

Annex to the “Paper on some policy issues before the Office of the Prosecutor”: Referrals and Communications

This Annex to the Policy Paper of the Prosecutor provides additional information on the handling of information submitted by communications and referrals, and in particular:

- *explains the threshold to initiate investigations, the analysis of information and steps during analysis to ensure cooperation;*
- *describes in further detail the structure of the Office of the Prosecutor and the role of the Jurisdiction, Complementarity and Cooperation Division; and*
- *provides the new provisional regulations dealing with the process of analysis of referrals and communications up to the time when a decision is taken to proceed with an investigation.*

I. Management of Referrals and Communications

One of the important tasks of the Office has been the development and refinement of a clear methodology and general practice for the handling of information submitted to the Office. It is valuable for States and civil society to understand this methodology and practice.

A. *The threshold to initiate an investigation*

The Prosecutor may start an investigation upon referral by the Security Council or a State Party, or *proprio motu* (at his own initiative) on the basis of information provided by other sources (“communications”).

Senders of communications are encouraged to draw the attention of the Prosecutor to situations that they believe may fall within the jurisdiction of the Court. However, neither referrals nor private communications automatically “trigger” the powers of the Prosecutor. Under the Statute, the Prosecutor is entrusted with a broad measure of discretion with respect to what additional steps should be taken in relation to information received. Indeed, in the light of its limited resources, the Office of the Prosecutor is required to set priorities, taking into account the limits and requirements set out in the Statute, the general policy of the Office and all other relevant circumstances, including the feasibility of conducting an effective investigation in a particular territory.

In all cases the Office of the Prosecutor must first conduct an analysis of information in order to determine whether the statutory threshold to start an investigation is met: there must be “*a reasonable basis to proceed*”.

There are however important procedural differences between referrals and communications. Where the Prosecutor receives a referral, Article 53 provides that the

Prosecutor *shall* initiate an investigation *unless* he determines that there is no reasonable basis to proceed under the Statute. Initiation of investigation is further simplified in that the Pre-Trial Chamber may only review his determination *not to proceed*, but does not review an affirmative decision to proceed.

When the Prosecutor receives a communication, the test is the same but the starting point is reversed: the Prosecutor shall not seek to initiate an investigation unless he first concludes that there is a reasonable basis to proceed. In addition, when the Prosecutor acts *proprio motu*, he needs an authorization of the Pre-Trial Chamber to start an investigation. This means that he does not take the decision to investigate alone, but needs to convince the Pre-Trial Chamber that the threshold of a *reasonable basis* to proceed has been met (Article 15). The Chamber must be satisfied “that the case appears to fall within the jurisdiction of the Court”, a determination that is “without prejudice to subsequent determinations by the Court with regard to the jurisdiction or admissibility of a case.”(Article 15.4).

Once a decision whether to initiate an investigation is taken, senders of related communications will be promptly informed of the decision, with reasons for the decision.

B. *Content of referrals and communications*

The Statute does not specify any required contents of a Security Council referral. With respect to State referrals, it provides that “as far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation” (Article 14.2).

In relation to information from other sources, the Statute does not specify what the communication should contain. It would not be reasonable to impose upon the senders of communications the burden of investigating for themselves or conducting an extensive inquiry for the purpose of sending detailed information to the Prosecutor. On the other hand, if the information provided is too broad and unspecific, it might be impossible for the Office to assess its value without launching a full investigation, something the Prosecutor is not allowed to do without authorization from the Pre-Trial Chamber. Like wise, even those States most willing to cooperate may find it impossible to provide substantive information if the questions raised by the Office are too broad and general. Significantly, the reference in Article 42.1 to examination of “substantiated information” indicates the logical assumption of the Statute that the preferred basis for analysis is comparatively detailed and credible information.

