

# Improving the Operations of the ICC Office of the Prosecutor: Reappraisal of Structures, Norms, and Practices

Outcome Report and Recommendations

Open Society Justice Initiative & Amsterdam Center for International  
Law/Department of Criminal Law, Amsterdam Law School

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# 1 Background and Objectives

On 25 – 26 March, 2020, the Open Society Justice Initiative and the Amsterdam Center for International Law, jointly with the Department of Criminal Law and the University of Amsterdam, organized the expert workshop “Improving the Operations of the ICC Office of the Prosecutor: Reappraisal of Norms, Structures, and Practices.”<sup>1</sup> Its main objective was to support the work of the Independent Expert Review (IER) Panel in relation to cluster 3 (“Preliminary Examinations, Investigations and Prosecutions”). Held online, the workshop brought together 39 practitioners and experts with experience in investigating and prosecuting international crimes and/or monitoring the relevant proceedings. We also welcomed members of the Office of the Prosecutor (OTP) who both explained the current practices and engaged constructively and actively in the discussion on future directions for the OTP. The event was invitation only and held under Chatham House Rules to enable a candid exchange of views among the participants. All participants spoke in their private capacity.

Over the course of two days, the expert group discussed past and current practices of the ICC Office of the Prosecutor (OTP), lessons learned from other international, regional, and domestic criminal jurisdictions, and potential ways to strengthen the operations of the OTP in the principal areas of its mandate. The expert participants were tasked with formulating evidence-based, practice-oriented, and actionable recommendations on specific questions identified in advance by the organizers.<sup>2</sup> Discussions were actively moderated. At the end of each session or following the workshop, the participants shared their main takeaways, and some of them were requested to provide further input. In addition, the organizers held separate interviews with a selected number of prominent experts who were unable to join the online sessions.

The expert consultation was divided into four sessions, each devoted to one or more key areas or aspects of the OTP’s functioning:

- Preliminary Examinations;
- Investigations;
- Prosecutorial strategies and case preparation;
- Completion strategies, engagement, and outreach; and
- Organization, accountability, and ethics.<sup>3</sup>

This report presents the discussions and extracts key conclusions and recommendations from those debates. On many issues, participants were in agreement as to the existence and nature of problems in the OTP’s operations, while in other instances no consensus emerged and the discussions remained inconclusive. The report briefly outlines the experts’ main positions and formulates recommendations which, in the authors’ view, hold a greater promise of improving the relevant aspects of the OTP’s performance. In doing so, the authors draw upon their own research and analysis, assisted, as

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<sup>2</sup> Annex 2: Concept Note.

<sup>3</sup> Annex 1: Discussion Paper.

appropriate, by further input provided by the experts following the workshop. We would like to emphasize that while remaining true to the discussions, the recommendations presented here do not signify or imply that there was consensus on a particular issue or recommended course of action. Recommendations should be taken as individual, discrete points of input for further consideration.

## 2 Preliminary Examinations

### 2.1 Challenges and Resources

Experts recognized the Preliminary Examinations (PE) process to be essential for successful trials and to the Court's external image and perception. Participants noted several internal and external challenges that the OTP faces in the context of the PE process. For example, the OTP has limited operational capacity and financial means at its disposal during the PE stage. Its staff are stretched over multiple situations. Experts expressed concern that operating on a shoestring budget has severely affected the quality of the OTP's work. Other internal challenges include the bureaucratic divisions between the PE and investigative processes. External challenges include political pressure from states, including different actors within states, civil society organizations, as well as victims' advocates. Lack of cooperation or deficient cooperation from states, which may either refuse to provide the necessary information or overwhelm the OTP with irrelevant or inaccurate information, puts a further strain on its limited capacity.

Addressing these challenges by simply increasing resources available to the OTP may prove impracticable and insufficient. It is necessary to reconsider distribution of existing resources, and carefully examine where redundancies can be removed and processes further streamlined. One solution could be a better integration of functions and existing divisions within the OTP. Experts suggested that the OTP integrate investigators, lawyers, forensic specialists, and situation analysts more closely into PE activities. That would ensure PE work products are more useful for later stages of investigation and case building. Moreover, reducing the length of PEs will go some way to addressing the existing resource inefficiencies in this stage. The distribution of workload would likely shift considerably if the OTP proceeds with any of the proposals for achieving shorter PEs, discussed in the following section.

#### Recommendations

- Urge States Parties to allocate adequate resources to PEs and consider supplementary sources of funding or resource provision, such as professional secondments.
- Consider alternative, and more efficient, allocation of existing resources across teams as well as opportunities to streamline processes and eliminating redundancies.
- Ensure better embedding of PE processes into OTP structures and activities by integrating investigators, lawyers, forensic specialists, and situation analysts more closely into the PE activities.

## 2.2 Phasing, Completion, and Timelines

The OTP has been widely criticized for the excessive duration of its PE activities in some situations. The OTP acknowledges this criticism and has been trying to address it in earnest. Participants noted that limited resources and operational capacity often contribute to lengthy PEs. In particular, the OTP has used a protracted PE process as a tactic to “park” situations ready to be investigated while waiting for resources and capacity to free up. This practice leads to deliberate delays in the PE analysis in order to slow down the pace at which PEs move to investigations. It creates risks such as deteriorating evidence and witnesses losing interest or motivation in cooperating with the Court. Experts also noted that it would be especially problematic if the Prosecutor were to make budgetary calculations a part of the legal analysis on whether the Article 53(1) criteria are met. Experts considered this to be clearly an issue for the States Parties to settle, not the OTP.

Some experts endorsed the idea of imposing standard timelines for the completion of PEs. Under that approach, the OTP would have to decide whether to close a PE or open an investigation within a predetermined period of time. Experts noted the inherent difficulty of defining such timelines in the abstract. Some suggested that setting rigid timelines might result in closing a PE or initiating an investigation prematurely; detract from complementarity; or lead to an even greater politicization of the ICC’s involvement in a situation. Experts noted that in some situations, lengthy PEs have benefitted domestic investigative and prosecutorial efforts. However, there is also the risk that some states would attempt to manipulate the admissibility phase of the PE process in order to keep the OTP from investigating the situation. Therefore, experts suggested, policy and political considerations relating to positive complementarity and cooperation warrant allowing the OTP some flexibility on the length and conduct of PEs.

An alternative to timelines would be for the OTP to take only the time practically necessary to conclude a PE and, if a reasonable basis to proceed is established, (seek to) open an investigation and hibernate it shortly thereafter. The OTP could then use its case selection and prioritization policy to determine when to activate investigations. This “concluding PEs, hibernating investigations” approach triggered considerable discussion and no consensus was reached on its merits. Some experts strongly supported this proposal. In their view, this approach would be more legally sound considering the language of Article 53(1) (“The Prosecutor shall [...] initiate an investigation”). It would also be more transparent and more ethical towards affected communities. Experts noted that lengthy PEs risk losing traction and negatively affect motivation among local civil society and government actors to cooperate with the Court. Moreover, the OTP has broader powers in the investigation stage. It could take advantage of unique investigative opportunities in order to preserve evidence while States Parties (and similarly situated states) have an obligation to cooperate with the Court. Some experts suggested that this approach may prompt States Parties to provide more resources and funding to activate investigations.

Several experts opined that the PE process in general would benefit from greater statutory regulation and judicial oversight. Expanding the scope of judicial oversight beyond procedures under Articles 15(3) and 53(3) would require an amendment to the Rome Statute. However, the “concluding PEs, hibernating investigations” approach would allow states to address any legal issues (such as with respect to national proceedings and admissibility) with the Pre-Trial Chamber pursuant to Article 18.

Other experts noted the political risks associated with this possible approach, as it could negatively impact cooperation and complementarity. Some experts explained that protracted PEs have been beneficial to galvanize local prosecutions. They expressed concern that concluding PEs and hibernating investigations could negatively impact the potential for domestic prosecutions and justice and security more generally. Governments might balk at the graduation from PE to investigation and could therefore be more antagonistic in their interactions with the OTP. Hibernating investigations could also enable impunity; provide an opportunity for evidence to be destroyed; leave victims feeling deceived and disempowered; reignite violence; or trigger the commission of new crimes.

On balance, several participants agreed that the proposed solution of initiating investigations once the statutory criteria are met is preferable to the practice of allowing PEs to last indefinitely given the lack of resources for absorbing new investigations. They emphasized that this approach should only be undertaken if the OTP communicates its decisions and reasoning openly and transparently. Experts agreed that any decisions to conclude PEs and hibernate investigations must be based on objective criteria and that the OTP must be sure to meet its obligation of transparency about the status of an investigation to the state concerned, victims, and the public.

### Recommendations

- Carefully consider all aspects of imposing timelines on PEs. If timelines are adopted, they should allow the OTP some flexibility and the possibility to adapt in the interests of justice, complementarity, and changing dynamics on the ground.
- Carefully consider the proposed “concluding PEs, hibernating investigations” approach. Such considerations should take into account the views of civil society and other stakeholders, and should address concerns about deteriorating evidence, cooperation, political pressure, judicial oversight, and the OTP’s obligations to victims and affected communities. If adopted, any decisions made pursuant to this policy should be accompanied by clear and transparent communication about the decision making process, criteria for prioritization among situations and investigations, any legal consequences, and the impact of a potential decision to “hibernate” an investigation on the interest of justice.

## 2.3 Goals, Priorities, and Transparency in PEs

Experts considered providing sufficient information in the course of the PE process to be essential to maintaining the Court’s credibility and legitimacy. Transparent communications and effective engagement with domestic actors such as victims, civil society, and the relevant government(s) can greatly facilitate the OTP’s work. Experts maintained that it should be recognized as a key tool in achieving the broader goals of ending impunity and preventing atrocity crimes.

The OTP’s current approach to transparent communications involves making public announcements at the start of PE Phase 2 activities; issuing annual reports on PE activities and situation-specific interim and final reports; and engaging in bilateral consultations with states during Phase 3. Experts generally agreed that this process needs improvement. Participants suggested that the OTP could provide more information to both communication senders and the general public on Phase 1 situations, including publicizing its full reasoning underlying decisions not to take situations beyond that phase. In addition,

while the experts welcomed the OTP's annual reports of PE activities, they noted that they are often repetitive and fail to present new content—even over the course of several years. Those reports should provide more specific and meaningful updates on the progress made in specific situations during the reporting period, experts said.

The need for improved transparency and communication cuts across the various scenarios presented for new PE approaches and policies, whether by adopting timelines, hibernating investigations, or continuing with existing approaches. For situations where a timeline is imposed, the stages, implication, and any changes to that timeline need to be communicated clearly and regularly to relevant stakeholders, including those who provide the OTP with information. If the OTP opts for the "concluding PEs, hibernating investigations" approach, it would need to not only make its analysis public but also explain the grounds for, and legal consequences of, hibernation. In particular, it should communicate clearly that the commencement of an investigation merely means that the minimum statutory threshold of "reasonable basis to proceed" has been met in a situation and will not necessarily lead to the OTP bringing any cases in the near future. If the OTP does not change its approach to PEs significantly, whether by adopting timelines or taking steps to concluding them more quickly, the OTP ought to issue interim situation-specific reports detailing reasons for protracted PEs.

## Recommendations

- Enhance transparency with regard to the OTP's decisions on each PE phase and provide more meaningful updates on progress made in situations in the annual PE reports.
- Provide communication senders and the public with more detailed information on Phase 1 situations and about decisions not to move situations beyond that phase.
- Issue situation-specific reports for protracted PEs detailing the reasons for delays in completing a determination under Article 53(1).
- Ensure timely communication and greater transparency on the grounds for, and legal consequences of, lack of progress in certain situations, including timelines and/or hibernation if the OTP proceeds with such an approach.

## 3 Investigations, Charging, and Case Preparation

### 3.1 Investigative Teams, Modalities, and Resources

Experts agreed that the OTP must make a cardinal change in its approach to the composition of investigative teams. The Investigation Division (ID) needs to be strengthened, its staff professionalized, and working practices ameliorated in order to address current deficiencies. Participants acknowledged that ICC OTP investigative teams have at times been severely understaffed and under-resourced. Several experts pointed to the lack of experienced and competent investigators and analysts on the investigative teams. As a result, the OTP has failed to investigate thoroughly or corroborate key evidence in some cases. In multiple cases, this has had a negative impact on prosecutorial success at trial.

While there was no agreement on the appropriate size of a team in concrete numbers, experts agreed that the optimal size and composition of investigative teams should match the unique demands of each situation and case. Several experts noted that the number of investigators on a team is less important than the experience and skills of team members. Experts agreed that it is essential that investigative teams feature highly-skilled criminal investigators with suitable (and, as need be, diverse) forensic profiles, who have prior experience investigating international, transnational, or other serious crimes. Experts considered that each team should be staffed by a sufficient number of analysts able to understand the situation context and process the relevant information. Investigations should be guided by lawyers from the Prosecution Division who must define the focus of investigative activities. Experts also suggested that there needs to be a stronger connection between the Investigation Division and Prosecution Division, and that the OTP official responsible for prosecutions should be involved more closely in supervising the work of the investigators.

The experts agreed that investigative teams should feature a mix of criminal investigators coming to the Court from domestic jurisdictions as well as investigators with other backgrounds (human rights fact-finders, investigative journalists, defense practitioners, analysts, etc.). Participants acknowledged that having staff with other (non-criminal) investigative experience on a team may at times prove beneficial. However, some experts expressed caution in this regard, given potential gaps in knowledge and skills. Experts emphasized the need for the OTP to take additional measures to ensure that it recruits and hires experienced criminal investigators of the highest caliber possible.

Given the considerable differences in investigators' expertise and experience in technical criminal investigation techniques relevant to the ICC, some experts suggested that the OTP develop a mandatory in-person induction and training program to fill gaps in knowledge and experience among investigators. Particular attention should be paid to building criminal cases; the collection, verification, and transfer of different types of evidence, especially novel types of proof (e.g. OSINT and digital evidence); financial investigations; taking a victim-centered approach to investigations; interviewing techniques; and investigating sexual and gender-based crimes, including sexual violence against men and boys. A formal mentoring program can also help build capacity among investigation team members. Such training and mentoring programs should be complementary to improved recruitment practices and are not meant to repair any deficiencies in that regard.

Some experts connected investigative shortcomings to the limited amount of time investigative teams spend in the field. A number of experts emphasized that maintaining field-based staff during investigations was a critically important tool for enhancing their quality. Experts noted that field-based staff can actively contribute to building trust between OTP investigators and local communities. They explained that individuals, whether witnesses or victims, often open up only after trust is established between an investigator and the local community, and that trust is difficult to foster during short, sporadic, and busy trips to the field. Participants also suggested that field-based staff could further strengthen investigations by helping to ensure engagement with the local community and a deeper understanding of the local context.

