

## **IER Presentation – 7 October 2020**

### **CLUSTER 3 Prosecution and Investigation**

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*Notes drafted in preparation for the meeting. Content might slightly differ from oral presentation.*

#### ***Mr Hassan B. Jallow***

#### **Question regarding whether there are units that the OTP should delegate to Registry:**

1. No specific units identified by the IER.
2. The IER position is that there is a need to avoid duplication of activities and to streamline resources, as recognised in the Report.
3. The Registry and the OTP should consult and agree on which services/activities the OTP can delegate to Registry.
4. Such delegation should take into account the need to respect the independence of the OTP and the need to safeguard the security of the OTP information and operations.

#### **Question regarding the reasoning for not recommending two Deputy Prosecutors:**

1. The IER believes having two (2) Deputy Prosecutors (DP) will not be a judicious use of scarce resources and will create challenges of coordination at top level of OTP.
2. Focus should be on providing better and clearer role description of duties and more effective use of the office of the Deputy Prosecutor.

#### **Question regarding development of “uniform cooperation framework for all States Parties”:**

1. Effective state cooperation is vital to the success of international criminal justice and of the ICC. Timely attention by states to RFAs included.

2. One of the challenges to such cooperation and timely processing of RFAs is the diversity in national systems regarding the conditions and procedures for submission and processing of RFAs.
3. The IER believes that the States Parties of the Court should standardize such conditions and procedures and in effect create a common legal regime amongst States Parties to regulate them. This would facilitate the preparation and submission of requests of the ICC and their processing by states parties.

**Question regarding the recommendation for a 'special fund' (R290), whether it is a common practice/practice of other International Organisations:**

1. A readily available cash fund should be at the control of the OTP – preferably the Director of Investigations with a view to meet urgent expenses in the field relating e.g. to the needs of witnesses, informants, collaborators etc. This is particularly important for the work of investigators and fugitive trackers in the field who need to reimburse on the spot expenses of such persons and settle urgent expenses on the ground.
2. At the ICTR the OTP created a Special Operations Cash Fund (SOCAF) of about \$10,000 under the control of the Director of Investigations for such purposes. The fund was of course subject to strict audit controls.

**Questions regarding OTP Resources**

1. Redistribution of resources within the OTP as between investigations and trial sections is necessary to ensure that each activity is well supported at the time it requires such support.
2. E.g at investigations phase, there is need for more investigators. Once the case goes to trial you need fewer investigators on the case and more lawyers. So OTP should be able to shift resources accordingly.
3. Redistribution however is not by itself sufficient to solve OTP resource challenges as the resource base is already very low, compared to the actual and anticipated workload. There is therefore a need for additional resources to ensure greater

efficiency within the OTP and to enable it attend more effectively to its growing workload.

### *Mrs Cristina Schwensee Romano*

#### **1. Questions related to the recommendations concerning the criteria for prioritising, and hibernating situations. What criteria should those be? What is the international practice on consideration of feasibility. In which ways hibernation may impact on the broader mandate of the Court.**

Regarding criteria for de-prioritisation of investigations, the Experts did not find issue with the current criteria used by the Prosecutor. It is set out in the OTP Policy paper on case selection and prioritisation, which overlaps with the criteria for prioritisation of examinations/investigations.

The Experts encourage the Prosecutor to consider the prospects of investigative and prosecutorial success (what is referred to in the report as feasibility) but made it clear that matters of feasibility should only be considered at the investigation, and not at the preliminary examination stage, in line with the Rome Statute

Regarding the international practice, considerations of feasibility are not common at other international criminal courts and tribunals. At the ICTY/ICTR, the pre-indictment phase was loosely regulated, and the Prosecutor did not face the dilemma of having too many cases to consider. No other international court or tribunal is legally bound to consider feasibility at the stage of preliminary examinations/pre-indictment, and a policy decision to do so would be an extra-legal factor.

Concerning hibernation, the recommendations apply to situations, not cases. Regarding cases, the criteria for (de-)prioritisation applies, in order to have a ranked overview of all the cases available within active investigations.

Regarding the way hibernation may impact on the broader mandate of the Court, it would have to be assessed on a case by case basis, and mainly depend upon the reasons for hibernation, and the extent to which the investigation has been completed prior to hibernation. Outreach and communications would have to play a strong role in informing the affected communities and civil society about the state of hibernated investigation, and provide relevant and sufficient information from the Prosecutor.

#### **2. Questions related to the recommendations on the threshold of gravity for case selection and who should fix these criteria.**

The Experts are not placed to comment on individual cases, or decisions made by the Prosecutor. In line with OTP policy goals, the Prosecutor exercises discretion in determining how OTP assesses gravity. In the recommendations the Experts encourage a more stringent approach by adding gravity as one of the factors to weigh already during PE phase 1 filtering, without being prescriptive or listing precise quantitative/qualitative thresholds, in line with the ICC Appeals Chamber decisions on the matter.

## *Mr. Richard Goldstone*

### **General questions related to Preliminary Examinations:**

1. The recommendations on the conduct of PEs are intended, to the extent possible, to apply to the conduct of present PEs and to all future PEs. This includes the time limit of 2 years subject to exceptional circumstances. Exceptional circumstances could arise, for instance, in cases of war, a pandemic or the late discovery of key evidence. There might well be others.
2. The Prosecutor is best placed to implement the recommendation regarding the two-year length of PEs. Compliance will appear from the annual PE Report of the Prosecutor.

### **Preliminary Examinations Resources/Staff:**

3. The recommendation about regularising core teams from the PE stage is intended to apply to existing and future PEs. This is in line with the recent policy adopted by the Prosecutor. If, as recommended, there are to be a smaller number of PEs, there should be no adverse budgetary consequences.
4. Clearly, if the Prosecutor decides to implement some or all of the recommendations on PEs, the Policy Paper on PEs will require to be amended to reflect this.

### **Questions relating to Preliminary Examinations Time Limits:**

5. Setting timelines for investigations in general and for PEs in particular will introduce more consistency in the OTP and assist in both the quality and the reduction of length of proceedings.

### **Complementarity and Positive Complementarity**

6. The main problems relating to the present approach to PEs are set out in the Report. In short, they can be met by implementing the recommendation of a two-year time frame for PEs and a strict application of the provisions of the Rome Statute relating positive complementarity at the PE stage. It is all in the Report.
7. The staff complement working on PEs is not a serious budgetary item. The main reasons for recommending the absence of positive complementarity at the PE stage relates to the legal requirements of the Rome Statute and the undue length of some PEs.
8. Having regard to positive complementarity at the investigation stage should not have budgetary implications. It could indeed have positive budgetary consequences.
9. The PE Strategy Plan is an internal document in the OTP. Compliance with it is a matter for the Prosecutor. Compliance with strategy plans could appropriately be incorporated into the annual reports on the PE activities, already produced by the OTP. There is no diminution of independence involved with the recommendation that the OTP should keep the ASP fully informed to the extent that might be appropriate.

### **Criteria to measure genuineness of domestic proceedings**

10. The need for additional criteria to measure the genuineness of domestic proceedings is not a matter that was brought to the attention of or considered by the Experts. In my own view, this is an issue the Prosecutor might well wish to pursue.

**Basic Size Document of 2016**

11. The Basic Size document of 2016 was indeed found to be a useful reference document. It was not used by the Experts with regard to budget which is not within their terms of reference.