



26 November 2019

## Full Statement of the Prosecutor, Fatou Bensouda, on external expert review and lessons drawn from the Kenya situation

### Introduction

As I have repeatedly stated, my Office is committed to a culture of continuous learning and improvement in the service of our mandate under the Rome Statute. In the past seven years, in particular, the Office under my direction has expended great energy and effort in countless managerial and strategic initiatives to strengthen its capacity to deliver as effectively and efficiently as possible on its important mandate. Bolstering our internal quality control mechanisms through a systematic process of review and lessons learned is an integral part of the Office culture that I, along with my senior management, have embraced and fostered.

It is in this context that I wish to publish the outcome of my Office's internal Kenya situation review exercise following the receipt of a report in February 2018 by a panel of independent external experts that I commissioned to assist us with the review. I have not released this statement until now, in part to adequately consult and engage with my senior management and staff members involved in the Kenya situation about the outcome of the exercise, and to conduct a careful review of the recommendations in order to determine those that have already been implemented and those that require further action. Additionally, given the Review process the Court is now embarking upon with States Parties, the time seems particularly appropriate to report on such an important exercise, which draws lessons from past experience, in order to strengthen the way the Office works.

The purpose of this initiative was not to lay blame or to criticise anyone, but rather to learn from experience, particularly in relation to the early handling of the Kenya situation by the Office of the Prosecutor ("OTP" or "Office") of the International Criminal Court ("ICC"), in order to understand how to improve the way we operate.

In addition to external factors, including [lack of sufficient cooperation](#), [witness tampering and interference](#), which played their role in the final outcome in the context of the Situation in Kenya, the goal of this internal initiative was to assess the performance of the Office itself, and to draw the appropriate lessons and to make changes where necessary. I am encouraged by the fact that the Office had already addressed most of the recommended changes in response to our experience of the Kenya situation even prior to the receipt of the independent external expert report.

The recommendations of the three independent external experts who conducted the exercise and their underlying conclusions are reflected in the Executive Summary of their confidential report (“Executive Summary”), which is included herein. Not everyone may agree with certain conclusions, and some findings may not be fully supported by the record, but no one can take issue with the essential thrust of the report.

The completion of this important initiative has allowed my Office to consider and implement, where still necessary, any appropriate changes in both operational and management practices, as recommended by the external experts. The fact that my Office has already implemented most of the recommendations made by the experts is a sure indication that we are on the right track in determining what changes in working methods could be made to hone performance internally and to better manage external factors that impinge on success. Indeed, a key objective of the exercise was to ensure that the improvements the OTP has been making in its management processes and operational methods are properly oriented to continuously achieve positive results in line with our Strategic Plans and policies.

Through this initiative, I hope to demonstrate to the international community my Office’s *bona fides*, transparency and readiness to engage in honest self-reflection, but also our capacity to learn from such experiences and to implement concrete changes where necessary.

I am proud of the improvements and related achievements my Office has made, and I am confident that the OTP will stay the course on this forward trajectory.

The Kenya situation presented unique challenges for the OTP.<sup>1</sup> As emphasised in successive OTP Strategic Plans, for the Office to learn from such experiences is key to ensuring better performance. While my Office spared no effort to advance and salvage the cases in the Kenya situation, and had to take difficult but professionally responsible decisions in the process, the experience in the situation provided learning opportunities that have assisted, and continue to assist, the Office.

In determining that an internal OTP review and lessons learned exercise was necessary in relation to the Kenya situation, I believed that a thorough and objective process required me to involve external experts of trusted experience and skill. To that end, my Office retained Ms Brenda J. Hollis, Prosecutor for the Residual Mechanism for the Special Court for Sierra Leone, and an independent consultant, based in Denver, Colorado, USA; Mr Robert Reid, Chief of Operations at the UN International Criminal Tribunal for the former Yugoslavia and the International Residual Mechanism for Criminal Tribunals (“IRMCT”), based in The Hague, The Netherlands; and Ms Dior Fall, former Senior Trial Attorney and Senior Appeals Counsel at the

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<sup>1</sup> Of six suspects against whom charges were brought, three suspects in each of two cases: two suspects were discharged at the conclusion of the confirmation of charges hearing, one in each case; charges against one accused in one of the cases were withdrawn, without prejudice, during the pre-trial stage; and the charges against the last accused in that case were withdrawn, without prejudice, on the eve of trial; the trial of the two remaining accused in the other case went ahead, but their charges were vacated by the Trial Chamber, at the close of the Prosecution case, on a no-case-to-answer motion, but without prejudice to the Prosecution.

UN International Criminal Tribunal for Rwanda, now an independent consultant based in Dakar, Senegal. While one may not accept, without qualification, all their observations, they conducted the exercise in an independent and conscientious manner, giving generously with their time and commitment to the task. This was greatly appreciated.

As a key deliverable of the exercise, the three external experts presented to me and my Deputy, on 7 February 2018, a confidential report, entitled: *ICC OTP Kenya Cases: Review and Recommendations*. This confidential report forms the basis of this public statement on the outcome of the Kenya situation lessons learned exercise, to which I have appended the Executive Summary of the original report.

### **Funding**

Since the cost of a lessons learned exercise that involved external experts exceeded the budget for consultants available to the OTP, the Office sought the financial support of donors willing to sustain its efforts to learn from experience and enhance its performance, while ensuring the independence of the experts and the process.

The efforts of the intergovernmental organisation, Justice Rapid Response (“JRR”), to solicit funds from governments for the exercise did not meet with success.

Fortunately, the Office was eventually able to secure funding from another independent source. Additionally, while the IRMCT generously permitted Mr Robert Reid to give his time to the OTP free of charge, this funding in combination with the OTP’s own budget resources for consultants covered all necessary associated costs.

### **Review and Recommendations**

I will address below the findings and recommendations contained in the enclosed Executive Summary.

As stated in the Executive Summary, the team of experts interviewed some 30 current and former staff members, representing all three Divisions of the Office, as well as some Sections; reviewed various OTP documents and press releases; and examined OTP filings and ICC judicial decisions, in order to formulate their recommendations. Staff interviews were done on a confidential basis. I believe, however, that the experts did not interview my predecessor in office, Mr Luis Moreno Ocampo (*prior to public release, Mr Ocampo was provided a courtesy advance notice of this statement and the Executive Summary of the report of the Independent Experts. Mr Ocampo’s response is annexed to this statement*). It also appears that certain key documents made available as part of the process were not given sufficient weight or mention in the expert’s report.

In conducting the exercise, the experts decided that it would be most productive to focus primarily on the early years of the OTP’s handling of the Kenya situation, when “the die was cast”, so to speak, rather than the later trials. In their report, they suggest that the outcome of the Kenya cases might simply have been a reflection of the inability of the ICC to respond adequately to the challenges presented by cases against powerful, high level accused. They

examine a number of factors that they found to have affected the outcome of the Kenya cases, identifying leadership, decision-making and staffing issues as the key ones. Once again, the point was not to blame, but to learn from past experience.

In the experts' view, OTP leadership, primarily in the person of the first Prosecutor, was a major contributing factor to the problems encountered in the Kenya cases. In the opinion of the experts, the first Prosecutor's leadership style discouraged candid, contrary assessments and viewpoints to the detriment of the cases, and some lower level leaders perpetuated this attitude.

Decision-making, the experts found, was concentrated in the first Prosecutor and his Executive Committee ("ExCom") (primarily with Prosecutor 1), even for day-to-day decisions relating to the conduct of the investigations and prosecutions. Such micro-management, in the experts' view, worked to the detriment of the Kenya cases. Decision-making was too complex leading to delays or the failure to reach decisions at all.