Another problem that, according to experts, seriously affects the quality of investigations is the deficit of investigative team members with knowledge of local languages, culture, and society. Having this expertise integrated into the team is essential, especially where witnesses and local actors can be



inherently suspicious towards foreigners and therefore hesitant to share evidence or information. Consulting on these issues with external experts and interlocutors is insufficient, experts maintained. At least some of the investigators and/or analysts on the team must be intimately familiar with the context in which the crimes under investigation have occurred; master local languages; and have a nuanced knowledge and profound understanding of local politics, culture, and society. Several experts suggested that contract-based staff from the affected community (ideally), country, or region could help fill this gap—contingent upon careful vetting—in addition to having a continuous staff presence in the field.

Experts noted that the management of the Investigation Division needs to be strengthened and its decision-making streamlined. Investigations must be driven by a strong leadership capable of making well-considered decisions and taking responsibility, experts maintained. They suggested conducting an office-wide role alignment process (see section 5.3). Alternatively, or in addition, experts suggested that the Prosecutor could hire an experienced managing investigator which would fill gaps in the operational experience of the Head of the Division. Thus, the managing investigator would be in charge of operational issues arising in the course of investigations and have authority to make time-sensitive decisions concerning, for example, arrests, search and seizure operations, and other investigative measures. That official would also help develop and review related standard operating procedures that the OTP has struggled to put in place.

Several experts underscored that investigative teams require flexibility and independence to function effectively. Investigators operating in the field are deprived of necessary autonomy because much of the decision-making with regard to the case strategy and investigative tactics occurs remotely in The Hague. Moreover, experts leveled serious criticism against the Jurisdiction, Complementarity and Cooperation Division (JCCD) from an investigative and a managerial perspective. Experts considered that it has been allowed to vastly exceed its mandate and dominate (and hinder) rather than facilitate investigative decision-making. Some noted that the JCCD took upon itself the role of a gatekeeper and said that the way in which it has operated to-date created unnecessary obstacles. In some instances, experts noted, JCCD staff have prevented investigators from communicating with local authorities or following investigative leads. They explained that this created inefficiencies and time lags in investigations, detracting from their fluidity and, ultimately, quality. Other support services, such as the PSU, OSU, and GCU have also posed barriers for investigators by creating their own rules, policies, and requirements for approval, which are cumbersome and impede investigators' action on certain time-sensitive issues. Reducing bureaucracy and ensuring greater autonomy, flexibility, and decision-making capacity for investigators, including at the ExCom level, could help address bottlenecks in investigations.

## Recommendations

- Define a standard composition and size of an investigative team to be treated as a default which can be departed from if warranted by the (evolving) demands of specific investigations.
- Take concrete steps to address the staffing and resource deficits in respect of investigative teams.
- Hire competent investigators with significant experience in conducting investigations of international, transnational, and other serious crimes—in particular SGBC.

- Take steps to recruit and hire highly qualified professionals with the needed skills and attitude for the unique nature of ICC work. This requires paving the way for experienced investigators who may face difficulties moving between domestic and international systems as well as making improvements in ICC hiring and recruiting procedures. It also includes ensuring that candidates with the required investigative skill set have the inter-personal, cultural, and other soft skills needed for successful performance in the ICC system.
- Hire investigators with knowledge of the local context on a temporary basis. Use (short-term) secondments of investigators from States Parties as well as expert rosters, such as Justice Rapid Response, to surge capacity and specific skills (such as SGBC and crimes involving children) without the concern of requesting/increasing permanent staff positions.
- Develop and implement a mandatory induction and training program for investigative staff who may be lacking knowledge of the ICC-specific context or specific skill sets. Those programs may be geared towards improving “soft skills” (working in a different cultural context, interacting with authorities, working with a victim-centered approach) as well as “technical skills” (building a case; locating, verifying and corroborating evidence; new types of evidence; forensics; investigating financial crimes; effecting arrests and executing search and seizure warrants, etc.). Such in-person training should be provided, supervised, and evaluated by senior and experienced ICC investigators and/or external experts.
- Establish a formal mentoring program within the OTP, pairing experienced investigators with less experienced colleagues.
- Establish a field presence during the investigation, whenever possible.
- Ensure that each investigative team includes members with requisite linguistic, political, and cultural expertise and a nuanced understanding of the local society from the early stages of investigations. A Country Expert and/or field investigator, which can be a temporary position for the duration of an investigation/case, should be allocated to each team.
- Strengthen the Investigation Division senior management. Conduct a formal role alignment process by evaluating needed skill sets and comparing against skills and capacities of existing staff. Staff who do not align with role expectations should be re-assigned or let go.
- Consider creating a position of managing investigator to fill existing gaps in ID management experience. The managing investigator would be an experienced manager knowledgeable about the conduct of investigations, including evidentiary matters, coercive measures, and applicable due process requirements. This official would support the Head of the Division and act as an operational chief with respect to ongoing investigations with a view to expeditious decision-making.
- Ensure that OTP investigators and prosecutors can operate with the necessary autonomy and flexibility and are not impeded from contacting local counterparts and other authorities in the course of investigations.
- Consider alternate division of roles and responsibilities for investigation teams and JCCD. The JCCD should refrain from interfering in the conduct of investigations and managing the Investigation Division’s staff interactions with local counterparts. JCCD should not be the only point of contact for external stakeholders, including in-country actors. The OTP should find alternative ways to efficiently centralize and coordinate communications with external actors by appointing ID staff members to communicate with certain actors and ensure consistency in requests and information sharing.

## 3.2 Case Selection, Prioritization, and Charging Policies

Experts expressed concern at the wide scope of investigations and the apparent difficulty the OTP has faced in focusing on cases which offer a reasonable prospect of success. Participants generally agreed that the Office should bring charges that are most representative of the criminality in question. But, experts noted, at present case selection appears to be somewhat random, largely based on the availability of persons for arrest, and contingent on opportunities to obtain information, evidence, and cooperation with respect to specific incidents. Moreover, experts noted that the OTP sets its goals early in its involvement in a situation, and thereafter is reluctant to adjust them based on changing circumstances. Some suggested that case selection policy should be part of an organic process and follow the evidence, while being primarily based on feasibility and the prospect of prosecutorial success. Some experts thought that bringing the charges that best serve the interests and demands of justice of the affected community is also a valid consideration.

According to some experts, the OTP needs to fill the courtrooms and get grounded experience in securing convictions through bringing more, smaller-scale, cases. Subject to capacity limitations, some argued, the OTP should be prepared to bring more cases in specific situations than it has been doing thus far—even if it means that those cases are modest in scale and/or concern (notorious) mid-level perpetrators and local commanders. Some experts thought that this would be better than having empty courtrooms, shoddy investigations, withdrawals of charges, or acquittals. Pursuing such cases could encourage victims, witnesses, and perpetrators to come forward and cooperate with the OTP, experts noted. They maintained that the OTP should abandon the unsustainable rhetoric of “persons bearing the greatest responsibility.” Those experts noted that while making this shift requires bold leadership and will certainly garner criticism, it could in turn strengthen the legitimacy, reputation, and impact of the Court on ending impunity and preventing atrocity crimes.

However, for other experts, the idea of the ICC OTP pursuing a greater number of smaller-scale cases is counterintuitive and at odds with the Court’s mission of closing the impunity gap for those allegedly most responsible for atrocity crimes. It may also be inconsistent with the notion of positive complementarity. Some experts noted that calls for full courtrooms showed a marked departure from the early narrative around the Court, which emphasized the role of the ICC as a court of “last resort,” which would be successful if it had no cases to try because domestic courts do so genuinely. Some experts argued that the ICC should not be trying to perpetuate its own existence by pursuing smaller cases, but instead should support local prosecutions of such cases. They thought that instead of spreading its resources thin over a greater number of low-level cases, which can and should be dealt with elsewhere, the OTP ought to perfect its strategies and develop tools and practices that would enable it to tackle significant cases and go after higher-level perpetrators.

The third position expressed was that cases pursued by the OTP must be symbolically meaningful and that they should be built in such a way as to increase the chances of conviction. Experts noted that securing a conviction may require bringing fewer, but more specific, charges based on a limited number of incidents in relation to which the OTP has direct evidence. Therefore, experts maintained, pursuing higher level perpetrators should not be a goal in itself. The OTP has moral obligations to affected communities and therefore ought to prioritize the concerns and interests of the victims, who are more likely to have suffered harm inflicted by mid-level perpetrators or local commanders, over

its own interests. It was noted that witnesses will generally be more eager to step forward and cooperate if cases and charges pursued resonate widely in their community. Experts explained that while leadership cases are usually seen to satisfy the need for accountability and demonstrate the impact of international justice, witnesses will often feel that justice has not been delivered if local perpetrators continue to roam free.

Some participants maintained that considerations regarding the validity and pragmatism in charging should in particular apply to the OTP's choice of modes of liability. They noted that the OTP has a tendency to bring charges that are broader and more ambitious than it can sustain. Most defendants are charged as principals/co-perpetrators for a large number of crimes, experts noted, often in the absence of a well-established link between the physical perpetrators and the accused. Some argued that in order to be able to draw such a link, the OTP is compelled to articulate complex case theories that lack solid direct evidence. This practice weakens the OTP's opportunities for conviction. In some instances, experts considered, it may be preferable to formulate narrower charges and opt for less ambitious modes of liability. In addition to simplifying their case theory and evidentiary burden, this could also facilitate negotiating an admission of guilt. Accused who face charges painting them as criminal masterminds and who face charges that will likely entail severe penalties if proven at trial have no incentive to admit guilt or agree to facts. They are likely to contest everything, experts maintained, which is bound to lengthen the proceedings and consume much of the OTP's (and the Court's) resources.

## Recommendations

- Refrain from fixing goals too early. Exercise reasonable flexibility by following the evidence and leads collected in the course of a thorough and reasonably focused investigation. Focus on cases where the OTP stands a reasonable chance of securing a conviction, based on the evidence at its disposal.
- Focus on bringing charges where the available evidence of the defendant's guilt is overwhelming, as opposed to where the OTP hopes or expects such evidence to become available in the future. Charges relying on the "control of the crime" theory and common plans involving the commission of mass crimes in particular should only be considered where there is strong direct evidence to support them.
- Consider bringing more smaller-scale, modest cases concerning individuals lower down the chain of command, in particular notorious mid-level perpetrators and local commanders.
- Continue developing OTP tools and practices that would make cases against higher-level perpetrators and persons bearing the gravest responsibility more feasible, which includes but is not limited to a "building upwards" strategy.
- Focus charges on fewer incidents that are, to the extent possible, representative of the scope of criminality, and, whenever appropriate, use modes of liability other than (indirect) co-perpetration, in particular the forms of complicity included in Article 25(3)(c) and (d) of the Rome Statute.
- Refrain from bringing overly broad and ambitious charges and consider taking a more modest and realistic approach towards framing case strategies. In most cases, it is advisable to bring simple charges, which do not require a footing in overly complex and often far-fetched case theories.

- Factor in the eventuality of an admission of guilt and/or agreements as to evidence when opting for a specific case strategy, charges, and modes of liability in an individual case.

### 3.3 Focus on SGBC

Experts welcomed the advances made by the OTP in including more charges reflecting SGBC in its more recent cases. However, they noted significant gaps between rhetoric and practice and internal barriers that are impeding further progress in this area. In particular, experts emphasized that the Office needs to improve its practice with respect to gender persecution and SGBC committed against men and boys.

In particular, experts noted that in spite of policy papers, strategic plans, and public statements from the Prosecutor about her statutory obligations to ensure the effective investigation and prosecution of SGBC and crimes against children, decisions to do so in practice come down to the proclivities of individual Senior Trial Lawyers (STL) and Investigation Team Leaders. They pointed to a lack of standardized systems and practices and a knowledge gap among senior management about the elements of SGBC. Experts called for more consistency in practice. They supported the idea of appointing a focal point for SGBC and children on the investigation and prosecution teams to ensure that someone is keeping track of SGBC evidence collection and the extent to which that evidence is being reflected in the case hypothesis and charging decisions. These focal points should liaise with the Gender and Children Unit (GCU) and share best practices and challenges amongst each other to build internal capacity, experts suggested.

Experts also noted a lack of consistency in oversight and assessment of how SGBC and crimes against children are included at the PE, investigations, and charging phases of situations and cases. Addressing and analyzing SGBC should not be limited to the investigation phase; experts noted that better integration of these issues at all stages could help improve the development of cases, charges, and modes of liability. In particular, an analysis of a state's willingness and ability to prosecute SGBC should be an integral part of admissibility decisions. Moreover, experts noted that SGBC evidence requires a contextual analysis as it relates to both the crime-base evidence and to the linkage evidence to establish the liability form or mode of the accused.

According to experts, existing evidence review processes should be adjusted to allow for critical assessment of whether all possible charges for SGBC have been included and whether the most appropriate legal characterization has been applied. This should be systematic and broadly applied in a way that is objective—and subject to oversight and performance review—and not governed on the selective presentation and assessment of evidence by the STL. To this end, experts thought, the evidence review panel should take steps to ensure they understand the full details of a case with respect to SGBC, including the SGB evidence that was not presented to it, and why.

Another issue raised by experts is the need for continuing capacity building and training on the nature of SGBC and the gendered nature of other crimes. This need extends through the entire OTP structure, including senior management, experts noted. Experts also considered that SGBC focal points need to have the necessary skills and power to ensure effective oversight of their teams. One expert noted that some STLs are hesitant to bring charges of SGBC because they lack experience prosecuting similar

crimes, while others lack a comprehensive understanding of the nature of SGBC and the gender aspect of other elements of crimes and chapeau elements. Another expert suggested that the ExCom should appoint a Legal Advisor for Gender to help facilitate changes in policy and practice at the most senior management levels. A similar lack of experience and skill among OTP staff was noted with respect to crimes involving children.

## Recommendations

- Develop a common and shared operational plan for prosecuting SGBC.
- Consider SGBC as part of PEs and planning at the earliest stages of the OTP's involvement in a situation, including an evaluation on whether complementarity is met and non-admissibility granted because potential SGBV crimes are not being pursued domestically.
- Make consulting with the GCU legal advisor a mandatory part of every investigation plan. A SGBC focal point should contribute directly to the development of the investigation plan and/or create a separate investigation plan specific to SGBC.
- Ensure that the SGBC focal points have the necessary knowledge, experience, seniority, and influence to effectively provide advice and oversight to the investigation and trial teams.
- The management and evidence review panel must consider the opinion, presentation, or a report directly from the SGBC focal point.
- STLs and other senior staff must attend mandatory SGBC trainings, on at least a bi-annual basis. There should be a special training/roundtable just for the attorneys about charging of SGBC with the input of the Gender Advisor and Gender Children Unit legal advisor. ExCom members should undertake training on formulating SGBC policies, leading investigations on SGBC, and prosecuting SGBC.
- Appoint a Legal Advisor for Gender, as a member of Ex Com level, for a 3-5year period to oversee standardizing the investigative, PE and prosecution of SGBC at the decision-making level.
- Engage a legal and investigative specialist in children in the Gender and Child Unit.

