



**Cour  
Pénale  
Internationale**

**International  
Criminal  
Court**

**Le Bureau du Procureur**

**The Office of the Prosecutor**

# Policy on Situation Completion

15 June 2021



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Pénale  
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## 1. Introduction

1. The strategic framework of the International Criminal Court (“ICC” or the “Court”)—and, in particular, the *Strategic Plan 2019-2021* of the Office of the Prosecutor (the “Office”)—prioritises the development of a completion strategy, or strategies, for situations under investigation.<sup>1</sup> This need was also identified by the Assembly of States Parties (“ASP”),<sup>2</sup> as well as independent experts commissioned in 2019 to review the work of the Court.<sup>3</sup>
2. This policy paper explains how the Office will complete its work in situations where the Court is exercising its jurisdiction (*i.e.*, once an investigation has been opened),<sup>4</sup> and is made public in accordance with the consistent practice of the Office. It completes a trilogy of policy papers describing the life cycle of the Office’s operations in a situation, and must be read with the *Policy Paper on Preliminary Examinations* (which describes the opening of an ICC investigation in a situation) and the *Policy Paper on Case Selection and Prioritisation* (which describes the selection of cases for investigation in a situation, and their prioritisation in light of the multiple situations under investigation in the Office at the same time). Over time, it may form the basis for further developments in the policy and practice of the Office to carry out its own mandate under the Statute with even greater efficiency and effectiveness.
3. At present, this policy paper relates only to the Office’s own internal operations, in accordance with its legal mandate under the Rome Statute (“Statute”).<sup>5</sup> As such, it does not address certain other important aspects of situation completion, as far as the wider Court is concerned. In particular, it does not address how other Organs of the Court may complete their activities within a

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<sup>1</sup> [ICC, ICC Strategic Plan 2019-2021, 17 July 2019](#) (“Court Strategic Plan”), goal 10. See also [ICC Office of the Prosecutor, Strategic Plan 2019-2021, 17 July 2019](#) (“Office Strategic Plan”), goal 2, especially pp. 18-19.

<sup>2</sup> See e.g. [ICC Assembly of States Parties, Report of the Court on complementarity: completion of ICC activities in a situation country, ICC-ASP/12/32, 15 October 2013](#) (“ICC ASP 2013 Report on Complementarity”), para. 1.

<sup>3</sup> See e.g. [Independent Expert Review of the International Criminal Court and the Rome Statute System: Final Report, 30 September 2020](#) (“IER Report”), recommendations R243-R250, especially R245-R246, R248-R250. See also paras. 684-694. While some of these recommendations may not fall within the scope of this policy paper, this is without prejudice to their implementation in other policy papers or internal decisions of the Office.

<sup>4</sup> This policy paper does not, therefore, encompass the process by which the Office ‘completes’ its preliminary examinations, which is governed by a distinct legal framework, including but not limited to decisions not to open an investigation of a referred situation, having concluded that the criteria in article 53(1) of the Statute are not met, or not to seek authorisation to investigate in the exercise of prosecutorial discretion under article 15: see [ICC, Rules of Procedure and Evidence](#) (“ICC RPE”), rules 49, 105(2); [ICC-02/17-138 OA4](#) (“Afghanistan Appeal Judgment”), paras. 29-30. These matters are addressed exclusively in [ICC, Office of the Prosecutor, Policy Paper on Preliminary Examinations, November 2013](#).

<sup>5</sup> In this sense, in terminology which has previously been accepted by the Assembly of States Parties, this policy paper addresses “completion issues” for the Office (defined as “core judicial and administrative work performed before completion” of those functions in the situation) and “residual functions” (defined as “core judicial and administrative tasks that must be performed post-completion” of relevant prosecutions). See [ICC ASP 2013 Report on Complementarity](#), paras. 17-23.

particular situation or the conduct of ‘legacy’ initiatives to which the Office may contribute, as appropriate, including in partnership with other actors such as the ASP and the Trust Fund for Victims.<sup>6</sup> However, this policy paper may serve as a valuable, even necessary, precursor for those broader considerations. The Office looks forward to participating in any discussions with other stakeholders towards a Court-wide general protocol on situation completion, and hopes that this policy paper will assist in shaping that discussion.

4. This policy paper has been produced with the benefit of a public consultation process, drawing on feedback from ICC States Parties, civil society, and other stakeholders. Yet it remains an internal document of the Office and, as such, does not give rise to any legal right or cause of action for any individual, organisation, or State. It may be revised, consistent with the discretion vested in the Prosecutor under the Statute, the operational experience of the Office in implementing this policy and the accompanying *Policy Paper on Case Selection and Prioritisation*, and any evolution in the applicable legal texts or jurisprudence.

## 2. EXECUTIVE SUMMARY

5. While the progress of an individual case is relatively easy to measure, the progress of a situation is more complicated; it is not just a question of how advanced the Office may be in investigating one or more cases but, crucially, *how many* and *which* cases the Office will ultimately investigate with a view to prosecution in that situation.<sup>7</sup> This is decided by the Prosecutor within her broad discretion under articles 42, 53-54, and 58 of the Statute, in light of the material circumstances. It is distinct from the decision whether or not to prosecute a particular case, which is made solely on its own individual merits.
6. This paper introduces the concepts of the Investigation Phase and the Prosecution Phase to describe and clarify the different kinds of work undertaken by the Office in completing its activities in a situation, and the threshold conditions which must be met. The Investigation Phase determines the scope of the Office’s caseload in that situation, while the Prosecution Phase ensures that the necessary steps are taken to complete the Office’s responsibilities with regard to that caseload.

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<sup>6</sup> See [ICC ASP 2013 Report on Complementarity](#), paras. 17 (defining “legacy issues” as “long-term post-completion projects [...] such as outreach and institutional and capacity-building efforts, aimed at leaving a lasting positive impact on affected communities and their criminal justice systems”), 27-37.

<sup>7</sup> The Court’s jurisprudence distinguishes between “situations” and “cases”. While a “case” will generally be completed by the exhaustion of legal proceedings, or the Prosecutor’s determination to take no further action before the Court, there is no pre-determined legal threshold or procedure to determine precisely when a situation may be completed. See [ICC, Office of the Prosecutor, Policy Paper on Case Selection and Prioritisation, September 2016](#), para. 4; [Policy Paper on Preliminary Examinations](#).

7. Using this conceptual framework is important to ensure that this policy is both thorough and comprehensible, bearing in mind the complexity of the underlying issues. But it does not imply an artificial separation between investigative and prosecutorial activities. To the contrary, *the prosecution of a particular case* (or indeed multiple cases) may well start before *the investigation of the overall situation* (the Investigation Phase) has ended. Likewise, the conclusion of the Investigation Phase does not mean that investigative activities will not continue to be carried out in support of the Office’s prosecutions or its residual activities. Rather, the transition from the Investigation Phase to the Prosecution Phase marks the point at which the Office’s resources for a situation will be focused on completion of the defined caseload, as opposed to launching investigations into any new cases.
8. Specifically, the Investigation Phase of a situation at the Court is concluded when the Prosecutor has been granted warrants or summonses under article 58 for the totality of cases in that situation to be prosecuted (thus defining the “Prosecutorial Programme”). From that point onwards the Office will make no further requests to the Pre-Trial Chamber to start proceedings for article 5 crimes in that situation, save in exceptional circumstances such as those defined in this policy. The Prosecutor’s determination of the appropriate number and variety of cases to make up the Prosecutorial Programme is informed by the Situation Strategy. This will be framed in preliminary form at the start of the investigation in a situation, but will be dynamically reviewed and adjusted as the investigation progresses, taking into consideration the evidence collected and other relevant factors.
9. Completing the Investigation Phase is the key milestone towards completing a situation. Because at this point the Prosecutorial Programme is then defined, forecasting the resources required for that situation will become more predictable (although particular demands will obviously fluctuate as arrests are made), and preparations for transferring resources to other situations can begin. It will also enable external stakeholders—especially victims of crime, civil society, the ASP and other relevant States or bodies, such as the United Nations (“UN”) Security Council—to better understand the Office’s progress, and consequently where to direct their expectations and further efforts for accountability. In turn, this may encourage national and international efforts to enhance domestic capacity. These benefits will be derived from public notification by the Office that the Investigation Phase of a situation has been completed, even though the details of particular prosecutions will only become known as arrest warrants are made public. This may occur over time, since arrest warrants are typically first sought and granted under seal.

