



Cour  
Pénale  
Internationale  

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International  
Criminal  
Court

Le Bureau du Procureur  

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The Office of the Prosecutor



## Informe sobre Actividades de Examen Preliminares (2015)

el 12 de noviembre de 2015

## TCAPAZ DECONTENTS

I. INTRODUCCIÓN.....	#Pages [3]	2
II. SITUACIONES BAJO LA FASE 2 (PLURISIDICCIÓN DE LA MATERIA).....	#Pages [9]	7
	#Pages [8]	Iraq/REINO
UNIDO.....	#Pages [12]	7
Palestina.....	#Pages [19]	11
Ucrania.....	#Pages [27]	18 III.
SITUACIONES BAJO la FASE 3 (PLURISIDICCIÓN DE LA MATERIA).....	#Pages [27]	26
Afganistán.....	#Pages [27]	26
Colombia.....	#Pages [33]	32
Guinea.....	#Pages [41]	40
Nigeria.....	#Pages [41]	44 IV.
EXÁMENES PRELIMINARES COMPLETADOS.....	#Pages [45]	52
Georgia.....	#Pages [53]	52
Honduras.....	#Pages [53]	61
	#Pages [62]	

## I. INTRODUCCIÓN

1. La Oficina del Acusador ("Oficina" o "OTP") del Tribunal Criminal internacional ("Tribunal" o "ICC") es responsable de determinar si una situación encuentra los criterios legales establecidos por el Estatuto de Roma ("Estatuto") para garantizar la investigación por el Tribunal. Para este fin, la Oficina conduce un examen preliminar de todas las comunicaciones y situaciones que vienen a su atención basada en los criterios estatutarios y la información disponible.  
1
2. El examen preliminar de una situación por la Oficina puede ser iniciado sobre la base de: información de a) enviada por individuos o grupos, estados, organizaciones intergubernamentales o no gubernamentales; b) una remisión de un Partido estatal o el Consejo de Seguridad de las Naciones Unidas ("Consejo de Seguridad" o "Consejo"); o (c) una declaración alojada por un estado que acepta el ejercicio de jurisdicción por el Tribunal de acuerdo con el artículo 12 (3) del Estatuto de Roma.
3. Una vez que una situación es así identificada, los factores dispuestos en el artículo 53 (1) (a) - (c) del Estatuto establecen el marco jurídico para un examen preliminar. Provee esto, a fin de determinar si hay una base razonable para seguir con una investigación sobre la situación el Acusador debe considerar: jurisdicción (temporal, territorial o personal y material) admisibilidad de (complementariedad y gravedad); y los intereses de justicia. Jurisdicción de
4. está relacionado con si un delito dentro de la competencia del tribunal tiene sido o está siendo destinado. Requiere una evaluación de la jurisdicción temporal (i) (la fecha de la entrada en vigor del Estatuto, a saber el 1 de julio de 2002 adelante, la fecha de la entrada en vigor para un estado de la adhesión, fecha especificada en una remisión del Consejo de Seguridad, o en una declaración se alojaron de acuerdo con el artículo 12 (3)); (ii) jurisdicción territorial o personal, que implica que el delito ha sido o está siendo destinado en el territorio o por un ciudadano de un Partido estatal o un estado no Partido que ha alojado una declaración que acepta la competencia del tribunal, o proviene de una situación mandada por el Consejo de Seguridad; y (iii) jurisdicción de la materia como definido en el artículo 5 del Estatuto (genocidio; crímenes contra la humanidad; crímenes de guerra; y agresión).  
3
5. *Admisibilidad* comprende tanto la complementariedad como la gravedad.
6. *Complementariedad* implica un examen de la existencia del ciudadano relevante medidas con relación a los casos potenciales considerados para investigación por la Oficina. Esto será hecho teniendo en cuenta su estrategia prosecutorial de investigar y procesar a los más responsables del más serio

<sup>1</sup> Ver ICC-OTP Documental de política sobre Exámenes Preliminares, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 2680, 2681, 2682, 2683, 2684, 2685, 2686, 2687, 2688, 2689, 2690, 2691, 2692, 2693, 2694, 2695, 2696, 2697, 2698, 2699, 2700, 2701, 2702, 2703, 2704, 2705, 2706, 2707, 2708, 2709, 2710, 2711, 2712, 2713, 2714, 2715, 2716, 2717, 2718, 2719, 2720, 2721, 2722, 2723, 2724, 2725, 2726, 2727, 2728, 2729, 2730, 2731, 2732, 2733, 2734, 2735, 2736, 2737, 2738, 2739, 2740, 2741, 2742, 2743, 2744, 2745, 2746, 2747, 2748, 2749, 2750, 2751, 2752, 2753, 2754, 2755, 2756, 2757, 2758, 2759, 2760, 2761, 2762, 2763, 2764, 2765, 2766, 2767, 2768, 2769, 2770, 2771, 2772, 2773, 2774, 2775, 2776, 2777, 2778, 2779, 2780, 2781, 2782, 2783, 2784, 2785, 2786, 2787, 2788, 2789, 2790, 2791, 2792, 2793, 2794, 2795, 2796, 2797, 2798, 2799, 2800, 2801, 2802, 2803, 2804, 2805, 2806, 2807, 2808, 2809, 2810, 2811, 2812, 2813, 2814, 2815, 2816, 2817, 2818, 2819, 2820, 2821, 2822, 2823, 2824, 2825, 2826, 2827, 2828, 2829, 2830, 2831, 2832, 2833, 2834, 2835, 2836, 2837, 2838, 2839, 2840, 2841, 2842, 2843, 2844, 2845, 2846, 2847, 2848, 2849, 2850, 2851, 2852, 2853, 2854, 2855, 2856, 2857, 2858, 2859, 2860, 2861, 2862, 2863, 2864, 2865, 2866, 2867, 2868, 2869, 2870, 2871, 2872, 2873, 2874, 2875, 2876, 2877, 2878, 2879, 2880, 2881, 2882, 2883, 2884, 2885, 2886, 2887, 2888, 2889, 2890, 2891, 2892, 2893, 2894, 2895, 2896, 2897, 2898, 2899, 2900, 2901, 2902, 2903, 2904, 2905, 2906, 2907, 2908, 2909, 2910, 2911, 2912, 2913, 2914, 2915, 2916, 2917, 2918, 2919, 2920, 2921, 2922, 2923, 2924, 2925, 2926, 2927, 2928, 2929, 2930, 2931, 2932, 2933, 2934, 2935, 2936, 2937, 2938, 2939, 2940, 2941, 2942, 2943, 2944, 2945, 2946, 2947, 2948, 2949, 2950, 2951, 2952, 2953, 2954, 2955, 2956, 2957, 2958, 2959, 2960, 2961, 2962, 2963, 2964, 2965, 2966, 2967, 2968, 2969, 2970, 2971, 2972, 2973, 2974, 2975, 2976, 2977, 2978, 2979, 2980, 2981, 2982, 2983, 2984, 2985, 2986, 2987, 2988, 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, 3005, 3006, 3007, 3008, 3009, 3010, 3011, 3012, 3013, 3014, 3015, 3016, 3017, 3018, 3019, 3020, 3021, 3022, 3023, 3024, 3025, 3026, 3027, 3028, 3029, 3030, 3031, 3032, 3033, 3034, 3035, 3036, 3037, 3038, 3039, 3040, 3041, 3042, 3043, 3044, 3045, 3046, 3047, 3048, 3049, 3050, 3051, 3052, 3053, 3054, 3055, 3056, 3057, 3058, 3059, 3060, 3061, 3062, 3063, 3064, 3065, 3066, 3067, 3068, 3069, 3070, 3071, 3072, 3073, 3074, 3075, 3076, 3077, 3078, 3079, 3080, 3081, 3082, 3083, 3084, 3085, 3086, 3087, 3088, 3089, 3090, 3091, 3092, 3093, 3094, 3095, 3096, 3097, 3098, 3099, 3100, 3101, 3102, 3103, 3104, 3105, 3106, 3107, 3108, 3109, 3110, 3111, 3112, 3113, 3114, 3115, 3116, 3117, 3118, 3119, 3120, 3121, 3122, 3123, 3124, 3125, 3126, 3127, 3128, 3129, 3130, 3131, 3132, 3133, 3134, 3135, 3136, 3137, 3138, 3139, 3140, 3141, 3142, 3143, 3144, 3145, 3146, 3147, 3148, 3149, 3150, 3151, 3152, 3153, 3154, 3155, 3156, 3157, 3158, 3159, 3160, 3161, 3162, 3163, 3164, 3165, 3166, 3167, 3168, 3169, 3170, 3171, 3172, 3173, 3174, 3175, 3176, 3177, 3178, 3179, 3180, 3181, 3182, 3183, 3184, 3185, 3186, 3187, 3188, 3189, 3190, 3191, 3192, 3193, 3194, 3195, 3196, 3197, 3198, 3199, 3200, 3201, 3202, 3203, 3204, 3205, 3206, 3207, 3208, 3209, 3210, 3211, 3212, 3213, 3214, 3215, 3216, 3217, 3218, 3219, 3220, 3221, 3222, 3223, 3224, 3225, 3226, 3227, 3228, 3229, 3230, 3231, 3232, 3233, 3234, 3235, 3236, 3237, 3238, 3239, 3240, 3241, 3242, 3243, 3244, 3245, 3246, 3247, 3248, 3249, 3250, 3251, 3252, 3253, 3254, 3255, 3256, 3257, 3258, 3259, 3260, 3261, 3262, 3263, 3264, 3265, 3266, 3267, 3268, 3269, 3270, 3271, 3272, 3273, 3274, 3275, 3276, 3277, 3278, 3279, 3280, 3281, 3282, 3283, 3284, 3285, 3286, 3287, 3288, 3289, 3290, 3291, 3292, 3293, 3294, 3295, 3296, 3297, 3298, 3299, 3300, 3301, 3302, 3303, 3304, 3305, 3306, 3307, 3308, 3309, 3310, 3311, 3312, 3313, 3314, 3315, 3316, 3317, 3318, 3319, 3320, 3321, 3322, 3323, 3324, 3325, 3326, 3327, 3328, 3329, 3330, 3331, 3332, 3333, 3334, 3335, 3336, 3337, 3338, 3339, 3340, 3341, 3342, 3343, 3344, 3345, 3346, 3347, 3348, 3349, 3350, 3351, 3352, 3353, 3354, 3355, 3356, 3357, 3358, 3359, 3360, 3361, 3362, 3363, 3364, 3365, 3366, 3367, 3368, 3369, 3370, 3371, 3372, 3373, 3374, 3375, 3376, 3377, 3378, 3379, 3380, 3381, 3382, 3383, 3384, 3385, 3386, 3387, 3388, 3389, 3390, 3391, 3392, 3393, 3394, 3395, 3396, 3397, 3398, 3399, 3400, 3401, 3402, 3403, 3404, 3405, 3406, 3407, 3408, 3409, 3410, 3411, 3412, 3413, 3414, 3415, 3416, 3417, 3418, 3419, 3420, 3421, 3422, 3423, 3424, 3425, 3426, 3427, 3428, 3429, 3430, 3431, 3432, 3433, 3434, 3435, 3436, 3437, 3438, 3439, 3440, 3441, 3442, 3443, 3444, 3445, 3446, 3447, 3448, 3449, 3450, 3451, 3452, 3453, 3454, 3455, 3456, 3457, 3458, 3459, 3460, 3461, 3462, 3463, 3464, 3465, 3466, 3467, 3468, 3469, 3470, 3471, 3472, 3473, 3474, 3475, 3476, 3477, 3478, 3479, 3480, 3481, 3482, 3483, 3484, 3485, 3486, 3487, 3488, 3489, 3490, 3491, 3492, 3493, 3494, 3495, 3496, 3497, 3498, 3499, 3500, 3501, 3502, 3503, 3504, 3505, 3506, 3507, 3508, 3509, 3510, 3511, 3512, 3513, 3514, 3515, 3516, 3517, 3518, 3519, 3520, 3521, 3522, 3523, 3524, 3525, 3526, 3527, 3528, 3529, 3530, 3531, 3532, 3533, 3534, 3535, 3536, 3537, 3538, 3539, 3540, 3541, 3542, 3543, 3544, 3545, 3546, 3547, 3548, 3549, 3550, 3551, 3552, 3553, 3554, 3555, 3556, 3557, 3558, 3559, 3560, 3561, 3562, 3563, 3564, 3565, 3566, 3567, 3568, 3569, 3570, 3571, 3572, 3573, 3574, 3575, 3576, 3577, 3578, 3579, 3580, 3581, 3582, 3583, 3584, 3585, 3586, 3587, 3588, 3589, 3590, 3591, 3592, 3593, 3594, 3595, 3596, 3597, 3598, 3599, 3600, 3601, 3602, 3603, 3604, 3605, 3606, 3607, 3608, 3609, 3610, 3611, 3612, 3613, 3614, 3615, 3616, 3617, 3618, 3619, 3620, 3621, 3622, 3623, 3624, 3625, 3626, 3627, 3628, 3629, 3630, 3631, 3632, 3633, 3634, 3635, 3636, 3637, 3638, 3639, 3640, 3641, 3642, 3643, 3644, 3645, 3646, 3647, 3648, 3649, 3650, 3651, 3652, 3653, 3654, 3655, 3656, 3657, 3658, 3659, 3660, 3661, 3662, 3663, 3664, 3665, 3666, 3667, 3668, 3669, 3670, 3671, 3672, 3673, 3674, 3675, 3676, 3677, 3678, 3679, 3680, 3681, 3682, 3683, 3684, 3685, 3686, 3687, 3688, 3689, 3690, 3691, 3692, 3693, 3694, 3695, 3696, 3697, 3698, 3699, 3700, 3701, 3702, 3703, 3704, 3705, 3706, 3707, 3708, 3709, 3710, 3711, 3712, 3713, 3714, 3715, 3716, 3717, 3718, 3719, 3720, 3721, 3722, 3723, 3724, 3725, 3726, 3727, 3728, 3729, 3730, 3731, 3732, 3733, 3734, 3735, 3736, 3737, 3738, 3739, 3740, 3741, 3742, 3743, 3744, 3745, 3746, 3747, 3748, 3749, 3750, 3751, 3752, 3753, 3754, 3755, 3756, 3757, 3758, 3759, 3760, 3761, 3762, 3763, 3764, 3765, 3766, 3767, 3768, 3769, 3770, 3771, 3772, 3773, 3774, 3775, 3776, 3777, 3778, 3779, 3780, 3781, 3782, 3783, 3784, 3785, 3786, 3787, 3788, 3789, 3790, 3791, 3792, 3793, 3794, 3795, 3796, 3797, 3798, 3799, 3800, 3801, 3802, 3803, 3804, 3805, 3806, 3807, 3808, 3809, 3810, 3811, 3812, 3813, 3814, 3815, 3816, 3817, 3818, 3819, 3820, 3821, 3822, 3823, 3824, 3825, 3826, 3827, 3828, 3829, 3830, 3831, 3832, 3833, 3834, 3835, 3836, 3837, 3838, 3839, 3840, 3841, 3842, 3843, 3844, 3845, 3846, 3847, 3848, 3849, 3850, 3851, 3852, 3853, 3854, 3855, 3856, 3857, 3858, 3859, 3860, 3861, 3862, 3863, 3864, 3865, 3866, 3867, 3868, 3869, 3870, 3871, 3872, 3873, 3874, 3875, 3876, 3877, 3878, 3879, 3880, 3881, 3882, 3883, 3884, 3885, 3886, 3887, 3888, 3889, 3890, 3891, 3892, 3893, 3894, 3895, 3896, 3897, 3898, 3899, 3900, 3901, 3902, 3903, 3904, 3905, 3906, 3907, 3908, 3909, 3910, 3911, 3912, 3913, 3914, 3915, 3916, 3917, 3918, 3919, 3920, 3921, 3922, 3923, 3924, 3925, 3926, 3927, 3928, 3929, 3930, 3931, 3932, 3933, 3934, 3935, 3936, 3937, 3938, 3939, 394