## 4 Completion Strategies, Engagement, and Outreach

### 4.1 Completion Strategies and Protocols

Experts agreed that the language of completion that the OTP uses in external relations will influence public expectations of the ICC. Therefore, it is important to consider terminology. Experts had diverging opinions on the best language to use with respect to the completion of situations and investigations. The OTP is currently debating the most desirable terminology for completion (such as "completion of prosecutorial program," "hibernation," "residual functions," "suspension," or "legacy"). Participants recognized that there is tension between the fact that the project of addressing impunity in a particular context will almost never be "complete," on the one hand, and the practical and policy need for the OTP to end its engagement in some situations, on the other hand. Some noted that publicly acknowledging the end of prosecutorial activity could send a wrong signal to governments. Experts also noted that it would be important to make a clear distinction between ending all activity in a situation, which may be undesirable, and pausing or "hibernating" activity as a strategy that would enable the OTP to resume activities as necessary. While some suggested that the

language of “legacy” is more appropriate, other participants noted that the term “legacy” was related to a broader concept and involved complex relationships with a range of actors sharing responsibility for the goals of the Court.

Participants debated the modalities of “completion,” and raised both legal and practical concerns. The Rome Statute does not include any guidance on completion or on the impact of the OTP announcing completion. Experts wondered if the OTP would need a new referral or have to submit a new request for authorization for a *proprio motu* investigation if it wanted to re-engage in a situation after closing it (e.g., if there were new crimes or a suspect was arrested). Experts further questioned whether closing investigations could trigger procedures under Article 53(2) of the Rome Statute, pointing out that closing investigations could be interpreted as a positive decision not to prosecute new cases. Others advised the OTP to evaluate how completion strategies and ongoing reparations processes would impact each other. Experts maintained that the OTP would need to develop clear criteria for a given situation to move from “active” to “less active” investigations and adopt a process of “completion” that is dynamic enough to allow the OTP to resume activities as may be necessary. Moreover, experts noted that inclusive consultation with relevant stakeholders, including affected communities, should be seen as a primary stage in designing the criteria for completion in a given situation.

The view that the OTP should close situations at a certain point was not unanimous. Nevertheless, some experts considered that if the OTP moves forward with the idea of exiting situations, it should develop separate completion strategies, and accompanying implementation plans, for both situations and cases/investigations. Those strategies and plans should be adapted to specific situations, contexts, and cases. They should also be in place upon entry into a situation or opening of an investigation and need to be flexible and adapted to changing circumstances on the ground.

Participants emphasized that communication about these decisions explaining their implications to stakeholders is critically important to ensure transparency and to address any misconceptions about what terminating or suspending engagement might mean. Communication about the prospect that the OTP may exit a situation at some point in the future should start from the early stages. According to participants, the OTP should consult with different actors as a mandatory part of decision-making on completion as well as explain what completion means for each situation and why completion might not be possible in a given situation.

## Recommendations

- Further consider the best terminology and approach to completion strategies, including through consultations with victims and civil society, on what “completion” should entail.
- Consult with a broad range of actors when it comes to generating and evaluating criteria for completing a situation. Affected communities should be consulted during early stages of designing completion strategies for given situations. The OTP should seek their buy-in to the process and victims should be afforded the opportunity to exercise their agency to determine what a “post-ICC” situation looks like.
- Engage in further study on the meaning and legal implications of completion.

- If a completion policy is adopted, ensure that a completion strategy and implementation plan is in place for each situation, and each case, as soon as a decision to examine/investigate is made.
- Develop a communications plan and strategy around “completion,” with due consideration to diverse possible scenarios and expectations.

## 4.2 Completion and Complementarity

Many experts agreed on the importance of and scope for incorporating complementarity into designing completion strategies. They emphasized that doing so requires extensive engagement and partnership with local stakeholders. Experts noted that this relates in part to the obligations of the OTP to affected communities and with respect to the evidence it collects from or about them. Some argued that the OTP has a duty to share evidence with other parties who are looking to pursue cases domestically or in other jurisdictions. Sharing information and evidence with national authorities is essential to enabling local prosecutions, experts noted, and can be considered part of a capacity building strategy. While experts acknowledged that the OTP currently shares evidence to the extent possible, they noted that such sharing is limited by consent and security implications for witnesses. It therefore may be—or appear to be—rather piecemeal. Several experts also underlined the importance of genuine cooperation between the OTP and national authorities, in particular on strengthening critical issues such as witness protection, prosecutorial strategies, and evidence collection. Others reflected that there might be benefits to engaging with locally-based development or transitional justice actors to push the international justice project further in a given context. For example, experts suggested that reopening the conversation between the ICC and transitional justice actors could expose common ground and opportunities to take advantage of funding and support for the ICC’s role in helping states achieve SDG16.

Some experts submitted that the OTP could or should intentionally build local capacity and develop local expertise. Others acknowledged that the OTP does not have the necessary resources to engage in these kinds of capacity building activities and faces considerable opposition from States Parties in this regard due to an insistence that the Court should not be pulled away from its core business or assume the costs related to positive complementarity. Experts cautioned that while capacity building should be an ongoing effort, particularly where situations are hibernated, it should not be a prerequisite for prolonging situations that should be hibernated. Some experts considered strengthening domestic capacity to investigate and try atrocity crimes to be part of the ASP mandate, not an ICC mandate. Nevertheless, some experts insisted that the OTP should take advantage of its unique position to support local efforts and, in so doing, bolster its own operations. For example, experts said, by using local investigators and/or sustaining field engagement, the OTP can leave behind strengthened local capacity to prosecute grave crimes.

### Recommendations

- As part of completion strategies, improve evidence- and information-sharing with domestic courts and authorities; engage with them in developing national prosecutorial strategies and priorities; and strengthen cooperation between the OTP and domestic courts.
- Urge the ASP to take a clear position on complementarity, positive complementarity, completion strategies, and legacy issues.



- Cooperate with development and transitional justice institutions as part of a broader approach to addressing impunity and supporting local justice processes. States Parties should assist the Court in addressing impunity gaps and facilitate the necessary synergies between the ICL field and development aid.
- Explore alternative opportunities to strengthen the capacity of local actors that may be short of formal capacity building activities. Examples include sharing information and evidence when possible, providing mentoring opportunities, and hiring local investigators as part of a strategy to develop local capacity.

### 4.3 Outreach, Engagement, and OTP Communication

Experts considered local engagement, outreach, and communication to be essential tools for supporting investigations, successful trials, cooperation, and complementarity. Throughout the workshop, experts underlined the critical need for clear communication from the start of OTP engagement in a particular situation. This issue is distinct from, but complementary to, outreach conducted by the Registry. Experts reiterated the importance of the OTP's clear and transparent communication to stakeholders, including local communities and victims. Participants emphasized that clear and consistent communication and engagement achieves numerous objectives, such as managing expectations of victims and civil society, supporting narratives of justice and complementarity, and building trust in the OTP.

Several experts were deeply concerned about the information gap for local communities. They noted that these information gaps are often the result of limited in-country outreach and outreach strategies directed from The Hague. In practice, local communities' questions and concerns are not given due consideration during OTP outreach meetings, experts noted. The approach tends to be very top-down, while effective outreach requires a genuine engagement and conversation with affected communities—including on the most sensitive topics, experts remarked. It was also noted that Registry staff in charge of outreach are not in a position to answer many questions that only the OTP can answer, such as on investigation and case strategy. But according to participants, these are often the questions that matter most to local communities, who can become frustrated when they are not addressed. Experts therefore suggested embedding OTP staff, an investigator or lawyer, in the field. This could also contribute to changing widespread local perceptions of the ICC as an outside actor and help strengthen OTP investigations. It was emphasized that embedding OTP staff could greatly contribute to building trust with local communities, which is vital for enhancing the quality of investigations. Experts noted that such trust is often a prerequisite for witnesses or victims open up about some crimes, especially SGBC.

Experts also discussed the lack of coordination between the OTP and Registry when it comes to outreach. Several experts concluded that outreach should be a joint effort between OTP, Registry, defense, and victim teams, to the extent possible. It was also noted that, as part of a strategy that is more centered in the field and on communities' needs, the OTP should work more closely and more cooperatively with victims' legal representatives. However, experts noted that the OTP must ensure that it is seen as independent and guard against the impression that the OTP is merely a branch of the Court.

Some experts pointed to the need for a radical conceptual shift within the OTP and the Court as a whole with respect to outreach. It was noted that the OTP's goal should be to serve the community and engaging with the community is therefore crucial. The more the OTP understands the community and local traditions, the better placed it will be to present and explain evidence, experts remarked. However, several experts noted that the Court maintains the mentality that it needs to distance itself from the local community in order to deliver "neutral justice." Experts strongly suggested that this mentality needs to change before any meaningful shift in outreach and engagement can be seen. Experts rejected the view that outreach is (only) a communications or public relations strategy. Rather, they considered that outreach must be at the core of the OTP's work and a central part of the investigation strategy. This can have a significant effect on improving evidence collection and bolstering cases' legitimacy, they suggested. Moreover, experts noted, approaching outreach in this manner could also contribute to obtaining more financial support for it (States Parties have been reluctant to allocate resources to these kinds of activities).

### Recommendations

- Provide clear and transparent communication from the beginning of and throughout engagement in a particular country. Communication and engagement should be consistent and done at regular, frequent, intervals.
- Strive to implement a genuine two-way approach to outreach, engagement, and conversation with stakeholders, including affected communities and victims. This requires abandoning the existing top-down, distant approach.
- Assign an OTP representative, investigator, or lawyer to remain based in the field for each case. This individual could be contracted on a temporary basis to reduce pressure on staffing allocations and hired for "active" investigations/trials, and ideally would be from the community or region. That person should not have outreach as their sole function, but rather be part of the team driving the case-building strategy.
- Integrate field-engagement as an essential part of the investigation strategy.
- Improve coordination between OTP and Registry outreach and consider joint outreach activities while taking steps to maintain the (perceived) independence of the OTP..
- Improve the coordination and cooperation among OTP, defense, and victim representatives, and consider joint outreach and engagement activities while taking steps to maintain the (perceived) independence of the OTP.
- Improve coordination and cooperation with victims' legal representatives, including in relation to identifying criminal patterns, evidence gathering, and to better understand the communities' needs and perceptions.
- Recognize the importance of communication more generally, including in tone, language, terminology, and approach. Employ effective and appropriate ways of communicating and reaching affected communities.
- Provide and allocate resources for outreach and engagement with local communities. Strong support for community outreach and engagement is needed.

## 4.4 Political Pressure

Several experts acknowledged the inherently political environment of international criminal justice and the ICC, noting that the Court often finds itself in a “damned if you do, damned if you don’t” type of situation. Political pressure can take many shapes and forms (for instance withholding resources, public or private statements, or through measures taken against the Court and its staff). Experts considered that in tackling external pressure, the OTP should not only consider the most visible and antagonistic political pushback, but also the more subtle political pressure inherent in self-referral cases and other tactics by States Parties.

Experts noted that one important way for the OTP to resist political pressure is by exercising its activities by the book, applying the law blindly, universally, and with integrity and independence. However, while recognizing the OTP as an independent judicial institution is a start, other experts pointed to the reality that the Prosecutor must engage in a savvy “behind the scenes” political strategy.

Experts suggested a variety of strategies for dealing with political pressure. The OTP should conduct solid investigations that are above reproach, and which involve extensive, effective engagement with local actors. The Court, and the OTP, should regularly engage and consult with states and other bodies or organizations, in particular the African Union (AU) as it can influence the narrative in African states. Several experts underscored that the Court should urge the ASP, States Parties, other bodies such as the EU, and particularly larger powers, to be more overt in pushing back on political pressure and faster in stepping up in support of the ICC. Experts suggested that by being more open about political pressure, the Prosecutor could lay the burden more appropriately on States Parties instead of the OTP and Court itself.

### Recommendations

- The OTP and the Court as a whole should continue to conduct its activities independently.
- The OTP and the Court as a whole should call for the support and backing of the ASP and powerful states.
- The OTP should be forthcoming and transparent about the political pressure it faces, and in turn, lay the burden for response on States Parties.
- The OTP should ensure that it is seen to be standing up against and resisting political pressure, by making public statements in response to attempts to exercise political pressure.
- The OTP should increase engagement and consultation with States Parties and international and regional organizations, such as the AU.
- The OTP should focus not only on blatant and antagonistic political pressure, but also the more subtle pressure often experienced in self-referral situations.
- States Parties should proactively and robustly assist the Court in the face of significant political pushback.
- The ASP should be faster to respond in support of the Court when it faces political pushback or threats.

## 5 Organization, Accountability, and Ethics

### 5.1 Organization and Structure

A number of experts pointed to challenges with the management style and structure of the OTP. Most agreed that the current “organigram” of the OTP is not the core problem—the move to integrated teams has been an improvement, and some experts considered that there is little need for a bifurcated Deputy Prosecutor level divided between Investigations and Prosecutions. Some noted that at other international justice institutions this structure ultimately led to increased inefficiencies and personality clashes, which ultimately detracted from the work of the OTP. However, some suggested that if there is an impetus to fill the two Deputy Prosecutor positions, their duties should be split between Operations, on the one hand, and Administration, on the other. Overall it was noted that the suggestion for a second Deputy Prosecutor is coming from States Parties, perhaps because of a desire to see change, but does not appear grounded in an actual need. Noting gaps in skills among OTP staff, others suggested that having an additional senior Managing Investigator with significant operational experience could help speed up decision-making and reduce barriers for investigators (see section 3.1). Some experts suggested that gaps could be filled through the use of secondments from States Parties and/or maintaining a roster of experienced experts who could be brought onto investigations or trial teams on a temporary basis.

Other experts suggested that in practice the OTP structure resulted in too much bureaucracy and inefficiencies. Participants remarked that the ExCom review process was unnecessarily bureaucratic, voluminous, and slow. Moreover, different policies and procedures within the various support units were seen as creating unnecessary lag time and added burden to investigators. In addition, while the integrated team approach seems to be an improvement, there was concern that JCCD has been allowed to exceed its mandate. JCCD is seen as creating barriers between investigators and prosecutors and useful contacts and counterparts in situation countries, which has been an impediment to effective investigations (see section 3.1). While some noted that this often came down to the personality and working style of individual JCCD representatives on investigation teams, it was also argued that this was an example of mis-management of those staff. One expert suggested abolishing JCCD outright and integrating JCCD staff among the ID and Prosecution Division.

The experts also discussed the lack of diversity and gender parity within the OTP. One expert noted a particularly alarming lack of gender balance among senior legal officers. While in general experts welcomed efforts in the OTP to mentor and develop the leadership skills of junior female staff, some noted that there are many women within the OTP staff that are already well-qualified for senior leadership roles—but who are being held back by a lack of promotion opportunities. Others argued that a pointed effort needs to be made to take an intersectional approach to recruiting and hiring staff, and particular attention needs to be paid to hiring diverse staff members to offset prior lack of access or prejudicial hiring practices. Existing senior leadership, who are primarily white males, need to be actively outspoken and supportive about changing the OTP culture and take an overt lead in making it more open, respectful, and diverse.

