis to proceed. I fear the initial responses to my decision resulted in some caricatures – as we anticipated, my report has been described by some as an endorsement of the UK's efforts, and by others as a degenerate display of double-standards. I hope that by now, after time has allowed for a more sober reflection of our report, it will be seen for what it is - an intellectually honest and candid effort to apply the law to the facts before us. What you have before you is my Office's assessment in full public display, showing how we came to the conclusions that we did.

The report, as you know, turned on shielding, whether we could conclude that the UK authorities, particularly its investigative and prosecutorial bodies, had taken steps to shield potential suspects from criminal accountability. We identified several indicators of shielding and emphasised that had these been substantiated, an investigation would have been warranted. We expended considerable effort on this process, given its determinative nature – including by assigning investigators and a senior trial lawyer to work within our article 15 powers in support of the preliminary examination team. While the report sets out the numerous issues that we identified in the process, it also candidly acknowledges that ultimately we could not substantiate the allegations of shielding. This is not a blanket endorsement – far from it. I would invite you to read our report.

Some have asked why we needed evidence of shielding. We set out in our report a two-fold requirement for this. Firstly, as the Appeals Chamber has emphasised, as Prosecutor, I need to be satisfied on complementarity, pursuant to my duty under rule 48, in reaching conclusions on

⁵ *Situation in the Islamic Republic of Afghanistan*, Notification to the Pre-Trial Chamber of the Islamic Republic of Afghanistan's letter concerning article 18(2) of the Statute, [ICC-02/17-139](#), 15 April 2020.

⁶ See article 18(2)-(3), ICC Statute, rules 52-53, ICC RPE.

admissibility. But equally, we must anticipate Court proceedings that follow.⁷ Specifically, under article 18, as you know, a State may request that I defer to its proceedings. That deferral request, if it is substantiated with evidence showing the existence of relevant domestic criminal proceedings, takes effect *unless* I revert to the Pre-Trial Chamber requesting to be authorised to proceed.⁸ But to do so – to request the Pre-Trial Chamber to authorise the Office – I would need to substantiate why. Since the Office did not conclude that the UK had remained inactive, we would need to argue why we believed the UK’s domestic process had, nonetheless, been inadequate. In other words, in this instance, I would need to provide evidence to the judges in article 18 proceedings, capable of demonstrating that the domestic authorities were in fact unwilling genuinely to investigate and/or prosecute, due to intentional efforts to shield perpetrators from criminal responsibility. As we explained in our report, following a detailed inquiry, and despite the concerns expressed in our report, we determined that we would be unable to provide evidence to substantiate this allegation in proceedings before the Court. Given this outcome, it would have been disingenuous of me, in turn, to have lodged an article 15 application only to reach the article 18 stage, knowing that we would not prevail.

My record in taking difficult decisions, without fear or favour, is well known. Moreover, my term as Prosecutor is almost up. What interest would I have in engaging in double-standards? Or in tarnishing the reputation that I have built with my dedicated team - that we don’t do politics, but apply the law vigorously and responsibly? The last time I checked, I am the one who was sanctioned for doing my job by the book, and I have continued to do just that. I take great exception to facile charges of double-standards, especially given who I am, what I have done as Prosecutor and what this Office has stood for and will continue to stand for, as a robust champion of the Rome Statute.

I recognise that my decision may be unpopular or disappointing, but is it not possible that I have acted with integrity in this file too?

The Office does not do popularity contests, as you know. It does professional work as a prosecuting office. Sometimes the end result is one that may be better received, in other instances, it may not. But we will continue to do our job professionally and consistently.

I also recognise my report will be criticised and heavily scrutinised – the public interest demands no less, and I invite it. It has been a difficult assessment for my Office to conclude, and I expect that comes through in our report.

As you know, there have been other key developments across multiple situations.

With respect to **Nigeria**, on Friday I [announced](#) that the assessment had ended with the legal criteria for opening an investigation being met. The scale of the violence in Nigeria is unprecedented. Since 2009, the insurgency by Boko Haram and counter-insurgency operations by the Nigerian Security Forces (“NSF”), alone, are reported to have resulted in the death of between 39,000 and 41,000

⁷ See 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, paras. 35-40 (concerning rule 48), and 42-43 (concerning article 18).

⁸ See article 18(2), ICC Statute, and rule 53, ICC RPE.

persons, including over 16,000 civilian victims. Although the largest proportion of the crimes identified by the Office have been attributed to Boko Haram and its splinter groups, we have determined both sides responsible for committing acts constituting war crimes and crimes against humanity.

As I mentioned in my statement, while I recognise that the Nigerian authorities remain committed to undertake domestic proceedings, which I have long supported and will continue to support, nonetheless, as things stand, the requirements under the Statute are met for my Office to proceed.