It was also the opinion of the experts that the first Prosecutor did not seem to appreciate that it is only through effective prosecutorial action, based on law and facts, that collateral consequences, such as bringing peace to the region or demonstrating the relevance of the ICC, can properly be achieved.

The experts were also concerned that too many staff positions were filled by individuals who did not have the requisite experience and skill sets to deal with complex investigations and prosecutions against high level suspects. While these individuals worked to the best of their abilities, these abilities were, in the views of the experts, not sufficient to cope with the complexities of the Kenya cases.

The experts' report also deals with other issues. Respecting OTP office structure at the time, the Jurisdiction, Complementarity and Cooperation Division ("JCCD") appeared, in their view, to exceed its mandate in the Kenya cases, exerting too much control over operational matters to the detriment of effective investigation and prosecution, and seemed to exercise "an outsized influence" over the first Prosecutor. Certain members of our staff, who were involved in the investigations, took issue with this characterisation of JCCD's role. The experts were focused on matters of management and approach, rather than the individual performance of line staff, whose good faith and dedication were never called into question. It should be noted that whatever role JCCD may have played back then, its leadership and work practices have since been significantly changed. It functions very differently and successfully today.

The team of experts analysed the functioning of the so-called Joint Team, with its shared leadership and consensus-based decision-making process. This, in their view, undermined the OTP's ability to conduct timely and responsive investigations. They noted with approval the replacement of the Joint Team, during my tenure as Prosecutor, with the Integrated Team concept—"a tried and tested model under the leadership of a senior prosecutor," which had since significantly improved the timely and efficient conduct of investigations. While an improvement, we are committed to making the Integrated Team model work even more effectively.

The prosecutorial process in the Kenya cases, the experts found, was hampered by deadlines set by the first Prosecutor that were based on considerations other than what they considered to be sound prosecutorial practice. In their view, the effectiveness of the investigations and prosecutions was significantly undermined by a “decision over assessment” tactic respecting cases and a target-based – as opposed to evidence-based – approach to investigation and charging. This, coupled with other problems, meant that the prosecutions were burdened with weak cases, relying on one or only a small number of insider witnesses - whose evidence could not be independently verified by the OTP – to establish essential elements of the case.

Additionally, the continued cooperation of these insiders was constantly threatened by a pervasive witness interference campaign, exacerbated by the difficulties encountered with the witness protection program at that time.

Witness issues, relating to both credibility and vulnerability to witness interference, were a problem from the beginning, the experts found. In their view, the OTP was dilatory in responding robustly to the potential for witness interference and the interference itself, delaying comprehensive Rome Statute article 70 investigations of alleged offences against the administration of justice until late in the process.<sup>2</sup>

In their report, the experts also draw attention to: the difficulty the Registry’s Victims and Witnesses Unit (“VWU”) had at the time in dealing with pervasive witness protection issues; the inability of the OTP to secure adequate cooperation from States Parties, notably Kenya; the failure of the judges to be pro-active with respect to effective witness protective measures, which may, in the experts’ view, have been partly due to the OTP’s failure compellingly to address these issues before the judges; and the first Prosecutor’s susceptibility to influence from domestic and international non-governmental organisations (“NGOs”) in his decision-making.

The Executive Summary, which is appended, contains a much fuller analysis of the factors that the experts found to have contributed to the failure of the prosecution of the Kenya cases, but the above captures the essence of their conclusions.

I am maintaining the confidentiality of the main body of the experts’ report, which, including the Executive Summary is 95 pages long, because of its detailed treatment of matters of an operational nature. Nonetheless, the Executive Summary does provide a succinct, yet clear and comprehensive, exposition of the experts’ findings and their recommendations, all of which are detailed below, including my observations in response.

## **Implementation**

My Office conducted a meticulous review of the experts’ report, to identify those recommendations that have already become part of OTP practice, or that were already being

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<sup>2</sup> Warrants are outstanding for the arrest of three suspects accused of offences against the administration of justice, contrary to article 70 of the Rome Statute, based on allegations of witness interference, and the matter of the arrest and surrender of these suspects to the ICC is still before the courts in Kenya.

implemented; those recommendations that merit serious consideration; and those few recommendations that the OTP need not implement. As noted earlier, most of the recommendations had already been implemented, as a function of the OTP's strategic planning and its continuous efforts to improve its governance and working methods.

The sequencing of the topics under each of the headings below follows the order of the recommendations found in the main body of the experts' confidential report.

## **RECOMMENDATIONS THAT ALREADY HAVE BEEN, OR ARE BEING, IMPLEMENTED**

### **Leadership**

*The report recommends that the Prosecutor should adopt a leadership style that ensures she has the benefit of all informed factual, legal, strategic and tactical views of her staff, encouraging an "open exchange of ideas" and "a fair, even-handed approach to interactions with staff;" she and the Deputy Prosecutor should ensure a similar approach is taken by their subordinates, who should in turn ensure that divergent views are made known to the Prosecutor and her Deputy.*

The report's recommendations on management style are fully implemented or underway. While the creation of a new culture, where it is safe to express ideas and critical thinking is the norm, remains a dynamic process of change management within the OTP, this change has been a hallmark of the approach I, along with my senior management, have adopted.<sup>3</sup>

For example, once investigation plans are developed, they are subjected to peer review to enhance their quality. At regular stages over the course of an investigation or in the preparation of a prosecution, the evidence and theories of liability are tested in a rigorous case review process, which involves senior OTP staff, who are not members of the Integrated Team conducting the investigation or prosecution. Such reviews drive the development of investigation plans, which are then submitted to a peer review to further ensure their quality. This has greatly improved the quality and presentation of the cases brought before the Chambers of the Court.

As a general approach, in team meetings or meetings at ExCom level, staff members are encouraged to express their views in a free and productive exchange of ideas. This has improved the quality of decisions, and is contributing to a positive working environment for staff.

Finally, in addition to a *Code of Conduct for the Office* adopted in 2013 to which my Deputy and I are also bound, the OTP has instituted and workshopped a set of Core Values, namely Dedication, Integrity and Respect, which serve as touchstones to ensure that both management and staff maintain the highest ethical standards in their work and interpersonal relations. Trainings on the Code and Core Values are mandatory for all members of the Office. These and other measures I have taken since assuming office demonstrate the importance we attach, as an Office, to professional ethics and to equip ourselves accordingly. When I assumed office as Prosecutor, one of my first acts was to establish a task force on working climate within the OTP.

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<sup>3</sup> Certain references to the Prosecutor are in the third person for ease of reading.

The task force reported to me, and we have been implementing its recommendations. A by-product of the work of the task force is the above-referenced *Core Values*. I want to emphasise that our Core Values form the bedrock of the OTP's organisational culture. A similar initiative is now being contemplated for the Court as a whole as part of our inter-organ efforts in the newly launched staff well-being framework. We have been building an office culture focused on excellence, open communication, dedication, integrity and respect, as well as lessons learned.

Our internal self-assessment and lessons learned initiatives take many forms, including milestone triggered lessons learned processes, regular evidence reviews, and other efforts, all aimed at critically assessing and enhancing our performance. The OTP today is a different Office, which is shown through its results in and outside of the courtroom, and has in place a different organisational culture. We continue to build on these efforts in line with our commitment to continuous improvement.