Accordingly, the Office will analyse the seriousness of all communications received, with the assistance of other information readily available to the Office. The extent of the analysis will be affected by the detail and substantive nature of the available information. The nature of this information will also affect the ability of the Office to make sufficiently focused requests to organisations and States with respect to facts, national investigations and other concrete relevant circumstances, necessary to determine whether

there is a reasonable basis to start an investigation. If the available information does not provide sufficient guidance for an analysis that could lead to a determination that there is a reasonable basis to proceed, the analysis should be concluded and the sender informed, in accordance with Article 15.6. This decision is provisional and may be revised in the event that new information is forthcoming. The Statute explicitly stipulates that such a decision does not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence (Article 15.6).

The working languages of the Court are English and French, and the official languages of the Court are Arabic, Chinese, English, French, Russian and Spanish (Article 50). Where information is submitted in a language other than these, the Office will endeavour to obtain informal translation relying on the linguistic diversity of its staff. Where this is not possible, senders will be advised in English and French of the working and official languages of the Court and requested to submit the information, preferably in a working language, or alternatively in an official language of the Court.

C. Analysis of information

As noted above, in response to referrals or communications, the Prosecutor will gather and assess relevant information until such point as he is satisfied that there is, or is not, a *reasonable basis* to proceed (Article 15.2 and 53.1 and Rules 48 and 104). The Prosecutor makes the determination as to whether there is a reasonable basis to proceed based on the three factors required by the Statute (Article 53. 1 (a) to (c)):

- a) *the factual/legal basis*: the information available provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
- b) *the admissibility test*: the case is or would be admissible (including on complementarity grounds) under Article 17;
- c) *the interests of justice*: taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

In addition, the Prosecutor has to take into account the published prosecutorial policy and the likelihood of any effective investigation being possible, having regard to the circumstances in the country concerned.

The Office of the Prosecutor will strive to complete all analyses as expeditiously as possible in order to reach timely decisions whether to investigate. It is worth emphasizing that Article 15 provides a valuable avenue by which concerned individuals and organizations may furnish information to the Prosecutor, but he retains his independence under the Statute. In particular, imposing rigid timetables on this process of analysis would not be workable under the framework of the Rome Statute. First, the nature of the crimes within the Court's jurisdiction, the broad scope of its jurisdiction, as well as the obligation to analyse the interests of justice, mean that some situations must

be carefully monitored for some time in order to make an informed decision. Second, the complementarity principle requires the Prosecutor to defer to genuine national proceedings, which means that the Prosecutor may have to wait for an extended period in order to assess ongoing national proceedings, before knowing whether ICC investigation is warranted. Third, the limited resources of the Office mean that not every situation can be immediately investigated, but some prioritization based on the factors in article 53 is necessary. In the course of such analysis, the Prosecutor can still monitor developments, follow up with States, encourage genuine national proceedings, and prepare for possible investigation where necessary.

At this pre-investigative phase (“analysis of information”), the Prosecutor is not entitled to exercise all of his powers. He can seek additional information from States and organizations and receive testimony at the seat of the Court. The method and manner of this preliminary information-gathering is not specified in the Statute or the Rules, except in respect of the taking of written or oral testimony at this stage (Article 15.2 and Rule 47).

Article 15.2 provides that “the Prosecutor *shall* analyse the seriousness of information received” and that for this purpose “he or she *may* seek additional information”. It is clear that the Office must analyse all communications received, and that discretion is provided as to when the seeking of additional information is warranted.

Where there is sufficient credible information about crimes potentially falling within the jurisdiction of the Court, jurisdictional and admissibility issues will be analysed and additional information may be sought. In the light of the complementarity regime set out in the Statute and the central role accorded to it in the general policy of the Office, the Prosecutor will generally seek to alert the relevant State of the possibility of taking action itself very early in the process. For this reason, when the Office receives sufficiently detailed and credible information about alleged crimes, the Office will in general consult and seek additional information from the States that would normally exercise jurisdiction, unless there is reason to believe that such consultations may prejudice the future conduct of an analysis or investigation or jeopardize the safety of persons.

The Office of the Prosecutor will carry out similar functions in relation to a situation referred to it by a State or the Security Council. As provided in Article 53.4, the Prosecutor may at any time reconsider a decision not to initiate an investigation, based on new facts or information.

