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*Presentation of the 2019 Annual Report on Preliminary Examination  
Activities*

**Eighteenth Session of the Assembly of States Parties**

Opening remarks

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

Thank you all for being here. It is a full-house once again. We appreciate your interest and support.

At the outset, I would like to express my appreciation to the States Parties that have so graciously co-sponsored this side-event, namely Bulgaria, Finland, Niger, Senegal, Tunisia and Uruguay. We remain grateful for your continued support.

We are here today for the presentation of my Office's annual Preliminary Examination Report, which was published online yesterday. As you know, this year's report summarises the Office's activities and findings with respect to the situations in Colombia, Guinea, Iraq/United Kingdom ("UK"), Nigeria, Palestine, the Philippines, and Ukraine, all of which are now at the admissibility stage (complementarity and gravity), and Venezuela, where the Office has been working to finalise its assessment of subject-matter jurisdiction.

You will also be aware that, during the reporting period, we also concluded one preliminary examination with respect to Bangladesh/Myanmar, for which we requested authorisation to open an investigation, and which was granted a few weeks ago.

Earlier this week on Monday, I submitted my reconsideration decision with respect to the Comoros situation, following the Appeals Chamber direction that I apply the legal interpretations of the majority of Pre-Trial Chamber I, as it was composed in 2015. My detailed reasons are set out in our filing, so they are not repeated in the annual report.

And as we speak, the Appeals Chamber is hearing oral arguments with respect to the appeal against Pre-Trial Chamber II's rejection of my request to open an investigation

into the situation in Afghanistan. Since this matter is also before the judges, I cannot say much on it in this setting.

I do not believe it necessary to take you through the individual chapters, which we can come back to in the Q&A session. I would simply provide you with a brief overview of the different chapters, and then I wanted to bring out three key themes in this year's report. I will get to these later in my presentation.

Let us begin with the general overview.

In relation to **Venezuela**, as you will see, the Office has almost concluded its subject-matter assessment, which should be completed in early 2020. Assuming that the assessment will result in a positive finding, we will then proceed to an assessment of admissibility. But we'll also continue to record allegations of crimes to the extent that they may fall within the jurisdiction of the Court. We've followed with interest the appointment by the President of the UN Human Rights Council of Members of a Fact-Finding Mission on Venezuela – we look forward to cooperating with it.

On **Colombia**, as you can see, we have set out the status of various cases as reported to us by the national authorities. We will be assessing this information in the coming period and seeing which other cases are being prioritised for judicial proceedings.

At the end of the chapter I note that I want to start a conversation on benchmarking. I don't want to cause confusion here or raise alarms – I am not saying that we have decided to conclude the preliminary examination in 2020. What I mean is that we need to reflect the reality of the long term and complex nature of domestic proceedings in Colombia. The Special Jurisdiction for peace (“JEP”), for example, is mandated to work for 20 years – the Office cannot have the preliminary examination open for 35 years (that's a generation!). There must

come a point at which the Office can say that proceedings, though not yet completed, are going in the right direction, that we don't see manifest gaps, or a lack of genuineness, or issues with respect to the proportionality of sentences. If and when we reach that stage, we could talk about whether it is the right moment for the Office to conclude the preliminary examination, for now, until there is a change in circumstances. And we would certainly want to identify which factors might trigger the Office to revisit its assessment and possibly re-open the preliminary examination – which as you know we always have the possibility to do under article 15 of the Rome Statute (“Statute”). So what I am saying is that, while I hope the present trend will continue, is it possible to start to identify the moment where the Office could potentially conclude the preliminary examination – subject to certain benchmarks being fulfilled before we do so, and subject to benchmarks continuing to being met if we do conclude. This is a conversation I want to start with all relevant stakeholders in 2020.

**On Guinea**, as you know, progress has been slow, painfully slow. But I was heartened by the one positive development, communicated during our mission to Conakry in October – namely, the Minister of Justice's announcement that the trial should start at the latest in June 2020. I am aware of the on-going political context in Guinea, which has been marked by episodes of violence and civil unrest – I only urge that this does not in any way delay proceedings further.