## Recommendations

- Reconsider the use of secondments, with a view to ensuring more diversity of representation among nationalities. For example, a trust fund could be established to facilitate less-wealthy states to second staff to the ICC.
- Consider the use of a roster of experts with situation-, context-, and crime-specific skills—in particular SGBC and crimes involving children—to be brought on when needed for limited terms.
- Reduce the slow and rigid decision-making process of the ExCom and the volume of issues/requests that must be sent to ExCom.
- Consider alternate division of roles and responsibilities for investigation teams and JCCD. In particular, reconsider the role of JCCD as one that facilitates connections rather than acts as a gatekeeper for investigators. See also recommendations in section 3.1. JCCD should not be the only point of contact for external stakeholders, including in-country actors. The OTP should find alternative ways to efficiently centralize and coordinate communications with external actors by appointing ID staff members to communicate with certain actors and ensure consistency in requests and information sharing.
- Review recruiting, hiring, and staffing procedures with a view to making them more fair, equitable, and non-discriminatory, as well as ensuring that the persons hired meet the objective requirements of the position they are hired for.

## 5.2 Leadership and Managerial Competency

Participants emphasized that regardless of the internal structure, it will not be effective without competent implementation of the functions within that structure. For any organizational structure to succeed, it requires the right people with the right skills in the right position. For the most part, experts remarked, those who currently fill senior management positions are not skilled managers. According to participants, while they may have been promoted because of technical capacities (e.g., being qualified lawyers), they are not suitable as managers and they lack leadership skills. Experts considered this an intrinsic issue that requires considerable attention and strong remedial measures.

Participants also noted that while there is a need for formal structures and organization for efficiency, there are too many layers at the OTP which cuts off access to senior leadership and undermines any efficiencies gained by such a structure. As a result, while there may be an “open door” policy with senior leadership, this is insufficient for ensuring that ideas, suggestions, and concerns of lower-level staff are taken seriously and addressed through change and practice.

## Recommendations

- Ensure that managers have the appropriate managerial skills to meet the needs of the position.
- With a view to adopting new protocols and approaches, review processes and procedures undertaken by other similarly situated organizations on issues of building management capacity, developing trust, and fostering leadership.
- Establish better communication within and throughout the teams to enable and foster trust and flexibility.

- Improve communication between different levels of staff—in particular with upward communication—and reduce bureaucratic hurdles that impede performance.

### 5.3 Staffing, Term Limits, and Rotation

Experts observed that while the OTP is staffed with a significant number of experienced and competent people, the Office’s personnel is static, to the detriment to the OTP’s ability to fulfill its mandate. One proposal put forward was that the OTP should consider reducing the number of permanent staff and putting together investigative teams from rosters, based on the specific expertise and skills needed for each distinct phase of each case. Scaling down the regular staff and employing more people on a contractual basis for specific investigations of situations and cases could help address the existing inefficiencies by adapting to capacity and skill needs. However, others expressed reservations about this idea. One objection, based on experience at other international tribunals, was that this scheme could create tensions between permanent and temporary/contracted staff members, who would have fewer employment benefits.

Experts carefully considered the issue of term limits and rotation schemes for OTP staff. Several experts highlighted a challenge with staff members’ “embeddedness,” “golden handcuffs,” and “entitlement,” where the status and perks associated with the job make their leaving unlikely. While it was readily acknowledged that there was a need for new personnel, new challenges, and turnover within the senior levels of the OTP, there was no consensus on how to achieve that. Some experts suggested that one solution would be to provide for term limits or regular rotation of staff. Experts acknowledged that this would be a radical departure from the present staffing scheme. Others noted the risks of this approach, including the critical need to maintain institutional memory; losing staff who take new positions towards the end of their term limit, but before they have completed significant tasks or milestones in a case; and the additional bureaucratic and contractual strain of this arrangement. In other organs of the Court where similar rotations or turnover is or has been applied, it has not yielded consistently positive results. For instance, in Chambers there is turnover of Judges every three years. Experts remarked that incoming judges who are very skilled and experienced in their home jurisdictions face a steep learning curve to be able to function effectively within the ICC. Similarly, there is a risk that as with the Registry ReVision process, States Parties could exert pressure on the OTP to ensure that their nationals maintain a certain quota within the office.

Participants also suggested that the OTP needs to take other steps to tackle serious gaps in its management and leadership. One important way to do this is through meaningful performance reviews, accountability for poor performance, and greater flexibility in hiring and firing staff. While experts welcome the introduction of a 360 degree review process in the OTP, they noted that it is critical that this be a meaningful exercise where staff see their input being taken seriously and contributing to consequential results. It was noted that there needs to be a way to fire, censure, decline to renew the contracts of, or put long-standing staff on administrative leave in a way that is fair and in accordance with existing employment rules. Whatever the disciplinary mechanism, it needs to be based on objective criteria, and potentially assessed by external professional bureaus. Assessments and performance reviews should also include metrics on management skills, cultural sensitivity, and sexual harassment, amongst other issues. Unqualified or poor performing staff need

to be let go, and there needs to be more opportunities for qualified staff to advance and be promoted within the organization.

## Recommendations

- Ensure that the right people are in the right position with the right skills by undertaking a top to bottom assessment of required staff skills and alignment with skills of current employees and making adjustments to personnel as necessary.
- With a view to adopting new protocols and approaches, review processes and procedures undertaken by other similarly situated organizations on issues of fostering leadership, management skills, accountability, and turnover. One example is the use of external professional bureaus to assess performance and skills.
- Avoid making decisions regarding the structure and staffing of the Office based solely or largely on the personality and character of staff members. Decisions on structure and staffing should be made based on the competence, expertise, and experience of the staff members holding respective positions.
- Personal assessments have to be honest, meaningful, and based on objective criteria. Employ a written 360 review process that lets staff know that their input is taken seriously and that they have the backing of senior management. Staff who are not performing according to predetermined objective standards must be fired, demoted, put on administrative leave, or otherwise censured. If permitted under ICC employment and financial rules, the OTP could consider offering financial incentives for senior staff to leave without going through a lengthy human resources appraisal and censure process.
- Take gender equity into consideration in any evaluation of hiring, rotation, or assessment practices.

## 5.4 Office Culture

Many experts pointed to the pervasive toxic office culture and atmosphere in the OTP. While experts acknowledged that there have been improvements in responding to bullying and harassment, it was still widely recognized that this was a persistent and concerning issue detracting from the OTP's ability to fulfill its mandate. Experts noted that morale is also an issue—teams working on cases that are unsuccessful and that have significant setbacks are understandably demoralized and lack motivation. At the same time, participants recognized that all staff in the OTP are working under incredibly stressful conditions, which are significantly exacerbated by strict budget limitations and increasingly burdensome workloads. Nevertheless, experts noted that the issue largely stems from the lack of leadership—as distinct from managerial skills—within the senior levels of the OTP. Experts emphasized that leadership needs to be shown and seen in everyday interactions and decisions in order to ensure an open and fair culture within the office. This includes by being open and vulnerable, and taking responsibility for mistakes, and mistakes of subordinates. When leaders fail to enforce those values, experts maintained, they become complicit in that toxic atmosphere.

Experts also identified the need for a safe, open atmosphere where staff can speak up with honesty and without fear of repercussions. While there is a code of conduct in place within the OTP, experts noted that there were still significant barriers for reporting, especially among junior women who wish

to make a report against a senior member of staff. The inhibition in reporting incidents was in fact characterized as part of the OTP culture. There is a pervasive sense that reporting incidents betrays the camaraderie within the OTP, experts said. Furthermore, they noted, a reporting system does not address widespread microaggressions, inappropriate comments made during meetings, or the concept that some inappropriate behavior is simply “unorthodox” and must be accepted by individuals who excel technically. Experts emphasized that overlooking these smaller, yet more frequent and pervasive types of inappropriate behavior engenders a lack of response to bigger ethical violations. Nevertheless, some suggested that creating a hotline or confidants for incident reporting may help provide a safe space for employees to register complaints. Experts also suggested creating and enforcing clearer and more robust rules and disciplinary measures while at the same clarifying the limits of acceptable behavior by providing mandatory internal diversity and gender sensitivity training. Finally, experts remarked, it is critical that reporting leads to change—existing management is aware of the problems in office culture, but there is a sense that they either refuse or lack the skills to make necessary changes.

### Recommendations

- With a view to adopting new protocols and approaches, review processes and procedures undertaken by other similarly situated organizations on issues of reporting harassment, misconduct, or other types of unethical behavior.
- Prioritize and engage more significantly on staff-welfare.
- Foster better leadership at all levels within the office, to build a flexible, warm, and trustworthy working environment. Leadership skills should be distinguished from management skills.
- Establish mandatory training and review processes on issues such as, but not limited to, management skills, gender and cultural sensitivity, sexual harassment, and leadership. Hold staff who attend these trainings accountable for implementing the skills by including them as criteria during staff review processes.
- Routinely and proactively promote or hire managers from under-represented groups to offset sexism and discrimination.
- Set the tone from the top by effectively enforcing the policy that inappropriate behavior—whether on a small or large scale—will not be tolerated.
- Establish a fully confidential, easy to access whistleblower process, reporting, or other system for reporting sexual harassment, other forms of harassment, bullying, discrimination, or other unethical practices within the OTP. The reports must be taken seriously and acted upon.



## Annex 1: Discussion Paper

# Improving the Operations of the ICC Office of the Prosecutor: Reappraisal of Structures, Norms, and Practices

Organized by OSJI & ACIL/Department of Criminal Law, Amsterdam Law School

25-26 March 2020

**Discussion Paper**

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# 1 Introduction

On 25-26 March 2020, the Open Society Justice Initiative and the Amsterdam Center for International Law jointly with the Department of Criminal Law at the Amsterdam Law School, University of Amsterdam, are convening the Expert Workshop “Improving the Operations of the ICC Office of the Prosecutor: Reappraisal of Structures, Norms, and Practices.” A joint civil society and academic effort, the workshop aims to produce practice-oriented recommendations to inform the Independent Expert Review (IER) of the International Criminal Court (ICC, or the Court).

## 2 Background

The functioning of the ICC—and the Office of the Prosecutor (OTP) in particular—has been subject to significant attention and occasional criticism by States Parties, civil society groups, and academia since the start of the Court’s operations in early 2003. Over the past several years, however, these critiques have multiplied and grown in volume and intensity in response to a series of setbacks suffered by the Court. Both the setbacks and critiques have reflected poorly on the Court’s track record, standing, and credibility. Among the salient criticisms voiced by States Parties, international organizations, victim groups and representatives of the affected communities, international criminal law professionals, and other stakeholders were the following: the OTP is too slow (or too fast) in completing preliminary examinations; the OTP has made politicized decisions with respect to preliminary examinations and investigations; the OTP has failed to bring and successfully pursue cases against the sitting members of governments and other powerful individuals suspected of having committed core crimes; and there have been a disproportionate number of cases resulting in non-confirmation of charges, withdrawal of charges, and acquittals.

A critical mass of discontent with the ICC has led to calls on States Parties to the Rome Statute to strengthen their commitment and undertake a comprehensive review of the Court.<sup>4</sup> Accordingly, the 18<sup>th</sup> session of the Assembly of States Parties (ASP) decided to establish the IER to carry out a critical evaluation of the Court’s operation in three key areas (governance; judiciary; and preliminary examinations, investigations and prosecutions) and identify measures to strengthen the Court and improve its performance.<sup>5</sup>

The IER process offers a unique opportunity for a comprehensive review of the ICC, including the OTP, with a view to strengthening the Court and Rome Statute system as a whole. The panel of Independent Experts commenced their work on 1 January 2020 and are expected to submit to the Bureau and the ASP a final report containing concrete, achievable, and actionable recommendations in September 2020.

The OSJI and the UvA aim to support this important process. The present workshop is meant to inform the IER’s deliberations on preliminary examinations, investigations, and prosecutions (termed “cluster three”). According to the Bureau’s “Matrix over possible areas of strengthening the Court and Rome

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<sup>4</sup> Zeid Ra’ad Hussein et al., “[The International Criminal Court Needs Fixing](#),” *Atlantic Council*, 24 April 2019.

<sup>5</sup> Resolution [ICC-ASP/18/Res.7](#), Review of the International Criminal Court and Rome Statute System, 6 December 2019. For more information, see e.g. International Justice Monitor, “[Review of the ICC](#).”

Statute system” (Matrix)<sup>6</sup> and the Resolution establishing the IER, the main legal and technical issues to be covered in cluster three include:

1. (partial) Number and function of deputy prosecutors;
2. Preliminary examinations;
3. Prosecutorial strategies;
4. Investigations and case-preparations;
5. Structure of the OTP; and
6. Completion Strategies.

While the workshop is primarily focused on the issues to be covered by the IER as part of cluster three, it will not necessarily cover all of the issues within that cluster with the same degree of detail, nor be strictly limited to the issues reserved for the IER exercise. Whenever appropriate, the present consultation will take a broader approach to the topics of preliminary examinations, investigations, and prosecutions, and address relevant matters falling within the purview of States Parties.

### 3 Format and Output

The expert consultation will be structured around key themes related to the operations of the ICC OTP, organized in four online sessions on a specific topic or topics.<sup>7</sup> Each session will provide ample opportunity for a candid and in-depth exchange of views among the participants. The discussions will be actively moderated, and experts are encouraged to develop concrete, practice-oriented, and actionable take-aways. The main findings of the workshop will be taken up in a written report containing recommendations and good practices relating to the ICC OTP’s functioning.

The purpose of the report is to inform the work of the IER. It will (i) identify innovative approaches and creative practical solutions to the problems the ICC OTP has faced across multiple facets of its work; and (ii) formulate good practices and develop actionable, practice-oriented recommendations for the improved functioning of the OTP.

## 4 Workshop Topics

### 4.1 Preliminary Examinations

Preliminary Examination (PE) is an early stage of the ICC’s engagement in a situation, during which the OTP determines whether there is a reasonable basis to proceed with an investigation in accordance with the criteria set out in Article 53(1) of the Rome Statute (RS). The Prosecutor makes her determination under Article 53(1) RS on the basis of the information she obtains from international organizations, NGOs, groups, individuals, and other actors. During the PE phase, she possesses no investigative powers in the proper sense, other than the possibility of receiving written or oral

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<sup>6</sup> Draft Working Paper, “[Meeting the challenges of today for a stronger Court tomorrow. Matrix over possible areas of strengthening the Court and the Rome Statute system](#)”, 27 November 2019.

<sup>7</sup> See Workshop Concept Note.

testimony at the seat of the Court and seeking additional information (as opposed to demanding cooperation) from third parties.<sup>8</sup>

Apart from these provisions, the ICC legal framework provides little guidance on the PE process. This should not distract from its importance in ICC practice. According to Carsten Stahn, the PE process has become “one of the most important centers of activity of the Court and focal point of contemporary critique.”<sup>9</sup> Such an intensive focus on PE may be excessive, however, given the modest function it serves compared to investigations and prosecutions, the OTP’s core activities.