10. Recognising the importance of completing the Investigation Phase is consistent with the experience of the *ad hoc* tribunals, and especially the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”). The completion strategies for these institutions relied on first establishing a deadline for completion of investigations leading to new indictments, and then progressively concluding the remaining cases in their prosecutorial programmes. After an initial intensive period of conducting prosecutions, resourcing was scaled down as these bodies transitioned to residual activities. In parallel with their prosecutorial efforts, these institutions also sought—within their means—to support national or regional processes aimed at building and enhancing domestic capacity to address international crimes. While the ICC differs from the *ad hoc* tribunals because it is a permanent court, exercising jurisdiction over multiple situations rather than only one, it can adopt a similar approach within the context of each of its situations.
11. After the Investigation Phase is complete, the Office will devote the resources allocated to the situation to the Prosecution Phase. This phase aims to conclude all legal proceedings relating to the cases in the Prosecutorial Programme, and other residual activities arising from the Office’s obligations in a particular case or in the situation as a whole. The Office cannot directly control all factors governing the pace at which the Prosecutorial Programme is concluded. In particular, resources and State cooperation are required to support the execution of any outstanding warrants of arrest and requests for assistance, and to complete litigation before the Court.
12. The Office regards its activities in a situation as complete when *both* the Investigation Phase *and* the Prosecution Phase are concluded, as illustrated in the following figure. The prolonged nature of the residual activities associated with the various cases arising from a situation means that considerable time may pass before the Office’s activities within a situation can truly be regarded as complete, in this technical sense.<sup>8</sup> It is also important to recall that States Parties will remain subject to their duties of cooperation throughout this period. However, in practice—and subject to effective State cooperation, particularly in executing arrest warrants and requests for assistance—the majority of the Office’s work (with the greatest demand for resources) will be completed well before this time. Consequently, while the Office’s residual activities in a situation may have a ‘long tail’, only minimal resourcing is required for this purpose.

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<sup>8</sup> The Court will only cease to exercise its jurisdiction (and oblige the cooperation of States Parties) in a situation when it is no longer required to carry out the mandate of all the Organs of the Court, as provided by the Statute.

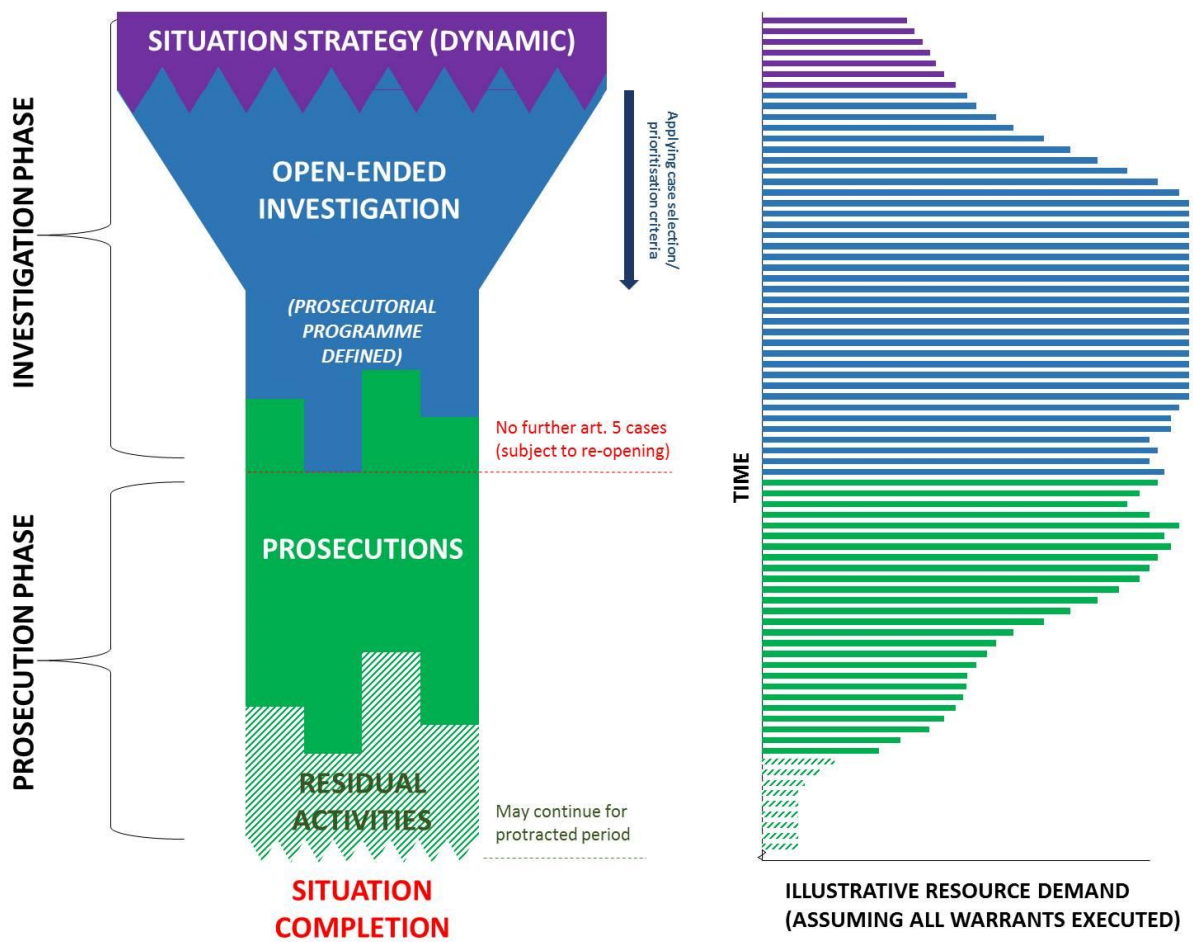


Figure 1: Progression towards Situation Completion

### 3. GENERAL PRINCIPLES

13. Given the close relationship between the selection and prioritisation of cases, and decisions relevant to the completion of a situation (such as when to cease selecting further cases for investigation), the Office re-emphasises that it will conduct all the activities addressed in this policy paper based on the same overarching principles of independence, impartiality, and objectivity.<sup>9</sup>

#### 3.A. Independence

14. The Office's obligation of independence under article 42(1) of the Statute has particular significance in concluding investigations since these may engage the political or other interests of third parties. Moreover, because these matters are highly fact sensitive, only those with knowledge of all the relevant facts and circumstances are in a position to make the required assessments properly. As the investigative arm of the Court, the Prosecutor is uniquely vested with that capacity, and that responsibility. But this does not mean that proper

<sup>9</sup> [Policy Paper on Case Selection and Prioritisation](#), paras. 16-23.



consideration will not be made of the interests of relevant stakeholders, in accordance with the law.

15. For example, consistent with the Statute and its established policy, the Office will consider the interests of victims and affected communities.<sup>10</sup> While an investigation is not a “judicial proceeding” in which victims are entitled to participate under article 68(3),<sup>11</sup> the Office will nonetheless ensure that their views are properly taken into account. It will do so by seeking the views of victims from the outset of its investigation, and at subsequent intervals, to ensure that those views are properly understood.<sup>12</sup> Given the confidentiality usually associated with ongoing investigations and any proceedings under article 58, the Office will not be able to consult with victims on decisions whether to select or prosecute individual cases,<sup>13</sup> or whether to conclude an investigation. But victims’ interests can still be properly considered in these contexts if the Office has already gained a sufficient understanding of their views through its general consultations, including during the evidence-gathering process.
16. Likewise, during the investigation in a situation, the Office will engage with other relevant stakeholders to inform its assessment of relevant matters. This may include the prospect of relevant proceedings before national authorities, and considerations pertaining to the interests of justice. As the following paragraphs explain, these considerations will be taken into account in framing the Situation Strategy and the Prosecutorial Programme, and where appropriate in deciding whether or not to prosecute specific cases.
17. The statutory independence of the Office precludes the imposition of any externally imposed timelines, conditions, or guidelines for the completion of the Investigation Phase,<sup>14</sup> even though the Office continues to be mindful of the need to enhance the transparency of its processes where possible. External factors also make rigid timelines unsustainable in practice, even if they were set internally by the Office. The unique blend of circumstances affecting the conduct of each situation, the essential importance of following the evidence, and the Court’s reliance on State cooperation in carrying out its mandate, combine to make generalisations about the duration of investigative activities

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<sup>10</sup> See [ICC, Office of the Prosecutor, \*Policy Paper on Victims’ Participation\*, April 2010](#), pp. 3-4; [Policy Paper on Case Selection and Prioritisation](#), para. 9.

<sup>11</sup> See e.g. [ICC-01/04-556 OA4 OA5 OA6](#) (“DRC Victim Participation Appeal Judgment”), para. 45; [ICC-02/04-01/05-371 OA2](#) (“Kony *et al.* Appeal Judgment, Dissenting Opinion of Judge Pikis”), para. 12.

<sup>12</sup> [Policy Paper on Case Selection and Prioritisation](#), para. 9.

<sup>13</sup> [Policy Paper on Case Selection and Prioritisation](#), para. 15.

<sup>14</sup> See also [ICC ASP 2013 Report on Complementarity](#), paras. 11-13 (recalling that the ICC’s legal framework foresees no limit on the number of cases that the Office may bring before the Court, nor any statutory prescription period for article 5 crimes).

unreliable and counter-productive. Estimates would be subject to such extensive caveats that they would be unlikely to promote cooperation or stakeholder engagement. The Office will, however, continue to bear in mind measures to enhance the transparency and predictability of its projected activities in situations, provided these are consistent with the needs of effective investigation.

