



## **The Office of the Prosecutor**

### **Report on Preliminary Examination activities**

**13 December 2011**

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## A. INTRODUCTION

1. The Office of the Prosecutor (“Office” or “OTP”) of the International Criminal Court (“Court” or “ICC”) is responsible for determining whether a situation meets the legal criteria established by the Rome Statute (“Statute”) to warrant investigation by the Court. For this purpose, the Office conducts a preliminary examination of all situations brought to its attention based on statutory criteria and the information available.<sup>1</sup>
2. The preliminary examination of a situation may be initiated by: (a) a decision of the Prosecutor, taking into consideration any information on crimes under the jurisdiction of the Court, including information sent by individuals or groups, States, intergovernmental or non-governmental organisations; (b) a referral from a State Party or the United Nations (“UN”) Security Council; or (c) a declaration pursuant to article 12(3) of the Statute by a State which is not a Party to the Statute.
3. Once a situation is thus identified, article 53(1) (a)-(c) of the Statute establishes the legal framework for a preliminary examination. It provides that, in order to determine whether there is a reasonable basis to proceed with an investigation into the situation the Prosecutor shall consider: jurisdiction (temporal, either territorial or personal, and material); admissibility (complementarity and gravity); and the interests of justice.
4. *Jurisdiction* relates to whether a crime within the jurisdiction of the Court has been or is being committed. It requires an assessment of (i) temporal jurisdiction (date of entry into force of the Statute, namely 1 July 2002 onwards, date of entry into force for an acceding State, date specified in a Security Council referral, or in a declaration lodged pursuant to article 12(3)); (ii) either territorial or personal jurisdiction, which entails that the crime has been or is being committed on the territory or by a national of a State Party or a State not Party that has lodged a declaration accepting the jurisdiction of the Court, or arises from a situation referred by the Security Council; and (iii) material jurisdiction as defined in article 5 of the Statute (genocide; crimes against humanity; war crimes; and aggression<sup>2</sup>).
5. *Admissibility* comprises both complementarity and gravity.
6. *Complementarity* involves an examination of the existence of relevant national proceedings in relation to the potential cases being considered for investigation by the Office, taking into consideration the Office’s policy to focus on those who appear to bear the greatest responsibility for the most serious crimes. Where relevant

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<sup>1</sup> See the Draft Policy Paper on Preliminary Examinations of 4 October 2010.

<sup>2</sup> With respect to which the Court shall exercise jurisdiction once the provision adopted by the Assembly of States Parties enters into force. RC/Res.6 (28 June 2010).

domestic investigations or prosecutions exist, the Prosecution will assess their genuineness.

7. *Gravity* includes an assessment of the scale, nature, manner and impact of the alleged crimes committed in the situation.
8. The “*interests of justice*” is a countervailing consideration. The Office must assess whether, 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.
9. There are no other statutory criteria. Factors such as geographical or regional balance are not relevant criterion for a determination that a situation warrants investigation under the Statute. While lack of universal ratification means that crimes may occur in situations outside the territorial and personal jurisdiction of the ICC, this can only be remedied by a UN Security Council referral.
10. As required by the Statute, the Office’s preliminary examination activities will be conducted in the same manner irrespective of whether the Office receives a referral from a State Party or the Security Council or acts on the basis of information of crimes obtained pursuant to article 15. In all circumstances, the Office will analyse the seriousness of the information received and may seek additional information from States, organs of the UN, intergovernmental and non-governmental organisations and other reliable sources that are deemed appropriate. The Office may also receive oral testimony at the seat of the Court.
11. Before making a determination on whether to initiate an investigation, the Office will also seek to ensure that the States and other parties concerned have had the opportunity to provide the information they consider appropriate.
12. There are no timelines provided in the Statute for a decision on a preliminary examination. Depending on the facts and circumstances of each situation, the Office may either decide (i) to decline to initiate an investigation where the information manifestly fails to satisfy the factors set out in article 53(1) (a)-(c); (ii) to continue to assess relevant national proceedings; (iii) to continue to collect information in order to establish sufficient factual and legal basis to render a determination; or (iv) to initiate the investigation, subject to judicial review as appropriate.
13. In order to promote transparency of the preliminary examination process the Office aims to issue regular reports on its activities and provides reasoned responses for its decisions to either proceed or not proceed with investigations.

14. Where the Prosecutor has initiated the preliminary examination process *proprio motu* and determined a reasonable basis to proceed, the Office has adopted a policy of inviting the State(s) concerned to refer the situation to the Court in order to promote cooperation. As in all other situations, such a referral will have no impact on investigative and prosecutorial activities.
15. The Office will also consider, as a matter of policy, the extent to which its preliminary examination activities can serve to stimulate genuine national proceedings against those who appear to bear the greatest responsibility for the most serious crimes. In accordance with its positive approach to complementarity, based on the goals of the preamble and article 93(10) of the Statute, the Office will seek to encourage and cooperate with efforts to conduct genuine national proceedings.