## PE Structure, Phasing, and Timelines

In 2013, the OTP released a policy paper on its PE strategy. Mirroring the statutory factors to be considered when making a determination on the opening of an investigation,<sup>10</sup> the OTP follows a standard four-step sequence in the PE process, regardless of whether they are triggered by a referral or *proprio motu*.<sup>11</sup>

1. An initial assessment of information received under Article 15 RS (*Phase 1*);
2. An assessment of a reasonable basis to believe that alleged crimes fall within the subject-matter jurisdiction of the Court (*Phase 2*);
3. An assessment of the admissibility of potential cases in terms of complementarity and gravity (*Phase 3*); and
4. An assessment of the “interests of justice” (*Phase 4*).<sup>12</sup>

The 2013 policy paper underscored that the Rome Statute includes no time period for the completion of PEs, noting that this “deliberate decision by the Statute’s drafters ensures that analysis is adjusted to the specific features of each particular situation.”<sup>13</sup> Although the ICC’s legal framework does not provide limits for the conduct of a PE, the Pre-Trial Chambers endorsed the notion that a PE must be completed within a “reasonable time ... regardless of its complexity.”<sup>14</sup> However, there has been significant variation in the duration of opening and conducting PEs in different situations. For example, in Afghanistan the OTP took some ten years to conduct a PE,<sup>15</sup> but in Libya the PE lasted only a few

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<sup>8</sup> Rome Statute, Article 15(2); ICC Rules of Procedure and Evidence, Rules 46-47.

<sup>9</sup> Carsten Stahn, “Damned If You Do, Damned If You Don’t. Challenges and Critiques of Preliminary Examination at the ICC,” *Journal of International Criminal Justice* 15 (2017) 413, p. 414.

<sup>10</sup> Rome Statute, Article 53(1). In deciding to open an investigation, the Prosecutor considers the following criteria: (a) a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed; (b) admissibility of (potential) cases under article 17, and (c) an investigation would serve the interests of justice.

<sup>11</sup> ICC OTP [Policy Paper on Preliminary Examinations](#), November 2013, para. 12.

<sup>12</sup> *Ibid.*, paras 77-84.

<sup>13</sup> *Ibid.*, para. 89.

<sup>14</sup> Pre-Trial Chamber III, *Situation in the Central African Republic*, [Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic](#), ICC-01/05-6, 30 November 2006, p. 4; Pre-Trial Chamber I, *Request under Regulation 46(3) of the Regulations of the Court*, [Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19\(3\) of the Statute”](#), ICC-RoC46(3)-01/18, 6 September 2018, para. 84.

<sup>15</sup> ICC OTP [Report on Preliminary Examination activities \(2017\)](#), paras 230-33. The preliminary examination of the situation in Afghanistan was made public in 2007, and the OTP requested authorization to open an investigation in 2017.

days.<sup>16</sup> By contrast, the PE in Burundi took 16 months.<sup>17</sup> In Colombia, the PE, initiated in June 2004, is still ongoing as of March 2020.<sup>18</sup> The excessively protracted PEs are a matter of concern and have attracted judicial censure,<sup>19</sup> academic criticism,<sup>20</sup> and pressure from States Parties to establish timelines. On the other hand, the unusually fast-paced PEs such as that in Libya are bound to appear rushed and motivated by political considerations.

It is possible to envisage timeframes for PEs, especially considering the limited purpose of Article 53(1) determinations and provided that such a deadline could be extended upon request, if necessary.<sup>21</sup> But it remains a genuine question whether imposing such deadlines would be appropriate or desirable given the need for flexibility in responding to developments in situations under PE, as well as the inherent complexity of complementarity assessments. Rigid timelines are hard to square with the dynamism of domestic developments.<sup>22</sup> They may also serve as a tool for states to manipulate the OTP and dodge investigations.

## PE Goals, Priorities, and Policies

The OTP's policy paper identifies two overarching goals of the Rome Statute to which the PE activities contribute: (1) ending impunity through positive complementarity by encouraging states to carry out national investigations and prosecutions; and (2) seeking to prevent crimes within the Court's jurisdiction by performing an early warning function and by systematically and proactively collecting open source information on alleged crimes within the Court's jurisdiction.<sup>23</sup> Another policy objective the Office has identified as relevant to its conduct of PEs is transparency, which is served by providing regular public information on PE activities in the form of annual reports, situation-specific reports, and consultations with the relevant States Parties.<sup>24</sup>

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<sup>16</sup> See ICC OTP [Report on Preliminary Examination Activities \(2011\)](#), paras 117-19.

<sup>17</sup> See ICC OTP [Report on Preliminary Examination Activities \(2017\)](#), paras 282-83.

<sup>18</sup> ICC OTP [Report on Preliminary Examination Activities \(2019\)](#), para. 84.

<sup>19</sup> Pre-Trial Chamber II, *Situation in Afghanistan*, [Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Islamic Republic of Afghanistan](#), ICC-02/17, 12 April 2019, para. 92 (noting that the PE was "particularly long").

<sup>20</sup> See e.g. Anni Poes, "Towards the 'Golden Hour'? A Critical Exploration of the Length of Preliminary Examinations," *Journal of International Criminal Justice* 15 (2017) 435 (Poes argues that indefinite PEs may violate the Prosecutor's statutory obligations to investigate impartially and effectively, p. 445-453). Human Rights Watch (HRW) moreover notes that lengthy PEs may disengage national authorities and have undermined the OTP's credibility in some affected communities, Human Rights Watch, [Pressure Point: The ICC's Impact on National Justice](#) (2018), p. 16.

<sup>21</sup> See e.g. Grotius Centre, [Report Preliminary Examination and Legacy/Sustainable Exit: Reviewing Policies and Practices](#) (2015), p. 3-4.

<sup>22</sup> Elizabeth Evenson, "ICC Preliminary Examinations and National Justice: Opportunities and Challenges for Catalyzing Domestic Prosecutions," in Morten Bergsmo and Carsten Stahn (eds.), [Quality Control in Preliminary Examinations: Volume 2](#) (TOAEP 2018), p. 725-727 (The OTP "cannot resort to pre-set timelines in order to put national authorities under pressure to produce real results, nor can it rely on these timelines to help it make crucial and difficult determinations regarding whether prospects for national investigations are sufficient to justify deferring ICC action."); See e.g. David Bosco, "Putting the Prosecutor on a Clock? Responding to Variance in the Length of Preliminary Examinations," *Symposium on the Rome Statute at Twenty* (2018), p. 161-62.

<sup>23</sup> ICC OTP [Policy Paper on Preliminary Examinations](#), November 2013, paras 100-6.

<sup>24</sup> *Ibid.*, paras 94-99.

These policy goals raise a number of challenges. First, there is debate about whether these ambitious objectives *should* be pursued at the PE stage, which, as noted, has a limited function in the ICC process. Second, it is unclear whether and how such goals can be pursued without compromising the primary procedural objective of this stage. Encouraging states to investigate and prosecute nationally and issuing early warnings about ongoing crimes might have the opposite result of intensifying criminal activities or could lead relevant actors to tamper with witnesses or destroy physical evidence, thereby prejudicing potential future investigations. The emphasis on transparency and publicity of PEs could similarly lead to unintended negative consequences, such as depriving the OTP of voluntary cooperation by non-State Parties, triggering a withdrawal from the Rome Statute, or providing perpetrators with additional incentives and opportunities to interfere with evidence so as to render any future investigations more difficult or outright impossible.<sup>25</sup> Finally, as noted above, the pursuit of these policy goals could impede the timely completion of PEs and delay requests for investigation, opening the Court to political manipulation and potentially jeopardizing the success of potential cases.

Considering the above, the workshop will address the following topics and questions related to PEs:

#### **PE Structure, Phasing, and Timelines**

- Does the current structure of the preliminary examinations and the division into phases require re-adjustment? If so, what needs to be done?
- Are there valid reasons why the duration of PEs varied significantly by situation, and would it be advisable or feasible to subject it to standard timelines?

#### **PE Goals, Priorities, and Policies**

- Is there evidence that the OTP has been meeting the objectives pursued in its PE activities?
- How are those objectives to be balanced in specific, and at times radically different situations? How can priorities be balanced or adjusted over the course of lengthy PEs with rapidly changing political and conflict contexts?
- How can the OTP be held accountable for whether or not it meets its own policy objectives for PEs?

#### **Balancing Transparency and Confidentiality**

- How can the OTP better strike a balance between transparency and confidentiality during the PE phase?
- Does the current OTP's strategy of communicating findings to the authors of communications, states, civil society, and other stakeholders by means of annual reports merit reconsideration? Do said reports and any additional information released by the Office provide too little or too much transparency? Should complete reports explaining why communications cannot be taken beyond Phase I also be made public?

#### **Challenges and Resources**

- What are the principal challenges the OTP has faced when carrying out PE assessments (e.g., a deficit of information, resources, investigative prerogatives, political pressure)?

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<sup>25</sup> See, e.g., Stahn, *supra* note 6, p. 430.

- How can the limited resources of the OTP be used more efficiently when it comes to PE activities?
- How can the OTP better manage its complementarity assessments and avoid potential manipulation by the state concerned?

## 4.2 Investigations

The investigation phase is a crucial aspect to building a case. It is also one of the most difficult. Judges, academics, and civil society have severely criticized early ICC investigations. Since the change of leadership in 2012, the OTP has addressed some of those criticisms. For example, it replaced “focused” investigations with an investigation strategy aimed at “open ended, in-depth investigations with a stronger evidence base.” The OTP furthermore aims to be trial-ready as early as possible and in any event no later than the confirmation of charges hearing and makes use of peer review of cases—a policy which has significant impact on the investigations phase.<sup>26</sup>

However, the current OTP continues to face considerable obstacles in its investigations. Some of the salient challenges across situations remain the reliability of witness testimony and the quality of available evidence; difficulty accessing crime scenes and witnesses; the need to guarantee the safety of investigators, intermediaries, and witnesses; debilitating budget constraints; and a lack of cooperation by States Parties and states not party to the Rome Statute. There are a number of practical, internal issues which amplify the way these challenges affect the OTP’s work.

### Investigative Techniques, Strategies, and Tools

Some contend that investigations have been under-prioritized by the OTP, while the second Prosecutor suggested that investigations have suffered as a result of budgetary constraints and the need to rotate team members across several trials.<sup>27</sup> Critiques have also focused on the “lean and flexible” approach to investigations, with small teams and limited time in the field.<sup>28</sup> For example, there were reportedly 12 investigators on staff for Democratic Republic of the Congo investigations,<sup>29</sup> whereas the Côte d’Ivoire situation had eight investigators working in the field in rotating teams of two.<sup>30</sup> The small-team approach also meant that investigators could not spend significant amounts of time in the field, which has detracted from the quality of evidence, and ability to grasp the context in

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<sup>26</sup> See, e.g., ICC OTP, [Strategic Plan 2019-2021](#), para. 14; ICC OTP, [Strategic Plan 2012-2015](#), paras 15, 21-23, 42-50.

<sup>27</sup> “[Address to the Assembly of States Parties, Eleventh Session of the Assembly of States Parties](#),” 14 November 2012, paras 7, 19. In her inaugural address to the ASP, Prosecutor Bensouda noted that in order to save money, staff needed to “rotate between teams depending on phases, workload and case priorities.” The “ideal structure,” she noted, would be to have full teams moving at maximum pace on all cases simultaneously.

<sup>28</sup> See, e.g., *The Prosecutor v. Thomas Lubanga Dyilo*, [Deposition of Witness DRC-OTP-WWWW-0582](#), ICC-01/04-01/06- Rule68Deposition-Red2-ENG, 16 November 2010, 16:11–16; Christian De Vos, “Investigating from Afar: The ICC’s Evidence Problem,” *Leiden Journal of International Law* 26(4) (2013) 1009, p. 1016-1017.

<sup>29</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, [Deposition of Witness DRC-OTP-WWWW-0582](#), ICC-01/04-01/06- Rule68Deposition-Red2-ENG, 16 November 2010, 16:11–16.

<sup>30</sup> De Vos, *supra* note 25, p. 1014, citing J. James, “Ivory Coast: Whos Next after Laurent Gbagbo?,” 146 *International Justice Tribune*, 29 February 2012.



which crimes are committed,<sup>31</sup> as well as the ability to charge a broader range of crimes and/or accused.<sup>32</sup> Investigations have been surprisingly short in some cases. The OTP requested arrest warrants in the Côte d'Ivoire situation only 22 days after the commencement of investigations, and 74 days into the investigation in Libya.<sup>33</sup>

As a consequence of the small-team approach, the OTP adopted the practice of continuing investigations after an arrest warrant has been requested, and in some cases, after charges have been confirmed. Among other problems, this often has a negative impact on defendants' fair trial rights.<sup>34</sup> Although many investigation practices and policies have changed since its early cases, in general it is still not clear to what extent the OTP delivers on the judicial precept that its cases be trial-ready at the confirmation of charges hearing stage. Even if conducting "ideal" investigations, the ICC structure and proclivities of international criminal crimes often mean that additional, post-confirmation investigations may be necessary and even unavoidable as a way to deal with various contingencies. These can include evidence degradation; witnesses becoming unavailable; or new information coming to light that brings into question the credibility and reliability of other prosecution evidence. Yet continuing full-fledged investigative activities in the lead up to and during trial is arguably not a sustainable approach. It spreads the OTP resources thin and creates procedural delays and obstacles in the conduct of trial proceedings, especially considering the need to disclose the new material and give the defense time to prepare. On the other hand, a stricter adherence to the principle of trial-readiness at confirmation may contribute to the length of investigations, compounding the risk of new contingencies. There is a need for a critical appraisal of the current practice of post-confirmation investigations in terms of their effectiveness and impact, particularly the risk of delays and disruptions in the trial process.

Staff retention and department organization has also been a challenge. High staff turnover, in part due to the stress and challenges of the "small team" approach, has led to a paucity of qualified and experienced investigators and a lack of sound investigative methodologies for high-threat environments.<sup>35</sup> The leadership structure of the Investigations Division, the original "joint team" approach to investigation management, and the process of routing investigation decisions through an executive committee may also have detracted from the efficiency and effectiveness of investigations.<sup>36</sup> The quality of evidence has suffered, generating criticism and "serious concern" from Pre-Trial and Trial Chambers alike.<sup>37</sup> In 2013, Judge Christine Van den Wyngaert chided the OTP for a

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<sup>31</sup> Trial Chamber II, *The Prosecutor v. Mathieu Ngudjolo*, [Judgement Pursuant to Article 74 of the Statute](#), ICC-01/04-02/12,

26 December 2012, paras 115-118.

<sup>32</sup> De Vos, *supra* note 25, p. 1017.

<sup>33</sup> Dermot Groome, "No Witness, No Case: An Assessment of the Conduct and Quality of ICC Investigations," *Penn State Journal of Law & International Affairs* 1(3) (2014) 1, p. 9.

<sup>34</sup> *Ibid.*, p. 11-13.

<sup>35</sup> See, e.g., William H. Wiley, "The Difficulties Inherent in the Investigation of Allegations of Rape before International Courts and Tribunals," in Morten Bergsmo, Alf B. Skre, and Elisabeth J. Wood (eds.), [Understanding and Proving International Sex Crimes](#) (TOAEP 2012), p. 375-6.