### **3.B. Impartiality**

18. Article 42(7) of the Statute requires the Prosecutor to act impartially in matters investigated and prosecuted by the Office, which means acting without favouring any person or group. This means that the Office will only take into account considerations material to the Statute in deciding on the conduct of an investigation, and its conclusion. This will be demonstrated by consistent application of the same processes, methods, criteria, and thresholds in selecting and prioritising cases arising from a situation.<sup>15</sup> Consequently, for example, the Office will not seek to create the appearance of parity within a situation between rival parties by investigating or prosecuting cases that would not otherwise meet the applicable criteria.<sup>16</sup>

### **3.C. Objectivity**

19. Article 54(1)(a) of the Statute requires the Prosecutor, “[i]n order to establish the truth,” to “extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute and, in doing so, investigate incriminating and exonerating circumstances equally”.<sup>17</sup> This requirement does not imply that the Office must investigate every case in the situation, but rather ensures that investigations on selected cases are carried out objectively and based on the evidence. The decision whether or not to prosecute a selected case will be determined on its own merits.<sup>18</sup>

## **4. THE SITUATION STRATEGY**

20. Since opening an investigation by the Office is conditional on determining that there is a reasonable basis to believe that at least one potential case arising from the situation would be admissible before the Court,<sup>19</sup> the Office will conduct its

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<sup>15</sup> [Policy Paper on Case Selection and Prioritisation](#), paras. 19-20; [Policy Paper on Preliminary Examinations](#), para. 28.

<sup>16</sup> [Policy Paper on Case Selection and Prioritisation](#), para. 20.

<sup>17</sup> See also [Afghanistan Appeal Judgment](#), para. 60 (“The Prosecutor’s duty, according to article 54(1) of the Statute, is ‘to establish the truth’. Therefore, in order to obtain a full picture of the relevant facts, their potential legal characterisation as specific crimes under the jurisdiction of the Court, and the responsibility of the various actors that may be involved, the Prosecutor must carry out an investigation into the situation as a whole”).

<sup>18</sup> See also [Policy Paper on Case Selection and Prioritisation](#), paras. 21-22.

<sup>19</sup> [Statute](#), art. 53(1).

investigation with the primary objective of bringing appropriate cases to trial before the Court. This is consistent with article 53(2), which ordinarily contemplates the prosecution of at least one case—providing this is supported by the evidence, and without prejudice to the complementary mandate of the Statute. At the same time, it is generally understood that the Office will never be in a position to investigate every potentially admissible case in a situation.<sup>20</sup>

21. In this context, the Office reaffirms that its overall aim in carrying out investigations and prosecutions is to represent as much as possible the true extent of the criminality which has occurred within a given situation, in an effort to ensure, jointly with the relevant national jurisdictions, that the most serious crimes committed in each situation do not go unpunished.<sup>21</sup>
22. The Prosecutor has statutory discretion to define *which* and *how many* cases will make up the Prosecutorial Programme for a situation,<sup>22</sup> and will exercise this discretion within the context of the overall aim described above. Once the Prosecutorial Programme is defined, such that the Prosecutor is of the view that no additional article 5 prosecutions will be brought in the situation, the Investigation Phase is concluded.
23. The Prosecutor will exercise this discretion in each situation by means of the Situation Strategy. Building on existing practice, this confidential internal document will be framed in preliminary form at the start of the investigation in a situation, but will be dynamically reviewed and adjusted as the investigation progresses, taking into consideration the evidence collected and other relevant factors. It will set out the lines of inquiry to be pursued before the investigation may be considered to be complete.<sup>23</sup> In this way, the Office will aim at completion of a situation, and identify the conditions for achieving this, from the outset of its investigation. At the same time, it will preserve the adaptability necessary to deliver objective, fair, and impartial investigations.
24. The Situation Strategy is framed around broad lines of inquiry—rather than pre-determined objectives (such as targeting particular individuals or groups,

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<sup>20</sup> See [Policy Paper on Case Selection and Prioritisation](#), para. 12.

<sup>21</sup> See [Policy Paper on Case Selection and Prioritisation](#), para. 8. See also para. 45.

<sup>22</sup> See [Statute](#), arts. 53(2), 54, 48. See also [Policy Paper on Case Selection and Prioritisation](#), paras. 25-26, 29, 33; [ICC-02/05-185](#) (“Darfur Rule 103 Decision”), para. 24 (holding that “States Parties have granted the Prosecution discretion to decide whether to request the initiation of a case through the issuance of an arrest warrant or a summons to appear”, subject to the Pre-Trial Chamber’s verification of reasonable grounds to believe that the person in question is responsible for a crime under the Statute).

<sup>23</sup> A line of inquiry, in this sense, reflects the general investigative work necessary to substantiate the “provisional case hypotheses” which in turn may form the basis for case selection: see [Policy Paper on Case Selection and Prioritisation](#), paras. 10-13. The Situation Strategy differs from the Case Selection Document, which is primarily used as a tool to optimise the Office’s investigative resources as a whole, across all situations.

or bringing a certain number of prosecutions)—to ensure consistency with the core mandate of the Office: the open-ended investigation of cases, with a view to potential prosecution if justified on the basis of the evidence. It is in that sense that the Office will deliver change in the situation, and on that basis that the impact of its efforts should be measured.<sup>24</sup>

25. Lines of inquiry are preliminarily identified in the Situation Strategy based on the conclusions from the preliminary examination stage, including but not necessarily limited to the potential cases which have been identified.<sup>25</sup> The Office will also endeavour to consult with relevant stakeholders (including victims and the affected communities, and the State(s) directly affected<sup>26</sup>). Lines of inquiry will be identified by reference to various factors, including:

- Representing the gravity of the alleged criminality in the situation (quantitatively and qualitatively), taking into account the likely charges and the likelihood that they will meet the Office’s standard for prosecution, and the interest in bringing at least some cases to trial at the Court within a reasonable time;
- The interests of victims and affected communities;
- The types of evidence available in the situation (witnesses, documents, open source material, electronic data, imagery, financial data, scientific and other expert evidence, etc.), its volume and accessibility, and any anticipated threats to its preservation;
- The prospects and requirements for cooperation with the Office, including from States Parties, other relevant States, international organisations, and non-governmental organisations (“NGOs”);

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<sup>24</sup> See [IER Report](#), para. 694 (calling on the Office to “consider how best the positive impact in situation countries can be achieved, and how it might be measured”).

<sup>25</sup> The alleged criminality and potential cases identified during the preliminary examination will not *necessarily* result in the selection of cases for investigation by the Prosecutor, nor does this conduct identified in the preliminary examination limit the cases which might be selected. This is because preliminary examinations serve to establish an objective justification for opening an investigation, but without prejudice to the Prosecutor’s assessment of the proper way to proceed once that investigation is carried out. While the Office will generally identify a representative illustration of alleged conduct within the situation, as a matter of policy, this is not a legal requirement. See [Policy Paper on Case Selection and Prioritisation](#), paras. 10, 13; [Policy Paper on Preliminary Examinations](#), paras. 43, 84, 97, 99; [ICC Office of the Prosecutor, Policy Paper on Sexual and Gender-Based Crimes, June 2014](#), paras. 7, 14, 53-54; [ICC Office of the Prosecutor, Policy on Children, November 2016](#), paras. 6-7, 17, 53, 62; [Afghanistan Appeal Judgment](#), paras. 59, 61. On defining the parameters of the situation, *see also below* fn. 59.

<sup>26</sup> See also [Office Strategic Plan](#), para. 23 (noting the aspiration to define prosecutorial goals if possible together with the situation country (notably where a lack of primary action by the State is due to inability rather than unwillingness to investigate), and to coordinate work to increase the speed and efficiency of investigations).

- The prospects for relevant genuine proceedings in jurisdictions other than the Court, and especially the potential for accountability partnerships with relevant States;
  - The operational conditions affecting the Office’s ability to conduct successful investigations and prosecutions, and to execute arrest strategies, while discharging its protection duties under the Statute; and
  - The resources anticipated to be required to investigate and, if necessary, prosecute relevant cases.
26. These lines of inquiry will be subject to an open-ended investigation. Particular cases will be further selected and prioritised for investigation within this framework, consistent with the *Policy Paper on Case Selection and Prioritisation*,<sup>27</sup> with a view to prosecution if merited.
27. As the investigation progresses, and mindful of the progress of those cases already selected for investigation, the Office will consider whether it is necessary to identify and pursue *further* lines of inquiry in order to select *additional* cases. Adjustments may also take into account new information relating to the above factors, as well as factors which assume greater prominence when certain cases have already been investigated and relevant facts have come to light, such as:
- The degree to which the alleged perpetrators of crimes are associated with multiple lines of inquiry, and their degree of responsibility;
  - The actual impact of particular lines of inquiry on the victims of crime and the affected communities, including with regard to ongoing criminality and their contribution to the prevention of crimes; and
  - The operational impact of pursuing a particular line of inquiry on other lines of inquiry, including with regard to the ability of the Office to pursue cases involving opposing parties to a conflict in parallel or on a sequential basis.<sup>28</sup>
28. Considering the progress of selected cases against the lines of inquiry in the Situation Strategy enables the rational exercise of prosecutorial discretion to determine whether the appropriate time has come to conclude the Investigation Phase. In other words, it allows the Prosecutor to determine whether a

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<sup>27</sup> See generally [Office Strategic Plan](#), para. 23; [Policy Paper on Case Selection and Prioritisation](#), paras. 34-46, 50-52; [Policy Paper on Sexual and Gender-Based Crimes](#), paras. 28, 45.