crime. Where relevant domestic investigations or prosecutions exist, the Office<sup>4</sup> will assess their genuineness.

7. *Gravity* includes an assessment of the scale, nature, manner of commission of the crimes, and their impact, bearing in mind the potential cases that would likely arise from an investigation of 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 criteria 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 the relevant State becoming a Party to the Statute or lodging a declaration accepting the exercise of jurisdiction by the Court or through a referral by the Security Council.
10. As required by the Statute, the Office’s preliminary examination activities are 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 on crimes obtained pursuant to article 15. In all circumstances, the Office analyses the seriousness of the information received and may seek additional information from States, organs of the United Nations (“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. All information gathered is subjected to a fully independent, impartial and thorough analysis.
11. It should be recalled that the Office does not enjoy investigative powers at the preliminary examination stage. Its findings are therefore preliminary in nature and may be reconsidered in the light of new facts or evidence. The preliminary examination process is conducted on the basis of the facts and information available. The goal of this process is to reach a fully informed determination of whether there is a reasonable basis to proceed with an investigation. The ‘reasonable basis’ standard has been interpreted by Pre-Trial Chamber II (“PTC II”) to require that “there exists a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court

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<sup>4</sup> See OTP Strategic Plan – June 2012-2015, para. 22. In appropriate cases the OTP will expand its general prosecutorial strategy to encompass mid- or high-level perpetrators, or even particularly notorious low-level perpetrators, with a view to building cases up to reach those most responsible for the most serious crimes. The Office may also consider prosecuting lower-level perpetrators where their conduct has been particularly grave and has acquired extensive notoriety.

committed’.” In this context, PTC II has indicated that all of the information<sup>5</sup> need not necessarily “point towards only one conclusion.” This reflects the fact<sup>6</sup> that the reasonable basis standard under article 53(1)(a) “has a different object, a more limited scope, and serves a different purpose” than other higher evidentiary standards provided for in the Statute.

In particular, at the<sup>7</sup> preliminary examination stage, “the Prosecutor has limited powers which are not comparable to those provided for in article 54 of the Statute at the investigative stage” and the information available at such an early stage is “neither expected to be ‘comprehensive’ nor ‘conclusive’.”<sup>8</sup>

12. Before making a determination on whether to initiate an investigation, the Office also seeks to ensure that the States and other parties concerned have had the opportunity to provide the information they consider appropriate.
13. 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 collect information in order to establish a sufficient factual and legal basis to render a determination; or (iii) to initiate the investigation, subject to judicial review as appropriate.
14. 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 either to proceed or not proceed with investigations.
15. In order to distinguish those situations that warrant investigation from those that do not, and in order to manage the analysis of the factors set out in article 53(1), the Office has established a filtering process comprising four phases. While each phase focuses on a distinct statutory factor for analytical purposes, the Office applies a holistic approach throughout the preliminary examination process.
  - Phase 1 consists of an initial assessment of all information on alleged crimes received under article 15 (‘communications’). The purpose is to analyse the

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<sup>5</sup> Situation in the Republic of Kenya, “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya”, ICC-01/09-19-Corr, 31 March 2010, para. 35 (“Kenya Article 15 Decision”).

<sup>6</sup> Kenya Article 15 Decision, para. 34. In this respect, it is further noted that even the higher “reasonable grounds” standard for arrest warrant applications under article 58 does not require that the conclusion reached on the facts be the only possible or reasonable one. Nor does it require that the Prosecutor disprove any other reasonable conclusions. Rather, it is sufficient to prove that there is a reasonable conclusion alongside others (not necessarily supporting the same finding), which can be supported on the basis of the evidence and information available. Situation in Darfur, Sudan, “Judgment on the appeal of the Prosecutor against the ‘Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’”, ICC-02/05-01/09-OA, 3 February 2010, para. 33.

<sup>7</sup> Kenya Article 15 Decision, para. 32.

<sup>8</sup> Kenya Article 15 Decision, para. 27.

seriousness of information received, filter out information on crimes that are outside the jurisdiction of the Court and identify those that appear to fall within the jurisdiction of the Court.

- Phase 2, which represents the formal commencement of a preliminary examination, focuses on whether the preconditions to the exercise of jurisdiction under article 12 are satisfied and whether there is a reasonable basis to believe that the alleged crimes fall within the subject-matter jurisdiction of the Court. Phase 2 analysis entails a thorough factual and legal assessment of the alleged crimes committed in the situation at hand with a view to identifying potential cases falling within the jurisdiction of the Court. The Office may further gather information on relevant national proceedings if such information is available at this stage.
  - Phase 3 focuses on the admissibility of potential cases in terms of complementarity and gravity. In this phase, the Office will also continue to collect information on subject-matter jurisdiction, in particular when new or ongoing crimes are alleged to have been committed within the situation.
  - Phase 4 examines the interests of justice consideration in order to formulate the final recommendation to the Prosecutor on whether there is a reasonable basis to initiate an investigation.
16. In the course of its preliminary examination activities, the Office seeks to contribute to two overarching goals of the Rome Statute, the ending of impunity, by encouraging genuine national proceedings, and the prevention of crimes, thereby potentially obviating the need for the Court's intervention. Preliminary examination activities therefore constitute one of the most cost-effective ways for the Office to fulfil the Court's mission.

### **Summary of activities performed in 2015**

17. This report summarises the preliminary examination activities conducted by the Office between 1 November 2014 and 31 October 2015.
18. During the reporting period, the Office received 502 communications relating to article 15 of the Rome Statute of which 360 were manifestly outside the Court's jurisdiction; 42 warranted further analysis; 71 were linked to a situation already under analysis; and 29 were linked to an investigation or prosecution. The Office has received a total of 11,519 article 15 communications since July 2002.
19. During the reporting period, the Office completed two preliminary examinations, in relation to the situations in Honduras and Georgia. On 13 October 2015, the Prosecutor submitted a request to Pre-Trial Chamber I for authorisation to initiate an investigation into the situation in Georgia pursuant to article 15(3) of the Statute. With respect to the situation in Honduras, following a thorough legal and factual assessment of the situation, the Office concluded that it lacks a

reasonable basis to believe that crimes within the jurisdiction of the Court have been or are being committed. The preliminary examination of the situation in Honduras was closed accordingly. A report summarising the Office's findings with respect to jurisdictional matters was published on 28 October 2015.

20. The Office opened one new preliminary examination on the basis of an article 12(3) declaration lodged by the Government of Palestine on 1 January 2015 and extended the preliminary examination of the situation in Ukraine on the basis of a second article 12(3) declaration lodged by the Government of Ukraine on 8 September 2015.
21. The Office also continued its preliminary examinations of the situations in Afghanistan, Colombia, Guinea, Iraq/UK, and Nigeria.
22. Pursuant to the Office's policy on sexual and gender-based crimes, during the reporting period the Office conducted, where appropriate, a gender analysis of alleged crimes committed in various situations under preliminary examination and sought information on national investigations and prosecutions of sexual and gender-based crimes by relevant national authorities.

## II. SITUATIONS UNDER PHASE 2 (SUBJECT-MATTER JURISDICTION)

### IRAQ/UK

#### *Procedural History*

23. On 10 January 2014, the European Center for Constitutional and Human Rights ("ECCHR") together with Public Interest Lawyers ("PIL") submitted an article 15 communication alleging the responsibility of United Kingdom ("UK") officials for war crimes involving systematic detainee abuse in Iraq from 2003 until 2008.
24. On 13 May 2014, the Prosecutor announced that the preliminary examination of the situation in Iraq, previously concluded in 2006, was re-opened following submission of further information on alleged crimes within the 10 January 2014 communication.<sup>9</sup>
25. On 7 April 2015, the Government of the UK submitted a comprehensive response to the allegations contained in the Communication submitted by PIL and ECCHR on 10 January 2014.
26. On 29 September 2015, the PIL International together with the ECCHR submitted a second article 15 communication adding substantively to the allegations contained within the 10 January 2014 communication and expanding the list of alleged crimes in relation to new cases of alleged detainee abuses.
27. The senders also submitted additional information in support of the allegations on several occasions during the reporting period.

#### *Preliminary Jurisdictional Issues*

28. Iraq is not a State Party to the Rome Statute and has not lodged a declaration under article 12(3) accepting the jurisdiction of the Court. In accordance with article 12(2)(b) of the Statute, acts on the territory of a non-State Party will fall within the jurisdiction of the Court only when the person accused of the crime is a national of a State that has accepted jurisdiction.
29. The UK deposited its instrument of ratification to the Rome Statute on 4 October 2001. The ICC therefore has jurisdiction over war crimes, crimes against humanity and genocide committed on UK territory or by UK nationals as of 1 July 2002.

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<sup>9</sup> ICC-OTP, [Prosecutor of the International Criminal Court, Fatou Bensouda, re-opens the preliminary examination of the situation in Iraq](#), 13 May 2014.



## *Contextual Background*

30. On 20 March 2003, an armed conflict began between a US-led coalition which included the UK, and Iraqi armed forces, with two rounds of air strikes followed by deployment of ground troops. On 7 April 2003, UK forces took control of Basra, and on 9 April, US forces took control of Baghdad, although sporadic fighting continued. On 1 May 2003, the US declared an end to major combat operations.
31. On 8 May 2003, the US and UK Governments notified the President of the Security Council about their specific authorities, responsibilities, and obligations under applicable international law as occupying powers under unified command.<sup>10</sup>
32. On 30 June 2004, the occupation officially ended when an Interim Government of Iraq assumed full authority from the occupying powers. In a letter addressed to the President of the Security Council, the Interim Government of Iraq informed the Council about its consent to the presence of multinational forces and the close cooperation between these forces and the Government to establish security and stability in Iraq. Multinational forces withdrew from the country on 30 December 2008 at the expiration of the mandate provided for by UN Security Council Resolution 1790.<sup>13</sup>

## *Alleged Crimes*

33. Both the 10 January 2014 communication and the 29 September 2015 communication allege that UK Services personnel systematically abused hundreds of detainees in different UK-controlled facilities across the territory of Iraq over the whole period of their deployment from 2003 through 2008. The communications further submit that over two hundred cases of alleged unlawful killing in custody and in situations outside of custody in Iraq can be attributed to UK Services personnel. A total of 1268 cases of alleged ill-treatment and unlawful killings are documented in the 10 January 2014 and 29 September 2015 communications. The vast majority of these cases are compiled in the *Iraq Abuse Handbook* published by Public Interest Lawyers in 2015.
34. Crimes allegedly occurred in military detention facilities and other locations under the control of UK Services personnel in southern Iraq, including in temporary detention/processing facilities and in longer-term detention and internment facilities.