<sup>36</sup> De Vos, *supra* note 25, p. 1013-14; citing Gregory Townsend, "Structure and Management," in Luc Reydam, Jan Wouters, and Cedric Ryngaert (eds.), *International Prosecutors* (OUP 2012), p. 590.

<sup>37</sup> Groome, *supra* note 30. For example, Pre-Trial Chamber I postponed the confirmation of charges hearing in the Gbagbo case so that the OTP could conduct additional investigations. The Chamber noted "with serious concern that in this case the Prosecution relied heavily on NGO reports and press articles with regard to key elements of the case, including the contextual elements of crimes against humanity." Pre-Trial Chamber I, The

“failure to investigate properly” before confirming charges against Uhuru Kenyatta. Judge Van den Wyngaert was of the view that there had been “grave problems in the Prosecution’s system of evidence review, as well as a serious lack of proper oversight by senior Prosecution staff.”<sup>38</sup>

The OTP has also come under fire for its practice of relying excessively on intermediaries— independent organizations and individuals that have assisted the OTP in its investigations.<sup>39</sup> Although the OTP has readily used intermediaries to obtain access to evidence and for other forms of support, it has often failed to develop a true partnership with these actors, integrate intermediaries’ legitimate concerns into the investigative process, as well as to properly oversee their work.<sup>40</sup>

Finally, others have criticized the OTP for the limited scope of charges in some cases, including charges for sexual and gender-based violence (SGBV) against both women and men.<sup>41</sup>

Considering the general lack of detailed information on the process of investigations at the ICC and competing issues of confidentiality, this session will discuss the following, with a view to understanding the existing processes and how they could be improved:

### **Investigation and Trial Teams**

- What is the standard composition of an investigative team? Is there an effective balance between criminal investigators and forensic specialists and analysts, on the one hand, and lawyers on the other? How does this compare to other institutions and what changes or good practices can be recommended to the ICC OTP in this regard?

### **Quality of Investigations**

- How have the investigative practices of the OTP evolved since the early practice characterized by the prevalence of remote and indirect investigations, over-reliance on third parties as evidence-providers (UN, NGOs, states), and the use of intermediaries in order to acquire access to and establish rapport with witnesses? Have the measures taken by the OTP and the Court to address

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*Prosecutor v. Gbagbo*, [Decision Adjourning the Hearing on the Confirmation of Charges Pursuant to Article 61\(7\)\(c\)\(i\) of the Rome Statute](#), ICC-02/11-01/11, 3 June 2013, para. 35.

<sup>38</sup> Trial Chamber V, *The Prosecutor v. Uhuru Muigai Kenyatta*, Decision on Defense Application Pursuant to Article 64(4) and Related Requests, ICC-01/09-02/11-7280Anx2, 26 April 2013, [Concurring Opinion of Judge Christine Van den Wyngaert](#), paras 1, 4–5. In 2014, after the confirmation decision against Laurent Gbagbo was postponed by the Pre-Trial Chambers due to insufficient evidence, Judge Van den Wyngaert was of the view that evidence was still insufficient to confirm charges against Gbagbo (“There is a considerable quantitative increase in evidence submitted by the Prosecutor since the adjournment on 3 June last year. [...] However, despite the request for more and better information as to the number of victims in relation to the alleged incidents, the previously identified problem regarding reliance upon anonymous hearsay remains.”), [Dissenting Opinion of Judge Christine van den Wyngaert](#), ICC-02/11-01/11-656-Anx, 12 June 2014.

<sup>39</sup> Susana Sácouto and Katherine Cleary Thompson, “Investigative Management, Strategies, and Techniques of the ICC’s OTP,” in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court* (OUP 2015), p. 328; [Expert Initiative on Promoting Effectiveness at the International Criminal Court](#) (December 2014), p. 59; Caroline Buisman, “Delegating Investigations: Lessons to be Learned from the Lubanga Judgment,” *Northwestern Journal of Human Rights* 30(11) (2013).

<sup>40</sup> De Vos, *supra* note 25, p. 1012.

<sup>41</sup> See, e.g., Women’s Initiatives for Gender Justice, [Gender Report Card on the International Criminal Court 2018](#); Pascal Kambale, “[The ICC and Lubanga: Missed Opportunities](#),” *SSRC Forums: African Futures*, 16 March 2012; Niamh Hayes, “Sisyphus Wept: Prosecuting Sexual Violence at the International Criminal Court,” in William A. Schabas, Yvonne McDermott, and Niamh Hayes (eds.), *The Ashgate Research Companion to International Criminal Law* (Routledge 2013), p. 7-44.

related criticisms proven effective and sufficient? In what areas are further improvements necessary?

- Considering the OTP’s mixed record of successful confirmation of charges and prosecutions, how does the OTP ensure an adequate quality of evidence in the cases under investigation and what practices has it developed to those ends? What steps does it take to probe the credibility and reliability of witnesses and other evidence?
- Does the Office make sufficient use of the device of “unique investigative opportunity” for the preservation of evidence under Article 56 Rome Statute? How can these practices be improved? Has the OTP developed sufficient tools to rely on non-witness evidence? How does the OTP go about evidence preservation taking into account the length of both PEs and investigations?

#### **Charging Decisions**

- How does the OTP make sure that its investigations focusing on specific individuals are representative of the fuller range of alleged criminality and inclusive of sexual and gender-based crimes?
- What steps should the Prosecutor take to provide strong leadership in this area?

#### **(Non-)Cooperation and Investigations**

- How does the OTP address non-cooperation by states in terms of acquiring evidence and custody of accused?
- How does it develop and maintain synergistic relationships with other organizations and entities that may provide it with cooperation without compromising its (perceived) independence?

### **4.3 Prosecutorial Strategies and Case Preparation**

The quality of investigations directly impacts the ability of the OTP to effectively prosecute persons put on trial before the ICC. However, the OTP’s capacity to see cases to completion and to secure convictions—which operates as the primary measure of prosecutorial success—also hinges upon its performance in the stage leading up to and during trial. Political and operational circumstances change; evidence deteriorates; witnesses falter, recant, or disappear; unforeseen evidentiary gaps surface and forensic certainties dissipate; and state cooperation may be withheld. The task of presenting a strong case and discharging its burden of proof at trial requires a careful risk-analysis, ability to anticipate and work proactively on potential challenges, and agility in the face of a changing situation on the ground and in the courtroom.

#### **Case Selection and Prioritization Strategy**

The OTP must operate on the basis of workable strategies for selecting and prioritizing cases within a situation while maintaining flexibility to respond to situational changes. The OTP has faced systemic problems with acquiring custody over defendants owing to non-execution of the ICC arrest warrants by states, as well as difficulties with securing convictions in early cases. In 2016, the Prosecutor adjusted the OTP’s policy for selecting and prioritizing cases to allow it to focus on “a limited number of mid- and high-level perpetrators in order to ultimately build the evidentiary foundations for case(s)

against those most responsible.”<sup>42</sup> However, it is unclear whether such policy statements actually guide the OTP’s practice, or whether they merely describe its current or potential practice. More specifically, it is unclear whether the shift has been effective.

Considering the limited resources available to the OTP, it also needs to take practical realities into account and focus on cases in which it can conduct an effective investigation and in which there is a reasonable possibility of conviction.<sup>43</sup> However, it is unclear the extent to which resource-related considerations should impact discretionary decisions and how they translate into decisions to select and prioritize—or not—a specific case. Neither budgetary nor other pragmatic limitations alone can credibly explain or justify the continuing lack of prosecutions in situations such as Georgia, which has been under investigation for more than four years, or the still-predominant focus on former and deposed political and rebel group leaders, as opposed to sitting members of governments and state military forces (e.g. Uganda and Côte d’Ivoire). The perceived imbalances in the OTP’s approach to case selection within and across situations negatively affects the Court’s image and legitimacy as an impartial judicial institution.

#### Case Preparation and Witness Management and Protection

In operational terms, it is essential for the OTP to closely monitor contextual developments and to be prepared to respond adequately to any emerging gaps and weaknesses in its case or evidence. In its past practice, the Office has proven unable to take remedial measures aimed to preserve evidence and protect its witnesses, counter witness interference and evidence tampering, and conduct additional investigations—or to seek the amendment or withdrawal of charges in a timely fashion. The Kenya cases, which collapsed largely as a result of such failures, are the prime, albeit not the sole, example of this.<sup>44</sup>

Witness interference has been pervasive in most cases before the ICC that have reached the trial phase and has had serious implications for the degree of prosecutorial success.<sup>45</sup> Despite the concerning reports of widespread evidence tampering, so far there have not been many prosecutions of offenses under Article 70 RS. One such case against the five accused in *Bemba II* (CAR I) resulted in convictions. Arrest warrants issued in 2013 and 2015 against three defendants in the Situation in Kenya remain unenforced.<sup>46</sup> More decisions on arrest warrants may have been issued under seal. However, it is unclear whether the OTP has made sufficient use of Article 70 as a way to curb witness interference. More generally, the Court’s witness protection measures may be insufficient and inadequate for effectively countering witness tampering and assuage witnesses’ legitimate fears for their and their

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<sup>42</sup> ICC OTP, [Policy paper on case selection and prioritization](#), 15 September 2016, para. 42. See also ICC OTP, [Strategic Plan 2019-2021](#), para. 24.

<sup>43</sup> ICC OTP, [Policy paper on case selection and prioritization](#), 15 September 2016, paras 49-51.

<sup>44</sup> “[Full statement of the Prosecutor, Fatou Bensouda, on external expert review and lessons drawn from the Kenya situation](#),” 26 November 2019, Annex 1; Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Reasons for oral decision of 15 January 2019, [Reasons of Judge Geoffrey Henderson](#), ICC-02/11-01/15-1263-AnxB-Red, 16 July 2019; and [Opinion of Judge Cuno Tarfusser](#), ICC-02/11-01/15-1263-AnxA, 16 July 2019, paras 4-5; The Appeals Chamber, *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; and [Separate opinion of Judge Christine Van den Wyngaert and Judge Howard Morrison](#), ICC-01/05-01/08-3636-Anx2, 8 June 2018.

<sup>45</sup> Open Society Justice Initiative, “[Witness Interference in Cases before the ICC](#),” November 2016.

<sup>46</sup> “[Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding the unsealing of Arrest Warrants in the Kenya situation](#),” 10 September 2015.

family members' safety and well-being. Some practitioners claim that the Court has not always properly balanced the need for witness testimony against the existing risks of exposure of and retaliation against (potential) witnesses and information-providers. In the Kenya situation, at least one person who was in contact with the OTP, but not placed on the witness list, was murdered.<sup>47</sup> There are likely others not benefitting from protective measures who have been threatened or harmed.

## Case Strategy

The OTP also needs to reconsider its strategy with respect to guilty pleas. *Al Mahdi* (Mali) is the only case so far which has been disposed of following an admission of guilt (Article 65 RS). This practice has resource-saving effects and comports with the OTP's building-upwards approach while being reconcilable with the public interest in a fuller presentation of evidence in open court (Article 65(4)(a) RS). The consensual disposition of cases could help the OTP secure convictions in more cases with fewer resources and circumvent many of the obstacles it typically faces in contested trial proceedings. However, it does not appear that the OTP is actively pursuing negotiated settlements as a matter of strategy. This aspect of practice may deserve reconsideration.

Considering the above, the workshop will address the following topics and questions regarding prosecutorial strategies and case preparation:

### Case Selection and Prioritization Strategy

- Has the shift in the OTP's case selection and prioritization strategy towards the building-upwards approach been a success on its own terms? In particular, what specific results has it produced and how can the limited number of new cases brought by the second Prosecutor be explained?
- What experience and good practice from other institutions can be brought to bear on this issue?

### Trial Readiness and Contingency Planning

- Has it proven feasible for the OTP to ensure trial-readiness at the confirmation of charges stage in all cases? Does this explain much longer investigations? Does it account for any contingencies in terms of witnesses or other evidence becoming unavailable, when preparing a case for trial? How does it go about conducting late investigations in the post-confirmation phase in case of any contingencies? What can be improved in this respect?

### Case Strategy, Preparation, and Disclosure

- Should the OTP consider doing more to obtain admissions of guilt by soliciting, offering, and negotiating settlements with defendants?
- Are the measures used by the OTP to ensure adequate and prompt case preparation and timely disclosure prior to the confirmation of charges and prior to the commencement of trial effective? If not, where do the bottlenecks lie?

### Witness Management and Protection

- Does the OTP ensure adequate protection of its (potential) witnesses and informants?

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<sup>47</sup> "[Statement of the Office of the Prosecutor regarding the reported abduction and murder of Mr. Meshak Yebei](#)," 9 January 2015.

- What specific lessons have been learnt from past cases or tribunals where widespread witness intimidation and interference were reported?
- Given reports of pervasive witness interference, why have there been so few prosecutions of Article 70 offences? How can the use of this device be optimized and made more effective?

## 4.4 Completion Strategies, Engagement, and Outreach

### Completion Strategies

In 2012, the ASP called for clarification about “exit strategies” and followed up with a Bureau report in 2013.<sup>48</sup> Until now, however, the OTP has not formally “ended” any investigations. The OTP’s Strategic Plan for 2019-2021 acknowledges the need to develop completion strategies to allow it to eventually wind down situations.<sup>49</sup> The OTP has stated that it will prioritize the development of a policy for completing situations under investigation. Situation-specific strategies could be developed at the opening of a new situation and would cover:

1. Defining prosecutorial goals, if possible together with the situation country;
2. Coordinating work, if possible with the situation country, to increase the speed and efficiency of investigations; and
3. Having partners assist, where needed, the situation country in building up its capacity to genuinely investigate and prosecute, which would allow the Office to reduce its list of pending cases requiring investigation.

The importance of completion strategies has been underlined by several authors, putting forward a number of arguments.<sup>50</sup> First, completion strategies can provide closure to victims and survivors and certainty for persons involved or interested in an investigation and therefore better manage expectations. Second, endless engagement in a situation could further the perception of international criminal justice and the ICC as inefficient. Third, completion strategies can catalyze and encourage investigation and prosecutions by domestic authorities. Finally, completion strategies can assist with the OTP’s resource constraints and caseload. Others have suggested that “completion strategies” as such may be a slight misnomer. Some have suggested that these strategies should not be only about completing or closing a situation, but also about the OTP, in coordination with other organs of the Court, planning intervention in any given situation from the start.<sup>51</sup>

However, little guidance exists on completion strategies. Article 53 RS provides criteria for the Prosecutor to initiate an investigation, but it does not make reference to a legal mechanism to close investigative activities in a situation. Several authors have espoused a more stringent approach to completion, while others have advocated for closing investigations only in the narrowest

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<sup>48</sup> See Resolution [ICC-ASP/11/Res.6](#), complementarity, 12 November 2012, preamble para. 5; [Report of the Bureau on Complementarity](#), ICC-ASP/12/31, 15 October 2013.

<sup>49</sup> ICC OTP [Strategic Plan 2019-2021](#), para. 23.