<sup>28</sup> See also [Policy Paper on Case Selection and Prioritisation](#), para. 50.

sufficient number and variety of cases have been investigated in a situation to meet the overall aim of representing the true extent of the criminality which has occurred.<sup>29</sup>

29. Throughout the Investigation Phase, the Situation Strategy will continue to be informed by considerations of complementarity. This is because relevant and genuine investigative and prosecutorial activities carried out by other jurisdictions will necessarily affect the lines of inquiry or cases investigated by the Office, based on the likelihood that such cases may become inadmissible, applying the statutory criteria. Likewise, the Office will continue, at all times, to identify opportunities to emphasise and support the primary responsibility of States to exercise their jurisdiction over crimes within the jurisdiction of the Court. This includes: identifying means to allow States to factor in their duty to conduct national proceedings and the mobilisation of external resource networks to support such activities, and cooperating with national jurisdictions conducting investigations on serious crimes, including by responding positively as far as possible to requests received under article 93(10) of the Statute.<sup>30</sup> The precise modalities for this engagement with States will vary according to the circumstances of each situation, and will be set out as part of the initial articulation of the Situation Strategy and will remain under continuous review.<sup>31</sup>
30. In all its operations, and within the limits of its mandate, the Office will also seek, as appropriate, to contribute to or cooperate with broader legacy initiatives carried out by the Court or by international and local partners. Such engagement does not, however, form part of the Situation Strategy, strictly speaking, insofar as it does not directly relate to the completion of the Office's own mandate, but rather relates to the broader Court-wide engagement in each situation.

## 5. CONCLUDING THE INVESTIGATION PHASE

31. As described above, the Office will continue to investigate within a situation until the Prosecutor considers that the Prosecutorial Programme (the docket of cases in the situation for which the Pre-Trial Chamber has issued warrants or summonses under article 58) gives effect to the Situation Strategy, as it has evolved during the investigation. However, the Office will only decide to prosecute each case (that is, to request an arrest warrant or summons to appear, under article 58) on its own individual merits—in particular, when it is

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<sup>29</sup> See above para. 21.

<sup>30</sup> See [ICC ASP, Report of the Court on Complementarity, ICC-ASP/10/23, 11 November 2011](#), para. 10 (noting that none of these activities is resource intensive). See also [Office Strategic Plan](#), paras. 23, 49.

<sup>31</sup> See also [IER Report](#), para. 693.

sufficiently established on the evidence. Consequently, if one or more of the cases selected for investigation does not meet the test for prosecution, but alternative lines of inquiry still remain within the Situation Strategy (potentially leading to the investigation and prosecution of a different case), the investigation may continue. In this way, prosecutorial decisions about the outcome of each selected case are relevant to—but not the same as—prosecutorial decisions about the conclusion of the Investigation Phase. If there are no alternative lines of inquiry remaining, the Investigation Phase will be concluded.

32. Once the Prosecutor has defined the Prosecutorial Programme, and thus concluded the Investigation Phase, the Office will make no further requests to the Pre-Trial Chamber to start proceedings for article 5 crimes in that situation, save for exceptional circumstances within the scope of the Court’s jurisdiction in that situation. These include the incidence of new or resurgent criminality, as described below, or the discovery of new and critical evidence which did not previously exist or could not previously be obtained due to external circumstances.
33. Indeed, circumstances may arise in which certain external circumstances prevent the Office from properly carrying out its investigation according to the Situation Strategy. This may prevent the Investigation Phase from being concluded. In this scenario, where it can be foreseen that the external obstacle(s) to proper investigation will continue for a protracted period, the Prosecutor may decide to suspend the Office’s activity regarding the situation as a whole. This will continue pending a material change in external circumstances. Alternatively, if the Prosecutor does proceed to conclude the Investigation Phase, such circumstances may again be relevant to a subsequent determination, exceptionally, to re-open the investigation if new and critical evidence becomes available.

#### **5.A. Deciding whether to prosecute a case**

34. Decisions on whether or not to prosecute a case or cases are made on a dynamic, rolling basis, and need not wait until the end of the Investigation Phase. Determining whether or not to prosecute a specific case is distinct from deciding to conclude the Investigation Phase for the situation as a whole—although, necessarily, when this decision concerns the ‘last’ case to be prosecuted in the situation, these decisions may coincide.
35. The Prosecutor will decide to prosecute a case, and thus to apply to the Pre-Trial Chamber under article 58 of the Statute, if there is a sufficient basis to



proceed *and* there is a reasonable prospect of conviction at the end of trial.<sup>32</sup> While the Statute does not expressly refer to this test, it has previously been adopted by the Office as a matter of policy and ensures that a criminal trial takes place only when justified.

36. If the Prosecutor decides that there is not a sufficient basis to prosecute a case, the Office may:
- Investigate the case further, which will have the effect of continuing the Investigation Phase; or
  - Deprioritise (suspend) the investigation of the case pending a material change in external circumstances, as described below, which will have the effect of continuing the Investigation Phase; or
  - Take no further action concerning the case. This will usually be because all relevant lines of inquiry have been exhausted, but may also occur if the Prosecutor has decided that a prosecution is not in the interests of justice, in the sense of article 53(2)(c).
37. Alternatively, the Prosecutor may consider that there is a sufficient evidentiary basis to prosecute a case, but take the view that it is no longer admissible, under articles 17 and 53(2)(b), if applicable. In such circumstances, having undertaken appropriate consultations, the Office will defer any action before the Court, in favour of the domestic proceedings. Since assessing the relevance and genuineness of national proceedings forms part of the Office's activities in a situation, and the Statute recognises the primary responsibility of national jurisdictions to exercise their jurisdiction in this regard, the Prosecutor's decision to defer a case in these circumstances will not bar the conclusion of the Investigation Phase. This is without prejudice to requesting the prosecution of relevant cases before the Court, if they subsequently become admissible, as explained further below.
38. The Prosecutor's decision whether to prosecute a case, or otherwise how to manage it, will be informed by a rigorous process of internal peer review of the evidence, including the participation of senior members of the Office assigned to other situations as well as relevant subject-matter specialists (law, analysis, sexual and gender based crimes, children, etc.).

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<sup>32</sup> [Policy Paper on Case Selection and Prioritisation](#), paras. 23, 46-47, 51, 53.



## 5.B. Deciding whether to conclude the investigation in a situation

39. The Prosecutor will conclude the Investigation Phase in a situation when the Situation Strategy, as adapted in light of the evidence collected, is given effect in the Prosecutorial Programme. This means that key lines of inquiry have been resolved through the cases selected for investigation, and that each of those selected cases has been investigated sufficiently for the Prosecutor to decide whether or not to initiate a prosecution, as described above. This assessment will be conducted by the Office internally.
40. The Office recognises that many of the benefits of concluding the Investigation Phase are best achieved by public notification that this milestone has been reached. The Office will therefore make such notification, in the exercise of the Prosecutor's discretion. In addition, when article 53(2) of the Statute directly applies, the Office will make the notifications required by that provision, which enables a confined regime of judicial review.

### 5.B.1. Internal process

41. The Office will carry out the assessment leading to the conclusion of the Investigation Phase internally and confidentially. This is because it is intrinsically related to the conduct of the investigation and, potentially, to *ex parte* article 58 applications before the Court. It will carry out this internal assessment consistently with the principles of independence, impartiality and objectivity as previously described.
42. As described above, the Prosecutor will decide whether or not to prosecute relevant cases on a rolling basis, whenever the lines of inquiry relevant to that case are considered to have been adequately addressed. By such timely decisions, the Prosecutorial Programme for the situation will be determined as the Investigation Phase moves forward. However, in assessing whether the Situation Strategy has been fully realised, the Prosecutor will not only need to determine whether to prosecute those selected cases which have been prioritised for investigation, but also to manage cases which have been deprioritised, in the following ways.
43. As explained in the *Policy Paper on Case Selection and Prioritisation*, prioritisation is the process which determines how the investigation of selected cases is rolled out over time.<sup>33</sup> Cases are prioritised on the basis of both strategic<sup>34</sup> and

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<sup>33</sup> The Office has taken note of the recommendation to explore means of prioritising certain situations from the outset, in light of their anticipated feasibility bearing in mind the availability of resources. See [IER Report](#), recommendations R243-R244. While this policy addresses prioritisation in the sense described in the *Policy Paper on Case Selection and Prioritisation*, this is without prejudice to the Office's future consideration of the IER's recommendation.

operational considerations<sup>35</sup>—and again, if possible and appropriate, this is informed by joint planning and coordination with national investigation and prosecution authorities.<sup>36</sup> Prioritisation is a relative process, in which cases across all situations under investigation by the Office are compared with one another. The necessary consequence of prioritising some cases for investigation (culminating with a decision whether or not to prosecute) is that others will have lesser priority (proceeding more slowly), and some may be temporarily deprioritised (suspending their investigation altogether).