### **Decision-making**

*The report notes that "the evolution from Joint Teams to Integrated Teams is an excellent development."*

*The report also supports objective decision-making, uninfluenced by personal relationships within the OTP or by outside actors.*

Decision-making is greatly improved, but its streamlining is still a work in progress, as I and ExCom devolve more and more "ownership" to the Integrated Teams and delegate greater decision-making responsibility, under my ultimate oversight and that of my senior management. The Integrated Team is the unit responsible for carrying out the core OTP activities of investigation and prosecution, and must take ownership of their assigned situations, a responsibility that entails accountability and regular reporting to me as Prosecutor. This is a new and preferred approach for the Office, and we are committed to seeing how we can further hone the working methods and efficacy of the Integrated Team model. We are already engaged in that effort.

Respecting objective decision-making, the OTP is well ahead of the recommendation – I insist in no uncertain terms upon the independence of my Office and upon its need to take decisions in an independent, impartial and objective way, based on the information or evidence available to it in strict conformity with the Rome Statute legal framework. This approach is well established and articulated in OTP policies and in our daily practice.

### **Staffing practices**

*Generally, the report repeats its recommendations about leadership and the creation of favourable working conditions to establish a climate of reciprocal respect among all staff members of the OTP.*

*It also recommends that the OTP commit itself to the most effective and efficient use of its resources, making this commitment clear to States Parties and continuing to explain to States Parties the rationale for the requested level of resources and the operational consequences of these not being provided.*

*The OTP should provide familiarisation training to all investigative and prosecutorial staff, to ensure they understand the legal and procedural framework within which they must work. The report suggests the creation of checklists, etc., to aid investigators.*

*Senior staff should occupy their positions on the basis of proven performance in their capacities in a criminal justice context.*

*The report also suggests a number of ways to enhance the quality of staff:*

- *recruiting from qualified staff who have served in the ad hoc international criminal tribunals and courts;*
- *set up exchange programs with law enforcement agencies;*
- *“borrow” investigators, as necessary, from the IRMCT;*
- *create a roster of seasoned investigators, analysts and prosecutors, which could be organised by geographic region, upon which to draw;*
- *ensure more senior staff guide and direct more junior staff.*

*It is also recommended that a system of case file continuity be created, so that loss of staff will not mean loss of case knowledge.*

*A specific recommendation that the report makes is that the OTP should increase the number of staff having proven experience with complex criminal cases and decrease the number of those who don't or of those who are not productive performers. The Office should hire, retain and “promote” a majority of staff with proven criminal justice experience. While staff with experience in human rights investigations can bring a valuable perspective, such staff should comprise a minority.*

*The report also urges the OTP to ensure that time and resources are made available to mentor less experienced staff.*

In addition to my observations above the new Office culture, the general recommendations are already being implemented. The paragraph on budget strategy sums up neatly the approach the OTP, in close collaboration with the other organs of the Court, on the basis of the “One-Court” principle, has been following for years now, but securing the requisite level of funding with the Committee on Budget and Finance and the Assembly of States Parties continues to present a challenge.

The set of specific recommendations is deceptively simple, but actually complex in practice – and not everyone may agree with the underlying assessment that the report makes of OTP staffing practices, at least, as they have evolved today. In essence, the OTP is already acting, to varying degrees, upon all of the recommendations, even if it can improve upon its efforts.

Staffing is a vast topic, and any broad misreading of the experts' comments about quality of OTP staff - whether during the tenure of the previous Prosecutor or under my term – is to be rejected. The Office of the Prosecutor, since its inception, has and continues to benefit from the committed service of highly skilled and motivated staff who are dedicated to the mission of the Office. Their contributions to OTP's complex mandate are to be commended.

The OTP recruits on the basis of experience and competence to meet work requirements, while being attentive to gender and geographical balance. The OTP accepts that it must continue to reassess the profile of staff it needs, as a function of the varied situations under investigation. The OTP endeavours to attract qualified candidates from every region, on the principle that its strength truly does lie in the diversity of its staff, always keeping in view the ultimate objective, which is to build the most effective teams it can. Staff having the right law enforcement background will be of obvious value, but the OTP also has to be careful to avoid overly rigid hiring practices, and look to recruit talent, wherever that is found, and staff capable of professional growth and development.

Further specific recommendations are under consideration, and some have been adopted; for example, the OTP has drawn on the JRR roster and the Office was able to finalise an arrangement that allowed it to “borrow” an experienced sexual and gender-based crime investigator from a State Party and the UN.

The OTP is placing greater emphasis upon tools, such as ePAS, to measure performance and create a culture of accountability. This approach applies across the board, including senior management. Still, how to reward good performance and to recognise achievements remains an issue.

Staff training is a priority across the Office, especially to integrate staff coming from a range of backgrounds and experience into a coherent and cohesive way of working. Training in interview techniques, in advocacy, and in many other areas of endeavour is a necessary feature of the continuing professional development of staff that is part of current OTP practice. However, the Office also needs to develop a more comprehensive mentoring system within the Office.

The creation of checklists and “scripts” is a work in progress, as are major projects, such as revision of the Operations Manual and other initiatives designed to educate staff and improve working methods. As a practical measure, the Investigations Division of the OTP is developing or reinforcing existing standards and procedures for all key areas of investigations.

The OTP has IT systems in place to create case file “depositories”, and will ensure they are in use across the teams. For each investigation, the Integrated Team documents its strategy in an investigation plan, that is regularly updated and submitted to ExCom for review. The team also uses an investigation management system that keeps track of all lines of inquiry, tasking and decisions; this practice helps with the transfer of knowledge, in relation to the case, and offers an auditable log of decisions and actions taken.

Overall, this situation will improve even more as the OTP further advances with its implementation of its plan to optimise and streamline its systems for the management of information and evidence, through their integration into the new, unified Information, Knowledge and Evidence Management Section (“IKEMS”) structure, led by the Information Management Coordinator. IKEMS also greatly facilitates a coordinated approach to information management needs with the Registry’s Information Management Services Section (“IMSS”).

In sum, the key recommendations here are being implemented or are clearly in the OTP's sights.

## Structure

*As a **general recommendation**, the report suggests the OTP simplify its structure, eliminating overlapping responsibilities and clearly defining the role of each Division, thus giving clarity to staff and assisting in devolving decision-making.*

*Respecting **JCCD**, the report recommends that the Division operate within its responsibilities, understand that it is part of a prosecutorial process, not a diplomatic one, share information and facilitate contacts, provide investigators and prosecutors follow-up on requests for assistance ("RFAs"), and give them access to its RFA database. It suggests that RFAs be prepared by team members for JCCD's review for consistency and transmission to States.*

*Respecting the **Investigations Division ("ID")**, the report supports the establishment of the integrated team model, with a Senior Trial Lawyer in charge, describing it as "tried and tested."*

*It recommends that the OTP ensure that the leadership and majority of staff in the **Prosecution Division ("PD")** have proven experience as prosecutors in complex criminal cases.*

*It suggests that the Senior Trial Lawyer, in consultation with his or her team, should develop a road map from the beginning of an investigation, so as to focus the efforts of investigators, recognising that this road map is a living document subject to refinement as evidence is collected. Integrated teams should be put in charge of situations as early as possible, even as early as the conclusion of the preliminary examination. Consideration should also be given to devolving more authority to the integrated teams.*

Regarding the **general recommendation**, the OTP is well on its way to simplifying and further optimising its structures and operations, to achieve clarity of roles, efficiencies and effectiveness.

As an opening point, since assuming office as Prosecutor, I have ensured the structural harmony and efficacy of the Office, ensuring the duties of all senior management positions with specific portfolios are clear and respected, starting from the Deputy Prosecutor to the Directors, and other members of our enlarged Executive Committee.

A further example is the current consolidation of several units that have been handling knowledge issues, evidence and information into a single Section, IKEMS, under the leadership of the Information Management Coordinator, which should realise genuine efficiencies and the flexibility to meet future information management challenges.

