



**Response of the ICC Office of the Prosecutor to an  
Outcome Report and Recommendations from Open Society Justice Initiative  
(OSJI)  
and Amsterdam Law School (University of Amsterdam)  
based on a workshop held on 25-26 March 2020 on**

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

Date: 8 May 2020

## *Introduction*

OSJI shared with the Office of the Prosecutor (OTP or Office) the Outcome Report and Recommendations referred to above. This report was prepared on the basis of a two-day workshop that OSJI organised jointly with Amsterdam Law School of the University of Amsterdam on the topic of *Improving the Operations of the ICC Office of the Prosecutor: Reappraisal of Structures, Norms and Practices*. The report was written for the consideration of the Cluster 3 (OTP) experts currently engaged in the Independent Experts Review (IER) of the International Criminal Court (ICC or the Court).

The OTP has embraced the IER process as a beneficial and timely examination of its operations, processes and structures. It has also always welcomed constructive criticism from external stakeholders, as it strives to improve its performance. OSJI is among those external supporters of the ICC, whose engagement with the OTP has always been useful.

The workshop report does provide a number of helpful suggestions, many on issues that are already matters of practice in the OTP, and other points that are worth consideration.

However, the report is also disappointing, because it is of uneven quality and fails to represent accurately or fairly the OTP's work, thinking and progress in many of the areas it covers. Only very rarely does it acknowledge that recommendations it makes are on matters that have already been implemented by the OTP, or which the Office is actively considering.

In the circumstances, the Office feels it advisable to assist the IER, by correcting certain key prejudicial inaccuracies in the report.

## *The OSJI report*

A two-day workshop would have difficulty, at the best of times, let alone when it had to be conducted remotely, doing justice to the issues this workshop was considering, given the scope of the subject. The experts, whom the organisers retained, also faced the challenge of understanding the OTP and its operations as outsiders. The experts themselves appear to represent a wide spectrum of sometimes contradictory opinions, and this will have made it difficult to provide coherent recommendations (a point the report itself appears to acknowledge); one is left sometimes to wonder whether the recommendations offered truly reflect the workshop discussions.

These difficulties were, moreover, compounded by flawed methodology: the concept paper used as the basis for the workshop was outdated and ill-informed (observations that might have had some validity years ago simply do not reflect the reality of today); no serious further research appears to have been done; and little real effort was made to reflect accurate information from the OTP itself. All these difficulties combine to undermine the usefulness of the report.

The OTP tried to participate constructively in the workshop, but it would appear that many of the views expressed by the few OTP participants were filtered out of the report and certain information they provided is not reflected in the report at all or appropriately treated. Instead, the report adopts a harshly negative view of the Office, when a more balanced approach might have increased the report's utility.

What follows is not an exhaustive critique of the report, but an effort to assist the IER Cluster 3 experts with the Office's reaction to certain of the report's assertions and recommendations, notably where these are either inaccurate or unhelpful. These comments are organised according to the order in which topics are treated in the report.

#### *Preliminary Examinations* (report, pages 2-5)

Two of the three recommendations the report makes concerning *Challenges and Resources* (report, page 2) reflect what the OTP is actually doing now: lawyers, analysts and investigators work with members of the Preliminary Examination Section (PES) on situations under examination, and the PES, which performs an invaluable "gatekeeper" function, is now integrated into the investigative and prosecutorial operations of the OTP in a way it was not in the past. Evidence is preserved. Contacts are developed. Factual and legal analyses are performed. Missions are carried out. If it becomes apparent that an investigation will be necessary, a nuclear investigation team is formed to engage in forward planning, even in the preliminary examination phase.

The other recommendation touches on the issue of resources. Here, as elsewhere in the report, the problems the OTP suffers due to chronic under-resourcing are recognised. This is helpful. The OTP believes it has to use the resources afforded to it in the most efficient and effective way, and that it is accountable to the States Parties for the economical use of its funding. In the current circumstances, however, and especially in light of the economic impact of the public health crisis produced by the coronavirus pandemic, the prospects of solving the OTP's resource challenges appear bleak.