D. Ensuring cooperation for effective investigations

The Prosecutor’s *proprio motu* power to initiate an investigation with authorisation from a Pre-Trial Chamber is a very important mechanism under the Statute. This procedure provides the legal basis to carry out investigations even where states have failed to refer an objectively serious situation. The Prosecutor will use this power with responsibility and firmness, ensuring strict compliance with the Statute. Of course, it may be difficult

in some situations to carry out investigations on the territory concerned, but the Office is developing ways to investigate from the outside.

Where the Prosecutor receives a referral from the State in which a crime has been committed, the Prosecutor has the advantage of knowing that that State has the political will to provide his Office with all the cooperation within the country that it is required to give under the Statute. Because the State, of its own volition, has requested the exercise of the Court's jurisdiction, the Prosecutor can be confident that the national authorities will assist the investigation, will accord the privileges and immunities necessary for the investigation, and will be anxious to provide if possible and appropriate the necessary level of protection to investigators and witnesses. Even if a referral comes from a third State not involved in the alleged crimes, the referral will indicate support for the involvement of the Court from that part of the international community. Thus, given that under the Statute, the Prosecutor relies on cooperation to carry out his investigations, the Prosecutor will in general seek where possible to make this support explicit through a referral.

In light of the conditions for the exercise of jurisdiction by the ICC, the Prosecutor is in a different position from a national prosecutor, who may be seen to prejudice his or her independence if contacts are made with the political authorities of the State. In carrying out his duties, the Prosecutor of the ICC must enter into dialogue with heads of State and Government and with other agencies of a State. He may have to have such meetings in order to receive referrals of situations, in order to discuss the modalities of cooperation with the Court, whether in relation to a particular case or generally, and in order to discuss prospects for a State's own authorities taking proceedings themselves. The Prosecutor will carry out his responsibilities in this way without jeopardising his independence and impartiality. To further safeguard the independence and impartiality of the Office, the Prosecutor has created two separate divisions, the Jurisdiction, Complementarity and Cooperation Division and the Investigation Division, making even more clear that the building of cooperation and support is not linked with the independent conduct of investigations.

II. Organisation of the Office of the Prosecutor

The experiences of the Office in its first few months have guided it in shaping the most effective structure to carry out its mission under the Statute. The new structure includes three functional divisions, corresponding to the three major areas of activity of the Office. A description of the structure will help promote understanding of how potential situations are analysed.

The Prosecution Division has trial and appeals lawyers who will present cases before the judges. This division is concerned with classic prosecutorial work, although some of the procedures being applied are not known in all legal systems, for example the provisions

on representation for victims during the proceedings. This Division is now being established, and three senior trial lawyers have recently been selected.

The Investigation Division is a group of lawyers, investigators and analysts who will work together in teams for each specific situation. Some will be based in headquarters and other will be deployed in the field. As explained in the policy paper, additional staff will be recruited as necessary for specific investigations. The Division will also need support and logistical assistance from States and international organizations for their work in the field. Following the election of Serge Brammertz as Deputy Prosecutor for Investigations, work is underway on recruitment and on developing investigative strategies.

The Jurisdiction, Complementarity and Cooperation Division (JCCD) includes analysts and lawyers providing advice to the Prosecutor on the issues of jurisdiction and admissibility, which are essential prerequisites for any investigations and prosecutions. The experience of the first few months of the Office has highlighted the unique challenges and issues facing the ICC in the light of (i) its open-ended jurisdiction (requiring analysis of multiple situations of potential jurisdiction); (ii) its complementarity regime (requiring assessment of national proceedings); and (iii) its lack of a direct enforcement arm (requiring cooperation from States and organizations). A specialized unit was established to deal with these issues, but based on subsequent experience, the unit was converted to the Jurisdiction, Complementarity and Cooperation Division, reflecting the volume of work and the need for specialized analysis and legal expertise on these issues.

One of the functions of JCCD is to analyse, in conjunction with relevant officers of the Investigations Division where appropriate, the information received from organizations and States (and, where relevant, the Security Council). JCCD will help provide the factual and legal analysis to enable informed decisions on whether the statutory conditions are met for initiating an investigation.