With respect to **Ukraine**, we similarly [announced](#) on Friday the completion of our preliminary examination with the conclusion that the criteria for opening an investigation are met. The ongoing armed conflict in eastern Ukraine has also had a devastating impact. Over the course of the past six and a half years, more than 10,000 persons are estimated to have been killed, including more than 3,000 civilians, and thousands more injured. Our assessment has identified crimes committed in the context of the conduct of hostilities in eastern Ukraine, including intentionally directing attacks against civilians and civilian objects as well as against protected buildings; a range of crimes committed during detentions; as well as crimes committed in Crimea. During the past year, my Office has completed its assessment of admissibility, in terms of both complementarity and gravity, and concluded that the potential cases likely to arise from an investigation into the situation, involving all parties, would be admissible.

As with Nigeria, we look forward to a constructive and collaborative exchange with the Government of Ukraine and, it is my hope, with the Government of the Russian Federation, to determine how justice may best be served under the shared framework of complementary domestic and international action.

The other remaining chapters of the report show the progress we have made during 2020, albeit without final decisions being reached at this stage. I will mention here briefly that in **Venezuela I**, we have set out the findings on and concluded the assessment of subject-matter jurisdiction. In **Colombia**, we continued to assess domestic proceedings and are hoping to share our benchmarking framework during 2021. In **Guinea**, I publicly [expressed](#) my concern over the delays in the proceedings and have similarly set out a goal to share a benchmarking framework to guide the preliminary examination process and to enable decision making. In **the Philippines**, where our intention to bring the preliminary examination to a conclusion during 2020 was impacted by the COVID-19 pandemic, the report notes that we anticipate reaching a determination in the first half of 2021. We have also made progress in the newest preliminary examinations opened in 2020, with respect to the referral by the Government of Venezuela (Venezuela II) and the referral by the Government of Bolivia, where, with respect to both situations, we hope to bring our subject-matter assessment to determination by mid-2021.

In implementation of my Office's [Policy](#) on Sexual and Gender-Based Crimes, we have also conducted a gender analysis in our preliminary examinations, such as by assessing how underlying gender norms and inequalities influence the commission of crimes. This has been relevant both for our identification of crimes, as well as for our assessment of gravity.

I have already taken up much time, but let me end with some brief reflections of the measures we have taken during the past years to enhance the effectiveness and efficiency of the preliminary examination process. I know these are matters that are on your minds as well, and have been addressed also in the report of the Independent Expert Review. Whereas we will respond to the Independent Expert Review report more comprehensively in the new year, I'm glad to see that its various recommendations appear to chart a similar way forward.

One key step that we have taken is to fully integrate the preliminary examination process as an OTP-wide activity, something that was echoed and applauded by the Independent Expert Review report. This process was already underway, but in the past year we have accelerated it. This has involved assigning additional support to all preliminary examination teams in order to strengthen Office-wide integration, enhance the transition from preliminary examinations to investigations, and further deepen internal harmonisation of standards and practices as well as internal knowledge transfer.

Specifically, a senior lawyer has been placed to oversee the Preliminary Examination Section, in charge of a staff of analysts and legal officers assigned to different situations. While my staff from my Preliminary Examination Section continue to be at the forefront of these processes, in addition, a senior lawyer from the Prosecution Division, a senior investigator from the Investigation Division and an international cooperation advisor from the International Cooperation Section have been assigned to support each preliminary examination team, in addition to their regular duties as members of Integrated Teams conducting investigations and trials. Other sections and units of the Office also continue to provide *ad hoc* support in such areas as forensics, protection, evidence preservation, as well as operational and logistical support. This is all done to support our preliminary examination activities, while fully respecting the legal requirements of the Rome Statute and what is permissible at this stage of our activities.

We have also sought to advance on timelines by adopting the approach of articulating our findings as early as possible in the process. This includes providing article 15 communication senders a detailed reasoning of the Office findings when, upon Phase 1 analysis, these communications are dismissed. This is done in order to enable early identification of relevant factual and/or legal gaps, as well as to facilitate a more focused reconsideration request in any subsequent submission under article 15(6). In some situations, the Office has in recent years sought rulings from the Pre-Trial Chamber to resolve complex jurisdictional questions that have arisen during preliminary examinations, whose resolution has been necessary to progress to the next stage. And as I mentioned earlier, early integration of investigative team leaders, trial lawyers and cooperation advisors contributes to the Office's preparation for the operational roll-out of future investigations, once opened.

And this integration process is two-way, the analysts and legal officers of the Preliminary Examination Section have also deepened their integration into the life cycle of future investigations as they roll out, and by providing ongoing legal inputs on questions that have arisen at the preliminary examination stage.

I will stop there. You have our report before you.

The full report is available in English. Individual chapters have also been translated into the other official languages of the Court, as appropriate, including Arabic, French, Spanish and Russian. The French version of the complete report will be uploaded to our website in the coming days.

I thank you again for your patience and interest.

The floor is open.

I am joined here by my able team, the Deputy Prosecutor, my Chef de Cabinet, and my talented and dedicated colleagues from the Preliminary Examination Section, including the Acting Head of that Section. We look forward to your questions or comments. | **OTP**