**In relation to the Iraq/UK preliminary examination**, as set out in the report, we have sought to finalise our admissibility assessment, which has been focussing on the genuineness of relevant domestic proceedings. As you know, allegations recently surfaced from a number of former investigators of the Iraq Historic Allegations Team (“IHAT”) alleging that their inquiries had been prematurely terminated or certain lines of inquiry blocked. I take these allegations, coming from within IHAT itself, very seriously. However, I also have to assess this independently myself – this is the task I aim to conduct as soon as possible in order to get to

the bottom of the matter and so enable my Office to come to a final position on the preliminary examination.

**On Nigeria**, I must confess that the Office has sought, with repeated missions and requests, to obtain the information on the conduct of national proceedings that the authorities have long promised me. That promise was renewed this week. I have stressed the urgency of such cooperation, since I must be in a position to bring this preliminary examination to a conclusion one way or another as soon as I can.

The theme of urgency is also continued in the **chapter on Palestine** where – although I know that I have been criticised vehemently by both sides for the delay in reaching a final determination, I intend to bring the preliminary examination to a conclusion rapidly. Make no mistakes, the assessment has not been easy – there have been many complex factual and legal questions that my Office has needed to take a position on – and which need to be able to withstand Pre-Trial Chamber’s scrutiny whatever position we take on the referral. I have stated that the time has come to take the necessary steps. I cannot say more. You will see the fruits shortly.

**On Philippines**, similarly, my assessment is very advanced on all phases of the preliminary examination. I expect to make a decision in 2020 on whether to request authorisation to proceed from the Pre-Trial Chamber.

**In Ukraine**, we have completed our subject-matter assessment this year and are now full swing into our admissibility assessment, which I also do not intend to take more time than is needed. I also hope to come to a final determination on whether the statutory criteria are met soon.

Finally, **on Bangladesh/Myanmar**, we have just opened the investigation, following the conclusion of the preliminary examination earlier this year. As with all of our preliminary examinations approaching this stage, we had already taken measures to prepare for the possible roll-out of our operations should an investigation be authorised, and had already undertaken various missions and sought to preserve evidence. This is also testament to the fact that the preliminary examination stage is more than about merely assessing information – as preliminary examinations progress, they are also increasingly about preparing for the possible opening of investigations and readying the Office to do so.

I will stop here as it concerns the overview of the chapters and come back to the themes that run through this year's Preliminary Examination Report which I mentioned earlier in my presentation. These are important to highlight as they concern both our approach and a number of considerations and challenges that operate in the context of our preliminary examination work.

So please bear with me.

### *Phase 1*

First, you will notice that we have introduced a new chapter on Phase 1 analysis. As you may recall from our Preliminary Examination Policy Paper, the Office follows a four-phase process in conducting its analysis of situations:

- Phase 1 consists of an initial assessment of all of the information received to filter out those communications that are manifestly outside the Court's jurisdiction. This year alone, we received 795 communications under article 15 of the Statute. In practice, the Office may encounter a situation where it is not immediately apparent whether a communication is manifestly outside the jurisdiction of the Court, and which may therefore warrant further analysis before deciding how to proceed;

- Phase 2 focuses on a more detailed assessment of jurisdiction;
- Phase 3 addressed admissibility (complementarity and gravity); and
- Phase 4 examines the interests of justice and the final recommendation whether there is a reasonable basis to initiate an investigation.

With respect to Phase 1, as mentioned, every year the Office receives hundreds of communications. Many are immediately found to *manifestly fall outside the Court's jurisdiction*. For some communications, however, this is not immediately apparent. In our internal jargon, these are called communications *warranting further analysis*. In practice, whenever the Office encounters communications that are not manifestly outside the jurisdiction of the Court and do not pertain to an already on-going preliminary examination or investigation, these communications are subjected to a more detailed factual and/or legal analysis.