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<sup>10</sup> U.N. Doc. S/2003/538.

<sup>11</sup> U.N. Doc. S/RES/1546 (2004).

<sup>12</sup> U.N. Doc. S/RES/1546 (2004).

<sup>13</sup> U.N. Doc. S/RES/1790 (2007).

35. Torture and other forms of ill-treatment: The 10 January 2014 communication based allegations of ill-treatment on 85 cases brought before UK courts concerning 109 Iraqi detainees. These 109 victims were presented as a detailed sample of abuses allegedly committed on a large scale against at least 412 victims of ill-treatment in total. On 17 September 2014, the Office received information on 372 additional alleged individual cases of ill-treatment of detainees. The 29 September 2015 communication further alleges that the total number of individual cases of torture and other forms of ill-treatment amounts to 1009.
36. Killings: The combined communications allege a total number of 259 unlawful killings of civilians. This number includes at least 47 Iraqi persons who reportedly died in UK custody and others who were allegedly killed by UK Services personnel in situations outside of custody.
37. Denial of a Fair Trial: The 29 September 2015 communication submits that at least 88 detainees were entitled to the protection of the Geneva Convention III until such time as their status would be determined by a competent tribunal in accordance with article 5 of the Geneva Convention III. Further, according to the communication, out of these detainees, 66 were either in military uniform, inside a military depot, or were otherwise Iraqi soldiers who were entitled to the protections afforded by the Geneva Convention III.
38. Rape and Sexual Violence: The 29 September 2015 communication alleges 19 cases of rape in detention, including male anal rape, and 26 cases of other forms of sexual violence. The alleged sexual violence reportedly involved *inter alia* the following acts: touching of genitalia, forced masturbation, forced or simulated sexual acts (including oral sex), and forced exposure to sexual acts by individual soldiers or between soldiers.

### ***OTP Activities***

39. The Office has been conducting a thorough factual and legal assessment of the information received in order to establish whether there is a reasonable basis to believe that the alleged crimes fall within the subject-matter jurisdiction of the Court. In parallel, the Office has undertaken a comprehensive evaluation of all relevant sources, in accordance with article 15(2) of the Statute. In addition to the information on alleged crimes, during the reporting period, the Office has also received information on relevant national proceedings conducted by the UK authorities.
40. The Office has maintained close contact with relevant stakeholders, including the senders of the article 15 communications and the UK government, both of whom have provided full cooperation with the Office's preliminary examination activities during the reporting period. In particular, the Office held a number of meetings with the information providers and the UK authorities, both in the UK and at the seat of the Court, in order to verify the seriousness of the information in its possession, discuss the progress of the Office's preliminary examination

process, address methodological issues as well as to solicit updates and provision of additional relevant information. The Office has given due consideration to all views and submissions conveyed to it during the course of this process, strictly guided by the requirements of the Rome Statute in the independent and impartial exercise of its mandate.

41. During the reporting period, the Office has completed its review of the 1,146 witness statements submitted by the claimants, and related documentation, amounting to over 5,000 pages of material in total. Having regard to the volume of the information received, a robust and consistent methodology of data inputting was developed to enable the Office to conduct its own assessment of the relevant material.
42. In parallel, the Office has been conducting a thorough evaluation of the reliability of sources and credibility of information received on alleged crimes. In this regard, on 1-2 October 2015, the Office conducted a mission to PIL's offices in Birmingham for the purposes of screening the supporting material relating to the claims.
43. While the preliminary examination is focused on subject-matter jurisdiction issues at this stage, the Office has also received and considered information on the progress of ongoing relevant national proceedings. The Office is in particular mindful that domestic proceedings involving a judicial review of the Iraq Historic Allegations Team ("IHAT") activities are taking place in the UK. Nonetheless, an admissibility assessment of such proceedings by the Office would be premature at this stage of the analysis. Similarly, the Office is not examining at this stage the alleged criminal responsibility of any person named in the communications received.

### *Conclusion and Next Steps*

44. The Office is currently engaged in processing and analysing the vast amount of material provided by the communication senders while conducting a thorough evaluation of the reliability of the sources and the credibility of the information received. In conducting its assessment of whether the alleged crimes fall within the jurisdiction of the Court and were committed on a large scale or pursuant to a plan or policy, the Office will take into account the findings of the relevant investigations conducted by the UK authorities as well as the outcomes of judicial review proceedings in the High Court of Justice of England and Wales.

## PALESTINE

### *Procedural History*

45. On 1 January 2015, the Government of Palestine lodged a declaration under article 12(3) of the Statute accepting the jurisdiction of the Court with respect to alleged crimes committed “in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014.”

On 2 January 2015, the Government of Palestine deposited an instrument<sup>14</sup> of accession to the Statute with the UN Secretary-General (“UNSG”).<sup>15</sup> The Rome Statute entered into force for Palestine on 1 April 2015, pursuant to article 126 of the Statute.

46. On 16 January 2015, the Prosecutor opened a preliminary examination of the situation in Palestine, in accordance with Regulation 25(1)(c) of the Regulations of the Office and the Office’s policy on preliminary examinations.<sup>16</sup>

47. The Office has received 66 communications pursuant to article 15 in relation to crimes alleged to have been committed since 13 June 2014.

### *Preliminary Jurisdictional Issues*

48. The Office previously conducted a preliminary examination of the situation in Palestine upon receipt of a purported article 12(3) declaration lodged by the Palestinian National Authority on 22 January 2009. The Office carefully considered all legal arguments submitted to it and, after thorough analysis and public consultations, concluded in April 2012 that Palestine’s status at the UN as an “observer entity” was determinative, since entry into the Rome Statute system is through the UNSG, who acts as treaty depositary. The Palestinian Authority’s “observer entity,” as opposed to “non-member State” status at the UN, at the time meant that it could not sign or ratify the Statute. As Palestine could not join the Rome Statute at that time, the Office concluded that it could also not lodge an article 12(3) declaration bringing itself within the ambit of the treaty, as it had sought to do.

49. On 29 November 2012, the UN General Assembly (“UNGA”) adopted Resolution 67/19 granting Palestine “non-member observer State” status in the UN by majority: 138 votes in favour, nine votes against and 41 abstentions. The Office examined the legal implications of this development for its own purposes and concluded, on the basis of its previous extensive analysis of and consultations on the issues, that, while the change in status did not retroactively validate the previously invalid 2009 declaration lodged without the necessary

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<sup>14</sup> [Declaration lodged by the Government of Palestine under Article 12\(3\) of the Statute, 31 December 2014.](#)

<sup>15</sup> [UNSG Depositary Notification of Palestine’s Accession to Rome Statute, C.N.13.2015.TREATIES-XVIII.10, 6 January 2015.](#)

<sup>16</sup> See ICC-OTP, Policy Paper on Preliminary Examinations, November 2013, para. 76.

standing, Palestine would be able to accept the jurisdiction of the Court from 29 November 2012 onward, pursuant to articles 12 and 125 of the Rome Statute. The Rome Statute is open to accession by “all States,” with the UNSG acting as depositary of instruments of accession.

50. On 2 January 2015, Palestine deposited its instrument of accession to the Rome Statute with the UNSG. As outlined in the Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, “the Secretary-General, in discharging his functions as a depositary of a convention with an ‘all States’ clause, will follow the practice of the [General] Assembly in implementing such a clause [...]” The practice of the UNGA “is to be found in unequivocal indications from the Assembly that it considers a particular entity to be a State.”

<sup>17</sup> In accordance with this practice and specifically UNGA Resolution 67/19, on 6 January 2015, the UNSG, acting in his capacity as depositary, accepted Palestine's accession to the Rome Statute, and Palestine became the 123<sup>rd</sup> State Party to the ICC. It was welcomed as such by the President of the Assembly of States Parties to the Rome Statute.<sup>18</sup>

51. Likewise, on 7 January 2015, President Mahmoud Abbas was informed by the ICC Registrar of the latter's acceptance of the article 12(3) declaration lodged by the Government of Palestine on 1 January 2015, and that the declaration had been transmitted to the Prosecutor for her consideration.<sup>19</sup>
52. The Office considers that, since Palestine was granted observer State status in the UN by the UNGA, it must be considered a “State” for the purposes of accession to the Rome Statute (in accordance with the “all States” formula). Additionally, as the Office has previously stated publicly, the term “State” employed in article 12(3) of the Rome Statute should be interpreted in the same manner as the term “State” used in article 12(1). Thus, a State that may accede to the Rome Statute may also lodge a declaration under article 12(3).
53. For the Office, the focus of the inquiry into Palestine's ability to accede to the Rome Statute has consistently been the question of Palestine's *status* at the UN. The UNGA Resolution 67/19 is therefore determinative of Palestine's ability to accede to the Statute pursuant to article 125, and equally, its ability to lodge an article 12(3) declaration.
54. The Office's conclusions with respect to the validity of the article 12(3) declaration lodged by the State of Palestine on 1 January 2015 are without prejudice to any future determinations by the Office regarding the exercise of territorial or personal jurisdiction by the Court.

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<sup>17</sup> UN Office of Legal Affairs, Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, U.N. Doc. ST/LEG/7/Rev.1, paras. 81-83.

<sup>18</sup> ICC-ASP, [The State of Palestine accedes to the Rome Statute](#), ICC-ASP-20150107-PR1082, 7 January 2015. See also ICC-ASP, [Official Records of the Resumed Thirteenth Session](#), The Hague, 24-25 June 2015, para. 16 and Annexes I and II.

<sup>19</sup> [Letter from ICC Registrar to President Mahmoud Abbas, 7 January 2015](#).

## *Contextual Background*

### *Gaza*

55. The conflict in Gaza stems as far back as Israel's occupation of the territory beginning in 1967 and its subsequent conflicts with the organised groups operating in Gaza. In 2005, Israel unilaterally disengaged from Gaza, and shortly thereafter Hamas gained control over the Gaza Strip, following its electoral victory in 2006.
56. In response to increasing rocket attacks, in 2007, Israel declared that Hamas had turned Gaza into "hostile territory" and took sanctions against Hamas, imposing restrictions on the passage of certain goods to Gaza and the movement of people to and from Gaza. In January 2009, Israel also imposed a naval blockade of the Gaza Strip, as an extension of the previously imposed land crossing restrictions. Two major military operations were also launched in Gaza by Israel in 2008 and 2012.
57. Despite occasional ceasefires, periodic rocket attacks by Hamas and affiliated armed groups, military incursions into Gaza by Israel, and clashes between the two sides continued in the subsequent years.
58. On 12 June 2014, three Israeli teenagers were kidnapped and murdered in the West Bank. In response, Israel launched an extensive search and arrest operation named "Brother's Keeper," which lasted until the bodies of the three Israeli teenagers were found on 30 June. On 7 July 2014, the Israel Defense Forces ("IDF") commenced operation "Protective Edge" in the Gaza Strip, with the stated objectives of destroying Hamas and other armed groups' military infrastructure, particularly with respect to their rockets and mortar launching capabilities, and neutralising their network of cross-border assault tunnels. After an initial phase focused on air strikes, Israel launched a ground operation on 17 July 2014, followed by a third phase of the operation between 5-26 August characterised by alternating ceasefires and aerial strikes.

### *West Bank and East Jerusalem*

59. As a result of the Six-Day War in 1967, Israel acquired control over the West Bank and East Jerusalem. Shortly thereafter, Israel adopted laws and orders effectively extending Israeli law, jurisdiction and administration over East Jerusalem and purporting to unite West and East Jerusalem. In 1980, the Knesset passed a law declaring Jerusalem, complete and united, the capital of Israel.
60. Pursuant to the Oslo Accords, the Palestine Liberation Organisation was recognised as the official representative of the Palestinian people in 1993, and Israel transferred security and civilian control of certain Palestinian-

populated areas of West Bank to the Palestinian Authority ("PA"), which was formed in 1994 as the interim governing body of such areas. Under the accords, West Bank is divided into three administrative divisions (Area A – full civil and security control by the PA; Area B – Palestinian civil control and joint Israeli-Palestinian security control; Area C – full civil and security control by Israel). The accords also provided a framework to facilitate negotiations between the two parties for a peaceful resolution of the conflict.

61. To date, no final peace agreement has been reached, and remaining unresolved issues between the parties include determination of borders, security, water rights, control of Jerusalem, Israeli settlements in the West Bank, refugees, and Palestinian freedom of movement.