The discussion that the report summarises on *Phasing, Completion, and Timelines* (report, pages 3-4) only demonstrates the difficulty of the internal debate that the OTP itself has been engaged in, respecting these matters, as it attempts to make the preliminary examination process more efficient. Most preliminary examinations are completed within two years or less; some are protracted; each presents, however, unique circumstances. As the report itself seems to recognise, a flexible approach may be necessary, most typically in connection with the complementarity assessment, where the OTP must determine whether evolving domestic proceedings are genuine and mean that the ICC need not intervene.

Feasibility and cost do *not* enter into the assessment of the conditions that must be satisfied, under article 53(1) of the Statute, to justify initiating the investigation of a situation (this is clearly stated in the OTP's policy paper on preliminary examinations). Once the investigation is opened, however, feasibility and cost may factor in, as practical considerations, in the selection of cases within the situation, in accordance with the application of the OTP's case selection and prioritisation policy.

Respecting the situations themselves, it is difficult to balance the imperative in *Rome Statute* article 53(1)<sup>1</sup> with the practical consideration that objectives must be linked to available resources, if success is to be achieved. This is a difficulty that the OTP is trying to resolve in a principled way, so that it may sequence its work and set reasonable priorities. Some of the issues that must be addressed are reflected in the summary of the experts' views that the report contains.

Thus, the recommendations that appear in this part of the report, while not being particularly helpful, touch on issues that the OTP is currently engaged in trying to resolve.

However, it is wrong to say (report, page 3):

"... [T]he 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

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<sup>1</sup> "The Prosecutor [...] **shall** initiate an investigation unless [...]" (emphasis added).

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.”

While the Office may agree with the last two sentences in the passage cited, it rejects what precedes them as untrue – and an OTP staff member, who participated in the workshop discussion, had made this plain. Preliminary examinations take the time circumstances in each situation require strictly in order for the Office to make an informed determination with respect to the applicable statutory criteria, even if the OTP could improve efficiency in this area. As already noted, evidence is preserved and other steps are taken for the benefit of any eventual investigation. Budgetary calculations, it has to be emphasised, are never part of the legal analysis to determine whether a reasonable basis exists to open an investigation. Issues concerning admissibility (usually complementarity), the need to engage with stakeholders, or the resources the OTP has available to complete the analysis of a large volume of information can explain why some preliminary examinations take longer, not a deliberate “go slow” policy.

On the matter of *Goals, Priorities, and Transparency in PEs* (report, pages 4-5), the Office agrees with the importance that the report places upon communication and transparency, even if it feels that the report fails to recognise sufficiently the effort the OTP has made to meet these goals and certain sensitivities that the Office must take into account.

Thus, the Office would agree with the general thrust of the four recommendations made in this part of the report, but points out, for example, that in its last preliminary examination activities report, it did include a section on Phase 1 determinations not to open a preliminary examination, with a detailed explanation, both factual and legal, why it reached these determinations. The Office is actively considering going even further in this regard, to create better understanding of the complexity of the preliminary examination process and the attention it requires. However, *Rome Statute* article 15 communications are confidential, unless the sender makes them public or they become known otherwise, and this places a constraint on the OTP in reporting on Phase 1 decisions. The value of doing so, where this is possible, is accepted by the Office and is one of the reasons why it chose to expand its last activities report in the way it did.

In addition, the Office approaches Phases 2 through 4 of its preliminary examination process holistically, and it may not be appropriate to report on each phase, as if the process was entirely linear. The OTP attempts to be as transparent as possible, through the issuance of the annual activities report; interim reports,

as necessary (see, for example, the 2012 report on the situation in Colombia); reports on the closing of preliminary examinations, where no investigation is opened; and reports on situations where investigations are initiated, which would include the article 15 request for judicial authorisation to open an investigation, where the Prosecutor is acting on her own motion. In some cases, however, it is difficult for the Office to make more details public concerning its assessments, because of confidentiality issues. The Office explains its reasons for decisions to those who submit article 15 communications and has improved this process, but agrees it can do more.

*Investigations, Charging, and Case Preparation* (report, pages 5-12)

The report falls down most egregiously in its treatment of investigations, one of the most important aspects of the OTP's work, thinking and progress. It is not only inaccurate in its observations, but unfair in its sweeping conclusory opinions.

Much of what the report recommends is already part of OTP practice, or is in the process of implementation; yet this is hardly acknowledged. There is also no mention of areas of international crime investigation where the OTP is progressive. The report thus creates a distorted picture of the OTP's investigations, as well as of its charging practices and case preparation.

