

JUTTA BERTRAM NOTHNAGEL: My name is Jutta Bertram Nothnagel, Union Internationale des Advocats, and I speak in my personal capacity.

The draft paper puts a lot of emphasis on the connection between analysis and the organisation of the Office, and this matters also very much with regard to the mandate of the Prosecutor to investigate exonerating and incriminating circumstances equally. And it should be noted that this mandate is much more strict than it is set out in the UN guidelines on the role of the Prosecutor, which merely speaks of the task to pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the subject.

I want to argue here that that mandate is important, particularly in the early stages of the investigations, both for the purposes of the defence and the prosecution, and that it must have consequences for the type of staff that the Prosecutor relies upon.

In the case of investigations upon the territory of a state, the rights of the Defence are set out very generally in the Statute in Article 57(3)(b). "The Court may seek state cooperation upon the request of the person arrested or summoned before the Court."

But there are situations conceivable where the efforts of the Court for state cooperation directly on behalf and upon request of the Defence may actually run into greater resistance than the efforts by the Prosecutor, either over the request of the Court or directly by the Prosecutor. And of course it is also conceivable that independent efforts of the Defence may run into the reluctance of a particular state. There it matters then a lot that the mandate of the Prosecutor to look for exonerating circumstances can compensate for potential imbalances. And I want to refer there also to Article 99(1) that representatives of the Defence may be present, possibly, at the investigations of the Prosecutor on the territory of the state.

Or consider unique investigations, unique investigative opportunities under Article 56. Where the person has not yet been arrested or summoned or where a counsel has not yet been designated, the Court may appoint another counsel. But again you may have there, due to the lack of preparatory time, a potential disadvantage to the Defence, and therefore it will be again important that this is picked up and compensated for due to the vigorous implementation of the mandate of the Prosecutor to look at exonerating circumstances, particularly in the light of the obligation to later disclose what you have found to the Defence.

It's not enough, then, to put a checklist together for the investigation but to personalise this mandate in the staff of the Office. And there I'm looking particularly at expertise that you need for the grounds of excluding criminal responsibility under Article 31. If you look, for example, to Article 31(1)(c), self-defence, there it entails an examination of unlawful use of force which may require expertise also in public international law. And generally in the exonerating circumstances you will require a lot of public international law, international humanitarian law and comparative law capacity, particularly also with regard to Article 31(3) with regard to grounds for excluding criminal responsibility which are derived from applicable law as set forth in Article 21.

In Article 21, after you look at the Statute and the Rules of Procedure and the elements of crime, you need to look at treaties, at principles and rules of public international law, including international humanitarian law and the general principles of all the different legal systems in the world, provided with the caveat that they should not conflict with human rights. So there it matters a lot to have right away public international law and comparative law expertise available.

Similarly with regard to insanity, I remember in the course of the Rome negotiations, there were concerns about the meaning of the capacity to control his or her conduct to conform to the requirements of law, and they were overcome with the interpretation by the Chair that the law referred to was the law applicable under Article 21.

In the absence of expertise in these areas of law, investigations would run the risk to overlook important signals early on, and that oversight may be irreparable.

I also think that when the Defence later notifies its intent to raise grounds for excluding criminal responsibility, the adjournment that is granted to the Prosecutor under Rule 79 and 80 may then not fully compensate for opportunities and preparations that are lost earlier. In contrast, the fulfillment of the mandate early on will help in the early examination and development of counter-arguments to the Defence and thus sharpen the quality of the Prosecutor's presentation.

Thank you.