### *Alleged Crimes*

62. The following summary of alleged crimes is preliminary in nature and is based on publicly available reports as well as information received by the Office. The descriptions below are without prejudice to the identification of any further alleged crimes which may be made by the Office in the course of its analysis, and should not be taken as indicative of or implying any particular legal qualifications or factual determinations regarding the alleged conduct.

### *Gaza conflict*

63. The conflict in Gaza between 7 July and 26 August 2014 allegedly caused a high number of civilian casualties. According to multiple sources, over 2,000 Palestinians, including over 1,000 civilians, and over 70 Israelis, including six civilians, were reportedly killed, and over 11,000 Palestinians and 1,600 Israelis were reportedly injured as a result of the hostilities.

<sup>20</sup>

These casualty figures include both civilians and combatants on both sides. Casualty figures reported by various sources differ on the number of overall casualties, the proportion of civilians to combatant casualties, and the proportion of civilian casualties that were incidental to the targeting of military objectives. All parties are alleged to have committed war crimes during the 51-day conflict.

64. *Alleged crimes by Palestinian armed groups:* According to UNDSS, Palestinian armed groups allegedly indiscriminately fired 4,881 rockets and 1,753 mortars towards Israel. At least 243 of these projectiles were intercepted by Israel's Iron Dome missile defence system, while at least 31 fell short and landed within the Gaza Strip. Six civilians, including one child, were

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<sup>20</sup> See for example UN HRC, Report of independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, A/HRC/29/52, 24 June 2015, paras. 20-21 (based on data compiled by UN OCHA Protection Cluster, 31 May 2015, Palestinian Ministry of Health, Israeli Internal Security Agency and Israeli Ministry of Foreign Affairs).

reportedly killed in Israel as a result of these attacks, and many more sustained injuries or were displaced. It is alleged that rocket attacks that were aimed at Israel but fell short also caused civilian casualties and damage to civilian objects within the Gaza strip.

65. Attacks by Palestinian armed groups were allegedly launched from civilian buildings and compounds, including schools, hospitals and buildings dedicated to religion. Civilian buildings and facilities were also allegedly used for other military purposes, such as storing munitions.
66. Additionally, between 21 and 23 August 2014, over 20 Palestinians accused of collaborating with Israel were reportedly summarily executed by gunmen alleged to have been acting on instructions from Hamas. The majority of them were allegedly taken from Katiba Prison in Gaza City and summarily executed, while the others were allegedly executed in other locations.
67. Alleged crimes by IDF: On the Israeli side, IDF attacks were allegedly directed against civilian residential buildings and infrastructure, UN facilities, hospitals, paramedics and ambulances, and further included allegedly indiscriminate attacks in densely populated civilian neighbourhoods. In particular, according to UN Office for the Coordination of Humanitarian Affairs ("OCHA"), intense artillery shelling and aerial strikes alongside fierce ground fighting in Ash Shuja'iyyeh neighbourhood between 19-21 July 2014, allegedly resulted in hundreds of civilian fatalities, including many women and children. Widespread destruction of civilian buildings and infrastructure was also reported. Dozens of civilian casualties were also reported during several incidents of artillery fire on the town of Khuza'a, east of Khan Yunis, between 23-25 July 2014. Between 1-3 August 2015, massive bombardment of the Rafah area reportedly caused more than one hundred civilian casualties.

#### *West Bank and East Jerusalem*

68. Successive Israeli governments have allegedly led and directly participated in the planning, construction, development, consolidation and/or encouragement of settlements on West Bank territory occupied during the Six-Day War (June 1967). This settlement activity is allegedly created and maintained through deliberate implementation of a carefully conceived network of policies, laws, and physical measures. Such activities are alleged to include the planning and authorisation of settlement expansions or new construction at existing settlements; the confiscation and appropriation of land; demolitions of Palestinian property and eviction of residents; and a scheme of subsidies and incentives to encourage migration to the settlements and to boost their economic development.
69. In 2014, the Israeli government reportedly destroyed 590 Palestinian-owned structures in the West Bank, including East Jerusalem, displacing 1,177



people, according to figures published by OCHA. An additional 77 Palestinians, over half of them children, were reportedly displaced in January 2015 due to the demolition of 42 Palestinian-owned structures in the Ramallah, Jerusalem, Jericho and Hebron governorates by Israeli authorities. OCHA reported that during the first half of 2015, the Israeli Civil Administration demolished 245 Palestinian structures. In August 2015, 228 Palestinians, including 124 minors, were allegedly displaced as a result of demolitions in 29 villages and communities, primarily in the Jordan Valley and the Ma'ale Adumim area.

70. With respect to settlement-related activities, the Office has also received information related to acts of violence allegedly committed by settlers against Palestinian communities.
71. Allegations concerning ill-treatment of Palestinians arrested, detained and prosecuted in the Israeli military court system have also been reported, including, for example, allegations of systematic and institutionalised ill-treatment of Palestinian children in relation to their arrest, interrogation, and detention for alleged security offences in the West Bank.

#### *OTP Activities*

72. Since the initiation of the preliminary examination in January 2015, the Office has focused on gathering relevant information from reliable sources. This includes publicly available information, information from individuals or groups, States, and intergovernmental or non-governmental organisations, including from the UN system. The Office gathered a large volume of information in the public domain and has taken steps to analyse and verify the seriousness of information received, including through a rigorous and independent source evaluation process.
73. The Office received and responded to a large number of queries from potential information providers, regarding procedures and modalities for the submission of information pursuant to article 15 of the Statute. Subject to any future legal process, the confidentiality of all information submitted under article 15 is protected, as is the identity of the information provider, unless the provider chooses to waive that confidentiality.
74. The Office also sought the cooperation of key information providers such as the Governments of Palestine and Israel. On 25 June 2015, the Palestinian Minister of Foreign Affairs, H.E. Riad al-Maliki, submitted a communication pursuant to article 15 of the Statute regarding alleged crimes committed in Palestine. Further information was submitted by Palestine on 3 August and 30 October 2015.

75. On 9 July 2015, the Government of Israel announced that it had decided to open a dialogue with the Office over the preliminary examination.<sup>21</sup> In May 2015, the Government of Israel published a report on factual and legal aspects of the 2014 Gaza Conflict.

### *Conclusion and Next Steps*

76. The Office is in the process of conducting a thorough factual and legal assessment of the information available, in order to establish whether there is a reasonable basis to believe that crimes within the jurisdiction of the Court have been or are being committed. In accordance with its policy on preliminary examination, the Office may gather available information on relevant national proceedings at this stage of analysis. Any decision on whether there is a reasonable basis to proceed with an investigation will be based on an independent and impartial analysis of all reliable information available to the Office, in application of the legal criteria set forth in article 53 of the Statute.

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<sup>21</sup> Haaretz, [Exclusive: Israel Decides to Open Dialogue With ICC Over Gaza Preliminary Examination](#), 09 July 2015.

## UKRAINE

### *Procedural History*

77. On 17 April 2014, the Government of Ukraine lodged a declaration under article 12(3) of the Statute accepting the jurisdiction of the Court over alleged crimes committed on its territory from 21 November 2013 to 22 February 2014.
78. On 25 April 2014, in accordance with the Office's policy on preliminary examinations,<sup>23</sup> the Prosecutor opened a preliminary examination of the situation in Ukraine.<sup>24</sup>
79. On 8 September 2015, the Government of Ukraine lodged a second declaration under article 12(3) of the Statute accepting the exercise of jurisdiction by the ICC in relation to alleged crimes committed on its territory from 20 February 2014 onwards, with no end date.<sup>25</sup> On 29 September, the Prosecutor [announced](#), based on Ukraine's second declaration under article 12(3), the extension of the preliminary examination of the situation in Ukraine to include alleged crimes occurring after 20 February 2014.
80. The Office has received more than 20 communications under article 15 of the Statute in relation to crimes alleged to have been committed during the period between 21 November 2013 and 22 February 2014. In addition, over 35 communications were received under article 15, concerning allegations of crimes committed after 20 February 2014.

### *Preliminary Jurisdictional Issues*

81. Ukraine is not a State Party to the Rome Statute. However, pursuant to the two article 12(3) declarations lodged by the Government of Ukraine on 17 April 2014 and 8 September 2015, respectively, the Court may exercise jurisdiction over Rome Statute crimes committed on the territory of Ukraine from 21 November 2013 onwards. Ukraine's acceptance of the exercise of jurisdiction by the ICC was made, in both cases, on the basis of declarations of the Verkhovna Rada of Ukraine (the Parliament of Ukraine), urging acceptance of the exercise of jurisdiction by the Court in respect of crimes allegedly committed during the relevant periods.

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<sup>22</sup> [Declaration by Ukraine lodged under Article 12\(3\) of the Statute, 9 April 2014](#); [Note Verbale of the Acting Minister for Foreign Affairs of Ukraine, Mr. Andrii Deshchytsia, 16 April 2014](#).

<sup>23</sup> See ICC-OTP, Policy Paper on Preliminary Examinations, November 2013, para. 76.

<sup>24</sup> [The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination in Ukraine, 25 April 2014](#).

<sup>25</sup> [Declaration by Ukraine lodged under article 12\(3\) of the Statute, 8 September 2015](#).

<sup>26</sup> [Declaration of the Verkhovna Rada of Ukraine \(English Translation\), 25 February 2014](#); [Declaration by Ukraine lodged under article 12\(3\) of the Statute, 8 September 2015](#) (with Declaration of the Verkhovna Rada in annex).

## *Contextual Background*

82. In 1991, Ukraine became an independent state, following the break-up of the Soviet Union. At the time of the start of the events that are the subject of the Office's preliminary examination, the democratically-elected Government of Ukraine was dominated by the Party of Regions, which was also the party of then-President Viktor Yanukovich. The Maidan protests were prompted by the decision of the Ukrainian Government on 21 November 2013 not to sign an Association Agreement with the European Union. This decision was resented by pro-Europe Ukrainians, who perceived it as a move closer to Russia. The same day, mass protests began in Independence Square, Kyiv.
83. Over the following weeks, protesters continued to occupy Independence Square and confrontations between the demonstrators and security forces increased. The protest movement continued to grow in strength and reportedly diversified to include individuals and groups who were generally dissatisfied with the Yanukovich Government and demanded his removal from office. Following the adoption on 16 January 2014 by the Ukrainian Parliament of laws which imposed tighter restrictions on freedom of expression, assembly and association, relations between the protesters and the authorities deteriorated further. As of 23 January 2014, protests also grew in other Ukrainian cities including, for example, in Kharkiv, Luhansk, Donetsk, Rivne, Ivano-Frankivsk, Dnipropetrovsk, Vinnytsya, Zhytomyr, Zaporizhzhya, Lviv, Odessa, Poltava, Sumy, Ternopil, Cherkasy and Sevastopol. In some cities, protesters forcibly occupied state buildings.
84. Violent clashes in the context of the Maidan protests continued over the following weeks, resulting in injuries both to protesters and members of the security forces, and the death of some protesters. On the evening of 18 February 2014, the authorities reportedly initiated an operation to try to clear the square of protesters. The violence escalated sharply from that time onwards, causing scores of deaths and hundreds of injuries within the following three days. On 21 February 2014, under European Union mediation, President Yanukovich and opposition representatives agreed on a new government and fixed Presidential elections for May 2014. However, on 22 February 2014, the Ukrainian Parliament voted to remove President Yanukovich, who left the country that day.
85. On 27 February 2014 armed individuals seized control of government buildings in Simferopol, the capital of the autonomous Republic of Crimea. Soon after, in March 2014, the integration of Crimea and the city of Sevastopol into the Russian Federation was announced following a referendum that was declared invalid by the interim Ukrainian Government, led by Arseniy Yatsenyuk, and by a majority of states of the UN General Assembly.
86. During April and May 2014 pro-Russian demonstrators seized government buildings in the eastern Ukrainian oblasts (provinces) of Donetsk and Luhansk.

Following referenda that were deemed illegitimate by the Ukrainian Government, the “Donetsk and Luhansk People’s Republics” made declarations claiming independence from Ukraine. On 15 April 2014 the Ukrainian Government announced the start of an “anti-terrorist operation” and armed forces were deployed to the regions of Donetsk and Luhansk, (collectively referred to as “Donbas”).

87. On 25 May 2014 Petro Poroshenko was elected President and legislative elections were held in October 2014 in most of Ukraine, though not in 27 constituencies in Crimea, Sevastopol, Donetsk and Luhansk.
88. Fighting of varying degrees of intensity has since persisted in Donbas between Ukrainian Government forces and separatist groups. An attempted ceasefire agreement, the Minsk Protocol, was signed on 5 September 2014 but violations of the ceasefire reportedly persisted on both sides.