<sup>50</sup> See, e.g., Elizabeth Evenson and Alison Smith, “[Completion, Legacy, and Complementarity at the ICC](#),” in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, p. 1259-1276 (OUP 2015); Rebecca J. Hamilton, “The ICC’s Exit Problem,” *NYU Journal of International Law & Politics* 47(1) (15 March 2014).

<sup>51</sup> Evenson & Smith, *supra* note 47, p. 1267

circumstances, preferring instead to “hibernate” investigations. Leaving investigations inactive, it is argued, could enhance the OTP’s flexibility in specific situations should circumstances change. It could also increase the deterrent effect of the ICC’s involvement in situations and uphold its credibility. Finally, it could make it easier for the OTP to deal with residual issues such as outreach and witness protection.<sup>52</sup>

As the Court itself noted, many of the issues specific to the completion strategies of the *ad hoc* tribunals may not apply to the ICC as a permanent institution and lessons learned cannot simply be copied.<sup>53</sup> Despite the differences between the *ad hoc* tribunals and the ICC, the experience of the former might still prove instructive, in particular with regard to domestic capacity-building. Evenson and Smith identify outreach and archive management as further key elements that should be included in the ICC completion strategies based on lessons learned from the ICTY, ICTR, and SCSL.<sup>54</sup>

With respect to completion strategies, three main areas of consideration have been identified:

1. Completion issues: core judicial and administrative work performed before completion of closing dates, including planning for residual issues.
2. Residual functions: a range of core judicial and administrative tasks that must be performed post-completion, since a criminal court’s mandate is not complete with the final rendering of decisions.
3. Legacy issues: long-term post-completion projects, which being prior to the institution’s closure, such as outreach and institutional and capacity-building efforts, aimed at leaving a lasting positive impact on affected communities and their criminal justice systems.<sup>55</sup>

## Outreach

An issue closely related to completion strategies and engagement plans is the OTP’s approach to outreach and communications. Outreach is a critical aspect of the Court’s work as a whole, and a shared responsibility between the OTP and the Registry. As part of its outreach activities, the OTP particularly focuses on the communities affected by the Court’s work.<sup>56</sup> For affected communities and local civil society organizations, the OTP’s lack of communication about important decisions in a situation or a case, such as a decision to withdraw charges or to end presence in a situation country, have significant consequences. They have a major impact on the safety and security of those who have worked with the Court, as well as on the OTP’s ability to gather evidence, communicate with witnesses and affected communities, and advocate for local trials and justice initiatives. Moreover, as with

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<sup>52</sup> Kevin Jon Heller, [The OTP Should Not Close Investigations Unless Absolutely Necessary](#), ICC Forum, 24 February 2020; Alex Whiting, [Prioritizing Investigations is Key](#), ICC Forum, 24 February 2020.

<sup>53</sup> [Report of the Court on complementarity: Completion of ICC activities in situation countries](#), ICC-ASP/12/32, 15 October 2013, para. 4; Evenson & Smith, *supra* note 47.

<sup>54</sup> Evenson & Smith, *supra* note 47, p. 1269-1273.

<sup>55</sup> [Report of the Court on complementarity: Completion of ICC activities in situation countries](#), ICC-ASP/12/32, 15 October 2013 para. 17; Kevin Jon Heller, “Completion,” in Luc Reydam, Jan Wouters, and Cedric Ryngaert (eds.), *International Prosecutors* (OUP 2012), p. 887.

<sup>56</sup> Regulations of the Office of the Prosecutor, Regulation 15(1): “The Office shall disseminate information on its activities to, and respond to enquiries from states, international organizations, victims, non-governmental organizations, and the general public, with a particular focus on the communities affected by the work of the Office.”) Regulation 15(2) further states that the OTP shall contribute to the Court’s outreach strategies and activities.

completion strategies, outreach and engagement plans need to be specifically adapted to local realities and geared towards specific target groups which vary by case and situation.

## Political Pressure

Another related, and pressing, issue for consideration is how the OTP can or should respond to political pressure with respect to decisions on opening, closing, or conducting investigations in situation countries. Political pressure from non-Member states has increased significantly in recent years. For example, in March 2020, the US Secretary of State threatened to impose travel restrictions on family members of key OTP staff in response to the investigation in Afghanistan.<sup>57</sup> Israel has also mounted a political campaign against the Court over its inquiries into crimes allegedly committed in Palestine.<sup>58</sup> This political pressure has an impact on the OTP's ability to conduct investigations and carry out its mandate. Experience from other prosecutors working in highly politicized contexts under political pressure may be able to inform the ICC Prosecutor in this regard.

Regarding completion strategies, engagement, and outreach, the workshop will cover the following topics and questions:

### **Situation Completion Strategies and Protocols:**

- What factors and circumstances does the OTP take into account when making a decision to phase out a situation and what role should financial considerations play? Does the OTP consult relevant stakeholders for that end (e.g., victims and affected communities, former witnesses, civil society sector, domestic authorities)?
- Should the OTP prepare a plan for engagement at the outset of an inquiry, stating its goals and ideal timelines for each situation, rather than only planning exits?
- How should the OTP coordinate with other parts of the Court in planning entry to and exit from certain situations?

### **Case/Investigation Completion Strategies and Protocols:**

- What protocol and strategy, if any, does the OTP follow when deciding to wrap up an investigation in a specific situation? Does such a strategy accommodate situation-specific factors for the purpose of completion sufficiently (or perhaps excessively)?

### **Completion and Complementarity:**

- How should the completion strategy be designed and operationalized in such a way as to maximize prevention, ending impunity, and catalytic effects with respect to domestic investigations and prosecutions of international crimes?
- Are there capacity-building needs that the OTP or others should take on to ensure that there is sufficient national capacity to oversee any residual issues, such as witness protection?

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<sup>57</sup> US Department of State, "[Secretary Michael R. Pompeo Remarks to the Press](#)," 18 March 2020.

<sup>58</sup> See, e.g., Mark Kersten, "[Injustice Anywhere is a Threat to Justice Everywhere](#)" – Palestine, Israel, and the ICC," *Justice in Conflict*, 3 February 2020.



#### **OTP Outreach and Communication:**

- Outreach is a shared responsibility between the OTP and the Registry. To what extent should the OTP coordinate with the Registry or engage in its own outreach activities separate from the rest of the Court?
- Should the OTP delay operations by the Registry's outreach unit into new situations?
- At what point in the investigation and in the process should the OTP communicate to the stakeholders the information about the status and the progress made in the situation or a case, or about completion?
- How can the OTP better coordinate with the Registry so that the Office's participation in outreach-related activities is more effective in terms of impact and more efficient in terms of related costs?
- How can the OTP improve its engagement with victim communities?

#### **Political Pressure:**

- How should the Prosecutor respond to external political pressure, including from non-Member states?
- How can the Prosecutor operate in a clearly politicized environment while maintaining independence?

## **4.5 Organization, Accountability, and Ethics**

As the “engine” of international criminal proceedings,<sup>59</sup> a structured and well-managed prosecution is crucial. Based on experiences from international criminal tribunals, several organizational features may be conducive to this. These include, but are not limited to, avoiding a structural division between the investigative and prosecutorial functions; having skilled individuals in leadership positions; effective and clear delegation of tasks among and assigning of responsibilities to staff; recruiting and maintaining highly skilled staff; and, if possible, hiring staff members from situation countries.<sup>60</sup>

### **OTP Organization and Office Culture**

Unlike the ICTY and ICTR OTP's, the ICC OTP is entirely self-governing. Article 42 RS provides that the OTP is to be headed by the Prosecutor, who is vested with full authority over the management and administration of the Office, including staff, facilities, and other resources. Article 42 RS adds that one or more Deputy-Prosecutors shall assist the Chief Prosecutor. The ICC OTP is further composed of three divisions: the Jurisdiction, Complementarity and Cooperation Division (JCCD), the Investigations Division (ID), and the Prosecutions Division (PD). Under the Prosecutor, who makes the final decision regarding investigations and prosecutions, the Deputy Prosecutor heads all three divisions, which are in turn each led by a director. The OTP's Executive Committee (ExCom), consisting of the Prosecutor and the heads of the divisions, is responsible for strategies, policies, and budget of the Office.<sup>61</sup> Early investigations were conducted by joint teams composed of staff from all three divisions. Team

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<sup>59</sup> Carsten Stahn, *A Critical Introduction to International Criminal Law* (CUP 2018), p. 281.

<sup>60</sup> Gregory Townsend, “Structure and Management,” in Luc Reydam, Jan Wouters and Cedric Ryngaert (eds.), *International Prosecutors*, p. 316-318 (OUP 2012).

<sup>61</sup> ICC OTP, [Regulations of the Office of the Prosecutor](#) (2009), Regulation 4.

leadership was shared by members from the JCCD, ID, and PD and consensus was required for decision-making.<sup>62</sup> The second Prosecutor adopted an integrated team approach, similar to the approach of the ICTY, in which a trial attorney from PD oversees the investigation. This approach has been seen as an improvement from the previous joint team structure. Indeed, the report on the external expert review of the Kenya situation underlined the importance of simplification and a clear definition of the responsibilities and role of each division.<sup>63</sup>

Most prosecution offices of international criminal tribunals adapted their organizational structure as their caseloads progressed, budgets were revised, as well as when new prosecutors took office.<sup>64</sup> However, the basic structure of the ICC OTP has remained unchanged since the start of the Court's activities. The individual directors of the three divisions have largely been the same since the early days of the Court. There have furthermore been very few changes in the leadership of division sections. In light of the past experiences within the OTP, the question is whether any adjustments to the Office's structure and personnel policy are warranted.

Office management and culture have been a recurring concern. Former OTP staff and scholars alike have made note of the lack of office culture and sound management in the early years of the ICC OTP.<sup>65</sup> The review team conducting the ICC OTP Kenya cases review criticized the first Prosecutor's leadership as "autocratic, not open to contrary assessments or viewpoints, too often marginalizing those who disagreed with him or reacting angrily and threateningly," an attitude which middle management perpetuated.<sup>66</sup>

The current Prosecutor has taken steps to create a new culture ("where it is safe to express ideas and critical thinking is the norm") and this remains a priority for 2019-2021.<sup>67</sup> For instance, investigation plans are peer-reviewed; staff members are encouraged to express their views during team meetings; and in addition to the 2013 code of conduct for the Office, the OTP created core values applicable to

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<sup>62</sup> ["Full statement of the Prosecutor, Fatou Bensouda, on external expert review and lessons drawn from the Kenya situation,"](#) 26 November 2019, Annex 1, para. E15; see for criticism on the joint team structure, e.g. Gregory Townsend, "Structure and Management," in Luc Reydam, Jan Wouters and Cedric Ryngaert (eds.), *International Prosecutors*, p. 292 (OUP 2012); War Crimes Research Office, [Investigative Management, Strategies, and Techniques of the International Criminal Court's Office of the Prosecutor](#) (Oct. 2012), p. 22-23.

<sup>63</sup> ["Full statement of the Prosecutor, Fatou Bensouda, on external expert review and lessons drawn from the Kenya situation,"](#) 26 November 2019, p. 10.

<sup>64</sup> Gregory Townsend, "Structure and Management," in Luc Reydam, Jan Wouters and Cedric Ryngaert (eds.), *International Prosecutors*, p. 172 (OUP 2012).

<sup>65</sup> Gregory Townsend noted that management was "one of the most underdeveloped areas of the OTP," see Gregory Townsend, "Structure and Management," in Luc Reydam, Jan Wouters and Cedric Ryngaert (eds.), *International Prosecutors*, p. 293 (OUP 2012); Jens Meierhenrich pointed out that no institutional or shared culture existed within the OTP in its early years, see Jens Meierhenrich, "The Evolution of the Office of the Prosecutor at the International Criminal Court. Insights from Institutional Theory," p. 112, 114-15, in Martha Minow, C. Cora True-Frost and Alex Whiting (eds.), *The First Global Prosecutor. Promise and Constraints* (University of Michigan Press 2018, 4th Ed.); Morten Bergsmo also identified issues with OTP management and culture, for instance noting that "a culture was established whereby even working meetings were choreographed, to ensure that the Prosecutor and his favorites would not be contradicted – soon, no one dared to," see Morten Bergsmo, Wolfgang Kaleck, Sam Muller, and William A. Riley, [A Prosecutor Falls, Time for A Court to Rise](#), FICHL Policy Brief Series No. 86 (2017); and Morten Bergsmo, "Institutional History, Behavior and Development," in Morten Bergsmo, Klaus Rackwitz, and SONG Tianying (eds.), [Historical Origins of International Criminal Law: Volume 5](#), p. 21-24 (TOAEP 2017).

<sup>66</sup> ["Full statement of the Prosecutor, Fatou Bensouda, on external expert review and lessons drawn from the Kenya situation,"](#) 26 November 2019, Annex 1, para. E8.

<sup>67</sup> ICC OTP, [Strategic Plan 2019-2021](#), para. 14(e).

the entire Office (Dedication, Integrity, and Respect).<sup>68</sup> The OTP furthermore identified staff well-being as a key component of its overall strategy for 2019-2021. However, given the apparently static character of the organization and absent renewal in the personnel occupying key positions, the question remains how a positive change of culture could be enabled.

## Prosecutorial Independence and Accountability

Prosecutorial independence and accountability for OTP staff is an overarching theme that touches on all of the other topics under discussion. Article 41(2) RS provides that the OTP shall act independently from the other organs of the Court. That independence was at the center of intense debate during the establishment of the ICC; many states feared that the Prosecutor would be accountable to no one. Since then, checks and balances have been set in place and have seriously changed the realities of institutional independence of the OTP.<sup>69</sup>

Some of these internal and external mechanisms to hold the OTP members accountable for misconduct include internal bureaucratic controls within the Office,<sup>70</sup> judicial intervention, and disciplinary measures by the ASP, the Independent Oversight Mechanism (IOM), and national or international bar associations. The first Prosecutor continuously postponed the adoption of the Code of Conduct applicable to the OTP staff, and it is only in 2013 that the Code was finally adopted.<sup>71</sup> However, the OTP had already suffered reputational costs due to mismanagement and unethical or otherwise questionable behavior during the term of the first Prosecutor. It has also taken a long time to fully operationalize the IOM due to the resistance on the part of the first Prosecutor. It is uncertain whether the adoption of the Code and the reaching of an agreement on the mandate of the IOM have resulted in any concrete improvements or changes within the OTP, not least considering that its structure and personnel at the senior management level have been rather static. There is a need to evaluate the existing performance review plans, staffing structures, and the enforcement of the code of conduct. It is also necessary to take concrete steps to improve the professional culture of the OTP by ensuring the integrity, ethics, and high moral character of its staff members. In order to protect them and ensure their well-being, additional measures are required to identify, report, and adequately sanction all forms of harassment, bullying, abuse of power, discrimination, sexual harassment, and other forms of misconduct.

Considering the above, the workshop will address the following topics and questions related to the OTP structure, office culture, accountability, and performance:

### OTP Structure

- Has the institutional structure proven workable and effective, or are any adjustments warranted in light of the past experience within the OTP?