The findings of this analysis are collated in what we call internally a *Phase 1 Report*. The point of this analysis is to enable the Office to come to a fully informed and well-reasoned recommendation on whether to proceed to the next phase (Phase 2) of the preliminary examination process.

Since mid-2012, my Office has produced over 50 detailed Phase 1 reports relating to communications warranting further analysis - analysing allegations on a range of subjects and concerning situations in all regions throughout the world. It may interest you to know that they have also dealt with many complex and novel issues untreated to date in the jurisprudence of the Court, where the Office has needed to come to a determination.

To date, while I have provided reasoned responses to the senders of such communications, I have tended to only publicise our preliminary examination activities once they reach Phase 2.

However, given the increasing complexity and novelty of issues arising from some of this Phase 1 analysis, I believe it is in the public interest to publish our findings on these communications not only to enable greater transparency and scrutiny of the Office's position also with respect to these Phase 1 reviews, but to also demonstrate the scale and breadth of the task and the resources required to conduct a thorough analysis.

Indeed, in recent past, the Office itself has even triggered judicial review of situations that were under Phase 1 – notably our initial request in April 2018 for a jurisdictional ruling with respect to Bangladesh/Myanmar, which at the time was subject to a Phase 1 analysis.

As you will see in this year's report, during the reporting period, my Office responded to the senders of communications with respect to four situations that had been subject to further analysis.

With respect to all four sets of communications, the Office ultimately concluded that the alleged crimes in question did not appear to fall within the Court's jurisdiction. Nonetheless, each required detailed assessment, short summaries of which are included in the Preliminary Examination Report. It goes without saying that as with all phases of the preliminary examination process, I do so in full regard to my duties to protect the confidentiality of communications themselves and of information providers.

As you can see, Phase 1 remains an initial filtering process – indeed a filtering process that is applied soberly, since the vast majority of communications received by the Office do not progress to Phase 2. Nonetheless, I also believe it is helpful for the Office to provide greater transparency into its decision-making at this initial Phase 1 stage. This is indeed to the benefit of all stakeholders.



The Office is currently finalising its response to senders of communications with respect to a number of other communications that have warranted further analysis, which will be issued during 2020.

### *Finalisation*

Another theme that you will see running throughout the various chapters on individual situations under review is my desire to bring the relevant preliminary examination to conclusion.

Already last year, I indicated in our annual report that several situations had advanced to a stage where I hoped a decision could be reached soon. In those and several additional situations, I now anticipate that the respective decision will likely be taken during 2020.

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

In this context, I am alive of course to calls in the context of the review process to establish fixed timelines for preliminary examinations. While I am keen to listen to such proposals and will provide input from the Office's experience, my own sense is that abstract timelines may fail to adequately reflect the highly specific and complex factors in many of the situations that are before us. Timelines may just as likely lead to premature decisions to open investigations – where more careful analysis of subject-matter jurisdiction or of admissibility might be warranted. Or timelines might lead to a premature decision not to proceed – where the

circumstances are in such flux that the Office might be required to shortly thereafter re-open the preliminary examination due to the fluidity of the facts on the ground. But I do agree that preliminary examination cannot be left in abeyance indefinitely. I remain keen to listen to proposals and consult on the best way forward.

With this in mind, and irrespective of the wisdom of timelines, the facts before us are anyway such that in many of the preliminary examinations, the stage has been or is close to being reached for my Office to make a determination on whether to proceed with investigations or not.

### *Operational capacity*

This brings me to my third theme, which I set out in my plenary address to the Assembly of States Parties (“ASP”) on Monday. As I stated there:

“One key question which my Office will need to tackle in the coming period is the reality that a number of preliminary examination situations will likely progress to the investigation stage, but we will not have the operational capacity to absorb them all. As such, we are considering how prioritisation might apply across different situations and potential cases once an investigation has been opened, applying the principles outlined in our case selection and prioritisation policy paper.”