#### *Legal Analysis of Maidan Events (21 November 2013 to 22 February 2014)*

89. There is no information suggesting the existence of an armed conflict in Ukraine during the period from 21 November 2013 to 22 February 2014. Accordingly, the Office’s analysis of this specific period has focused on whether the crimes allegedly committed during the Maidan protest events may amount to crimes against humanity under article 7 of the Statute. The following summarises the Office’s preliminary analysis in this regard.
90. As described previously, between 21 November 2013 and 22 February 2014, mass protests against the Yanukovych Government and civil unrest took place in Kyiv and other regions throughout Ukraine. The information available indicates that in response to these events, Ukrainian security forces frequently used excessive and indiscriminate force against protesters and other individuals, such as journalists covering the events. Such violence and ill-treatment reportedly occurred primarily in the context of violent clashes and confrontations with protesters as well as during and immediately after the apprehension of protest participants. In addition, the information available indicates that in this period, protesters and other individuals participating in or associated with the Maidan movement were also often violently targeted by pro-government groups of civilians – often referred to as “titushky” – who coordinated with, and provided support to, law enforcement during public order operations. The information available supports the conclusion that during the course of the three-month period, protest participants and other individuals were killed as well as subjected to ill-treatment and other conduct (including excessive use of force causing serious injuries) which would constitute other inhumane acts and, in a few cases, torture, by members of law enforcement and titushky. Additionally, the information available indicates that in carrying out these acts, security forces and titushky targeted individuals on the basis of their actual or perceived political affiliation (namely their opposition to the Yanukovych Government), and thus such conduct may also constitute persecution under the Statute.

91. Based on the information available, it can be concluded that such violent acts allegedly carried out by the members of the Ukrainian security forces and associated unidentified private individuals (titushky) were directed against a civilian population within the meaning of article 7 of the Statute. In particular, these acts were committed against civilians participating in, or otherwise associated with, the Maidan protest movement in Kyiv as well as other regions in Ukraine. This collective comprised a large number of individuals, generally linked by their dissatisfaction with and opposition to the Yanukovych administration and its policies.
92. Additionally, the acts of violence do not appear to be a mere aggregate of random acts, but rather evidence a pattern of behaviour suggesting that such acts formed part of a campaign or operation against the Maidan protest movement. In this respect, it is noted that the alleged acts committed share common features in terms of their characteristics and nature (including in relation to a pattern of excessive and indiscriminate use of force, such as during public order operations, and the means used, such as batons, firearms and other special means), the population targeted (Maidan protesters and other civilians in the vicinity of the protests), the alleged perpetrators (state security forces – most often the Berkut and Interior Troops – and titushky), and locations (mainly the sites of demonstrations, predominantly in the city centre of Kyiv and to a lesser extent in other regions and cities in Ukraine, such as Cherkasy and Dnipropetrovsk).
93. While some of the acts of violence appear to have been extemporaneous and incidental to the situation of unrest, the information available tends to indicate that the commission of violence against protesters, including the excessive use of force causing death and serious injury as well as other forms of ill-treatment, was actively promoted or encouraged by the Ukrainian authorities. In this respect, the Office considers that it is possible to infer the existence of a state policy to attack the civilian population, within the meaning of article 7(2)(a), from the available information concerning: coordination of, and cooperation with, anti-Maidan citizen volunteers (i.e., titushky, or groups of unidentified private individuals) who violently targeted protesters; the consistent failure of state authorities (at multiple levels) to take any meaningful or effective action to prevent or deter the repetition of incidents of violence (including to genuinely pursue or investigate complaints or otherwise take measures to manage or hold accountable the law enforcement units alleged to be responsible for serious ill-treatment of protest participants); and the apparent efforts to conceal or cover up alleged crimes. These considerations, viewed together with the overall political situation and repetition of the conduct, suggest that the violent acts of security forces and titushky were carried out pursuant to or in furtherance of a state policy aimed at

94. Accordingly, based on the Office's preliminary analysis, it appears that the acts of violence allegedly committed by the Ukrainian authorities between 30 November 2013 and 20 February 2014 could constitute an "attack directed against a civilian population" under article 7(2)(a) of the Statute.
95. However, in order to fall within the scope of article 7 of the Statute, any such attack must be widespread or systematic in character. As noted by Trial Chamber II, it is the widespread or systematic nature of the attack which distinguishes, and is the hallmark of, crimes against humanity.<sup>27</sup> The Office considers that there is limited information at this stage to support the conclusion that the alleged attack carried out in the context of the Maidan protests was either widespread or systematic.
96. With respect to widespread, the Office observes in particular that the alleged attack was limited in its intensity and geographic scope. Although demonstrations were held throughout the three-month period and involved large numbers of protesters, the incidents during which the alleged crimes took place occurred more sporadically. In this regard, it is noted that the term "alleged crimes" as used in this context refers only to such conduct that amounts to one of the acts enumerated under article 7(1) of the Statute. In particular, rather than a daily occurrence, the alleged crimes were committed almost exclusively in the context of a limited number of clashes and confrontations between security forces and protesters that occurred on the following specific dates: 30 November 2013, 1 December 2013, 10-11 December 2013, 19-24 January 2014, and 18-20 February 2014. In addition, although the protests took place in regions throughout Ukraine, the majority of the alleged crimes occurred in a limited geographic area within the city of Kyiv, namely confined to the specific locations where the protests were held, particularly in and around Maidan Nezalezhnosti (Independence Square).
97. With respect to the killings, the information available reflects that at least 75 civilians were killed by security forces and *titushky* between 22 January and 20 February 2014 – the majority of such killings specifically occurring during the period from 18 to 20 February 2014. Between 30 November 2013 and 20 February 2014, at least 700 civilians participating in, or otherwise connected to, the Maidan protests were also injured by state security forces and *titushky* – although it appears that only a portion of these injuries may amount to an underlying act under article 7 of the Statute, while the rest were less serious in nature. In the particular facts of the present situation, based on the information available, it is questionable whether these acts, even taking into account their cumulative effect, reflect the requirements of article 7 of the Statute.
98. Several other considerations potentially undermine the conclusion that the attack was systematic in nature. While the conduct of security forces often evidenced a similar pattern of excessive use of force against protesters, the

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<sup>27</sup> ICC-01/04-01/07, para.1111.

alleged crimes do not necessarily appear to have been carried out in a consistent, organised manner or on a regular or continual basis.

99. For example, although certain state authorities may have encouraged the ill-treatment of protesters by law enforcement as a further means to suppress and undermine the protest movement, it appears that the alleged crimes occurred in an infrequent and often more reactive manner, determined by the different circumstances as events developed during the demonstrations. In particular, the information available indicates that most of the alleged crimes occurred in the context of an excessive, violent response by security forces to perceived threats to public order and their own security. The information available also does not appear to demonstrate a consistent pattern of Ukrainian security forces seeking out and attacking or violently targeting participants in the Maidan protest movement outside of the demonstration-related context. These observations suggest that the alleged acts were rather a reaction to events, however unjustified and disproportionate, and aimed to limit the protests rather than being part of a deliberate, coordinated plan of violence methodically carried out against the protest movement.

100. Additionally, during the three-month period of demonstrations and unrest, the episodes of violence leading to the alleged crimes occurred only sporadically, in limited instances. The Office observes in this respect that while the protests occurred continuously for around 90 days in Kyiv and other areas of Ukraine, most of the alleged crimes were concentrated in a dozen or so days (specifically one day in November, three days in December, five to six days at the end of January and three days in late February) and primarily in Kyiv, where the most significant violent confrontations with protesters occurred. It is further noted that some protests proceeded without significant interference and resort to violence by security forces, including some within Kyiv as well as many which occurred in other regions in Ukraine during the relevant period. From this perspective, the incidents in which alleged crimes occurred appear to follow an irregular pattern of occurrence.

101. While these considerations tend to indicate that the alleged crimes do not amount to crimes against humanity, the Office notes that serious human rights abuses did occur and its preliminary assessment of the Maidan events may be reconsidered in light of new facts or information which may be relevant to the assessment of the widespread or systematic nature of the alleged attack.

### *OTP Activities*

102. During the reporting period, the Office conducted three missions to Ukraine to hold meetings with Ukrainian authorities and representatives of civil society organisations. The first took place from 9 to 14 November 2014, the second from 25 to 27 March 2015, and the third from 26 to 29 October 2015. During these missions the Office discussed with its interlocutors the preliminary examination process, the Rome Statute criteria that guide the Office's analysis, cooperation



aspects, and the process of information verification that is undertaken by the Office at this stage.

103. Throughout the reporting period, the Office further engaged with Ukrainian authorities, civil society organisations and other relevant international actors on several occasions, and held meetings in this regard both at the seat of the Court in The Hague and in other places.

104. The Office continued to gather and analyse available information from a wide range of reliable sources in order to assess the existence of a reasonable basis to believe that the alleged crimes within the context of the Maidan events may amount to crimes against humanity under the Rome Statute.

105. In March 2015, the Office requested, and subsequently received, additional information from the Government of Ukraine on specific issues related to the preliminary examination. The Office also received a detailed joint communication regarding alleged crimes in the context of the Maidan events from some 13 civil society organisations. Furthermore, the Office analysed information publicly available from several non-governmental and intergovernmental organisations.

106. Following the lodging of a new article 12(3) declaration by Ukraine on 8 September 2015, the Office considered whether events after 20 February 2014 – including any relevant crimes arising out of events in Crimea and the fighting in eastern Ukraine – constitute a new situation or a continuation of the situation already under preliminary examination. Unlike previous instances where a similar issue has arisen (i.e., in relation to the jurisdictional scope of referred situations), the characterisation of the parameters of the Ukraine situation, at this stage, is primarily relevant in terms of the Office's working methodology during the preliminary examination process. In considering this issue, the Office nevertheless found it useful to take into account factors that have been considered by the Court in determining whether a sufficient nexus exists between the scope of a situation and crimes spanning different time-periods, locations and periods of intensity.

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107. The Office observed that the relevant events which have occurred in Ukraine since late-February 2014 are in some ways distinct from the Maidan events, including with respect to the contextual elements of crimes in question, the geographic scope, and the principal actors involved. However, from a broader perspective, and taking into account the evolution of the events since November 2013 and the inter-related political dynamics underlying them, the post-February 2014 developments in Crimea and Donbas, and any alleged crimes committed in such context, may at this stage be viewed as a continuation of the situation of crisis which commenced with the Maidan protest movement.

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<sup>28</sup> See ICC-02/11-36, para.14; ICC-02/11-14-Corr, paras.178-179; ICC-01/04-01/10-451, paras.40-42; ICC-02/05-01/09-94, para.8; ICC-02/05-01/09-3, para.113.

108. Based on these considerations, the Office therefore decided on 29 September 2015 to extend the temporal scope of the existing preliminary examination to include any alleged crimes committed on the territory of Ukraine from 20 February 2014 onwards. This decision, however, does not prejudice the ability of the Prosecutor to make separate determinations on specific conduct or incidents within the relevant period, as appropriate.

### *Conclusion and Next Steps*

109. The Office will continue to engage with the Ukrainian authorities, civil society and other relevant stakeholders on all matters relevant to the preliminary examination of the situation in Ukraine.

110. With regard specifically to events occurring after 20 February 2014, the Office will continue to gather information from reliable sources in order to conduct a thorough factual and legal analysis of alleged crimes committed across Ukraine, including in Crimea and the Donbas, to determine whether the criteria established by the Rome Statute for the opening of an investigation are met. In this context, the Office will also closely follow the progress and findings of the national and international investigations into the shooting down of the Malaysia Airlines MH17 aircraft in July 2014. Any alleged crimes occurring in the future in the context of the same situation could also be included in the Office's analysis.

### III. SITUATIONS UNDER PHASE 3 (ADMISSIBILITY)

#### AFGHANISTAN

##### *Procedural History*

111. The Office has received 112 communications pursuant to article 15 in relation to the situation in Afghanistan. The preliminary examination of the situation in Afghanistan was made public in 2007.

##### *Preliminary Jurisdictional Issues*

112. Afghanistan deposited its instrument of ratification to the Rome Statute on 10 February 2003. The ICC therefore has jurisdiction over Rome Statute crimes committed on the territory of Afghanistan or by its nationals from 1 May 2003 onwards.

##### *Contextual Background*

113. After the attacks of 11 September 2001, in Washington D.C. and New York City, a United States-led coalition launched air strikes and ground operations in Afghanistan against the Taliban, suspected of harbouring Osama Bin Laden. The Taliban were ousted from power by the end of the year.

In December 2001, under the auspices of the UN, an interim governing authority was established in Afghanistan. In May-June 2002, a new transitional Afghan government regained sovereignty, but hostilities continued in certain areas of the country, mainly in the south. Subsequently, the UN Security Council in Resolution 1386 established an International Security Assistance Force ("ISAF"), which later came under NATO command.

114. The Taliban and other armed groups have rebuilt their influence since 2003, particularly in the south and east of Afghanistan. Since at least May 2005, the armed conflict has intensified in the southern and eastern provinces of Afghanistan between organised armed groups, most notably the Taliban, and the Afghan and international military forces. The conflict has further spread to the north and west of Afghanistan, including the areas surrounding Kabul. Today Government of Afghanistan forces combat armed groups which mainly include the Taliban, the Haqqani Network, and Hezb-e-Islami Gulbuddin ("HIG"). International forces deployed in support of the Government of Afghanistan ended their combat missions in December 2014, although such forces remain in reduced numbers, primarily in a training, advisory and assistance role.