Another function of JCCD will be to contact the relevant State or States to alert them to the possibility of conducting domestic proceedings, to encourage and assist national proceedings where possible, and to verify that national proceedings are genuine.

Without its own police and other agencies to rely upon, it is essential for the Office to build networks of international cooperation. JCCD also has an ongoing responsibility to ensure that necessary agreements and other arrangements are in place to secure the full co-operation of States and international organizations (pursuant to Article 54.3(d)). Throughout an investigation JCCD will maintain contact with relevant authorities to facilitate ongoing cooperation.

III. Regulations

In the light of the policy and procedures mentioned above, regulations have been developed to govern the handling and analysis of information submitted by referrals and communications. These regulations will be provisionally applied, pending completion of the Office regulations. Comments on the provisional regulations may be submitted at the following address: otp.comments@icc-cpi.int.

The provisional regulations provide for analysis of all communications in three stages. The first phase of analysis is an initial review to identify those communications that manifestly do not provide any basis for further action. Following this determination, acknowledgements will be sent, either providing reasons for the decision not to proceed or else advising that further analysis will be undertaken.

Once the initial backlog of communications is cleared, the Office will endeavour to ensure that this first phase is completed and acknowledgements are sent within one month of receipt of any communication sent in a working language of the Court.

The second phase of analysis is a more detailed legal and factual analysis of significant communications, carried out by JCCD, with support from the Investigation Division, under supervision of the Executive Committee and the Prosecutor.

The most serious situations will proceed to the third phase, advanced analysis and planning. During this phase, the Office may develop an investigation plan, in which case a joint team will be created, led by the Investigation Division and including members of the Investigation Division, Prosecution Division and JCCD. In this third phase, a decision may be taken to initiate an investigation under article 53 or to seek Pre-Trial Chamber authorization under article 15(3).

Referrals are subject to the same process of analysis as communications, except that the first phase of analysis is unnecessary, given the treatment of referrals under the Statute (Article 13 and 53) and the comparative volume of communications. Nonetheless, the basic standard applied (the Article 53 standard) is the same for referrals and communications.

In all cases, analysis culminates in a decision by the Prosecutor either to proceed or not to proceed to investigation, whereupon senders of communications or referrals are promptly notified of the decision and the reasons for the decision. Subsequent regulations will govern the process following the decision to initiate an investigation.

ANALYSIS OF REFERRALS AND COMMUNICATIONS

Regulation x. [this Regulation will appear in a chapter relating to management of the OTP as a whole]

x.x The Executive Committee shall be comprised of the Chief Prosecutor, the Deputy Prosecutors for Investigation and Prosecution, and the head of the Jurisdiction, Complementarity and Cooperation Division (JCCD). The purpose of the Committee will be to render advice to the Prosecutor relating to the ongoing operations of the Office. Among the matters upon which the Committee shall render advice are:

...

(x) whether a communication submitted to the Office of the Prosecutor regarding a crime or crimes allegedly within the jurisdiction of the Court either manifestly does not provide any basis for analysis or warrants analysis under Regulation [5 below];

(x) whether a communication submitted to the Office of the Prosecutor regarding a crime or crimes allegedly within the jurisdiction of the Court warrants advanced analysis under Regulation [6 below];

(x) whether and when to seek authorization to commence an investigation under article 15.3 or to proceed with an investigation under article 53;

...

Regulation 1: General Provisions

1.1 The Office of the Prosecutor shall analyse the seriousness of information received in accordance with article 15.2 and Rule 104.

1.2 Information shall be analysed taking into account the fact that, in order to initiate an investigation under article 53 or as appropriate Rule 48, the Prosecutor must first determine whether there is a reasonable basis to proceed, on the basis of the factors contained in article 53.1(a)-(c). In carrying out the analysis, regard will be given to the detail and precision of the information provided and the credibility of the information and its sources.

1.3 Acknowledgements and responses to referrals and communications shall be sent in a manner that prevents any danger to the safety, well-being and privacy of those who provided the information or others who may be at risk by reason of the information provided.