44. Deprioritisation of a case, leading to the suspension of investigative activities in relation thereto, still entails a limited expense of resources, such as those necessary to preserve evidence or work product, to provide for the ongoing protection and well-being of relevant persons or, if required, to conduct investigations with regard to alleged offences under article 70. Deprioritisation acknowledges the impossibility of proceeding further with the investigation at that time in accordance with the Office's obligation under article 54(1) of the Statute.
45. Rapid expansion of the Office's docket of situations may mean that cases (or even, consequently, a situation as a whole) will be deprioritised or suspended more frequently and that certain cases may be deprioritised for much longer, as new cases are selected and prioritised instead.
46. Deprioritised cases necessarily affect the duration of the Investigation Phase for the situations concerned, since they prevent the Office from fully pursuing all lines of inquiry in the Situation Strategy and thereby proceeding to conclude the Investigation Phase. When this scenario arises, therefore, and all other selected cases have been resolved, the Office will consider whether it is appropriate (and feasible) to:
  - Mitigate the factor(s) causing the case(s) to be deprioritised. This may generally be the favoured option, if practicable. If successful, this option may allow the Office to reprioritise the case(s) for investigation, decide

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<sup>34</sup> Strategic considerations include a comparative assessment of all the cases selected by the Office, relative to one another, as well as considerations such as the existence of prior investigations or prosecutions concerning a suspect or their affiliates, the anticipated impact of investigating and prosecuting a given case on victims of the relevant crimes and the affected communities, the potential for preventing or disrupting ongoing criminality, and the impact of investigating and prosecuting a given case on other cases under investigation or prosecution by the Office. See [Policy Paper on Case Selection and Prioritisation](#), para. 50. See also e.g. [Policy Paper on Sexual and Gender-Based Crimes](#), para. 37.

<sup>35</sup> Operational considerations include the quantity and quality of the evidence available and the prospects for obtaining or preserving additional evidence, the prospects for cooperation with the Office and judicial assistance, the practical capabilities of the Office in relevant locations at that time, and the potential to secure the appearance of suspects before the Court: see [Policy Paper on Case Selection and Prioritisation](#), para. 51.

<sup>36</sup> See [Office Strategic Plan](#), para. 23.

whether or not to prosecute, and thereafter move toward concluding the Investigation Phase.

- Suspend the investigation of the situation as a whole, because the Prosecutor considers that the Situation Strategy demands the proper investigation of the deprioritised case(s) and anticipates that the operational factors which led to the deprioritisation may cease.<sup>37</sup> This will mean that the Investigation Phase cannot be concluded until there is a material change of circumstances.<sup>38</sup> At that point, the Prosecutor may reprioritise the case(s), complete the investigation, and make the appropriate decision whether or not to prosecute. This will eventually enable the conclusion of the Investigation Phase, but only after a potentially lengthy hiatus.
- Take no further action before the Court on the deprioritised case(s), and thus potentially enable the conclusion of the Investigation Phase, given the anticipated continuity, in the long term, of the strategic and operational factors which led to the deprioritisation. Other factors may also be relevant, such as: the potential for accountability for the case(s) to be pursued in other jurisdictions or by other mechanisms; and the potential for investigating and prosecuting cases of similar or connected crimes at the Court.

47. Where appropriate, the Office will publicly acknowledge the decision to deprioritise a case, or suspend a situation, and the reason why this occurred. Such acknowledgements will be subject to the overriding interest in conducting effective investigations and prosecutions, and will be consistent with the tailored outreach and public information strategy for that situation. In appropriate circumstances, where deprioritisation is associated with the level of required resources, this will include engagement with the ASP.<sup>39</sup>

#### 5.B.2. *Public notification*

48. Various stakeholders have a legitimate interest in knowing in which situations the Office is still investigating—with the potential for new article 5 cases to be prosecuted—and the Office's progress in completing its work. Accordingly, once the Prosecutor has concluded the Investigation Phase of a situation, and as part of a tailored outreach and public information strategy, the Office will make a public notification to this effect.

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<sup>37</sup> See also [Policy Paper on Case Selection and Prioritisation](#), paras. 48, 53.

<sup>38</sup> To do otherwise would be to encourage third parties to seek to frustrate investigations conducted by the Office, by deliberately creating conditions in which the Office cannot operate, and thereby preventing the execution of the mandate of the Court.

<sup>39</sup> See [IER Report](#), recommendation R246.

49. Public notification of the conclusion of the Investigation Phase in a situation will not contain details of the Prosecutorial Programme, since these will frequently be confidential. Nor will the notification be filed before the Court, subject to the exception recognised below, since this milestone does not directly trigger or relate to any judicial proceeding, but rather solely affects the operations of the Office.
50. Transparency about the realistic limits of the Court's activity in a given situation is important for all the Court's stakeholders, especially victims of crime, the ASP and any other specifically affected States, and the UN Security Council (in the event of a referral under article 13(b)). While the Office does not consult directly with these stakeholders in determining the Prosecutorial Programme, as explained above, public notification of the conclusion of the Investigation Phase may help calibrate expectations for the outcomes of the Office's activities. It may give victims a sense of closure, or stimulate their advocacy for additional forms of accountability in other forums. This may be enhanced as details of the Prosecutorial Programme become clearer over time.
51. In response to such notification, States may deepen their cooperation with the Court and increase their efforts to help conclude the Prosecution Phase, especially by executing warrants of arrest. Furthermore, the Investigation Phase may identify more leads and cases than the Court can properly accommodate—including cases which do not meet the gravity threshold for prosecution before the Court.<sup>40</sup> As the Investigation Phase is concluded, and the scope of the Prosecutorial Programme becomes clearer, national authorities and partners in the international community may be encouraged to investigate and prosecute outstanding cases.<sup>41</sup> The Office will evaluate the extent to which material in its possession can be appropriately disseminated to assist national proceedings, as described further below, and may be aided in this process by effective consultations with relevant stakeholders.<sup>42</sup>

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<sup>40</sup> See also [Office Strategic Plan](#), goal 6; [Policy Paper on Case Selection and Prioritisation](#), paras. 5, 7; [Policy Paper on Sexual and Gender-Based Crimes](#), paras. 46, 105, 109.

<sup>41</sup> Strengthening partnerships of this kind, in such circumstances, has long been under consideration: see e.g. [ASP, Report of the Bureau on stocktaking: complementarity—Taking stock of the principle of complementarity: bridging the impunity gap](#), ICC-ASP/8/51, 18 March 2010, para. 26; [ASP, Strengthening the International Criminal Court and the Assembly of States Parties](#), ICC-ASP/18/Res.6, 6 December 2019, para. 132.

<sup>42</sup> See further [Statute](#), art. 93(10).

5.B.3. *Legal notification, if required, and potential review*

52. Article 53(2) of the Statute requires the Prosecutor to inform the Pre-Trial Chamber and the referring entity if there is not a sufficient basis for “a prosecution” in a situation which has been referred to the Court. By contrast, there is no obligation of legal notification for an investigation in a situation which has been opened *proprio motu* by the Prosecutor under article 15, with authorisation of the Pre-Trial Chamber.<sup>43</sup>
53. As set out in its previous submissions before the Court,<sup>44</sup> the Office interprets this requirement to mean that it must notify the Pre-Trial Chamber and the referring entity if it proposes to complete the Investigation Phase of a referred situation without initiating *at least one* prosecution by making an application under article 58. In providing this legal notification, rule 106(2) requires the Office to state “the conclusion of the Prosecutor and, having regard to article 68, paragraph 1, the reasons for the conclusion.”
54. This interpretation of article 53(2) arises from the plain words of the provision—which refers to “a” prosecution (in the sense of “one” prosecution, or “any” prosecution)—and the object and purpose of the Statute, as well as the constant practice of the Office and Court in its operations to date. Any alternative interpretation of article 53(2) would mean that each decision not to prosecute a given case would be potentially subject to judicial review, which would not only be inconsistent with the discretionary nature of the Prosecutor’s powers in matters of case selection, but would also frustrate the Office’s effective operation and independence.<sup>45</sup>

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<sup>43</sup> The Appeals Chamber has confirmed that “[a]rticle 53(3) of the Statute envisages judicial control over the Prosecutor’s decision not to investigate and aims at ensuring that the Prosecutor complies with her duty to investigate *referred situations*”: [Afghanistan Appeal Judgment](#), para. 29 (emphasis added). *See also* para. 30 (fn. 52). Article 15 provides for a distinct procedure, based primarily on prosecutorial discretion, which provides a supervisory role for the Pre-Trial Chamber only to guard against frivolous or unfounded *proprio motu* investigations: *see* paras. 30-34 (including fn. 54), 45, 61. Nothing in article 15, or any other provision of the Statute, obliges the Prosecutor to notify the Pre-Trial Chamber concerning decisions not to prosecute any case arising from a *proprio motu* investigation: *see* para. 63.