### *Subject-Matter Jurisdiction*

115. The situation in Afghanistan is usually considered as an armed conflict of a non-international character between the Afghan Government, supported by the ISAF and US forces on the one hand (pro-government forces), and non-state armed groups, particularly the Taliban, on the other (anti-government groups). The participation of international forces does not change the non-international character of the conflict since these forces became involved in support of the Afghan Transitional Administration established on 19 June 2002.

116. As detailed in previous reporting, the Office has found that the information<sup>29</sup> available provides a reasonable basis to believe that crimes under articles 7 and 8 of the Statute have been committed in the situation in Afghanistan, including crimes against humanity of murder under article 7(1)(a), and imprisonment or other severe deprivation of physical liberty under article 7(1)(e); murder under article 8(2)(c)(i); cruel treatment under article 8(2)(c)(i); outrages upon personal dignity under article 8(2)(c)(ii); the passing of sentences and carrying out of executions without previous judgement pronounced by a regularly constituted court under article 8(2)(c)(iv); intentionally directing attacks against the civilian population or against individual civilians under article 8(2)(e)(i); intentionally directing attacks against personnel, material, units or vehicles involved in a humanitarian assistance under article 8(2)(e)(iii); intentionally directing attacks against buildings dedicated to education, cultural objects, places of worship and similar institutions under article 8(2)(e)(iv); and treacherously killing or wounding a combatant advers

117. The Office has continued to gather and receive information on alleged crimes committed during the reporting period, including alleged killings, abductions, torture and other forms of ill-treatment, attacks on civilian objects, the use of human shields, the imposition of punishments by parallel judicial structures, and the recruitment and use of children to participate actively in hostilities.

118. According to the United Nations Assistance Mission in Afghanistan ("UNAMA"), over 23,000 civilians have been killed in the conflict in Afghanistan in the period between January 2007 and June 2015. Members of anti-government armed groups were responsible for at least 15,000 civilian deaths, while pro-government forces were responsible for at least 3,500 civilian deaths. A number of reported killings remain unattributed.

119. Following a trend first observed in 2014, ground engagements and crossfire between anti-government armed groups and pro-government forces were the leading cause of civilian casualties during the reporting period, whereas in previous years, the majority of civilians were killed and injured by improvised explosive devices. UNAMA reported that during the first half of 2015, the Taliban claimed responsibility for 239 incidents that caused 1,002 civilian

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<sup>29</sup> See ICC-OTP, Report on Preliminary Examination Activities 2013 (November 2013).

casualties (259 killed and 743 injured). UNAMA also documented significant increases in the number of targeted killings and abductions by anti-government armed groups during the reporting period. Since 2011, more than 1,000 women and 2,300 children have reportedly been killed as a result of the armed conflict.

120. During the Taliban's take-over of Kunduz city and the subsequent fighting (28 September – 13 October 2015), alleged war crimes of murder, rape and destruction of property by the Taliban and affiliated anti-government armed groups were reported by multiple sources. On 3 October 2015, aerial

bombardment of the *Médecins Sans Frontières* ("MSF") hospital in Kunduz by the US armed forces allegedly killed 22 people, including 12 MSF staff members and 10 patients, and partially destroyed the hospital. It is a war crime under article 8(2)(e)(iv) of the Rome Statute to "[i]ntentionally directing attacks against (...) hospitals and places where the sick and wounded are collected, provided they are not military objectives." The incident is reportedly under investigation by NATO, by the US Department of Defense, and jointly by the Afghan and US governments. Alleged crimes committed in Kunduz during the September-October 2015 events will be further examined by the Office.

### *Admissibility Assessment*

121. Following a thorough legal assessment of the information available, the Office is analysing the admissibility of potential cases arising from the conduct of three separate groups of alleged perpetrators: members of the Taliban and their affiliates (anti-government groups); members of Afghan government forces; and members of international forces. Further information on the alleged conduct related to each potential case is detailed in previous reporting.

<sup>30</sup> The selection of potential cases identified herein is without prejudice to any further findings on subject-matter jurisdiction to be made pursuant to additional information that the Office could receive in the future. In addition, the legal characterisation of these cases and any alleged crimes may be revisited at a later stage.

122. A brief summary of information relevant to the admissibility analysis of each potential case is included below. The information included is a limited sample of the information under analysis by the Office, and should not be taken as indicative of or implying any particular conclusions on admissibility, the analysis of which remains ongoing.

### *Anti-Government Groups*

123. Complementarity: Members of anti-government armed groups captured and detained in the context of the armed conflict are generally accused of committing crimes against the State codified in the 1976 Penal Code, the 1987 Penal Law on Crimes against Internal and External Security, and the 2008 Law on Combat against Terrorist Offences. Although the Code of Criminal Procedure permits *in*

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<sup>30</sup> See ICC-OTP, Report on Preliminary Examination Activities 2014 (November 2014).

*absentia* proceedings, this provision has not been utilised in the case of members of anti-government armed groups that have evaded capture, including those who appear to bear the greatest responsibility for the most serious crimes.

124. The Afghan parliament passed a general amnesty in 2007 which was signed into law by the President in 2009. The “Law on Public Amnesty and National Stability” provides legal immunity to all belligerent parties including “those individuals and groups who are still in opposition to the Islamic State of Afghanistan,” without any temporal limitation to the law’s application or any exception for international crimes. Prior to the passage of the amnesty law, only one high-ranking member of an armed group (Abdullah Shah, a commander of Ittehad-e Islami), had been put on trial, for crimes committed in 1992-93.

125. *Gravity*: Between 2007 to 2014, approximately 37,000 civilian casualties (14,700 deaths and 22,300 injuries) have been attributed to anti-government armed groups, primarily from their use of improvised explosive devices. Many alleged crimes were committed with the aim to terrorise and spread fear among the local civilian population, as a means of control. The alleged campaign of targeted killings of politicians, government workers, tribal and community leaders, and religious scholars, has had a severe impact on communities, including the denial of humanitarian assistance and basic government services such as health care. The Office is also assessing the impact of the alleged crimes on the lives of women and girls, including but not limited to their right of access

#### *Afghan Government Forces*

126. *Complementarity*: The Government has instituted only a limited number of proceedings against alleged perpetrators. Despite the scale of alleged ill-treatment in NDS and ANP detention facilities (an estimated 35-51% of conflict-related detainees according to the findings of UNAMA’s detention monitoring program), information provided by the Government of Afghanistan to UNAMA indicates that to date the Government has prosecuted only two NDS officials (in relation to one incident), and no ANP officials, for this conduct. The Government has not provided any information on national proceedings to the Office, despite multiple requests for such information from the Office since 2008, including two requests submitted during the reporting period.

127. *Gravity*: There are an estimated 5,000 conflict-related detainees in Afghan government custody. The manner in which the crimes are alleged to have been committed appears particularly gruesome and was seemingly calculated to inflict maximum pain. The alleged crimes had severe short-term and long-term impacts on detainees’ physical and mental health, including permanent physical injuries.

128. Complementarity: US civilian and military courts can exercise their jurisdiction over conduct that would constitute a crime within ICC subject-matter jurisdiction (i.e. war crimes, crimes against humanity, and genocide), when committed abroad by US nationals. The Department of Justice conducted a two-year preliminary review (from August 2009 to June 2011) of allegations related to the abuse of detainees in the custody of the Central Intelligence Agency ("CIA"), which reviewed allegations regarding the ill-treatment of 101 detainees. As a result of the review, the Attorney-General conducted full criminal investigations into the cases of two detainees who had died in CIA custody. Both investigations were completed in August 2012 and did not result in any indictments or prosecutions. The Attorney-General explained that "the Department declined prosecution because the admissible evidence would not be sufficient to obtain and sustain a conviction beyond a reasonable doubt."

129. The United States Government indicated to the Committee against Torture that the Department of Defense has conducted "thousands of investigations since 2001, and prosecuted or disciplined hundreds of service members for mistreatment of detainees and other misconduct." At least 13 senior-level investigations have been conducted by the Department of Defense in response to allegations of detainee abuse.

These investigations were administrative <sup>31</sup>

enquiries rather than criminal proceedings, although some of them had the power to make recommendations relating to individual accountability within their mandates. Some of these reports concluded that abuses resulted from unclear policy guidance, insufficient training, and command failures, but disciplinary measures recommended for commanders did not go higher than the brigade commander level.

130. Gravity: The Office is assessing information relevant to determine the scale of the alleged abuse, as well as whether the identified war crimes were committed as part of a plan or policy. The information available suggests that victims were deliberately subjected to physical and psychological violence, and that crimes were allegedly committed with particular cruelty and in a manner that debased the basic human dignity of the victims. The infliction of "enhanced interrogation techniques," applied cumulatively and in combination with each other over a prolonged period of time, would have caused serious physical and psychological injury to the victims. Some victims reportedly exhibited psychological and behavioural issues, including hallucinations, paranoia, insomnia, and attempts at self-harm and self-mutilation.

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<sup>31</sup> Office of the Inspector General of the Department of Defense, "Review of DoD-Directed Investigations of Detainee Abuse," 25 August 2006.

## *OTP Activities*

131. During the reporting period, the Office continued to gather and verify information on alleged crimes committed in the situation in Afghanistan, and to refine its identification of potential cases for the purposes of assessing admissibility. The Office also continued to gather information needed to enable a more thorough evaluation of the reliability of sources of information on alleged crimes. The Office gathered and analysed information relevant to reach determinations on the admissibility of potential cases likely to arise from an investigation of the situation.

132. The Office further engaged with relevant States and other information providers with a view to assess alleged crimes and national proceedings, and took steps to address information gaps in relation to *inter alia* the attribution of incidents, the military or civilian character of a target, the number of civilian and/or military casualties resulting from a given incident, and the existence of national proceedings.

133. In October 2015, the Office carried out a security assessment mission to Kabul. To date, however, the Office's planned mission for admissibility assessment purposes has been frustrated by the non-permissive situation in the country.

## *Conclusion and Next Steps*

134. While continuing to analyse allegations of crimes committed in Afghanistan, the Office will finalise its analysis of admissibility issues, including by gathering outstanding information on the existence and genuineness of relevant national proceedings, taking into consideration the Office's policy to focus on those most responsible for the most serious crimes.

135. The Office will also continue to gather information relevant to the assessment of whether there are substantial reasons to believe that an investigation would not serve the interests of justice prior to making a decision on whether to seek authorisation from the Pre-Trial Chamber to open such an investigation of the situation in Afghanistan.



## COLOMBIA

### *Procedural History*

136. The OTP has received 173 communications pursuant to article 15 of the Rome Statute in relation to the situation in Colombia. The situation in Colombia has been under preliminary examination since June 2004.

137. In November 2012, the OTP published an Interim Report on the Situation in Colombia, which summarised the analysis undertaken in the course of the preliminary examination including the Office's findings with respect to jurisdiction and admissibility, and identified five areas of continuing focus: (i) follow-up on the Legal Framework for Peace and other relevant legislative developments, as well as jurisdictional aspects relating to the emergence of "new illegal armed groups"; (ii) proceedings relating to the promotion and expansion of paramilitary groups; (iii) proceedings relating to forced displacement; (iv) proceedings relating to sexual crimes; and, (v) proceedings relating to killings

and enforced disappearances, commonly known as *false positives* cases.

### *Preliminary Jurisdictional Issues*

138. Colombia deposited its instrument of ratification to the Rome Statute on 5 August 2002. The ICC therefore has jurisdiction over Rome Statute crimes committed on the territory of Colombia or by its nationals from 1 November 2002 onwards. However, the Court may exercise jurisdiction over war crimes committed since 1 November 2009 only, in accordance with Colombia's declaration pursuant to article 124 of the Rome Statute.

### *Contextual Background*

139. Colombia has experienced over 50 years of violent conflict between government forces, paramilitary armed groups and rebel armed groups, as well as amongst those groups. The most significant actors include the *Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo* ("FARC-EP") and the *Ejército de Liberación Nacional* ("ELN"); paramilitary armed groups; and the national armed forces and the police. In recent decades, the Government of Colombia has held several peace talks and negotiations with various armed groups, with differing degrees of success.

140. In October 2012, peace talks between the Government of Colombia and the FARC-EP began in Oslo, and then moved to Havana where they remain on-going. The negotiations have focused on six agenda items, including: (1) rural development and agrarian reform; (2) political participation; (3) disarmament and demobilisation; (4) drug trafficking; (5) victims (human rights of victims and truth-telling); (6) implementation and verification mechanisms. In June 2014, after reaching preliminary agreements on rural development and agrarian reform, political participation and drug trafficking, the Government of Colombia

and the FARC-EP issued a joint statement of principles framing the discussion of agenda item on victims upon the principles of recognition of victims, recognition of responsibility, establishment of the truth, and satisfaction of victims' rights, *inter alia*.

141. On 04 June 2015, the Government of Colombia and the FARC-EP agreed to create a Commission for the Clarification of the Truth, Coexistence and Non-repetition. On 23 September 2015, the Government of Colombia and the FARC-EP issued a joint communiqué announcing their agreement on the creation of "Special Jurisdiction for Peace." Both mechanisms are to be implemented after a final agreement is signed.