ID and PD are working in close collaboration to achieve common goals, and have included JCCD in this process. Some of these developments are the consequence of the change in roles that has resulted from the implementation of the Integrated Team concept.

Also, with the move to the ICC's permanent home, the integration of management has become much closer and interact more frequently, a process that is enhanced by regular Senior Managers' Meeting (Prosecutor, Deputy Prosecutor and the Directors) and other mechanisms.

Respecting JCCD, I note that the operations and work processes of the Division is rather complex, and I have some reservations accepting the entirety of the expert's observations respecting that Division as they do not appear to be fully supported by the documentary evidence and existing internal processes and intimate institutional knowledge. The recommendations have nonetheless been duly considered and overtaken by the way that JCCD operates under the existing management and as a function of the evolution of the Office. As noted earlier, whatever role it may be suggested that JCCD played, in relation to the Kenya situation, its role and way of working have evolved significantly since then. The functional separation between the two key components of the Division, the Situation Analysis Section ("SAS") and the International Cooperation Section ("ICS") has been reinforced, at the same time allowing flexibility to allow the necessary flow of information and collaboration, facilitating best decision-making in the interests of the Office and in the service of its mandate.

Through SAS, JCCD performs the vital "gatekeeper" function assigned to it, most especially in relation to the conduct of preliminary examinations, which involves a thorough analysis of all information received to determine whether Rome Statute legal criteria for opening an investigation are met. There is now greater integration and coordinated hand-over of situations from SAS to the Integrated Teams, when the Prosecutor opens investigations. The Office is working to effect an even closer integration of the work of SAS with that of ID and PD.

Cooperation being a key factor in successful operations, ICS members are embedded in the Integrated Teams, which draw their personnel with the necessary skill sets from all three Divisions and are led by a Senior Trial Lawyer from PD. Through ICS, the Division facilitates contacts with States Parties and other partners, to ensure the timely and tangible cooperation that is necessary for the OTP to carry out its investigative and prosecutorial mandate, while respecting national procedural laws. The International Cooperation Advisers, who are embedded in the Integrated Teams, open the way for such cooperation and handle cooperation issues.

The need for RFAs is assessed by each team; if deemed useful, an RFA is drafted through a consultative process and, once finalised, is conveyed to the Director of ID for signature. The RFA database has now been completed for each situation, and Integrated Team members will have access to it, to follow-up on RFAs.

Recommendations concerning staffing and Integrated Team functioning have already been implemented. Careful planning, early assignment of situations, increased responsibility – these are all features of the OTP's current way of working. A Working Group on Integrated Team Function has already been established to provide greater clarity on the precise roles, responsibilities and activities of the various members of the Integrated Team and the interaction of these Teams with the divisional structures. The eventual report of this internal working group should further improve operations and enhance the functioning of the model across teams.

Through recruitment of high quality candidates, both internally and from outside the OTP, the Office has also developed a strong cadre of Senior Trial Lawyers, with proven experience and

skill in handling complex criminal cases in both domestic and international contexts. This development has greatly strengthened the capacity of the Office to deal with the most challenging situations.

## Process

This long section of the report covers the whole evolution of the Kenya cases. Rooted in the experience of those cases, the recommendations have, with very few exceptions, been overtaken by the way the OTP currently operates. The summary of the recommendations, and their implementation, which follows below is therefore very brief and concise.

*Respecting **preliminary examinations**, the report recommends, as part of the process, that the OTP consider the feasibility of investigating in the situation country (resources, witness protection, ability to operate on the ground). However, it warns that a “zero risk” policy would effectively preclude investigating in any situation. It recommends involving experienced prosecutors and investigators, a Protection Strategy Unit (“PSU”) representative and a country expert in the preliminary examination process.*

*Respecting article 15 **requests to open an investigation**, the report recommends against imposing arbitrary deadlines and in favour of the current OTP practice of completing the preliminary examination before filing the request and involving OTP staff from outside JCCD in preparing the request. It advises against assuming the Pre-Trial Chamber will automatically approve a request, but to anticipate all legal and jurisdictional issues.*

*Concerning **investigations**, the report recommends against pre-determining targets for investigation: investigations should be evidence-based, not target-based. Evidence the OTP relies upon should be collected by OTP investigators (not accepted from others). In-country investigations should begin immediately following authorisation to open.*

*With respect to **charging**, the report’s recommendations, in sum, relate to an appreciation of the article 61 standard of proof, comprehensive review of the evidence and applicable law, evidence-based charging, and arrest warrants versus summonses (the former being necessary, should there be any concern about witness interference).*

*On **charge confirmation**, the report, in sum, recommends that the focus be on the need to rely on investigations, not just on secondary source documentation, and the need to perform a comprehensive analysis of the evidence and applicable law.*

*Respecting the **pre-trial phase**, the report’s recommendations relate to the need to avoid relying on documentary sources and hearsay and excessive use of intermediaries, but to ensure the OTP conducts its own investigations. The report underscores the danger of over-reliance on very few key witnesses.*

*Finally, respecting **trials**, the report’s recommendations focus on the desirability of being trial ready by the time of the confirmation hearing; the need to verify the credibility of witness testimony; and the importance of taking measures to protect the security of witnesses.*

Respecting **preliminary examinations**, OTP policy until now has been not to include the feasibility of investigating as a factor to consider at the stage of seeking authorisation to open, but rather to consider it as a factor in case selection and prioritisation, once an investigation has been opened. There are many ways to get around obstacles to investigation and it should be the rare case where any operations would be impossible.

Moreover, the Office is now beginning to assign ID and PD staff to situations under preliminary examination, to collaborate with SAS staff in preparing for any eventual investigation, and to assist in taking any necessary steps to preserve evidence.

The report's recommendations are otherwise all ones that have already been implemented or are moving toward implementation.

Respecting article 15 **requests to open investigations**, the recommendations are already fully part of the OTP's practice. The goal of the preliminary examination process is to arrive at a fully informed determination as to whether there is a reasonable basis to open an investigation. SAS subjects all of the information it receives to an independent, impartial and thorough analysis. This process also involves internal peer review by analysts and lawyers outside SAS. Only then does the Section make its recommendations to the Prosecutor and ExCom. The Prosecutor will only open an investigation, or seek judicial authorisation to do so, once the preliminary examination process has been completed to her satisfaction. The Rome Statute imposes no timelines on preliminary examinations of situations, and the Office takes the time it needs to complete a thorough analysis. However, conscious of the need to reduce the length of preliminary examinations, where possible, and to deliver justice as swiftly as possible, the Office is considering ways to expedite preliminary examinations, where appropriate.

Respecting **investigations**, the recommendations are already fully part of the OTP's practice, given that feasibility figures into case selection or prioritisation. See the Office's Strategic Plans, and the Office's Policy Paper on Case Selection and Prioritisation.

The recommendations on **charging** are already fully part of OTP practice. See the Office's Strategic Plans.

Respecting **confirmation of charges**, the OTP's current working methods, and the policy of being as "trial ready" as possible, even before reaching confirmation, fully conform to the recommendations.

Respecting the **pre-trial phase**, the OTP's current working methods fully conform to the recommendations.

Respecting the **trial** phase, the OTP's current working methods fully conform to the recommendations.

## Witness issues

The report's recommendations on witness matters focus on issues of witness credibility and witness interference, arising out of difficulties encountered in the Kenya cases.