The OTP is acutely aware that it must continuously strive to improve its performance, especially in so fundamental a core activity as investigations, and it has worked hard since mid-2012 to do just that; however, a reading of this report would leave the impression that nothing had changed. This is wrong and unhelpful.

Fresh ideas of genuine value, or recommendations that are truly helpful to the OTP, are simply absent from this part of the report. In sum, the report represents, most unfortunately, an opportunity missed.

The recommendations contained in the part of the report that looks at *Investigative Teams, Modalities, and Resources* (report, pages 5-8) require a genuine "reality check", by way of comment.

No analysis seems to have been done respecting the composition of the Investigations Division (ID) and how it actually works. ID, as such, is not independently responsible for the conduct of investigations. This responsibility has devolved to the integrated teams, which are led by Senior Trial Lawyers from the Prosecution Division (PD), and composed of members with complementary

skill sets drawn from the staff of ID, PD and the Jurisdiction, Complementarity and Cooperation Division (JCCD). ID supplies the investigative team leader to each team, as well as analysts and investigators. It also supports the work of the teams through its specialised Sections and Units.

Thus, ID's composition and practices have evolved in line with operational needs and budgetary possibilities, in a variety of ways, for example, in the appointment of experienced investigative team leaders, development of sophisticated online investigation capabilities, creation of training packages based on updated standards, and so on. Recommendations made in the report are based on a lack of knowledge of the roles and responsibilities within ID, PD and JCCD, or how these relate to the OTP's Executive Committee (ExCom), that is, how the Office actually functions, and therefore do not make sense.

Moreover, the suggestion that there exists a relationship between "multiple" failures and investigative practices is an oversimplification of a complex set of reasons behind the setbacks the Office has suffered. These reasons include an initial prosecutorial strategy that had to be transformed; cooperation challenges; security conditions; resource limitations; and lack of consistent judicial practice or clarity, in addition to the need for the Office to improve its own performance. The report ignores the very different practice of the Office today, which places the emphasis on trial-readiness as the standard before proceeding and relies on critical thinking to test evidence and case theories. This change in approach is not new, and was announced publicly as early as the strategic plan for 2012-2015. Investigative practices have been improved and they continue to improve.

The report also omits to take account of recent successes the OTP has achieved. These have occurred in relation to processes, such as the OTP's contribution to the holding of compact, efficient confirmation of charges hearings. They are also evident in outcomes, such as prosecutions resulting in conviction and sentence and appeals that have protected gains and developed international humanitarian law. Where the OTP has been able to work fully in accordance with its current policies and practices, it has enjoyed considerable success. This has not just happened, but is the result of a concerted effort to enhance performance at every level of operations and leadership.

This part of the report, respecting investigative teams, modalities and resources, presents a long list of recommendations. In a few instances, these are helpful. In most, however, the report is deficient. Here, briefly, are the OTP's observations:

Responding to State Party queries about the level of funding the OTP (and ultimately, the ICC itself) felt it would need, the Office developed a detailed Basic

Size Document that defined and recommended the standard composition and size of an investigative team. This standard could never be consistently implemented due to budgetary constraints. However, it is applied tactically, to support cases most in need, and is departed from to meet evolving demands for staff redeployment. In sum, there is a standard, but of necessity this standard is applied flexibly.

The OTP agrees with the recommendation that concrete steps be taken to address staffing and resource deficits, respecting teams, but notes that the current budgetary situation imposes a severe limitation on its ability to do so. In addition to budget proposals, the OTP strategic plan for 2019-2021 expressly addresses the resource issue, including the idea of using staff secondments.

It has been the strategy of the OTP for the past years to favour recruitment of competent investigators having significant experience conducting investigations of international, transnational or other serious crimes, including SGBC. The junior P-1 associate investigator level has been abolished. The Office seeks candidates who have already acquired experience in complex criminal investigations. (OTP staff quality is illustrated by the fact OTP professional levels appear to function above equivalent levels in the UN system, since OTP investigators leaving the ICC at the P-2 level often go to posts at the P-3 and P-4 levels outside.)