### ***Subject-Matter Jurisdiction***

142. As detailed in previous reporting,<sup>32</sup> the Office has determined that the information available provides a reasonable basis to believe that crimes against humanity under article 7 of the Statute have been committed in the situation in Colombia by different actors, since 1 November 2002, including murder under article 7(1)(a); forcible transfer of population under article 7(1)(d); imprisonment or other severe deprivation of physical liberty under article 7(1)(e); torture under article 7(1)(f); rape and other forms of sexual violence under article 7(1)(g) of the Rome Statute.

143. There is also a reasonable basis to believe that war crimes under article 8 of the Statute have been committed in the situation in Colombia since 1 November 2009, including murder under article 8(2)(c)(i); attacks against civilians under article 8(2)(e)(i); torture and cruel treatment under article 8(2)(c)(i); outrages upon personal dignity under article 8(2)(c)(ii); taking of hostages under article 8(2)(c)(iii); rape and other forms of sexual violence under article 8(2)(e)(vi); and conscripting, enlisting and using children to participate actively in hostilities under article 8(2)(e)(vii) of the Rome Statute.

144. During the reporting period, the Office continued to gather and receive information on alleged crimes, including killings and enforced disappearances allegedly committed by members of the Colombian armed forces, known as *false positives* cases. The review and analysis of a vast number of judgments rendered by different courts of Colombia against mid- and low-level members of the Colombian armed forces, support previous OTP findings relating to the planning and commission of the alleged crimes, and further corroborates allegations that there was constant pressure on several brigades to "produce results." The information available indicates that at least within brigades 4, 11 and mobile brigade 15, the perpetrators followed a similar *modus operandi* to satisfy pressure demands as well as to obtain personal benefits and recognition. According to the UN Office of the High Commissioner of Human Rights, the

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<sup>32</sup> See [ICC-OTP, Situation in Colombia: Interim Report \(November 2012\)](#).

number of victims of *false positives* cases from 2002 to 2010 could be as high as 5,000.

145. The Office will continue its analysis of information relating to the level of planning and organisation within other military units as well as information received relating to possible command responsibility of high ranking officials at higher levels within the military hierarchy.

### *Admissibility Assessment*

146. During the reporting period, the Office received 130 judgments from the Government of Colombia relating to members of the armed forces, FARC-EP and ELN armed groups, members of paramilitary armed groups and their sponsors. The Office continued to analyse the relevance of these decisions for the preliminary examination, including whether they concern conduct falling under the temporal and subject-matter jurisdiction of the Court and whether they focus on those most responsible for the most serious crimes committed.

147. In addition to judgments against members of armed groups relevant to the preliminary examination, the Colombian authorities submitted 296 judgments against members of successor paramilitary armed groups ( *bandas criminales*, commonly known as “BACRIM”).

#### *(i) Relevant developments relating to the peace process*

148. The Office has taken note of the agreement between the Government of Colombia and the FARC-EP on the creation of a Special Jurisdiction for Peace in Colombia. The jurisdiction, made up of Chambers of Justice and a Tribunal for Peace, would have the duty “to end impunity, obtain the truth, contribute to the reparation of the victims and prosecute and sanction those responsible of grave crimes committed during the armed conflict, particularly the most serious and representative ones, ensuring non-repetition.”

<sup>33</sup> The Office noted that the agreement excludes the granting of amnesties or pardons for crimes against humanity, genocide and serious war crimes. Instead, the taking of hostages, torture, forced displacement, enforced disappearances, extrajudicial executions and sexual violence are to be investigated and prosecuted by the Special Jurisdiction for Peace.

149. The Special Jurisdiction for Peace would have jurisdiction over members of the FARC-EP, State agents and those who, directly or indirectly, have participated in the internal armed conflict. The agreement foresees a procedure for those who recognise responsibility for their crimes and another one for those who do not do it or do it belatedly. Sanctions for those who recognise responsibility for their crimes would range between five and eight years of “effective restriction of

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<sup>33</sup> Oficina del Alto Comisionado para la Paz [Joint Communiqué # 60 regarding the Agreement for the creation of a Special Jurisdiction for Peace](#), 23 September 2015, point 3.

liberty in special conditions.”<sup>34</sup> Those who accept responsibility for crimes belatedly would serve the same term under ordinary conditions, while those who fail to recognise their responsibility could be convicted to prison sentences of up to twenty years. To enjoy any special treatment within the Special Jurisdiction for Peace, it will be necessary to provide the full truth, redress to the victims and guarantees of non-repetition.

(ii) *Proceedings relating to forced displacement*

150. During the reporting period, Justice and Peace Law (“JPL”) tribunals rendered 12 convictions of first instance relating to cases of forced displacement against members of paramilitary groups.

<sup>35</sup> The Office received from the Government of Colombia information on six of these cases, including against paramilitary leader Salvatore Mancuso, and other 15 decisions rendered in previous years. On 20 November 2014, the JPL tribunal of Bogotá issued the first “macro-judgment” against Salvatore Mancuso and other 11 mid-level commanders on 405 charges of forced displacement involving 6,845 victims, and several other crimes, including sexual and gender-based crimes. This decision is the first issued as a result of the prioritisation policy and analysis of contexts and patterns of “macro-criminality” conducted by the JPL Unit in the Office of the Attorney-General (“A

151. In terms of ongoing investigations, according to the information available, the AGO’s Directorate of Analysis and Context ( *Dirección Nacional de Análisis y Contextos*) pursued one case of forced displacement in the Urabá region ( *Urabá Antioqueño*), affecting 105 families, against ten individuals, including members of paramilitary groups. During the reporting period, three of the ten suspects accepted all the charges against them and requested the anticipated termination of their proceedings while the remaining seven were formally accused. In addition, according to the information available at this stage, the Directorate of

Human Rights and International Humanitarian Law ( *Dirección de Fiscalía Nacional Especializada en Derechos Humanos y Derecho Internacional Humanitario* ) is investigating 247 cases of forced displacement affecting 1,555 victims.

152. As part of an institutional reform to strengthen its investigative and prosecutorial capacity, the Directorate of National Prosecutions ( *Dirección de Fiscalías Nacionales*) defined the framework of its thematic cluster on “Enforced disappearances and forced displacement.” Accordingly, a specific working group on forced displacement has been created with offices in 15 cities in Colombia.

<sup>34</sup> *Oficina del Alto Comisionado para la Paz* [Joint Communiqué # 60 regarding the Agreement for the creation of a Special Jurisdiction for Peace](#), 23 September 2015, point 7.

<sup>35</sup> The Medellín JPL tribunal’s decision of 7 July 2015 against Uber Dario Yáñez Cavadiás was ultimately declared void (*inexistente*) by the Supreme Court on 9 September 2015.

(iii) *Proceedings relating to sexual and gender-based crimes*

153. During the reporting period, the most relevant developments relating to sexual crimes concern cases under the Justice and Peace Law framework. Since November 2014, three convictions were issued against high- and mid-level members of paramilitary groups. The Government of Colombia submitted to the Office information on these cases and on two decisions rendered by JPL tribunals prior to the reporting period. In the November 2014 “macro-judgment” of Bogota’s JPL tribunal, paramilitary leader Salvatore Mancuso and other mid-level

commanders were convicted for, *inter alia*, 175 charges of sexual crimes, including rape (*acceso carnal violento*), sexual slavery, enforced prostitution, enforced sterilisation, enforced abortion and sexual violence (*actos sexuales abusivos*), affecting 2,906 victims. In March 2015, the Supreme Court confirmed the exclusion of former paramilitary commander Marcos Tulio Pérez Guzmán (a.k.a. *El Oso*) from the JPL process at the request of AGO’s JPL Unit, for denying his responsibility for sexual crimes, including sexual slavery of minors. The Office further notes the thorough analysis undertaken by the Medellín JPL tribunal in its February 2015 decision against paramilitary leader Ramiro Vanoy Murillo in determining the existence of a macro-criminal pattern of sexual and gender-based crimes.

154. However, progress in the investigations and prosecutions of cases in the ordinary justice system over the reporting period is limited. As noted in January 2015 by the Constitutional Court’s Special Chamber, with respect to the 183 conflict-related cases of sexual violence submitted to the AGO to investigate, the number of investigations and judicial decisions where responsibility has been attributed remains low. The Special Chamber further noted that obstacles to improve the quality and pace of proceedings relating to sexual crimes in the context of the armed conflict and forced displacement are of strategic, institutional and technical nature, including the absence of coordination between judicial and administrative institutions, insufficient technical capacity and of expertise to investigate and prosecute these crimes, and the lack of a reliable database of cases.

155. Nonetheless, the Attorney-General established a working group within its immediate office to analyse 442 cases submitted by the Constitutional Court in a confidential annex of its decision *Auto* 009 of 2015 in an effort to improve investigations and accelerate proceedings relating to sexual crimes. Furthermore, the Sub-Directorate of Public Policies (*Subdirección de Políticas Públicas*), in coordination with *Corporación SISMA Mujer* representing civil society organisations, have finalised the drafting of a protocol for the investigation and prosecution of sexual crimes. Further, the AGO and seven national institutions involved in the judicialisation of cases of sexual crimes, including the Institute of Legal and Forensic Medicine and the Ministry of Justice, adopted an agreement to improve inter-institutional coordination on matters relating to investigation and prosecution of sexual violence.

(iv) *Proceedings relating to “false positives” cases*

156. Over the reporting period, the Office pursued consultations with the Colombian authorities to follow-up on the progress of national proceedings concerning alleged *false positives* cases. In April and September 2015, the Colombian government submitted 51 judgments addressing *false positives* killings, of which 46 concern crimes committed since 1 November 2002. Of the total number of judgments submitted, 23 judgments were rendered during the reporting period. These include judgments against one Lieutenant Colonel, one Major and five Lieutenants.

157. Information available to the Office indicates that the Office of the Attorney-General is investigating over 3,000 cases against members of the armed forces for alleged *false positives* cases committed since 1985 and that at least 837 members of the armed forces have been convicted for homicides of protected persons or aggravated homicide. According to judgments submitted by the Colombian government, since 2012, one Colonel, two Lieutenant Colonels, nine Majors, six Captains and 35 Lieutenants have been convicted for extrajudicial killings committed after 1 November 2002. One Major, two Captains and three Lieutenants have been acquitted.

158. In addition, the Office of the Attorney-General reported having initiated preliminary investigations against a number of current and retired generals of the armed forces, four of which have been reportedly called for questioning (*indagatorias*) for their alleged involvement in *false positives* cases. No material information about the suspects, scope of the investigations, nature of charges or the investigative steps taken thus far has been provided to the Office in spite of repeated requests.

***OTP Activities***

159. During the reporting period, the Office continued to consult with the Colombian authorities and relevant stakeholders on a variety of issues relevant to the preliminary examination. The Office conducted two missions to Bogota, gathered additional information on the areas of focus of the preliminary analysis

examination, information submitted through article 15 communications, provided input to public discussions on accountability and transitional justice issues, as appropriate, and held numerous meetings with international organisations, international NGOs and Colombian civil society in Bogota, The Hague and Oslo.

160. The Office conducted missions to Bogota from 01 to 13 February and from 11 to 14 May 2015. During these missions, the OTP met with senior officials from the three branches of government, national and international civil society, and international organisations to discuss a variety of issues relating to contextual developments as well as matters relating to jurisdiction and admissibility.

161. Separately, in December 2014, March and May 2015, the Office requested from the Colombian authorities specific information regarding the nature and scope of national proceedings relevant to the preliminary examination as well as updated information about investigate steps taken in specific cases.

162. Over the reporting period, the Office reiterated on several occasions the Prosecutor's support for all efforts undertaken to end the armed conflict within the framework of the Rome Statute and in accordance with Colombia's international obligations. On 13 May 2015, in the context of the conference on

*"Transitional Justice and the Role of the International Criminal Court"* organised, *inter alia*, by the Universidad del Rosario, the Cyrus R. Vance Center for International Justice, and the International Center for Transitional Justice, amongst others, the Deputy Prosecutor delivered a widely-reported keynote speech on the peace process in Colombia and the role of the ICC/OTP.<sup>36</sup>

163. On 24 September 2015, the Prosecutor expressed her hope that the Agreement on the Creation of a Special Jurisdiction for Peace in Colombia would constitute a genuine step towards ending the decades-long armed conflict while paying homage to justice as a critical pillar of sustainable peace. The Office further indicated it would review and analyse the agreed provisions in detail as part of its on-going preliminary examination.

37

### *Conclusion and Next Steps*

164. While it appears that the Colombian authorities have made progress in their investigations against high-ranking officials for *false positives* cases, the Office is concerned about the delay in providing tangible and pertinent evidence that demonstrate that the relevant Colombian authorities are taking "concrete and progressive investigative steps" in cases relating to the areas of focus of the preliminary examination. The jurisprudence of the Court is clear that statements that national authorities are actively investigating a case must be supported with evidence of a "sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case."<sup>39</sup>

165. The Office will continue to engage with the Colombian authorities to facilitate the provision of such evidence, in particular with respect to investigations, reportedly regarding those possibly most responsible for the alleged crimes committed.