1.4 When seeking additional information, the Office shall do so in a manner that prevents any danger to the safety, well-being and privacy of those who provided information or to the integrity of investigations or proceedings, shall protect the confidentiality of the information provided, and shall take other necessary measures pursuant to its duties under the Statute.

1.5 For the purpose of fulfilling his or her responsibilities on the Committee, any member of the Executive Committee may request information from any member of the OTP staff. JCCD will conduct and lead the work in the areas of jurisdiction, admissibility, and the interests of justice, and any reports relating to these topics. The Investigation Division will be responsible for gathering information on alleged crimes and for preparing any investigation plan.

Regulation 2: Receipt of referrals

2.1 In accordance with applicable Regulations on information and evidence management, the Information and Evidence Unit (IEU) shall receive, register, and secure referrals and supporting documents received by the Office of the Prosecutor from the Security Council or a State Party.

2.2 The Head of IEU shall immediately inform the Prosecutor of the referral received and shall make electronically available the referral and supporting documents to the heads of JCCD, the Investigation Division and the Prosecution Division.

2.3 The Prosecutor will promptly inform the Presidency of the referral. Where a State Party provides a referral in confidence, the Prosecutor will inform the Presidency on condition of confidentiality, until such time as the referring State Party agrees to disclosure.

2.4 Receipt of the referral shall be acknowledged by the Head of IEU or otherwise as directed by the Prosecutor.

2.5 The seriousness of the information contained in the referral shall be analysed in accordance with Regulation 5 (Analysis Phase II), *mutatis mutandis*.

Regulation 3: Receipt of communications

3.1 In accordance with applicable Regulations on information and evidence management, IEU shall receive, register, and secure all information received on crimes allegedly within the jurisdiction of the Court received by the Office of the Prosecutor under article 15 (“communications”).

3.2 The seriousness of the information contained in the communications shall be analysed in accordance with Regulation 4 (Analysis Phase I).

Regulation 4: Analysis Phase I (Initial Review of communications: IEU-JCCD)

4.1 IEU shall, on a weekly basis, or more frequently as required by the number of communications received or reasons of urgency, prepare reports analysing the communications received. The reports shall be made electronically available to JCCD. The reports will identify:

- (a) those communications that manifestly do not provide any basis for the Office of the Prosecutor to take further action;
- (b) those communications that appear to relate to a situation already under analysis, investigation or prosecution; and
- (c) those communications warranting further analysis in order to assess whether further action may be appropriate.

4.2 IEU shall also prepare, periodically or upon request, general reports on the volume, frequency and patterns of communications relating to particular situations. These reports shall be made electronically available to the members of the Executive Committee.

4.3 JCCD shall review IEU reports on communications and confirm or amend the preliminary identifications made by IEU.

4.4 When the JCCD-IEU review identifies a communication as relating to a situation already under analysis, investigation, or prosecution, IEU shall send an appropriate acknowledgement, and JCCD shall draw the information to the attention of the relevant OTP staff.

4.5 When the JCCD-IEU review identifies a communication as either manifestly not providing any basis for the Office of the Prosecutor to take further action or as warranting further analysis, it shall be included in a report from JCCD to the Prosecutor and the Executive Committee, with appropriate recommendations. The report shall be made electronically available to the Investigation Division and the Prosecution Division. Members of the Executive Committee may request clarification or make comments. After hearing any comments, the Prosecutor shall either:

- (a) determine that the communication manifestly does not provide any basis for the Office of the Prosecutor to take further action, in which case IEU shall send an acknowledgement and response and the information shall be archived; or
- (b) determine that further analysis is necessary to evaluate the seriousness of the information in the communication, in which case IEU shall send an appropriate acknowledgement and the communication shall be analysed in accordance with Regulation 5 (Phase II).

Regulation 5: Analysis Phase II (Jurisdiction and Admissibility Assessment - JCCD)

5.1 When a referral is received or in the case of those communications identified in Regulation 4.5(b), JCCD shall analyse the information in accordance with Regulation 1.1, including issues of jurisdiction, admissibility, interests of justice, and credibility and sufficiency of information. In carrying out analysis (Phase II), JCCD shall examine related communications and consider other readily-available information. JCCD may consult with the Prosecution Division and the Legal Advisory Section (LAS), as appropriate.