Most OTP P-3 investigators and P-4 senior investigators or team leaders had experience with the UN international criminal tribunals, in addition to their work in domestic police services or other investigative agencies, before they came to the OTP, or came directly to the OTP with considerable, diversified investigative experience, often from domestic police services, where they dealt with terrorism, organised crime and other serious crime, including SGBC. While there is a small legacy of less experienced staff members, the Office's long term plan to manage this has been implemented through training, professional development and performance appraisals, in addition to staff turnover. In recruiting competent investigators, the Office also takes into consideration the need for gender balance and geographical representativeness, a requirement the report does not acknowledge.

The OTP has recognised the need to engage investigators with knowledge of local context on a temporary basis, and to use intergovernmental agencies, such as Justice Rapid Response (JRR) for "surge capacity" or special skills in connection with SGBC or crimes involving children.

The Office has used locally recruited Situation Specific Investigation Assistants (SSIAs) successfully respecting Sudan (Darfur), Uganda, Georgia and Côte d'Ivoire, and is pursuing this policy (there are currently six SSIAs working, but not more due to budget limitations). The Investigations Coordinator has revamped the P-3 Country Expert profile and the Office is seeking to recruit one each for Burundi and Bangladesh.

The OTP has had recourse to JRR on several occasions, including for SGBC (funded by UN Women). The Office has also been successful in concluding an agreement with a State Party to gain the benefit of the temporary assignment to one of its teams of an experienced SGBC police investigator.

In sum, the OTP has already implemented the approach recommended in the report, and this continues to be part of its current planning.

The development and implementation of a mandatory induction and training program for investigative staff, coupled with a mentoring program, is an excellent idea. The OTP has in place an induction period, but this can be improved; two OTP investigative staff members are now working on recommendations for a more comprehensive program.

With respect to training generally, the OTP provides advanced training on investigative interviewing; this training has been audited, and external experts have recognised it as one of the best examples of how an investigative body should prepare itself to conduct interviews. The Office has also put in place, with the assistance of external experts, online investigations training. ID has standardised investigation management through the use of investigation plans, their systematic review and an Investigation Management System, but it continues to strive for improvement; to this end, it is currently seeking to involve external partners to develop investigations management training.

One difficulty the OTP confronts is the need for resources dedicated to develop and implement more robust training plans, for example, through recruitment of a training officer. This need was underscored by the Price Waterhouse Coopers report of some years ago and again in a much more recent audit of OTP training practices carried out by the ICC Office of Internal Audit (OIA). The OTP has to manage with the budget resources it has, knowing that more could be done.

The OTP agrees that establishing a field presence during an investigation, whenever possible, is essential. However, this objective has been part of the OTP's investigative planning for several years, and while it is still a work in progress, has been implemented in a variety of ways, such as the deployment of

headquarters staff to the field, the recruitment of SSIsAs and field-based investigators, the development of longer field missions, and ensuring the continuous presence, on a rotating basis, of investigative teams in a situation country. JCCD international cooperation advisers embedded with the teams have, in many cases, established solid relationships with national focal points. Seasoned investigators, with the knowledge and support of their team leadership, have also developed their own networks of local contacts, and this has enabled teams, for example, in Central African Republic, to pull off some remarkable investigative successes.

To deepen this aspect of investigations, the Office is having to deal with the limits of what it can do, taking into consideration the security of both OTP staff members and those with whom they engage, the confidentiality of operations, staff contractual and labour rights, and, as always, budget implications. However, field presence in countries, such as Uganda, Côte d'Ivoire, Central African Republic and Georgia, has been immensely beneficial, and the same is planned for the situations relating to, for example, Burundi and Bangladesh.

Beyond this, however, the Office is looking to the future and the possibility of using GTA contracts in an appropriate way to create in-country satellite teams for specific investigations. This concept, however, is at the theoretical stage and its development will depend on how future investigations are planned.

The recommendations respecting the need to strengthen ID senior management, and for a formal role alignment process to take place, misses the important achievements of ID senior management as agents of change within the OTP and overlooks the fact their skills are aligned with ID's current role within the Office. Integrated teams are responsible for the conduct of investigations under the leadership of Senior Trial Lawyers and the strategic supervision of ExCom. The role of the Divisions is to support both the teams and ExCom. For its part, ID develops standards, in consultation with the Scientific Advisory Board and the Technology Advisory Board, composed of external experts, that it has established; provides operational advice to the teams; manages resources; and ensures the coordination of investigative, analytical, operational and forensic functions. ID's leadership is fully competent to manage these responsibilities.