*On **credibility**, the report recommends the OTP ensure there is a reasonable basis to believe there will be access to evidence in the situation country, interview potential witnesses as soon as possible, critically evaluating their credibility, and not rely on interviews conducted by actors external to the OTP.*

*Respecting **witness interference**, the report suggests there will be very few situations where there will be zero risk to potential witnesses, the questions being what level of risk to anticipate and how to mitigate it. The report recommends that witness management and protection issues must be anticipated from the outset.*

*The OTP must respond robustly and immediately to reports of witness interference, initiating article 70 investigations and informing the judges.*

The recommendations respecting **credibility** are fully covered by the OTP's current methods of operation: accessibility of evidence is part of investigation planning, as are risk assessments involving the PSU, and, once the groundwork is laid, potential witnesses are screened and, where indicated, interviewed. Investigators use interviews conducted by other actors as lead information, if at all, and do their own interviews of witnesses.

OTP thinking is now, in fact, far ahead of the recommendations, in relation to witness risk assessments, screening methods, and field craft regarding evidence collection.

Respecting witness interference, the OTP's current practices – as well as those of the Chambers and Registry – have overtaken the recommendations: the Office reacts promptly to trouble, engaging the Chambers and Registry, and looking out for the well-being and security of witnesses. We are committed to ensuring that this is a systematic reaction.

The Prosecution also has, as a fallback in extreme cases, rule 68 of the Rules of Procedure and Evidence ("Rules"), now fully available to counter any witness interference that has been successful in causing witness retractions. Through the application of the rule, Chambers may receive the prior statements in writing of witnesses, who have recanted due to corruption or intimidation, and weigh this evidence in the case.

It should also be noted that, while the OTP has the initial responsibility to look out for the security of witnesses, the Rome Statute assigns the important responsibility of ensuring witness protection and welfare to the Registry. On these issues, the OTP and the Registry work in close collaboration, and their working relationship is efficient and effective.

## External actors

The report, in this part, focuses upon actors external to the OTP, namely, VWU (now the Victims and Witnesses Section, or "VWS"), the Government of Kenya, States Parties, Chambers and NGOs.

*The recommendations of the report arise out of the experience of the Kenya situation and cases, and this experience will become apparent in what follows, describing the current approaches the OTP takes.*

In sum, our current practice meets all of the suggestions made in the report.

Thus, the OTP works closely with **VWS**, with which it has a generally excellent relationship, involving it in planning for anticipated witness protection needs from the earliest stage. (This is part of the close collaboration between OTP and Registry even at the budget planning stage.) VWS's capacity and competence greatly improved under the previous Registrar and this continues to be the case under the new Registrar.

The key point concerning the **Government of Kenya** was the OTP's delay in seeking the assistance of the Trial Chamber to compel cooperation, resulting in part from the contradictory approaches advocated by JCCD and PD (that is, continue to try to persuade the authorities to cooperate versus applying to the Trial Chamber for a finding of non-cooperation against the Government, respectively). This lesson has been taken on board. The OTP also has a range of strategies to secure cooperation from States Parties and situation countries, and these are still evolving.

The ability of the Court – beyond simply the OTP – to secure effective action from **States Parties** to compel cooperation is an area in need of further thought and development, although the OTP does secure “quiet diplomacy” from third party States Parties, at times, even non-States Parties, to assist with cooperation matters, and certain States Parties have intervened on other issues. Also, the OTP and the Court as a whole pursue a strategy to secure adequate budget support, with the aim of persuading States Parties to provide sufficient resources to the ICC.

In the **Chambers**, the judges are now far more alert to the risk of witness interference and take prophylactic measures to prevent it.

As a measure to compensate for witness interference, rule 68, as noted, is now fully available.<sup>4</sup>

The OTP enjoys an excellent relationship with **NGOs** and civil society in general, but one that is firmly based on the independence of the Office in prosecutorial decision-making. NGOs can provide valuable perspectives on the OTP's work and, in certain situations, they may find themselves in the role of “first responders”, being present to witness events and collect information. The OTP is actively engaging with NGOs to sensitise them as to the need to collect and preserve evidence at the earliest opportunity and to equip them with the skills needed to do so in a forensically sound manner. Thus, while the relationship between the OTP and NGOs must be one carried on at arm's length, it is helpful to the OTP in the independent and impartial exercise of its mandate.

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<sup>4</sup> In the Kenya I case, I attempted to rely on the amended rule 68 to admit the prior statements of witnesses who recanted their testimony as a result of witness interference. However, the Appeals Chamber ruled that rule 68 could not be relied upon, since this would amount to a retroactive application of the amendments, which had only come into operation after the commencement of the trial.

## RECOMMENDATIONS THAT MERIT SERIOUS CONSIDERATION

### Leadership

Both the Prosecutor and Deputy Prosecutor accept *the report's recommendation they be more interactive with staff, visiting them in their offices to enquire how they are doing and what is going on, that is, "managing by walking around."*

### Decision-making

*The report suggests that decision-making in the OTP should be more streamlined: as far as possible, decision-making should be delegated to the team level, with oversight by senior management.*

The Division retreats of the Office have underscored the desire in the OTP to streamline decision-making further than it has been already, so that delay is reduced and efficiency gained. On this matter, therefore, the OTP is moving in the very direction the report recommends, and is actively considering how to accomplish more efficient decision-making without losing the quality, the due diligence and the thoroughness of decisions the Office is now accustomed to delivering.

### Structure

*Respecting JCCD, the report suggests that RFAs be prepared by team members for JCCD's review for consistency and transmission to States, and that the OTP consider using pro formas tailored to the requirements of each State.*

The recommendations respecting the drafting and approval of RFAs have already been implemented, and further attention is being paid to developing, to the degree possible, *pro formas* tailored to each State. It bears noting the Integrated Team also includes a JCCD component in the form of an International Cooperation Adviser, who duly participates in the drafting of RFAs.

### Witness issues

Respecting the recommendation that the OTP must respond robustly and immediately to reports of witness interference, initiating article 70 investigations and informing the judges, *the report also suggests that, through outreach activities, the OTP should convey that interference with witnesses will attract criminal sanctions, as a means of reassuring witnesses and sources.*

Outreach in situation countries is primarily the responsibility of the ICC Registry. While collaboration with the OTP exists across the situations, in at least five situations, the OTP and the Registry have developed a robust coordinated practice that has involved the participation of OTP staff in important outreach missions and related activities on the ground, where possible. The Registry and the OTP now enjoy close, coordinated and efficient collaboration and a continuum of services in the delivery of outreach and public information needs. As reflected in the latest OTP Strategic Plan, the Office will also be looking to further enhance its strategy towards communications.

## External actors

*The report recommended that the OTP should endeavour to secure effective action from **States Parties** to compel cooperation.*

As noted earlier, the ability of the Court to secure effective action from **States Parties** to compel cooperation is an area in need of further thought and development, and one that continues to pre-occupy the OTP as part of its strategic planning and in its every-day operations. It is also a pre-occupation of States Parties and the Hague Working Group of States Parties has now had a working group on cooperation for several years and cooperation has been a topic of consideration at sessions of the Assembly of States Parties. Cooperation remains, nonetheless, an area where improvement is needed and, to the extent that this is within the power of the OTP, it will continue to work towards this goal. The Office is also pleased to note that State Party cooperation will be a topic of discussion in the context of the anticipated Review process.