<sup>44</sup> *See e.g.* [ICC-02/17-74](#) (“Afghanistan Prosecution Appeal Brief”), para. 83 (text accompanying fn. 167). *See also* [Policy Paper on Preliminary Examinations](#), para. 92.

<sup>45</sup> Since decisions whether or not to prosecute an individual before the Court, and the timing and sequencing of such decisions, are an intrinsic part of the investigative process, any contrary approach would not only result in a potential flood of litigation but would also eliminate the Prosecutor’s control over the conduct of the investigation and introduce a significant difference in the conduct of investigations of referred situations as opposed to *proprio motu* situations. This has never been the Office’s practice, nor expected by any Pre-Trial Chamber: *see e.g.* [ICC-01/09-01/11-49](#) (“*Ruto and Sang Amicus Curiae Decision*”), paras. 11-12 (“the power to select and investigate cases [...] is a matter that falls within the pure mandate of the Prosecutor”); [ICC-01/05-01/08-453](#) (“*Bemba Amicus Curiae Decision*”), para. 10; [ICC-01/04-399](#) (“*Lubanga Further Investigation Decision*”) (a decision not to proceed with charges against a person is not a decision not to prosecute in the meaning of article 53(2) of the Statute); [ICC-01/04-373](#), para. 5 (“*Lubanga Amicus Curiae Decision*”). *See also* [Afghanistan Appeal Judgment](#), para. 63 (“continuous monitoring of the scope of the Prosecutor’s investigation by the pre-trial chamber is contrary to the statutory scheme”).

## 6. CONCLUDING THE PROSECUTION PHASE

55. Setting the Prosecutorial Programme for a situation—and by this means concluding the Investigation Phase—defines the judicial work to be done by the Court. It marks the transition into the Prosecution Phase, where the focus is no longer on investigations with a view to initiating new prosecutions for article 5 crimes but instead on: executing arrest warrants; conducting and completing trial proceedings; and completing residual activities. These activities are explained in the remainder of this policy.
56. Transition from the Investigation Phase of a situation to the Prosecution Phase marks a shift in the emphasis of the Office’s activities, but not necessarily a difference in the types of activities carried out. For example, in some cases, arrest warrants may be executed—and trials begin—even while the Investigation Phase still continues. Likewise, certain investigative activities to support the Prosecutorial Programme (but not to initiate new prosecutions) will continue even once the Investigation Phase has concluded.
57. In different situations, entering the Prosecution Phase will have a different impact on the intensity of the Office’s activity. For some situations, commencing the Prosecution Phase may entail that the Office will initially operate with equal (or, for a period, potentially even greater) intensity than before, in order to complete the trials of suspects who have already appeared before the Court, and to carry out the necessary supporting activities. Once the litigation in these cases has been completed, the Office’s operations will be more limited, and thus impose a lighter burden. For other situations, however, the pattern may be reversed—the Office’s activity may initially decrease while the Office awaits the necessary external conditions to execute arrest warrants, and then surge once those arrests have taken place. Yet other situations may exhibit a different pattern still. In all situations, the key to bringing the Prosecution Phase to an expeditious conclusion is State cooperation in executing warrants of arrest, and complying with requests for assistance by the Court.
58. In moving towards completion of a situation, the significance of shifting the emphasis from investigation to prosecution is illustrated by the completion strategies of the *ad hoc* international criminal tribunals. The UN Security Council requested the ICTY and ICTR to complete their investigations leading to the issue of new indictments by the end of 2004,<sup>46</sup> which they did<sup>47</sup>—but even

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<sup>46</sup> [UN Security Council, Resolution 1503 \(2003\), UN Doc. S/Res/1503 \(2003\), 28 August 2003](#), para. 7. See also [UN Security Council, Resolution 1534 \(2004\), UN Doc. S/Res/1534 \(2004\), 26 March 2004](#), para. 3.

<sup>47</sup> The ICTY Prosecutor issued her last indictments (for genocide, crimes against humanity, or war crimes) by the end of 2004, and the ICTR Prosecutor did so in 2005.



at that stage it was anticipated that trials and appeals would continue for a further five years. As it turned out, this period not only saw the issue of some of the tribunals' most significant judgments, but continued for longer—the ICTR was not closed until 2015, and the ICTY until 2017, and their successor institution (the International Residual Mechanism for Criminal Tribunals (“IRMCT”)) is still hearing some of the final cases in 2021.

59. The mandates of the IRMCT and the Residual Special Court for Sierra Leone (“RSCSL”) (the successor to the Special Court for Sierra Leone (“SCSL”)) illustrate the types of activities that must continue after the investigation phase is completed: prosecution of persons previously indicted;<sup>48</sup> apprehension of fugitives;<sup>49</sup> additional investigative activities, including the investigation and prosecution of offences against the administration of justice (necessary, for example, to maintain effective witness protection measures);<sup>50</sup> collateral and *ad hoc* forms of litigation, such as review proceedings;<sup>51</sup> monitoring of the service of sentences, and other material circumstances;<sup>52</sup> and cooperation and judicial assistance for cases prosecuted in other jurisdictions.<sup>53</sup>

#### 6.A. Completing the Prosecutorial Programme

60. Completion of the Prosecutorial Programme is the most significant component of the Prosecution Phase. It comprises: executing outstanding warrants of arrest; preserving and managing evidence for trial; conducting and completing legal proceedings before the Court against all suspects and accused persons; conducting additional investigative activities in support of the proceedings, as required; and assessing relevant national proceedings for cases under the Court’s jurisdiction.
61. Other activities in support of the Prosecutorial Programme, but which also remain ongoing even once the Prosecutorial Programme is completed, include: securing the administration of justice, as required; monitoring the situation for new or resurgent crimes within the jurisdiction of the Court; and other residual activities as described below.

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<sup>48</sup> [IRMCT Statute](#), arts. 1(2)-(3), 1(5), 16(1). *See also* [RSCSL Statute](#), arts. 1(2), 14(3).

<sup>49</sup> [UN Security Council Resolution 1966 \(2010\)](#), [UN Doc. S/Res/1966 \(2010\)](#), 22 December 2010, para. 10. *See further e.g. Letter dated 19 May 2020 from the President of the International Residual Mechanism for Criminal Tribunals addressed to the President of the Security Council*, [UN Doc. S/2020/416](#), 19 May 2020, Annex I: Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Carmel Agius, for the period from 16 November 2019 to 16 May 2020, paras. 95-98; Annex II: Progress Report of the Prosecutor of the International Residual Mechanism for Criminal Tribunals, Serge Brammertz, for the period from 16 November 2019 to 16 May 2020, paras. 31-38.

<sup>50</sup> [IRMCT Statute](#), arts. 1(4), 16(1). *See also* [RSCSL Statute](#), arts. 1(1), 14(3).

<sup>51</sup> [IRMCT Statute](#), art. 24. *See also* [RSCSL Statute](#), arts. 1(1), 22. Under the Rome Statute, the term used for this procedure is “revision”: *see* [Statute](#), art. 84.

<sup>52</sup> [IRMCT Statute](#), arts. 6(5)-(6), 25-26. *See also* [RSCSL Statute](#), arts. 1(1), 7, 23-24.

<sup>53</sup> [IRMCT Statute](#), art. 28. *See also* [RSCSL Statute](#), art. 1(1).

6.A.1. *Executing outstanding warrants of arrest*

62. The Office will actively pursue information leading to the arrest and surrender of all persons suspected of responsibility for crimes under articles 5 to *8bis* of the Statute, who are subject to a warrant issued by a Pre-Trial Chamber under article 58. The Office will vigorously seek the cooperation of States Parties, and other relevant entities, in this endeavour, which is vital to the success of the Court.
63. It is stressed that public notification that the Office has completed its investigation in a situation should not be mistaken for the Office's disengagement. To the contrary, completion of the Investigation Phase in a situation may potentially allow *greater* resources to be allocated to pursuing individuals wanted for arrest in cases arising from that situation. The Office will always consider measures to promote the arrest and surrender of fugitives to be a high-priority activity, and this may be especially so once the Investigation Phase of a situation has been completed.

6.A.2. *Preserving evidence, cooperation, and judicial assistance*

64. The Office will take appropriate measures to preserve evidence in relation to the cases in the Prosecutorial Programme, and potentially to assist proceedings undertaken by national authorities. This includes managing and maintaining evidence for cases awaiting the arrest or surrender of suspects, or cases in which the investigation has been suspended due to external circumstances.
65. The Office will seek to preserve evidence from the outset of an investigation, and if necessary—and with the voluntary cooperation of States Parties and other actors—even *before* the formal opening of an investigation, particularly when there is a risk of its degradation or loss.<sup>54</sup> But, having completed the Investigation Phase in a situation, the Office will ensure that the collected evidence is preserved so as to best ensure its future use in proceedings before the Court. Pending arrests, the Office will consider how best to mitigate any risks arising from the passage of time during which witnesses may disappear, disengage from the Office or be subject to interference, and evidence in physical or electronic form may degrade or deteriorate.
66. The Office will, as necessary, seek the assistance of the Pre-Trial Chamber in preserving evidence under article 56 of the Statute, and where possible will seek to identify multiple witnesses with similar testimony, or other

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<sup>54</sup> See [ICC-01/17-9-Red](#) (“Burundi Article 15(4) Decision”), para. 17. See also [Statute](#), art. 15(2); [ICC RPE](#), rule 47.



corroborating evidence. The Office will use technical and documentary evidence where possible.