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<sup>68</sup> ["Full statement of the Prosecutor, Fatou Bensouda, on external expert review and lessons drawn from the Kenya situation,"](#) 26 November 2019, p. 6.

<sup>69</sup> See, e.g., Jan Wouters, Sten Verhoeven, and Bruno Demeyere, "The International Criminal Court's Office of the Prosecutor: Navigating between Independence and Accountability?," *International Criminal Law Review* 8 (2008), p. 273-318.

<sup>70</sup> ICC OTP, [Regulations of the Office of the Prosecutor](#) (2009).

<sup>71</sup> ICC OTP, [Code of Conduct for the Office of the Prosecutor](#), 5 September 2013.

- Should the current basic structure of the OTP be revisited so as to provide, for example, for two Deputy Prosecutors instead of one and/or to redistribute functions among different Divisions? Should some of the Divisions, or Sections, be abolished or placed elsewhere in the organigram?
- How can the OTP ensure better integration of functions across the different Divisions, from preliminary examinations to investigations and trials?
- What lessons, if any, could be learned from the structure of the OTP in other international and special criminal tribunals and/or domestic prosecution offices?

#### **OTP Office Culture**

- Given the apparently static character of the organization and absent renewal in the personnel occupying key positions as discussed above, how can stagnation be prevented or remedied and how can a positive change of culture be enabled?
- Should the OTP consider adopting employment and leadership personnel rotation practices in use in other organizations as a way to ensure dynamism and provide promotion opportunities to competent and talented staff members?
- How can the OTP develop a structure and work culture that is resilient and responsive to needs within existing institutional limitations (e.g. contract obligations, etc.)?
- What steps might the Prosecutor take to improve the overall culture of the Office as well as set an example from the top in terms of integrity, ethics, and moral character among all OTP employees? What does the Prosecutor need to do to end all forms of harassment, bullying, abuse of power, discrimination, sexual harassment, and other forms of misconduct in the OTP? Can, or should, the Prosecutor contribute to combating the endemic culture of misogyny present in the international justice field?
- How can the Office ensure support for staff welfare and a work environment that is conducive to effectiveness and success?

#### **Accountability and Disciplinary Measures**

- Are the existing disciplinary mechanisms meant to safeguard the integrity and accountability of OTP staff sufficiently robust to effectively deal with alleged instances of professional misconduct, including behavior which casts doubt on the “high moral character” of OTP officials?
- Does the current scope and interplay of the OTP’s competence to apply disciplinary measures, on the one hand, and the investigative mandate of the IOM in relation to the OTP staff, on the other hand, strike the right balance between the prosecutorial independence and accountability?

#### **Performance and Dismissal**

- Are existing performance review procedures sufficient for ensuring top-quality performance by OTP staff? What needs to change in this regard?
- How can the Prosecutor be held to account for mistakes and failures within the OTP, both at the top level and of individual managers? What tools can help maintain the balance between prosecutorial independence and accountability?
- Who is the Prosecutor accountable to?

## Annex 2: Concept Note

### Improving the Operations of the ICC Office of the Prosecutor: Reappraisal of Structures, Norms, and Practices

Organized by OSJI & ACIL/Department of Criminal Law, Amsterdam Law School

25-26 March 2020

#### Concept Note

## 1 Background

The 18<sup>th</sup> session of the Assembly of States Parties (ASP) decided to establish the Independent Expert Review (IER) of the International Criminal Court (ICC, the Court) to carry out a critical evaluation of the Court's operation in three key areas to assist it in carrying out its mandate.<sup>72</sup> The IER is organized into three clusters of issues under review: 1) governance; 2) judiciary and the judicial process; and 3) preliminary examinations, investigations, and prosecutions. The IER panel of experts commenced their work on 1 January 2020 and are expected to submit their final report to the Bureau and the ASP in September 2020. The report will include concrete, achievable, and actionable recommendations aimed at enhancing the performance, efficiency, and effectiveness of the Court and the Rome Statute system as a whole. The Bureau's working document entitled "Matrix over possible areas of strengthening the Court and Rome Statute system" (Matrix) forms a starting point for the dialogue on the review of the Court.<sup>73</sup>

The IER offers a unique opportunity for comprehensive review of the ICC, including the performance of the Office of the Prosecutor (OTP), with a view to strengthening the Court and Rome Statute System as a whole. According to the Matrix and the Resolution establishing the IER, the main legal and technical issues to be covered in the cluster on preliminary examinations, investigations, and prosecutions ("cluster three") include:

1. (partial) Number and function of deputy prosecutors;
2. Preliminary examinations;
3. Prosecutorial strategies;
4. Investigations and case-preparations;
5. Structure of the OTP; and
6. Completion Strategies.

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<sup>72</sup> Resolution [ICC-ASP/18/Res.7](#), Review of the International Criminal Court and Rome Statute system, 6 December 2019.

<sup>73</sup> Draft Working Paper, "[Meeting the challenges of today for a stronger Court tomorrow. Matrix over possible areas of strengthening the Court and the Rome Statute system](#)," 27 November 2019.

## 2 Objectives

On 25-26 March 2020, the Open Society Justice Initiative and the Amsterdam Center for International Law jointly with the Department of Criminal Law at the Amsterdam Law School, University of Amsterdam, will convene an online expert workshop on improving the operations of the ICC OTP. The workshop will bring together a group of approximately 30 (inter)national practitioners and experts. Based on their professional experience with investigating and prosecuting international crimes and/or monitoring the relevant proceedings, the participants will reflect on practice-oriented ways to strengthen the work of the ICC OTP and develop recommendations to be subsequently conveyed to the IER Panel. The workshop is invitation-only and will be held under Chatham House Rules. The workshop will produce a report containing practice-oriented advice, recommendations, and good practices that will be shared with the IER Panel reviewing preliminary examinations, investigations, and prosecutions.

## 3 Workshop Structure and Format

The workshop will be held online in a series of four sessions focusing on key themes related to the functioning of the OTP. Each session will provide ample opportunity for an open and candid exchange of views among all participants. The discussions will be moderated, and after each session, the moderator will provide a summary with key recommendations and takeaways. After the workshop, participants may be requested to provide further input to be included in a final written report.

The purpose of the report is to inform the work of the IER. It will (i) identify innovative approaches and creative, practical solutions to the problems the ICC OTP has faced across multiple facets of its work; and (ii) formulate good practices and develop actionable, practice-oriented recommendations for the improved functioning of the OTP.

We are asking participants to prepare comments and interventions on one to two specific topics most relevant to their practice areas and experience. While we are not asking participants to join every session, they are more than welcome to do so. We also kindly invite participants to provide written comments to us separately on any topic or question included below.

## 4 Sessions and Discussion Questions

Below we have included a series of discussion questions relevant to the topic for each session. We invite you to refer to the Discussion Paper for further background and contextual information.

### 4.1 Session 1: Investigations and Case Preparation

1. **Investigation and Trial Teams:** What is the standard composition of an investigative team? Is there an effective balance between criminal investigators and forensic specialists and analysts, on the one hand, and lawyers on the other? How does this compare to other institutions, and what changes or good practices can be recommended to the ICC OTP in this regard?
2. **Investigative Techniques, Strategies, and Tools:** How have the investigative practices of the OTP evolved since the early practice characterized by the prevalence of remote and indirect

investigations, over-reliance on third parties as evidence-providers (UN, NGOs, states), and the use of intermediaries to acquire access to, and establish rapport with, witnesses? Have the measures taken by the OTP and the Court to address related criticisms proven effective and sufficient, and in what areas are further improvements necessary?

Considering the OTP's mixed record of successful confirmation of charges and prosecutions, how does the OTP ensure an adequate quality of evidence in the cases under investigation, and what practices has it developed to those ends? What steps does it take to probe the credibility and reliability of witnesses and other evidence it intends to rely upon as part of its case?

Does the Office make sufficient use of the device of 'unique investigative opportunity' for the preservation of evidence under Article 56 Rome Statute? How can these practices be improved? Has the OTP developed sufficient tools to rely on non-witness evidence? How does the OTP go about evidence preservation, taking into account the length of both PEs and investigations?

3. **Case Selection and Prioritization:** Has the shift in the OTP's case selection and prioritization strategy towards the building-upwards approach, i.e., focusing on a limited number of notorious mid- and lower-level perpetrators to help establish the responsibility of high-level perpetrators, been a success on its own terms? In particular, what specific results has it produced and how can the limited number of new cases brought under the second Prosecutor be explained? What experience and good practice from other institutions can be brought to bear on this issue?
4. **Charging Decisions:** How does the OTP make sure that its investigations focusing on specific individuals are representative of the fuller range of alleged criminality and inclusive of sexual and gender-based crimes? What steps should the Prosecutor take to provide strong leadership in this area?
5. **Prosecutorial Strategies and Case Preparation:**<sup>74</sup> Does the OTP ensure adequate protection of its (potential) witnesses and informants? Has it proven feasible for the Office to ensure trial-readiness at the confirmation of charges stage in all cases? Does this explain much longer investigations? Should the Office consider doing more to obtain admissions of guilt by soliciting, offering, and negotiating settlements with the defendants?

## 4.2 Session 2: Preliminary Examinations

1. **PE Structure, Phasing, and Timelines:** Does the current structure of the preliminary examinations (PEs) and the division into phases require re-adjustment? If so, how should this be done? Are there valid reasons why the duration of PEs has varied significantly by situation, and would it be advisable or feasible to subject it to standard timelines?
2. **PE Goals, Priorities, and Policies:** The OTP has stated that its primary goals during the PE stage are transparency, prevention, and bringing an end to impunity. Is there evidence that the OTP has been meeting the objectives pursued in its PE activities? How are those objectives to be balanced in specific, and at times radically different, situations? How can priorities be balanced or adjusted over the course of lengthy PEs with rapidly changing political and conflict contexts?

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<sup>74</sup> Unfortunately for the purposes of the online workshop, we had to considerably condense the questions on this topic. This topic is further expanded upon in the Discussion Paper, and we welcome any thoughts or comments on the additional questions discussed there.

How can the OTP be held accountable for whether or not it meets its own policy objectives for PEs?

3. **Balancing Transparency and Confidentiality:** How can the OTP better strike a balance between transparency and confidentiality during the PE phase? Does the OTP's current strategy of communicating findings to the authors of communications, states, civil society, and other stakeholders by means of annual reports merit reconsideration? Do said reports and any additional information released by the Office provide too little or too much transparency? Should complete reports explaining why communications cannot be taken beyond Phase I also be made public?
4. **Challenges and Resources:** What are the principal challenges the OTP has been facing when carrying out PE assessments (e.g., a deficit of information, resources, investigative prerogatives, political pressure)? How can the limited resources of the OTP be used more efficiently? How can the OTP better manage the complementarity assessment and avoid potential manipulation by the state concerned?

### 4.3 Session 3: Completion Strategies, Engagement, and Outreach

1. **Situation Completion Strategies and Protocols:** What factors and circumstances does the OTP take into account when making a decision to phase out a situation, and what role should financial considerations play? Does the OTP consult relevant stakeholders in making those decisions (e.g., victims and affected communities, former witnesses, civil society sector, domestic authorities)? Should the OTP prepare a plan for engagement at the outset of an inquiry, stating its goals and ideal timelines for each situation, rather than only planning exits? How should the OTP coordinate with other parts of the Court in planning entry to and exit from certain situations?
2. **Case/Investigation Completion Strategies and Protocols:** What protocol and strategy, if any, does the OTP follow when deciding to wrap up an investigation in a specific situation? Does such a strategy accommodate situation-specific factors for the purpose of completion sufficiently (or perhaps excessively)?
3. **Completion and Complementarity:** How should the completion strategy be designed and operationalized in such a way as to maximize prevention, ending impunity, and catalytic effects with respect to domestic investigations and prosecutions of international crimes? Are there capacity-building needs that the OTP or others should take care of to ensure that there is sufficient national capacity to oversee any residual issues, such as witness protection?
4. **OTP Outreach and Communication:** Outreach is a shared responsibility between the OTP and the Registry. To what extent should the OTP engage in its own outreach activities separate from the rest of the Court? Should the OTP delay operations by the Registry's outreach unit into new situations? At what point in the investigation and in the process should the OTP communicate to the stakeholders the information about the status and the progress made in the situation or a case, or about completion? How can the OTP better coordinate with the Registry so that the Office's participation in outreach-related activities is more effective in terms of impact and more efficient in terms of related costs? How can the OTP improve its engagement with victim communities?



5. **Political Pressure:** How should the Prosecutor respond to external political pressure, including from non-Member States? How can the Prosecutor operate in a clearly politicized environment while maintaining independence?

#### 4.4 Session 4: Organization, Accountability, and Ethics

1. **OTP Structure:** Has the institutional structure proven workable and effective, or are any adjustments warranted in light of the past experience within the ICC OTP? Should the current basic structure of the Office be revisited so as to provide, for example, for two Deputy Prosecutors instead of one and/or to redistribute functions among different Divisions? Should some of the Divisions, or Sections, be abolished or placed elsewhere in the organigram? How can the Office ensure better integration of functions across the different Divisions, from preliminary examinations to investigations and trials? What lessons, if any, could be learned from the structure of the OTP in other international and special criminal tribunals and/or domestic prosecution offices?
2. **OTP Office Culture:** Given the apparently static character of the organization and absent renewal in the personnel occupying key positions as discussed above, how can stagnation be prevented or remedied, and how can a positive change of culture be enabled? Should the OTP consider adopting employment and leadership personnel rotation practices in use in other organizations as a way to ensure dynamism and provide promotion opportunities to competent and talented staff members? How can the OTP develop a structure and work culture that is resilient and responsive to needs within existing institutional limitations (e.g., contract obligations, etc.)? What steps might the Prosecutor take to improve the overall culture of the Office as well as set an example from the top in terms of integrity, ethics, and moral character among all OTP employees? What does the Prosecutor need to do to end all forms of harassment, bullying, abuse of power, discrimination, sexual harassment, and other forms of misconduct in the OTP? Can, or should, the Prosecutor contribute to combating the endemic culture of misogyny present in the international justice field? How can the Office ensure support for staff welfare and a work environment that is conducive to effectiveness and success?
3. **Accountability and Disciplinary Measures:** Are the existing disciplinary mechanisms meant to safeguard the integrity and accountability of OTP staff sufficiently robust to effectively deal with alleged instances of professional misconduct, including behavior that casts doubt on the 'high moral character' of OTP officials? Does the current scope and interplay of the OTP's competence to apply disciplinary measures, on the one hand, and the investigative mandate of the IOM in relation to the OTP staff, on the other hand, strike the right balance between the prosecutorial independence and accountability?
4. **Performance and Dismissal:** Are existing performance review procedures sufficient for ensuring top-quality performance by OTP staff? What needs to change in this regard? How can the Prosecutor be held to account for mistakes and failures within the OTP, both at the top level and of individual managers? What tools can help maintain the balance between prosecutorial independence and accountability? Who is the Prosecutor accountable to?