## RECOMMENDATIONS THAT DO NOT NEED TO BE IMPLEMENTED

### Structure

*The report recommends the OTP consider consolidating JCCD's legal advisory function, respecting jurisdiction, admissibility and cooperation, within the separate Legal Advisory Section.*

*The report recommends that consideration should be given to merging ID and PD into one Division, to provide administrative support to the integrated teams, who should have operational responsibility, or to serve as a "holding place" for staff yet to be assigned to an integrated team.*

*Finally, respecting PD, the report recommends the concentration of legal advice capacity in PD. The report also recommends removing the Appeals Section from PD and placing it under the direct supervision of the Deputy Prosecutor, since appellate counsel do not always share the same views as trial counsel and the Prosecutor and Deputy Prosecutor must receive independent and informed advice.*

While theoretically possible, the recommended consolidation of legal advisory functions is not one to implement at this stage, because the current system works well. While there is always room to optimise structures, this recommendation does not touch upon a pressing matter.

As regards ID, the OTP has evolved in a way that has made the recommendations redundant – other than to strongly endorse the Integrated Team concept. ID has since developed capable and necessary support functions to support the Integrated Teams. For example, specialised Sections have been created, such as: the Forensic Sciences Section ("FSS"), which serves all of the Integrated Teams; the Investigative Analysis Section ("IAS"), members of which are embedded in the Integrated Teams, but which also supports other Office-wide functions; and the Planning and Operations Section ("POS"), which, through its various units, such as PSU, serves all of the teams, as well as performs essential Office-wide functions.

The report also overlooks the multifaceted responsibilities of ID. Each of its four Sections either supply team members<sup>5</sup> (including the investigative team leaders) or provide specialised skills<sup>6</sup> to the teams. These vital support functions, and how they feed into and support Integrated Team operations, have become increasingly refined and efficient. More needs to be done, but the OTP has evolved in a way that addresses the problems identified in relation to the Kenya situation.

For obvious reasons – some of which are apparent immediately above – a merger of ID with PD is unnecessary and would not necessarily enhance the efficacy of OTP operations. The “home room” concept for analysts and investigators, balancing their assignment to the individual teams, works well; so do the specialised support functions performed by the units in FSS and POS. Likewise, the essential and varied legal functions that PD’s lawyers, case managers and trial support assistants perform are best housed in a separate Division, with a focus on the myriad legal issues that arise in the OTP’s work and the logistical support required by the teams.

Finally, respecting PD, the current distribution of responsibilities for providing legal advice, although appearing to be fragmented, works very well and there is no need right now for change.

The recommendation respecting the Appeals Section is unnecessary, because the need for independent and arm’s length advice is already guaranteed in the current arrangement, which works well. Moreover, the change would be detrimental to PD’s effective functioning, because the Appeals Section plays a pivotal role within the Division: in addition to handling all interlocutory and final appeals, the Section provides legal advice to all trial teams (and frequently to SAS and ID), drafts key legal submissions for trial teams (especially with respect to novel legal or procedural issues), and generally ensures the quality of legal submissions emanating from the OTP. In addition, the Senior Appeals Counsel is the number two in the Division, and, as the Director’s deputy, attends ExCom and acts as officer in charge in the absence of the Director.

As part of my end of term legacy review and report, I may further reflect on these recommendations.

## **Process**

*Respecting investigations, the report suggests that, if the security risk is too high to allow in-country operations, the OTP should not seek authorisation to open.*

Until now, the OTP has not accepted such an approach. In accordance with mandatory Rome Statute obligations and the OTP’s Policy Paper on Preliminary Examinations, an assessment of feasibility is not part of the OTP’s calculus with respect to opening investigations. It is a factor, however, to be considered in selecting cases or setting priorities, once an investigation has been

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<sup>5</sup> Through the Investigations Section (the “home room” for investigators) and IAS (the “home room” for analysts).

<sup>6</sup> Through FSS and POS.

opened. There are also other investigative methods available to the OTP, should in-country operations be impossible.

While *the report argues against presenting several modes of liability*, this recommendation is out of step with the current jurisprudence of the Court and the OTP's practice.

### **Witness issues**

Respecting the recommendation that the OTP must respond robustly and immediately to reports of witness interference, *the report suggests that the OTP should also initiate article 70 investigations*.

The steps my Office took to counter alleged witness tampering and interference during the judicial proceedings form part of the public record. Within our mandate and means, we sought to counter interference with the administration of justice in this case, by investigating incidents of witness intimidation or corruption, documenting the evidence, and apprising the Chamber of the situations as they arose. We obtained from the judges additional protective measures for witnesses. Following our investigations, [we also sought and obtained warrants of arrest for Messrs Walter Osapiri Barasa, Paul Gicheru and Phillip Kipkoech Bett](#), on charges of obstructing the course of justice. Resort to article 70 remains an available response to witness interference, or other attempts to obstruct justice, and will be pursued on a case by case basis by the Office.

That said, it ought to be emphasised that the OTP does not have the resources to open article 70 investigations in *every* situation, but does take steps short of that, reserving article 70 investigations and prosecutions for the most egregious cases that have had, historically, the most deleterious effect on proceedings. The focus is on prevention and prophylactic measures to disrupt witness interference and protect against it, reserving prosecution of article 70 charges for cases where this is absolutely necessary.

Where appropriate, however, the Office will also engage the assistance of the relevant States to investigate and prosecute instances of witness interference committed on their territory, as envisaged in the Rome Statute and Rules, or pursue article 70 investigations on an *ad hoc* basis where the circumstances in the Office's assessment justify doing so.

### **Conclusion**

In conclusion, the Kenya situation internal review exercise, conducted in an independent and objective fashion by three external experts, with my full support and the candid participation of my staff, was a salutary experience, from which the OTP has drawn great value.

The confidential report that the experts submitted to me, *ICC OTP Kenya Cases, Review and Recommendations*, which was one outcome of the exercise, has provided a useful platform for stock-taking: clearly, the OTP is on the right track. Already, the implementation of the Strategic Plans 2012-2015 and 2016-2018, and overall managerial focus and approach, have changed the way the OTP works, so that the problems that arose in the Kenya situation and cases have been addressed. Other refinements are underway. This will continue to be so under the new Strategic Plan 2019-2021 and onwards.

The OTP is a continuously learning organisation, robustly committed to its independent mandate, capable of drawing important lessons from its past experience. This has been the case, respecting the Kenya situation. The exercise undertaken, in relation to Kenya, was a necessary reflection upon that experience, vital to the future operational efficacy of the OTP. | OTP



**Cour  
Pénale  
Internationale**  
**International  
Criminal  
Court**

Le Bureau du Procureur  
The Office of the Prosecutor



## **ANNEX 1**

**ICC OTP Kenya Cases: Review and Recommendations**

**Executive Summary of the Report of the External Independent Experts**

## ICC OTP Kenya Cases: Review and Recommendations

### Executive Summary of the Report of the External Independent Experts<sup>1</sup>

E1. Consistent with the mandate given to it by Prosecutor Bensouda, a three-member team—Dior Fall, Robert Reid and Brenda J Hollis (Review Team or Team)—objectively assessed the Office of the Prosecutor’s conduct of the Kenya cases, including a root cause analysis of how the Office of the Prosecutor (OTP) conducted its preliminary examination, investigations and prosecutions in the situation. Also consistent with that mandate, the Review Team has made recommendations for changes in OTP working methods which could improve internal performance and allow the OTP to respond more effectively to detrimental external factors. It is the hope of the Review Team that its assessment and recommendations will further the OTP’s goal to learn lessons which will allow it to better succeed in its fight against impunity.

E2. The Team understands that despite the best efforts of the Prosecutor and her Deputy, this external review was delayed due to lack of funding. It is likely that the Prosecutor has conducted internal reviews in the interim; that those reviews may have considered some of the same recommendations contained in this Report, and, of those, may have implemented some.

E3. Each Team member provided inputs into all sections of this Report, but each was tasked with authoring specific sections. Thus, the Report reflects different writing styles.