67. Consistent with article 93(10), the Office may consult with national authorities or other competent regional or international investigative bodies—or potentially share evidence that it has collected—to promote genuine domestic proceedings, whether with respect to conduct constituting a crime under the jurisdiction of the Court, or other serious crimes under national law.<sup>55</sup>

*6.A.3. Concluding legal proceedings against all suspects and accused persons*

68. The Office will actively pursue and complete pre-trial, trial, appeal, and post-appeal proceedings for all persons who have appeared before the Court in answer to a summons or warrant issued under article 58. The Office will seek to ensure the expeditious hearing of these cases, provided that they remain admissible. If they become inadmissible, the Office will assess the relevant national proceedings, and provide appropriate cooperation, as explained further below.

69. In addition to prosecuting the cases arising from the situation, the Office will participate, as appropriate, in any collateral litigation which may arise from cases in the situation that it has previously prosecuted, or from the situation more generally. This may include participating in reparations proceedings under article 75 of the Statute, and responding to requests for compensation under article 85.

*6.A.4. Conducting additional investigative activity, as required*

70. While chambers of the Court have stressed that the Office is expected to have substantially completed its investigation of a case by the time of the confirmation of charges hearing, this does not mean the end of all investigative work associated with that case.

71. In particular, there may be circumstances when—notwithstanding the Office’s diligent efforts—important new evidence comes to light late in the day, and the Office will continue to investigate; for example, to strengthen the evidence or to amend the charges under articles 61(8) and (9) of the Statute. This may be particularly the case for criminality which is often under-reported, such as sexual and gender-based violence, or which depends on evidence of a nature that makes it difficult to acquire (such as certain technical evidence).<sup>56</sup> It can also happen when the Office is subsequently granted access to countries,

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<sup>55</sup> See also [Policy Paper on Case Selection and Prioritisation](#), paras. 7, 31; [Office Strategic Plan](#), goal 6.

<sup>56</sup> See [Policy Paper on Sexual and Gender-Based Crimes](#), paras. 49-51.

regions or locations relevant to the case, which had previously been inaccessible due to lack of cooperation or security.

72. More generally, the Office will also continue to investigate as required for the preparation and conduct of each trial, and potentially on appeal, especially with regard to developments in any case presented by the accused. Where significant time has elapsed since the investigation was completed, before the suspect is brought before the Court, the Office will investigate as necessary to ensure that it presents the best evidence available (for example, witnesses may be infirm or have passed away, and alternative witnesses may need to be located to give similar evidence).
73. The Office will also continue to collect any evidence material to a case within the Prosecutorial Programme, within its knowledge, where that evidence becomes available to it.

6.A.5. *Assessing (inadmissible) domestic cases under the Court's jurisdiction*

74. If a case has been ruled inadmissible at the Court, article 19(10) of the Statute provides that the Prosecutor may seek judicial review of the decision if fully satisfied of new facts which negate the basis of the ruling.
75. The Office will, therefore, evaluate the progress of domestic proceedings relating to inadmissible cases, in accordance with the standards in article 17, and engage with national authorities as appropriate, including under article 19(11).<sup>57</sup> The Office will also engage as appropriate with other stakeholders, including legal representatives for the victims, counsel for the accused, and others.
76. The Office will keep under review whether to make a request under article 19(10), following the procedure in rule 62, at least until relevant domestic proceedings are concluded by a final judgment in accordance with the applicable law. Thereafter, the Office will remain alert to any information suggesting that the completed proceedings were nonetheless conducted to shield the person concerned from responsibility, or were otherwise not conducted independently or impartially, as required by articles 17 and 20(3) of the Statute. The principle of *ne bis in idem* does not apply in these circumstances and consequently there is no bar to the resumption of proceedings before the Court.

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<sup>57</sup> See also [ICC-01/11-01/11-695 OA8](#) (“Gaddafi Admissibility Appeal Judgment”), paras. 58-63; [ICC-01/11-01/11-695-Anx OA8](#) (“Concurring Separate Opinion of Judges Eboe-Osuji and Bossa”), paras. 5-6.

77. The Office will apply these same principles in evaluating the progress of domestic proceedings concerning cases investigated by the Office, but which the Prosecutor has decided not to prosecute in accordance with article 53(2)(b) of the Statute. It will act similarly with regard to the cases deferred to a State with jurisdiction upon a request under article 18(2) of the Statute and which remain subject to possible review under article 18(3).

6.A.6. *Securing the administration of justice*

78. The Office will maintain the integrity of the cases in a situation against intentional efforts to interfere with the administration of justice. This activity remains ongoing throughout the Prosecution Phase, and continues as a residual activity even once the Prosecutorial Programme is completed.

79. Where warranted, the Office will commence investigations and/or prosecutions of alleged conduct contrary to article 70, bearing in mind the factors in rule 162(2).<sup>58</sup> This will be particularly where such allegations affect the conduct of active proceedings before the Court, but also where they concern evidence preserved for future trials or amount to retaliation against witnesses who have testified in past trials or other persons who may be victimised under article 70. In this regard, the Office welcomes cooperation from national authorities of States Parties, and will call for their active endeavours consistent with their obligations under article 70(4), and pursuant to article 70(2) and rule 167.

80. Where appropriate, the Office will consider the feasibility and effectiveness of practical measures alternative to proceedings under article 70 to prevent and deter attempts to interfere with the administration of justice. This may include use of the Court's internal administrative mechanisms, if applicable, or the issue of a direct warning accompanied by a deferred prosecution, conditional on compliance and non-repetition by the suspect. The Office will proceed to prosecute such cases where necessary, in accordance with rule 164.

6.A.7. *Monitoring new or resurgent criminality in the situation*

81. As previously explained, the Office will make a public notification that the Investigation Phase is complete once the Prosecutor has determined the Prosecutorial Programme for the situation.

82. However, and consistent with the Court's continuing exercise of jurisdiction over *all* article 5 crimes within the scope of a situation,<sup>59</sup> the Office will continue

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<sup>58</sup> See also [Policy Paper on Case Selection and Prioritisation](#), para. 54.

<sup>59</sup> The scope of the situation is usually described in broad terms by relevant geographic, temporal, material and/or personal parameters, and the Prosecutor may pursue all lines of inquiry or cases which are "sufficiently linked" to those parameters: see e.g. [Afghanistan Appeal Judgment](#), paras. 62, 79 (referring to the factors set out

to monitor relevant political, security, and other developments in the territory or territories within the parameters of the investigation to determine whether new or resurgent criminality is occurring. It will as necessary evaluate any such allegations to determine whether they fall within the Court’s jurisdiction, and within the parameters of the situation. As noted below, this activity remains ongoing throughout the Prosecution Phase, and continues as a residual activity even once the Prosecutorial Programme is completed.

83. If new allegations of crime fall within the scope of the situation, and they are of such a nature to warrant the intervention of the Court, the Prosecutor may re-open the Investigation Phase. This will be exceptional, given the considerations militating in favour of a clear and unequivocal conclusion of the investigation, as described above. This exercise of discretion is not without supervision—States and persons with standing may challenge the Court’s jurisdiction in any case arising from a re-opened investigation, consistent with the Statute.
84. If the Prosecutor is not satisfied that the criminal allegations fall within the scope of the situation, the Office will instead consider opening a new preliminary examination, applying the test in article 53(1). In such circumstances, the Office will not investigate the new criminal allegations without further authorisation from the Pre-Trial Chamber under article 15(4), or referral of the relevant allegations from a State Party or the UN Security Council.
85. Consistent with its established practice, the Office may as necessary issue warnings to contribute to preventing the imminent commission of further crimes.<sup>60</sup>

## **6.B. Residual activities**

86. Completing the Prosecutorial Programme will significantly diminish the Office’s activities in a situation but will not altogether extinguish them. To the contrary, while persons convicted by the Court continue to serve sentences, witnesses require protection, and the Court continues to exercise jurisdiction in the situation, the Office will conduct certain residual activities, as outlined in the following paragraphs.

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in [ICC-02/17-7-Red](#) (“Afghanistan Article 15(3) Request”), para. 1); [ICC-01/09-19-Corr](#) (“Kenya Article 15(4) Decision”), paras. 74-75; [ICC-01/15-12](#) (“Georgia Article 15(4) Decision”), para. 63; [Burundi Article 15\(4\) Decision](#), paras. 191-194; [ICC-01/04-01/10-451](#) (“Mbarushimana Decision”), para. 21. These parameters are initially defined by the entity triggering the preliminary examination (*i.e.*, the referring entity for referred situations, or the Prosecutor for *proprio motu* situations)—but they must be reasonable within the Court’s legal framework. In particular, the parameters must be defined in a way which is objective, impartial, and consistent with the object and purpose of the Statute: *see* [Policy Paper on Preliminary Examinations](#), para. 41; [Mbarushimana Decision](#), para. 27.