The report seems to assume that ID is directly in charge of investigations, and seeks to assign to its senior management the role of quickly deciding issues relating to "searches and seizures, arrest, etc.", when these are properly dealt with by the integrated teams, with the support of divisional senior management and under the overall supervision of ExCom.

The position of “managing investigator” actually exists, in that the Investigations Coordinator ensures that the teams uniformly apply the proper operational standards, provides advice to them on a wide range of operational issues, harmonises their work, and runs a number of projects aimed at enhancing their overall productivity and the quality of investigations.

Moreover, from a divisional perspective, ID, PD and JCCD enjoy a solid relationship. A collaborative approach is taken to dealing with operational issues and solving problems. For example, ID shares in advance with PD draft standards relating to matters, such as online investigations, witness assistance, and protection issues, so they can be discussed. ID and PD staff members take joint training on interviewing techniques and SGBC. Questions concerning potentially high risk activities are resolved collaboratively. Inter-divisional meetings, involving team leadership, are held to achieve better communication and understanding. The list is not exhaustive.

If the decision were taken to change the structure of the Office fundamentally, and hence the division of responsibilities, then such recommendations as the report makes on the role of ID senior management might have validity; but the report itself later indicates that the current structure of the OTP is fine.

Experienced investigators, properly briefed and alert to the needs of the case, should be able to operate with the necessary autonomy and flexibility, but clear roles and responsibilities within an integrated team are important. The right balance has to be struck between providing autonomy to investigators and ensuring that standards and the overall interests of the Office are met. Investigators do not act on their own, but as part of a team with common objectives and subject to the overall strategic imperatives of the Office.

Support units are there to assist the teams. The Operational Risk and Support Unit (ORSU) assesses conditions, such as security risks and how to manage them, which may affect investigations. The Protection Strategy Unit (PSU) evaluates risks to witnesses and others with whom the OTP interacts, and develops quick reaction strategies, in case of trouble. The Gender and Children Unit (GCU) provides assessments and support for traumatised or particularly vulnerable witnesses. These units are part of ID’s Planning and Operations Section (POS). Good investigators will learn how to work with them to advantage.

Moreover, in yearly in-Office surveys, the integrated teams have given ORSU, PSU and GCU generally positive performance scores. Where improvements are needed, they are discussed.

The criticism of JCCD, *as it currently operates*, is particularly ill-founded. (The recommendation reflects a criticism made of JCCD's role in relation to the Kenya situation investigations, but this pertains to a bygone time.) The International Cooperation Section (ICS) of JCCD negotiates the memoranda of understanding or agreement that provide the cooperation framework for investigations and facilitate the ability of investigators to operate in-country. Despite the statutory obligation of States Parties to cooperate with the OTP, cooperation is ultimately a human process that is ensured through inter-State legal assistance and diplomatic efforts. Only as a last resort does the OTP seek judicial non-compliance findings, a recourse available under the *Rome Statute*; these have to date, regrettably, proved quite ineffectual at the level of the ASP or, as the case may be, United Nations Security Council. Thus, to ensure effective cooperation, it is necessary, in advance, to establish the ground rules, and ICS specialises in this work.

In essence, ICS opens the door, so to speak, through which the investigators walk. It is not the role of the international cooperation adviser (ICA) embedded in the team to control or impede investigations, but rather to assist the team to achieve its objectives. On occasion, the ICA will alert investigators that a proposed course of action runs counter to the cooperation requirements of the country in which the activity is to occur; but this is not to impede the investigation, which must in any event operate within the limits of the cooperation environment, but to facilitate it.

Where there has been a problem, this has largely been due to growing pains, as teams were beginning to function in a particular situation, and such problems have long since been resolved; or the problem was a matter of poor performance, unrelated to any structural issue.

Furthermore, JCCD has been obtaining from the integrated teams positive scores overall on the yearly in-Office performance surveys. Where there is room for improvement, this is discussed.

Indeed, improvements are always necessary, but the report and its recommendations, on these issues, are out of step with reality. The picture is much more balanced and positive than the report would suggest.