E4. To carry out its mandate, the Team interviewed some 30 current and former OTP staff members representing all the major Divisions and some Sections, such as the Legal Advisory Section (LAS), and reviewed various OTP documents and press releases, as well as OTP filings and judicial decisions. The Team wishes to thank all those interviewed for their candour and for generously giving their time to accommodate our interview schedule. In addition, several OTP staff members provided invaluable assistance to the Team in carrying out its mandate, and the Team expresses its appreciation for their efforts.

E5. It may be that the Kenya cases simply reflected the inability of the International Criminal Court (ICC) to adequately respond to the challenges presented in cases against powerful, high level accused willing to engage in concerted propaganda campaigns and pervasive witness interference. Certainly, it would appear the OTP, under Prosecutor 1, underestimated the ability of the powerful suspects/accused in these cases to undermine the integrity of Prosecution evidence, and overestimated the ability of the OTP to effectively address the challenges presented by such conduct. Indeed, Prosecutor 1 dismissed, without explanation, concerns voiced to him about whether the ICC could take on targets that were powerful, sophisticated, well-funded and organized, given the problems within the Victims and Witnesses Unit (VWU) at the time.

E6. Even if these cases were beyond the ability of the ICC to manage, internal and external factors exacerbated this inability to effectively and efficiently deal with the challenges posed by

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<sup>1</sup> Explanatory footnotes are those of the OTP, not the authors of the Executive Summary of the confidential report.

the Kenya cases. These factors run the gamut—leadership; decision-making; staffing practices; Office structure; the process in place, including conduct of the preliminary examination, investigation, charging, prosecution at the confirmation, pre-trial and trial stages; witness issues, including credibility assessments and interference with witnesses; and the impact of actors external to the OTP.

E7. While all these factors contributed to the problems that beset the Kenya cases, three factors contributed most significantly: (1) the autocratic leadership style of Prosecutor 1, (2) top-heavy, cumbersome decision-making and (3) staffing practices. These factors undermined the effective functioning of all aspects of these cases.

#### **A. Leadership**

E8. OTP leadership, primarily in the person of Prosecutor 1, was a major contributing factor to the problems encountered in the Kenya cases. Prosecutor 1's leadership could best be categorized as autocratic, not open to contrary assessments or viewpoints, too often marginalizing those who disagreed with him or reacting angrily and threateningly. This leadership style discouraged candid, contrary assessments and viewpoints to the detriment of the cases. Prosecutor 1 instilled an attitude that the Office must go forward with the Kenya cases, must save the cases, regardless of the evidentiary insufficiencies, and that any other view was disloyal. Some lower level leaders perpetuated this attitude. Those senior leaders did not act as a buffer between their subordinates and Prosecutor 1's angry, threatening reactions to members of their staffs who advanced assessments differing from Prosecutor 1's views. Nor does it appear they vigorously supported their subordinates' realistic case assessments, evaluations, and suggestions if these were contrary to Prosecutor 1's decisions and wishes.

#### **B. Decision-making**

E9. During the tenure of Prosecutor 1, decision making was concentrated at the Prosecutor and Executive Committee (ExCom) level, primarily with Prosecutor 1, even for day-to-day decisions relating to the conduct of investigations and prosecution. These actors, primarily Prosecutor 1, micro-managed the process to the detriment of the cases. Decision-making was too complex, with too many actors involved, leading to delays in decision-making or failure to make decisions at all. Decision making by Prosecutor 1 was too often premised on non-prosecutorial considerations, such as bringing peace to the region, making an impact to demonstrate the relevance of the ICC. While these are appropriate collateral consequences of proper prosecutorial functioning, they cannot take precedence over the primary ICC OTP mandate. Prosecutor 1 did not seem to appreciate that only through effective prosecutorial action based on law and facts can these collateral consequences be realized.

E10. Prosecutor 1 also seemed to rely too heavily on the Jurisdiction, Complementarity and Cooperation Division (JCCD) recommendations and views in his decision making, rather than on those of the Investigation Division (ID) and Prosecution Division (PD). He may have been inappropriately influenced by actors outside the OTP. ExCom did not exercise enough of an

oversight and buffer role, and did not pressure Prosecutor 1 to heed well-founded, realistic legal and factual assessments if they were contrary to his own.

E11. The decision-making process improved significantly upon the departure of Prosecutor 1, but can be more streamlined.

### **C. Staffing Practices**

E12. Staffing practices resulted in too many staff positions being filled by individuals who did not have the requisite experience and skill sets to deal with complex investigations and prosecutions against high level suspects/accused. The individuals in those positions worked to the best of their abilities, but those abilities were not sufficient to deal with the complexities of the Kenya cases.

E13. For a variety of reasons, including lack of sufficient relevant experience and skills, many staff members were unable or unwilling to accurately assess the viability of the cases or to voice such assessments, and to overcome the many obstacles OTP faced in dealing with high level, powerful accused conducting a pervasive campaign of propaganda and witness interference.

### **D. Office Structure**

E14. JCCD appeared to exceed its mandate in these cases, exerting too much control and influence over operational matters to the detriment of effective investigation and prosecution. JCCD also seemed to have outsized influence over Prosecutor 1, including his decision-making and the authority he gave to JCCD, for example, authorizing them to withhold certain types of information from investigators and prosecutors.

E15. The ID was further hampered in its efforts by the use of a Joint Team structure. This structure undermined the Office's ability to conduct timely and responsive investigations. Joint Team leadership was shared among representatives from the ID, PD and JCCD, and decision-making was required to be by consensus. Absent such consensus, the issues were elevated to the ExCom for resolution, a burdensome and time-consuming process. Prosecutor 2 replaced Joint Teams with Integrated Teams, a tried and tested model under the leadership of a senior prosecutor, significantly improving the timely and efficient conduct of investigations.

### **E. Process**

E16. In general, the prosecutorial process was hampered by deadlines set by Prosecutor 1 based on considerations other than sound prosecutorial practice. These deadlines prevented completion of the legal analysis at the preliminary examination stage, and resulted in premature application for authorization to open an investigation into the Kenya situation, charging decisions, applications for summonses to appear, and Confirmation of Charges (CoC) hearings.

E17. The effectiveness of the investigations and prosecutions was significantly undermined by Prosecutor 1's "decision over assessment" approach to the cases, and his target-based approach to investigation and charging rather than an evidence-based approach. These approaches forced

investigators and prosecutors to try to fit the evidence into cases against pre-determined targets rather than determining targets based on the evidence. The investigations were further undermined by the decision to delay in-country investigations, which did not take place until after the CoC hearings. Unfortunately, after those hearings, investigating in Kenya became much more difficult: support for the ICC among Kenyans had been eroded by a concerted campaign of negative propaganda; OTP personnel were followed, putting them and anyone they contacted at risk; the witness interference orchestrated by the suspects/accused became even more pervasive; and the Government of Kenya (GoK) became even less willing to co-operate, if not actively interfering with OTP operations and witness security.

E18. The consequence of all the above was that the prosecutions were burdened with weak cases, less than effective investigations resulting in reliance on only one or a small number of insider witnesses whose evidence could not be independently verified by the OTP and whose continued cooperation with the OTP was at risk due to this pervasive witness interference campaign and difficulties with the witness protection programs. At Confirmation, the Prosecution was still struggling to fill evidentiary gaps and, according to one interviewee, was overwhelmed by large, well-resourced Defence teams led by very experienced counsel. Nonetheless, the OTP prevailed against most of the accused. At the pre-trial stage, the weakness of the cases against most of the remaining accused became even more obvious. The trial teams were forced to focus on filling the significant evidentiary gaps and replacing witnesses who had succumbed to the pervasive witness interference or to disappointments with the protection programs they were in. At trial, the Prosecution lost many of its witnesses, who either recanted or refused to appear. The trial teams attempted to deal with this serious blow to their cases by quite rightly requesting the judges to admit the prior statements of these witnesses, but were ultimately unsuccessful. Absent the witness interference campaign, it is very possible the Prosecution would have been successful in the case against Ruto. Even absent this interference, it is much less likely the Prosecution would have prevailed in the other cases.