5.2 Taking into account the reports and recommendations made pursuant to Regulation 4.5(b), and the analysis conducted by JCCD under Regulation 5.1, the Executive Committee may recommend that the Investigation Division gather information about alleged crimes identified by the referrals or the communications.

5.3 Among the measures available to JCCD in assessing issues of jurisdiction, admissibility and the interests of justice are:

- (a) to identify situations to be monitored on an ongoing basis;
- (b) to contact the State or States that would normally exercise jurisdiction and seek additional information about *inter alia* the existence and progress of national proceedings, unless there is reason to believe that such consultations may prejudice the future conduct of an analysis or investigation;
- (c) to take appropriate steps to assess the progress of national proceedings relating to crimes within the jurisdiction of the Court;
- (d) to seek additional information as appropriate, and establish and maintain contacts with States and organizations for provision of information and cooperation.

5.4 JCCD shall prepare reports summarizing its analyses and submit them to the Executive Committee. JCCD may make recommendations for consideration by the Executive Committee, including *inter alia*:

- (a) that there is no reasonable basis for further analysis;
- (b) that further analysis and monitoring under Regulation 5 is required;
- (c) after consultation with the Investigation Division, that advanced analysis under Regulation 6 is warranted.

5.5 Taking into account the reports and recommendations submitted by JCCD and the advice of the Executive Committee, the Prosecutor may determine that there is no reasonable basis for further analysis. The sender will be promptly informed of the decision and the reasons for the decision and the information shall be archived. Any such decision is provisional and may be reopened in the event that new information is forthcoming.

5.6 Taking into account the reports and recommendations submitted by JCCD and the advice of the Executive Committee, the Prosecutor may determine:

- (a) that further analysis and monitoring under Regulation 5 is required; or
- (b) that advanced analysis under Regulation 6 is warranted.

Regulation 6: Analysis Phase III (Advanced Analysis and Planning: ID-JCCD)

6.1 In this phase, and taking into account the reports and recommendations submitted by JCCD and the advice of the Executive Committee, the Prosecutor may authorize or instruct his staff:

- (a) to seek additional information;
- (b) to receive written or oral testimony at the seat of the Court;
- (c) to assess the progress of national proceedings relating to crimes within the jurisdiction of the Court;
- (d) to prepare reports on jurisdiction, admissibility, the interests of justice and any other matter relevant to the determination under article 53;
- (e) to prepare an investigation plan on the situation or the case(s);
- (f) to take other appropriate measures to facilitate analysis and prepare for possible investigation.

6.2 JCCD will be responsible for any reports on jurisdiction, admissibility, the interests of justice and any other matter relevant to the determination under article 53. If necessary, JCCD will obtain additional information on the alleged crimes from the Investigation Division and may consult with the Prosecution Division and LAS, as appropriate.

6.3 In the event that the Prosecutor directs the preparation of an investigation plan, the Executive Committee shall establish a joint analysis team, comprising members of JCCD, the Investigation Division, and the Prosecution Division. The Investigation Division shall lead the joint analysis team and shall be responsible for preparing the investigation plan. The joint analysis team shall consult with LAS, as appropriate. JCCD will provide input to the investigation plan on the topics within its expertise.

6.4. If necessary, the Executive Committee will appoint a staff member to coordinate the work performed pursuant to Regulations 6.2 and 6.3.

6.5 Taking into account any reports and recommendations submitted by JCCD and the joint analysis team, and the advice of the Executive Committee, the Prosecutor may determine that there is not a reasonable basis to proceed with investigation, in which case the sender will be informed in accordance with Regulation 5.5.

6.6 Taking into account any reports and recommendations submitted by JCCD and the joint analysis team, and the advice of the Executive Committee, the Prosecutor may decide to initiate an investigation pursuant to article 53 or to seek authorization from the Pre-Trial Chamber under article 15.3.