It is, unfortunately, hard to find anything in the report that is positive about investigations. Nothing, for example, is said about how the OTP has been innovative in exploring the use of technology and new types of evidence. The OTP has achieved great progress in developing a sophisticated capacity to conduct online investigations, managing big data and access to social media

materials, and others are now soliciting its assistance in this area. The collection of communications-related data, such as CDRs and intercepts, has also become a routine practice in the OTP.

While resources are overstretched to the point that the Office cannot focus on financial investigations to the degree it wishes – the budget request for a P-4 senior financial investigator was denied by the CBF and ASP – the Office is seeking to have competent financial investigators come to assist as Visiting Professionals, so that it can do more.

The OTP is also adopting innovative outreach approaches with affected communities, using technology. It has developed strategies to work more closely with so-called “first responders”, namely, NGOs and civil society members who witness atrocities first-hand. The Office is working more closely with national jurisdictions to close the impunity gap, for example, in relation to the situation in Libya. It is examining more robust investigative measures, such as developing confidential sources and using other lawful covert techniques. As already noted, OTP investigators employ interview methods that meet the highest international standards, and the Office is now engaged in a new project to do this remotely.

None of this, however, has found its way on to the pages of the report, leaving an incomplete, negative and outdated image of OTP investigative operations.

The part of the report purporting to deal with *Case Selection, Prioritization, and Charging Policies* (report, pages 9-11) once again reveals the wide spectrum of sometimes contradictory opinions held by the workshop experts themselves, which will have made it difficult for the authors of the report to offer coherent recommendations. In the end, the report provides very little that is new to current OTP thinking and practice, or it fails to recognise the progress the Office has achieved.

For example, it is already clear that the OTP will consider bringing smaller cases against mid-level perpetrators, as well as notorious offenders, where appropriate. This was enunciated in previous OTP strategic plans, as early as for 2012-2015, and is made crystal clear in the 2019-2021 strategic plan. Examples reflective of this approach may be seen in the *Al Mahdi* and *Al Hassan* cases from Mali, but also in the *Al Warfalli* case from Libya (which employed, in addition to more traditional methods, cutting-edge online investigation techniques).

The Office is not married to any particular theory of liability. Its current policy is to charge modes of liability that are clearly supported by the evidence. When the mode of liability charged encompasses allegations of co-perpetration and the

existence of a common plan, this is done on the basis of the evidence after a comprehensive case review by an internal, but independent, panel, and is always combined with other modes of responsibility that are pleaded in the alternative.

Moreover, co-perpetration, as developed by the Appeals Chamber in the *Lubanga* appeal judgment, offers a helpful tool to capture the totality of a criminal enterprise. One problem that has arisen, however, derives, to a degree, from the differing views within the Court's judiciary, as to how and when it is appropriate to charge this mode of liability.<sup>2</sup>

The report's *Focus on SGBC* (report, pages 11-12) contains ideas that could potentially strengthen the OTP's performance, but engages in an unduly negative assessment at the expense of the positive achievements the Office has made, which are nonetheless evident in its charging practices and courtroom presentations.

Briefly, the recommendations on SGBC could have benefitted from further research or inquiry. While improvements in this area, as in others, should always be sought, current OTP practices should meet the concerns expressed in this part of the report and implied in its recommendations.

For example, the OTP has a system in place to monitor the implementation in each Division of its SGBC policy, including focal points and specific performance indicators. The teams are required to describe in their investigation plans their strategy for pro-active investigation of SGBC and crimes affecting children. Every case brought forward is checked for the existence of SGBC charges, and, if no such charges are present, the team must explain why. Sexual and gender-based crimes are the subject of specific scrutiny in each case review: this disciplined approach led to the ground-breaking convictions of the accused, Bosco Ntaganda, for the brutal sexual exploitation of child soldiers within his own ranks; to the inclusion of forced marriage and forced pregnancy charges in the case of Dominic Ongwen; and to charges of persecution on gender grounds in the case of Al Hassan, among other developments.

The Office has also created a working group to assess the implementation of its SGBC policy for the past five years. At the time of writing, the working group is far advanced in its work. The Office has further expressed openness to have an

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<sup>2</sup> Perhaps the most extreme example of this is the recent confirmation decision in the *Yekatom and Ngaïssona* case, from Central African Republic, where the Pre-Trial Chamber appears, arguably, to have refused to follow appellate case-law on this issue.

evaluation done by the Independent Oversight Mechanism on the Office's implementation of the policy.