#### Summary of the activities performed during the last year

- a) The Office has received 431 communications relating to article 15 of the Rome Statute during the reporting period, and a total of 9,332 from July 2002.
- b) During the reporting period, the Office completed two preliminary examinations and subsequently opened two new investigations: one in Libya, the other in Côte d'Ivoire.
- c) On 26 February 2011, the UN Security Council unanimously adopted resolution 1970 (2010) and referred the situation in Libya since 15 February 2011 to the Prosecutor of the Court. The Prosecutor subsequently carried out an independent preliminary examination and, on 3 March 2011, determined that the statutory criteria for the opening of an investigation into the situation in Libya since 15 February 2011 had been met.
- d) On 23 June 2011, the Prosecutor requested authorisation from the Pre-Trial Chamber to commence an investigation in Côte d'Ivoire, which had accepted the jurisdiction of the Court under article 12(3) of the Statute, and began investigations on 3 October 2011 on receipt of authorisation from the Chamber.
- e) During the reporting period, the Office continued its preliminary examination activities in the following situations:
  - Analyzing preconditions to jurisdiction in Palestine;
  - Analyzing subject-matter jurisdiction in Afghanistan, Nigeria, Honduras and the Republic of Korea;
  - Analyzing national proceedings in Colombia, Georgia and Guinea.

## Nigeria

### *Procedural History*

50. In the period from 10 November 2005 through 9 November 2011, the Office has received 38 article 15 communications in relation to the situation in Nigeria, out of which 17 were manifestly outside the jurisdiction of the Court; 8 were found to warrant further analysis; and 13 communications were included in the preliminary examination. The preliminary examination of the situation in Nigeria was made public on 18 November 2010.

### *Preliminary Jurisdictional issues*

51. Nigeria deposited its instrument of ratification to the Rome Statute on 27 September 2001. The ICC therefore has jurisdiction over Rome Statute crimes committed on the territory of Nigeria or by its nationals from 1 July 2002 onwards.

### *Contextual Background*

52. Nigeria's approximately 168 million inhabitants belong to over 250 ethnic groups. Owing to the particular federal character of the country, there are distinctions drawn between "indigenes" of a state (individuals considered to be living in their state of "origin") and those referred to as "non-indigenes" or "settlers" ("newcomers" who might have lived in the state for decades).
53. In the Middle-Belt states, the Plateau State specifically, there have been recurrent clashes since 2001 between "indigene" and "settler" communities. This divide often coincides with divisions along ethnic and/or religious lines. As a result, Muslims and Christians from different ethnic groups have attacked their opponents, using religion as a tool to mobilize followers.
54. The oil-rich Niger Delta region is driven by violence among ethnically-based gangs and military groups and between them and federal forces. The violence primarily relates to a struggle for control over the oil production and access to resources in the region. The region has been also repeatedly affected by the political violence in the period of 2003, 2007 and 2011 elections.

### *Alleged Crimes*

55. *Killings*: Between July 2002 and April 2011, at least thousands of people died in Nigeria as a consequence of inter-communal, sectarian and political violence. These deaths are unevenly distributed over time and place. The vast majority died in the Middle-Belt states in central and northern Nigeria in a series of major assaults along ethnic/sectarian lines by mobs or youth groups. Ongoing examination of these events is determining whether some of these attacks were carried out in a coordinated and organized manner, although the available information is limited. A lesser number of persons died in the Delta region as a consequence of political and other forms of armed violence, including limited armed confrontations between government forces and Delta-based militant groups.
56. *Rape and Sexual Violence*: Rape and other forms of sexual violence have reportedly occurred in the context of ethnic/sectarian violence, allegedly by sponsored gang violence, and in the context of operations by the security forces and during detention, in the northern, central and Delta regions. Sufficient information, however, remains scarce and no precise numbers are available.
57. *Abductions (Delta)*: Abductions by armed groups and gangs appear to have been concentrated in the Delta region, particularly in Rivers State, where kidnappings reportedly became commonplace since the beginning of 2006 and targeted against foreign oil workers. First intended as a political statement, it reportedly also evolved into a profit-seeking activity.

### *OTP Activities/Engagement*

58. Following the public announcement of the preliminary examination in November 2010, the Nigerian authorities have been forthcoming.
59. On 21 April 2011, the OTP expressed public concern about the outbreak of violence in the context of the National Assembly and Presidential elections of April 2011. In response, on 7 June 2011, the Nigerian authorities informed the OTP that a 22-member Panel was set up to investigate pre- and post-election violence in Akwa Ibom State and in other parts of the country within the context of the 2011 general elections.
60. The public announcement of the preliminary examination appears to have raised the interest of Nigerian and international NGOs.