#### **F. Witness Issues**

E19. From the beginning there were credibility issues with the witnesses on whom the OTP would rely. Most of these witnesses were “insiders”. Such witnesses must be viewed with great caution and independent corroboration becomes even more important. Some of the witnesses had been relocated to the same locations for extended periods of time, raising the possibility that they had talked among themselves and tainted each other’s evidence; this also made independent verification more important. For reasons discussed above, investigators were unable to obtain independent verification of the evidence provided by these individuals.

E20. There were also significant security concerns in relation to these witnesses. From early on the suspects/accused engaged in a pervasive—and successful—campaign of direct and indirect witness interference.<sup>2</sup> Witnesses or those suspected of being witnesses residing inside or outside

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<sup>2</sup> While there was a concerted campaign of witness interference that had a detrimental impact upon the prosecution of the Kenya situation cases, the OTP was not in possession of evidence *directly*

of Kenya were directly contacted and intimidated, bribed, perhaps even physically harmed or killed. The relatives of these witnesses were also contacted and intimidated or pressured to convince the witnesses to refuse to cooperate with the OTP. As a result, many individuals on whom the OTP planned to rely as witnesses either recanted their earlier statements or refused to appear before the Court. Despite circumstances which alerted the OTP to the very real potential for witness interference and the interference itself, the OTP was dilatory in robustly responding to the interference, e.g., delaying comprehensive Article 70 investigations until too late in the process.

### **G. Outside Actors**

E21. Actions of outside actors also contributed to the problems encountered in the Kenya cases. At the time, VWU did not have the ability to effectively respond to the pervasive witness protection issues which undermined Prosecution efforts in both cases. This problem was compounded by the fact that VWU and OTP did not always have a positive working relationship.

E22. As noted above, the GoK did not support the OTP investigative activities, instead it either allowed interference with witnesses inside and outside of Kenya and with OTP activities in Kenya, including surveillance of OTP investigators, and/or may have been directly involved in such interference. It refused Requests for Assistance (RFAs) thereby hampering the OTP's ability to access potential evidence, or imposed such conditions or access as to, in reality, make that access so cumbersome as to be unworkable.

E23. To a large extent the smooth operation of the OTP depends on the co-operation of States; Article 86 *et seq* of the Rome Statute (Statute) makes this cooperation mandatory. In reality, such co-operation will only exist if the States Parties have the political will to do so. In the Kenya cases, States Parties did not seem to have the political will to assist the Court in providing protection measures, in particular relocation. Nor did the States Parties seem to have the political will to pressure the GoK to act consistent with its obligations under the Statute and to refrain from allowing interference with and/or interfering with the OTP criminal justice activities. This latter issue may have been in major part because the OTP did not give the States notice of Kenya's non-cooperation until late in the process.

E24. The judges did not seem to be attuned to the proactive *vice* reactive nature of effective witness protective measures, including such measures as delaying disclosure of names of witnesses and identifying details until a fixed period before actual testimony, to the need to issue an arrest warrant to minimize or eliminate interference with witnesses, nor to the necessity of taking immediate action when faced with evidence of interference with witnesses. The latter may have been in part the result of the OTP's failure to compellingly address these issues with the judges.

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implicating the accused themselves in witness interference. The report employs shorthand in this instance that must be nuanced.

E25. Some interviewees expressed concern that domestic and international non-governmental organisations (NGOs) and other international actors exercised too much influence over Prosecutor 1's decision-making. If that were true, such would be a violation of the OTP's mandate to act independently.<sup>3</sup>

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<sup>3</sup> The focus of the report, in this particular instance, is upon the decision-making of the first Prosecutor; it is important to note, however, that there is no suggestion whatever that civil society, in the form of either national or international non-governmental organisations, acted in any way other than what was appropriate and above-board.

## **ANNEX 2**

**Comments of Mr Luis Moreno Ocampo, former Prosecutor of the ICC  
dated 25 November 2019**

**The Report has two main problems:**

- 1. It does not suggest how the witness interference that affected the trial phase could had been controlled.**
- 2. Divert the attention producing unfounded personal attacks, including to the current Prosecutor, and a baseless challenge of the Office of the Prosecutor entire staff 'quality.**

**The Report rightly explains that the Court was able to initiate an investigation and to confirm charges in the Kenya's cases but "At trial, the Prosecution lost many of its witnesses, who either recanted or refused to appear."**

**The report mentioned what is, in my opinion, the cause of the problem: the "high level accused" were "powerful, sophisticated, well-funded and organized" and "willing to engage in concerted propaganda campaigns and pervasive witness interference."**

The report considers that "OTP was dilatory in robustly responding to the interference, e.g., delaying comprehensive Article 70 investigations until too late in the process."

I understand that the experts were not informed that during my tenure the Office requested to arrest individuals allegedly involved in witness interference.

I cannot make a judgment on what happened after the end of my tenure in June 2012 and the reasons not to initiate proceedings under Article 70 during the trial time.

The report is not exposing any legal mistake by the OTP rather it identified three factors that "contributed most significantly" to produce the problem: my leadership, one managerial aspect and Office's staff without the necessary skills. The focus of the report on internal matters cover up the Kenyans involved in the tampering of witnesses.

The report considered that:

1. I have an "autocratic leadership style". The experts arrived at such conclusion using an autocratic method: they did not interview me or allowed me to provide explanations to their concerns.
2. The OTP decision-making process was "top down" without providing a space of discussion. However, the experts recognized that the current Prosecutor and the head of the divisions were part of the Executive Committee debating all the decisions in the Kenya case. Ex Com intervention on reviewing the evidence and the legal arguments of an Office with a few cases is not "micro-managing" as labeled by the report, on the contrary is the proper implementation of the mandate defined by the Regulations of the Office.
3. The staff (apparently not just the Kenya team, rather all the individuals working in the entire office) have not "the requisite experience and skill sets to deal with complex investigations and prosecutions against high level suspects/accused." I don't understand how the experts reached such a conclusion that goes beyond the scope of their mandate and request to evaluate individuals with long carriers inside the ICC, in other international and national institutions, all of them appointed after a competitive selection process supervised by the head of divisions, sections and units.

The experts instead to focusing on the Kenya's authorities interfering witnesses, challenged the policy to prosecute "those most responsible" (or "high level accused") in accordance with the evidence collected, adopted by the Office of the Prosecutor in a Policy Paper made public on September 2003. The Kenya cases just applied such a policy. The targets were suggested by the investigators and prosecutors of the Kenya's team. Ex Com reviewed the proposal and approved the names. If the experts wanted to propose a policy to focusing the investigations and trials in "low level accused" they should provide more explanations.

It is inexplicable that “The focus of the report, in this particular instance, is upon the decision-making of the first Prosecutor” when I ended my tenure after the confirmation of the charges and more than one year before the trials. How my behavior until 2012 could have avoided the tampering of witnesses in 2013?

I found particularly inconsistent the suggestion “that domestic and international non-governmental organizations (NGOs) and other international actors exercised too much influence over” my decisions and at the same time affirming “that there is no suggestion whatever that civil society, in the form of either national or international non-governmental organizations, acted in any way other than what was appropriate and above-board.”