In conclusion, no one in the OTP is complacent about investigations, because, without competent investigations, nothing can be accomplished in court, nor the ICC project of accountability and deterrence advanced.

*Completion Strategies, Engagement, and Outreach* (report, pages 12-17)

This part of the report is stronger and offers constructive recommendations in a number of areas. The Office believes these are worth consideration and, in many cases, has already been actively examining the issues in question.

In relation to *Completion Strategies and Protocols* (report, pages 12-14), the report and recommendations pick up on issues that the OTP is itself engaged in resolving, as it develops a completion strategy.

Respecting *Completion and Complementarity* (report, pages 14-15), the report touches on a difficulty the OTP faces, but has managed quite successfully: the Office has no budget for capacity building, and any such activities it attempted to engage in would draw objections from States Parties, as the ICC's funders; however, the OTP shares its experience freely with national authorities and other stakeholders, and participates, within reasonable limits, in workshops, conferences and exchanges that contribute to capacity building.

The Office is also alert to complementarity issues, since, under the *Rome Statute* system of international criminal justice, States Parties have come together to repress genocide, crimes against humanity, war crimes and the crime of aggression, with the ICC serving as the system's failsafe mechanism. Thus, if the system is working as it should, States will accept their primary responsibility to investigate and prosecute *Rome Statute* crimes. In certain situations, the OTP can serve as a catalyst for national action. In addition, the Office has on occasion engaged in "burden sharing", dividing responsibility for the investigation of international crimes; this is its approach, for example, respecting the Special Criminal Court (SCC) set up in Central African Republic. While this may not be the precise focus of the treatment of the notion of complementarity in the report, it does demonstrate that complementarity is an issue that figures prominently in OTP thinking and practice.

The Office also notes the recommendations made in relation to *Outreach, Engagement, and OTP Communication* (report, pages 15-16). The assertion that the "Court maintains the mentality that it needs to distance itself from the local

community in order to deliver neutral justice” does not accord at all with OTP thinking and established approach. The OTP has always considered victims and affected communities as the first stakeholders of its work and hence audience. On outreach, fruitful OTP-Registry cooperation and synergies exist which have only been strengthened in the past few years. The viability of many of these recommendations will depend on the individual circumstances of the particular situation, and the OTP deals with many situations, each one unique. It will also depend on the stage of the proceedings, where considerations respecting confidentiality, security and cooperation, may vary. However, the Office has had very positive outreach and communication experiences, jointly with Registry and supported by a State Party, with communities in northern Uganda, respecting the *Ongwen* case, once it came to trial. Other examples include productive joint OTP-Registry outreach missions with respect to the situations in the DRC, Mali, Cote d’Ivoire, Georgia and Bangladesh-Myanmar, and such a joint approach has been and becoming increasingly part of the OTP’s approach to communication with affected communities. Thus, the points the report makes are not lost on the OTP, which will seek to improve its performance in these important aspects of operations.

Finally, with respect to *Political Pressure* (report, page 17), the report states the obvious. The Office, under this Prosecutor and her senior management team, has always worked independently, impartially and objectively, ensuring that decisions are not influenced by presumed or known wishes of any party, or in connection with efforts to secure cooperation: this approach is made clear in the policy paper on preliminary examinations. Protecting the independence and objectivity of the Office in the exercise of its mandate has been one of the hallmarks of the current Prosecutor’s term.

Yet, the OTP operates in a highly charged political environment. The Office is keenly aware of this, and manages the situation, by insisting upon its independence, but also by regularly engaging with States Parties and other stakeholders in a transparent way, to create understanding and build support. It has long, for example, attempted to engage the African Union in this way. Many of these efforts form part of the public record and are featured in the Office’s and the Court’s press releases and public interventions.

Nevertheless, the Office does have to rely upon the support of States Parties, civil society and other stakeholders to sustain and defend it, as an independent judicial institution, in the face of the most egregious political threats.

*Organization, Accountability, and Ethics* (report, pages 18-22)

This final part of the report makes some valid points and offers some helpful suggestions. However, overall, it does not provide much in the way of useful advice on realistic solutions to problems the OTP needs to address.

Respecting *Organization and Structure* (report, pages 18-19), the report regards the move to integrated teams as an improvement and deals helpfully with the issue of a bifurcated Deputy Prosecutor level.