I went on to remark that:

“At the same time, as we work on developing a policy on completion strategies, we will need to conceptualise the steps that need to be taken to bring our prosecutorial programme in each of our existing situations and cases to a workable conclusion.”

Indeed, one feature of this year's report that will be immediately apparent to you is that almost all of the situations are at the Phase 3 stage. The only exception is the Situation in Venezuela, although even there we are close to finalising our subject-matter assessment and, without wanting to prejudge the outcome, this situation might also progress to an admissibility assessment. This means that it could very well be that all of our preliminary examinations will be under Phase 3 analysis in 2020.

Of course, not every situation will result in a decision to initiate an investigation. But there is a high likelihood that several will.

There are several challenges in this regard.

Operationally, as mentioned, we are already at breaking point with our budget discussions and our operational capacity to simply sustain our existing level of activities. Cases under investigation must be sustained, at risk of loss or deterioration of physical and testimonial evidence or increasing operational challenges related to protection, combating interference and securing cooperation. As you know only too well, we have sought to maintain this capacity in our discussions with the Committee on Budget and Finance and with States Parties, and this is already proving extremely challenging.

So the question my Office faces is how we can responsibly absorb new situations given the current workload?

'Prioritisation' has become a key term these days. But we must be clear on what we mean by prioritisation and how it might be applied in practice.

For some, prioritisation means that the Office should do less with its means – that we should reduce the number of activities before us. I am sensitive to such calls. Indeed my first Strategic Plan set out to do just that by reducing the volume of activities to sustain a deeper qualitative impact with fewer lines of inquiries, thereby increasing the likelihood of success in court. Our publicly available case selection and prioritisation policy paper also sets out the criteria used by the Office in the exercise of prosecutorial discretion to select and prioritise cases within the context of an opened situation under investigation.

At the same time, during the course of my tenure, the sheer scale of new crimes requiring a response, new referrals by States Parties, new incidents of notorious crimes, as well as unpredictable and sudden arrests and transfer of suspects in cases that had been long hibernated, meant that the human and financial resources of my Office inevitably became stretched once more.

And with respect to new situations coming through the preliminary examination process, such as Georgia, Burundi, Afghanistan and Bangladesh/Myanmar, I have been alive to the reality that I cannot turn a blind eye to my mandate, nor the express terms of the Statute - which state that when the statutory criteria for opening an investigation are met the Prosecutor “shall” proceed.<sup>1</sup> In short, this mandatory language requires the Prosecutor to proceed to an investigation once the statutory requirements for the opening of an investigation have been met.

Hence, for me, the word ‘prioritisation’ cannot be used as a panacea term without recognising the heavy burdens and complex challenges before my Office.

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<sup>1</sup> Article 15(3), “If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she *shall submit* to the Pre-Trial Chamber a request for authorization of an investigation,”; article 53(1), “The Prosecutor *shall*, having evaluated the information made available to him or her, *initiate an investigation* unless he or she determines that there is no reasonable basis to proceed under this Statute.”

This is a pressing issue which I encourage all stakeholders to consider in the coming period, including in the context of the current review process to see how this challenge may be addressed in strict conformity with the Rome Statute, and its object and purpose.

With that, I will stop, except to mention one housekeeping issue - you will have seen that the report has only been issued this year in English and only electronically. This is because in a number of situations, incoming updated information from relevant States or planned missions occurred during November. As I mentioned at the beginning of my presentation, we have also added a new chapter on Phase 1 to our annual preliminary examination report. These factors combined to push our timelines for publication a bit further into the ASP.

I took this decision this year, exceptionally, in order to provide the most accurate and up to date information. I hope I have not caused any undue inconvenience. The report has already been sent for translation into French as well as other applicable languages for the different chapters, and the texts in the other languages will be uploaded to the Court's website very soon.

I thank you again for your patience and interest.

The floor is open.

I am joined here by my able team, including my talented and dedicated colleagues from the Situation Analysis Section, and we look forward to your questions or comments. | OTP