<sup>60</sup> *See* [Policy Paper on Preliminary Examinations](#), para. 106.

### 6.B.1. *Monitoring*

87. The Office has various ongoing obligations while the Court exercises its jurisdiction in a situation, whether as an independent organ of the Court or as a party to the Court's judicial proceedings. To carry out these duties, the Office will monitor relevant developments, and maintain effective communication and cooperation frameworks with relevant actors. In particular, once the Prosecutorial Programme is completed, and until the Court ceases to exercise jurisdiction, the Office will continue to scrutinise: the service of sentences by convicted persons; any alleged interference with the administration of justice; allegations of new or resurgent criminality in the situation; and information coming into the Office's possession which might be relevant to its obligations under article 84 of the Statute.

#### 6.B.1.a. Service of sentences, and other post-conviction measures

88. The service of sentences by convicted persons, governed by article 106(1), and the enforcement of fines and forfeitures, under article 109, are subject to the Court's supervision. These functions are entrusted to the Court's judicial organs, and not directly to the Office. However, as a party to the relevant judicial proceedings, the Office will monitor the situation, and report to the Court as appropriate, with particular regard to matters arising from articles 70, 104, 110, and 111 of the Statute.

89. The Office will monitor and supervise the continued cooperation of convicted persons subject to a plea agreement.<sup>61</sup>

90. While mindful that it is not a party to reparations proceedings under article 75, the Office will also track this process, and provide appropriate assistance where possible.

#### 6.B.1.b. Interference with the administration of justice

91. As noted above, the Office will continue to monitor the situation for any alleged interference with the administration of justice, and will if necessary investigate or prosecute well-founded allegations in accordance with the Statute. This follows in particular from article 70(c) and (e) of the Statute, read with article 68, which makes it a criminal offence to retaliate against a witness or official of the Court on account of their testimony or functions in accordance with the Statute. This policy underscores the Office's commitment to ensuring the continued effectiveness of the statutory protections afforded to witnesses and

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<sup>61</sup> See [ICC, Office of the Prosecutor, Guidelines for Agreements Regarding Admission of Guilt, October 2020](#), para. 21.

other persons potentially at risk due to their cooperation with the Court, even after the Court's proceedings in a case are concluded.

92. As appropriate, and where relevant in cooperation with other Organs of the Court, the Office will also monitor other circumstances relevant to the security of protected witnesses, or related matters. It may seek the cooperation of States Parties in addressing any relevant concerns.

#### 6.B.1.c. New or resurgent criminality in the situation

93. As noted above, the Office will continue to monitor the situation for allegations of new or resurgent criminality within the parameters of the situation to determine whether it is necessary to re-open the investigation. This monitoring will continue as long as the Court continues to exercise jurisdiction in the situation, and thus the discretion remains for the Prosecutor to re-open the Investigation Phase, where circumstances permit and require.

#### 6.B.1.d. New facts relevant to article 84 of the Statute

94. Article 84 of the Statute allows for the revision of a conviction or sentence where decisive new evidence comes to light after the conclusion of a final judgment of the Court, or in certain other prescribed circumstances. This is an important residual function, and safeguard against any potential miscarriage of justice.
95. The Office will continue to review material in its possession for potential disclosure in accordance with this provision. This will continue for such time as potentially required to give effect to the right of standing accorded to the accused person, their spouse, children, parents, or expressly designated agent, in accord with article 84(1). Where necessary, the Prosecutor may also act on a convicted person's behalf under article 84.
96. In circumstances where a convicted person or their representative brings a request under article 84 which the Prosecutor does not consider to be well founded, the Office will oppose the application, and may be required to conduct limited further investigative activities as necessary.

#### *6.B.2. Cooperation, judicial assistance, and archiving*

97. Consistent with article 93(10) of the Statute, the Office will remain available to national authorities or other competent regional or international investigative bodies, to consult or potentially to share evidence that it has collected, in order to promote genuine domestic proceedings, whether with respect to conduct

constituting a crime under the jurisdiction of the Court, or other serious crimes under national law.<sup>62</sup>

98. The Office will also put in place suitable measures to preserve and archive evidence and other information obtained in the course of the investigation, taking into account the possibility of declassifying confidential material where appropriate. Further guidance on this matter, taking into account general policies adopted by the Court as a whole,<sup>63</sup> may be promulgated by the Office in due course. Within this context, the Office will seek to address questions relating to long-term guardianship, custody, and accessibility of evidentiary archives on a case-by-case basis, mindful of the potential benefits that the availability of such materials may bring to victims, affected communities, and the Court's stakeholders more widely.

## 7. CONCLUDING THE OFFICE'S ACTIVITIES IN THE SITUATION

99. Once the Office has completed both the Investigation Phase and the Prosecution Phase, if any, its work in a situation is complete—although the activities of other Organs of the Court, in accordance with the Statute, may potentially continue.
100. Only when the statutory activities of all Organs of the Court are complete may the Court's exercise of jurisdiction in a situation be concluded, since it is no longer necessary that it is maintained. Any formalities associated with concluding the Court's exercise of jurisdiction in a situation are matters for the chambers of the Court and/or the Presidency.
101. Should allegations of new article 5 crimes arise after the Office has concluded its activities in a situation, the Prosecutor may consider them within the framework of article 15 of the Statute, or otherwise if the matter is referred to the Court by a State Party or the UN Security Council. In such circumstances, consistent with the Statute and the *Policy Paper on Preliminary Examinations*, allegations of new crimes could be considered in any new situation which meets the legal criteria for initiating an investigation.

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<sup>62</sup> See also [Policy Paper on Case Selection and Prioritisation](#), paras. 7, 31; [Office Strategic Plan](#), goal 6.

<sup>63</sup> See e.g. [ICC, Records Retention and Disposal Policy, ICC/AI/2015/002](#).

## 8. GLOSSARY OF KEY TERMS

<i>Case</i>	One or more specific incidents or episodes within a situation during which one or more crimes within the jurisdiction of the Court may have been committed. The scope of a case is defined by the suspected responsibility of one or more natural persons, for specific alleged conduct.
<i>Case Selection Document</i>	As defined in the Office's <i>Policy Paper on Case Selection and Prioritisation</i> , the confidential document which identifies in broad terms the potential cases across <i>all</i> situations under investigation by the Office at a given time. As such, it is primarily used as a tool to optimise the Office's investigative resources as a whole, for the purpose of case prioritisation, rather than to evaluate the sufficiency of the cases under investigation to complete a particular situation.
<i>Investigation Phase</i>	The initial phase of the Office's activity in a situation, once an investigation has been commenced under articles 15 or 53 of the Statute. It features an open-ended investigation with the objective of determining the truth with regard to cases selected for in-depth investigation. It is concluded when the Office has been granted warrants or summonses under article 58 for the totality of cases in that situation to be prosecuted ( <i>see</i> Prosecutorial Programme).
<i>Prioritisation/deprioritisation</i>	The process by which a case is deemed to be relatively more or less deserving of the allocation of resources, in comparison to all other cases currently under investigation by the Office. The priority afforded to a case will be determined on the basis of strategic and operational case prioritisation criteria set out in



the Office's *Policy Paper on Case Selection and Prioritisation*.

***Prosecution Phase***

The concluding phase of the Office's activity in a situation, which aims to conclude all legal proceedings relating to the cases in the Prosecutorial Programme, and any other residual activities arising from the Office's obligations in a particular case or in the situation as a whole. By this point, other than in exceptional circumstances, the Office will not initiate new prosecutions for article 5 crimes in the situation.

***Prosecutorial Programme***

The total docket of article 5 cases in a situation to be prosecuted, for which applications under article 58 of the Statute have been granted and suspects are required to appear before the Court. The number and variety of cases in the Prosecutorial Programme is informed by the Situation Strategy.

***Residual activities***

Core judicial and administrative tasks that must be performed by the Office following the completion of a case, in order to discharge its mandate under the Statute.

***Situation***

The parameters within which the Court exercises its jurisdiction, and which defines the outer scope of the investigation carried out by the Office. The parameters of a situation are usually described in broad terms by reference to relevant geographic, temporal, material and/or personal criteria. The Prosecutor may pursue all lines of inquiry which are "sufficiently linked" to those parameters.

***Situation Strategy***

The confidential internal document which sets out the lines of inquiry to be pursued before the investigation may be considered to be complete, in light of the overall aim to represent as much as possible the true extent of the criminality which has occurred within the

situation. While the Situation Strategy will be framed in preliminary form at the start of the investigation in a situation, it will be dynamically reviewed and adjusted as the investigation progresses, taking into consideration the evidence collected and other relevant factors.

### *Suspension*

The indefinite cessation of investigative activities in relation to a particular case, usually because external factors have come to prevent the Office from reaching a properly informed decision whether to prosecute. Suspension of a case entails the preservation of the necessary evidence and work product, and associated tasks, to allow the case to be re-prioritised in the future.