The report also underscores the need to streamline decision-making, a point the OTP accepts; but it fails to acknowledge progress the OTP has made, for example, in devolving most decisions and approvals, except those with strategic significance, from ExCom to lower levels of management.

Certain other issues raised in this part of the report, for example, criticism of the role of support units and JCCD in investigations and the need for an additional senior managing investigator, have been addressed earlier.

While it welcomes the OTP's efforts to mentor women staff members, the report's criticisms respecting gender balance, especially at senior levels, are well taken. However, the report does not adequately acknowledge the efforts the OTP – and the Court as a whole and in coordination- are making to address the problem. The same may be said, respecting the effort of the Office to recruit a diverse staff. The “white males”, to whom the report points as members of senior management, are indeed “actively outspoken and supportive about changing OTP culture and [are] tak[ing] an overt lead in making it more open, respectful, and diverse.”

Thus, the recommendations in this part that deal with recruitment practices add nothing to what the OTP is already doing. Those that relate to JCCD are misplaced, for reasons that have already been given earlier. Secondments are considered, but the OTP has to manage the application of certain restrictive rules that affect them. Drawing on a roster of skilled professionals is an excellent idea – in the abstract – but also presents practical problems, relating to availability, cost, fit and other issues, which can be difficult to resolve.

Progress has been achieved in streamlining decision-making, but the OTP recognises the value of further reducing “bureaucracy” and increasing speed, while ensuring the application of consistent standards, fairness, and attention to the broad interests of the Office.

Addressing *Leadership and Managerial Competency* (report, pages 19-20), the report suffers from generalisations that fail to recognise realities. For example, in a prosecution office, such as the OTP, why shouldn't a senior manager be a skilled lawyer? The answer, respecting the needs of such a person, who has superior legal "technical capacities", but may be lacking in managerial experience, is to improve her or his "managerial capacities", for example, by employing the training programs and 360-degree review processes, as the Office has done. It will never be possible to recruit senior managers who possess in perfect balance all of the necessary skills; it will always be the responsibility of the Office to help managers, as well as other staff members, to grow in skill, confidence and competence. It is this capacity for growth that is vital to the organisation.

The recommendations in this part of the report are fine, as far as they go, but they add very little that is new to what the OTP is already endeavouring to accomplish.

On *Staffing, Term Limits, and Rotation* (report, pages 20-21), the report reveals the widely divergent advice the workshop experts had to offer, but handles the issue of term limitations usefully. Once again, however, the recommendations add little to what the OTP is already doing to improve its performance.

Finally, concerning *Office Culture* (report, pages 21-22), the report offers criticisms that are dismaying, because they simply ignore the efforts of the Prosecutor and her senior management – and the ICC itself – to eliminate a "toxic office culture", and to create a working climate that is supportive, is open to ideas and critical thinking, values the contrarian, and seeks to be sensitive to differences of culture, background and experience. In addition to the Code of Conduct for the Office of the Prosecutor adopted in 2013 (accompanied by mandatory trainings for all incumbent and incoming OTP staff) and the strict application of the Code in practice, initiatives, such as the Task Force on Working Climate, the articulation of OTP Core Values of Dedication (and related mandatory trainings), Integrity and Respect, the ICC's Leadership Framework, declared zero tolerance for all forms of bullying, harassment or sexual harassment, and many other undertakings, are all aimed at creating a healthy working culture that supports productivity. Under this administration, the Office has also taken a vigorous approach, as a matter of policy and practice, to ensure that there are no deviations from the applicable rules governing conduct by members of the Office in all spheres of activities, and has taken remedial action where warranted.

The recommendations, while sensible, relate in almost all respects to matters the OTP has implemented or is trying to implement. Lasting change can be difficult to achieve, however, and the OTP accepts that there is a way yet to go.

### *Conclusion*

It is hoped that the above comments and clarifications will assist the IER Cluster 3 (OTP) experts in assessing what value they will place on the OSJI report.

The OTP was, unfortunately, not afforded the opportunity to review a draft report, to point out any concerns about factual issues, while, of course, leaving it to the workshop experts to draw what conclusions they wished.

The OTP has no doubt about the good intentions of the organisers of the workshop that produced the report. The Office draws inspiration from what is helpful in it, but regrets the opportunity that has been missed to offer genuine assistance. | OTP