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<sup>36</sup> ICC-OTP, "[Transitional Justice in Colombia and the role of the International Criminal Court](#)", Keynote speech by Mr. James Stewart, Deputy Prosecutor of the ICC, 13 May 2015.

<sup>37</sup> [Statement of the Prosecutor on the Agreement on the Creation of a Special Jurisdiction for Peace in Colombia](#), 24 September 2015.

<sup>38</sup> ICC-02/11-01/12-75-Red, 27 May 2015, para. 50.

<sup>39</sup> ICC-01/09-01/11-307, 30 August 2011, para. 62 and 63. See also ICC-01/11-01/11-466-Red, 11 October 2013, para. 66 (vi).

166. Regarding national proceedings for sexual crimes and forced displacement, although some relative progress has been made in the last year, in particular under the JPL framework, the Office remains concerned about the lack of substantial progress in investigations and prosecutions before the ordinary justice system.

167. The Office notes that the envisaged Special Jurisdiction for Peace in Colombia may be activated with respect to alleged crimes and perpetrators directly relevant to the potential cases it has identified. The Office will therefore carefully review and analyse the provisions of the agreement, in particular with respect to the restrictions of liberty in special conditions and the inclusion of state agents, as well as any subsequent implementing legislation, in the context of the on-going preliminary examination. To this end, the Office will also be engaging in extensive consultations with the Government of Colombia and other stakeholders, including victims and relevant civil society organisations.



## GUINEA

### *Procedural History*

168. The Office has received 33 communications pursuant to article 15 in relation to the situation in Guinea. The preliminary examination of the situation in Guinea was made public on 14 October 2009.

### *Preliminary Jurisdictional Issues*

169. Guinea deposited its instrument of ratification to the Rome Statute on 14 July 2003. The ICC therefore has jurisdiction over Rome Statute crimes committed on the territory of Guinea or by Guinean nationals from 1 October 2003 onwards.

### *Contextual Background*

170. In December 2008, after the death of President Lansana Conté, who had ruled Guinea since 1984, Captain Moussa Dadis Camara led a group of army officers who seized power in a military coup. Dadis Camara became the Head of State, established a military junta, the *Conseil national pour la démocratie et le développement* (CNDD), and promised that the CNDD would hand over power to a civilian president upon the holding of presidential and parliamentary elections. However, subsequent statements that appeared to suggest that Dadis Camara might run for president led to protests by the opposition and civil society groups. On 28 September 2009, the Independence Day of Guinea, an opposition gathering at the national stadium in Conakry was violently suppressed by the security forces, leading to what became known as the “28 September massacre”.

### *Subject-Matter Jurisdiction*

171. In October 2009, the UN established an international commission of inquiry (“UN Commission”) to, *inter alia*, investigate the alleged gross human rights violations that took place on 28 September 2009 and, where possible, identify those responsible. In its final report of December 2009, the UN Commission confirmed that at least 156 persons were killed or disappeared, and at least 109 women were victims of rape and other forms of sexual violence, including sexual mutilations and sexual slavery. Cases of torture and cruel, inhuman or degrading treatment during arrests and arbitrary detentions, and attacks against civilians based on their perceived ethnic and/or political affiliation were also confirmed. The UN Commission considered that there was a strong presumption that crimes against humanity were committed and determined, where it could, possible individual responsibilities.

172. The *Commission nationale d'enquête indépendante*(CNEI), set up by the Guinean authorities, confirmed in its report issued in January 2010 that killings, rapes and enforced disappearances took place, although in slightly lower numbers than documented by the UN Commission.

173. The 28 September 2009 events in the Conakry stadium can be characterised as a widespread and systematic attack directed against a civilian population, namely the demonstrators present at the stadium, in furtherance of the CNDD's policy to prevent political opponents from, and punish them for, challenging Dadis Camara's intention to keep his group and himself in power.

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174. The Office has concluded that the information available provides a reasonable basis to believe that the following crimes against humanity were committed in the national stadium in Conakry on 28 September 2009 and in their immediate aftermath: murder under article 7(1)(a); imprisonment or other severe deprivation of liberty under article 7(1)(e); torture under article 7(1)(f); rape and other forms of sexual violence under article 7(1)(g); persecution under article 7(1)(h); and enforced disappearance of persons under article 7(1)(i).

### *Admissibility Assessment*

175. On 8 February 2010, in accordance with the recommendations of the reports of the UN Commission and of the CNEI, the Conakry Appeals Court General Prosecutor appointed three Guinean investigative judges ("panel of judges") to conduct a national investigation into the 28 September 2009 events. Therefore, since a national investigation is underway, the Office's admissibility assessment is focused on whether the national authorities are willing and able to conduct genuine investigations, and in particular whether proceedings are conducted with the intent to bring to justice the alleged perpetrators within a reasonable timeframe.

176. During the reporting period, the level of support provided by the Guinean authorities to the panel of judges has increased considerably. As part of a broader reform of the national justice system, the panel of judges has received additional resources to conduct an independent and impartial investigation, including in terms of equipment and security measures. In the meantime, the panel of judges took a number of additional and pending key investigative steps, such as visiting the Conakry Stadium and interviewing political leaders and other key witnesses, some of whom were initially reluctant to appear before them. The active participation of civil society organisations and victims' associations in the judicial proceedings, including by submitting specific requests for further investigative steps, has also had an important impact on the pace and quality of the national investigation.

177. Over the reporting period, the panel of judges issued additional indictments against high-level political and military officials (14 individuals are currently indicted), including former Ministers at the time of the events and the former

Head of State, Moussa Dadis Camara, who was interviewed and indicted in Burkina Faso. The indictment and arrest of a former member of the military for alleged acts of torture committed against demonstrators detained in the weeks following the 28 September 2009 events is another important step in the investigation of alleged crimes committed in military facilities. In addition, with the support of civil society organisations, dozens of additional victims testified before the investigative judges. Since the beginning of the investigation, approximately 400 victims have been heard, of whom around 50 are victims of sexual crimes.

178. In terms of international assistance, the panel of judges has continued to benefit from the support of the judicial expert deployed by the UN Team of Experts on the Rule of Law and Sexual Violence in Conflict (“UN Judicial Expert”). Political and judicial authorities further engaged in consultations with the Office of the Special Representative of the Secretary-General (“SRSG”) on Sexual Violence in Conflict and other relevant partners to discuss possible support in matters relating to security of victims and witnesses, reparations, and exhumation of mass graves.

### *OTP Activities*

179. During the reporting period, the Office maintained regular contact with the panel of investigative judges, Guinean judicial and political authorities, civil society organisations, UN representatives, including the UN Judicial Expert and the Office of the SRSG for Sexual Violence in Conflict, the diplomatic community in Conakry and other relevant stakeholders. Mindful of the positive impact of the support of the international community and civil society to Guinean authorities’ efforts to complete the national investigation, the Office continued to encourage a coordinated approach and facilitate a constructive dialogue between all the relevant actors. The Office also carried out two additional visits to Conakry.

180. In December 2014, during the thirteenth session of the Assembly of States Parties to the Rome Statute (ASP), the Prosecutor met with the Guinean Minister of Justice, Me Cheick Sako, and the UN SRSG for Sexual Violence in Conflict, Zainab Hawa Bangura, to discuss the status of the national investigation, as well as the types and modalities of international technical assistance, including forensic expertise. A follow-up meeting was held with the UN SRSG for Sexual Violence in Conflict in May 2015 at the seat of the Court.

181. From 4 to 6 May 2015, the Office conducted its tenth mission to Guinea to obtain a detailed update on the progress of national proceedings and gauge the prospect of completion of the national investigation and the beginning of trial within a reasonable timeframe. During the mission, the OTP delegation exchanged with Guinean political and judicial authorities, including President Alpha Condé, the Minister of Justice and the panel of judges, national and international NGOs and victims’ representatives. The Office also informed the

newly-appointed magistrates at the Appeal Court and the *Chambre d'accusation* of the scope and purpose of the preliminary examination.

182. Following an invitation extended by the Guinean authorities, the Prosecutor visited Conakry from 2 to 4 July 2015 to take stock of the progress made in the national investigation. To this end, the Prosecutor met with Guinean high-level authorities, including President Alpha Condé and the Minister of Justice, the panel of judges, the diplomatic community and the press. The Prosecutor further interacted extensively with victims and civil society organisations to obtain their views and reassure them of her determination to see justice done.

183. Furthermore, the attention drawn by the Office to the encouraging progress made in the 28 September 2009 case in its regular reporting of activities, including to the ASP and to the UN General Assembly, has contributed to enhancing international support to Guinean authorities' efforts to complete the national investigation within a reasonable timeframe. In this regard, the participation of Guinean authorities in important events and high-level discussions, such as the launch of the OTP's Policy Paper on Sexual and Gender- Based Crimes and the ASP's side event on "Cooperation in the field of Sexual and Gender-Based Crimes", provided a propitious opportunity to pursuing dialogue with key stakeholders.

184. On 14 October 2015, following reports of growing tensions after the first round of presidential elections in Guinea, the Prosecutor issued a statement calling for calm and restraint.

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### *Conclusion and Next Steps*

185. Despite significant challenges, such as the Ebola crisis and political tensions linked to the electoral context, concrete and progressive investigative steps taken by the panel of judges have resulted in significant progress over the reporting period. These achievements are also partly ascribable to the positive and constructive dynamic created between the OTP, the UN, civil society and the Guinean authorities.

186. The Office will continue to closely follow-up on the progress of national proceedings, and encourage Guinean authorities to hold to their commitment to finalise the investigation and set the stage for a trial in 2016.

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<sup>40</sup> [Statement of the Prosecutor of the International Criminal Court, Mrs Fatou Bensouda, following growing tensions reported in Guinea](#), 14 October 2015.

## NIGERIA

### *Procedural History*

187. The Office has received 94 communications pursuant to article 15 in relation to the situation in Nigeria. The preliminary examination of the situation in Nigeria was made public on 18 November 2010.

188. On 5 August 2013, the Office published an Article 5 report on the Situation in Nigeria, presenting its preliminary findings on jurisdictional issues.

### *Preliminary Jurisdictional Issues*

189. 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*

190. During the course of its preliminary examination, the Office has analysed information relating to a wide and disparate series of allegations against different groups and forces at different times throughout the various regions of the country. This includes inter-communal, political and sectarian violence in central and northern parts of Nigeria as well as violence among ethnically-based gangs and militias and/or between such groups and the national armed forces in the Niger Delta. During the reporting period, the Office focused on alleged crimes arising from the activities of the non-state armed group commonly referred to as “Boko Haram”, a militant Islamist group mainly active in north-eastern Nigeria but also in neighbouring countries, and the counter-insurgency operations conducted by the Nigerian Security Forces. The Office furthermore examined information received on alleged crimes committed in the context of the Presidential and National Assembly elections on 28 March 2015 and the State elections on 11 April 2015.

191. The reporting period was marked by intense hostilities between the Nigerian Security Forces and Boko Haram. Boko Haram’s violent campaign in 2014, enabled the group by the end of the year and the beginning of 2015 to control territory that extended across most parts of Borno State, northern Adamawa and eastern Yobe States. At the beginning of February 2015, Nigeria started a counter-offensive, with support from Cameroon, Chad and Niger. By the end of March 2015, almost all territory had been recovered. However, the hostilities continued unabated throughout the reporting period.

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<sup>41</sup> Office of the Prosecutor, Situation in Nigeria: Article 5 Report, 5 August 2013.

## *Subject-Matter Jurisdiction*

192. The Office has previously found that the information available provides a reasonable basis to believe that crimes against humanity under article 7 of the Statute have been committed in Nigeria by Boko Haram, including: (i) murder under article 7(1)(a), and (ii) persecution under article 7(1)(h) of the Statute.<sup>42</sup>

During the current reporting cycle, the Office updated its subject-matter assessment, covering the period from 1 January 2013 to 31 March 2015, focusing on the alleged crimes committed in the context of the non-international armed conflict opposing Boko Haram to the armed forces of the State and other supporting forces.

43

193. Since the previous activity report, the Office has received and continues to receive information about alleged crimes committed in Nigeria. This information together with relevant open source information has been analysed to inform the Office's updated subject-matter assessment and resulted in the identification of potential cases on the basis of which the Office is analysing admissibility.

## *Admissibility Assessment*

194. The selection of the potential cases identified below is without prejudice to any further findings on subject-matter jurisdiction to be made pursuant to additional information that the Office could receive at a later stage of analysis. In addition, the legal characterisation of these cases and any alleged crimes may be revisited at a later stage.

195. The Office has identified eight potential cases involving the commission of crimes against humanity and war crimes under articles 7 and 8 of the Statute: six for conduct by Boko Haram and two for conduct by the Nigerian Security Forces. Inevitably, some of the cases identified below overlap in relation to the type of conduct or to the crime allegedly committed.

### *Boko Haram*

196. The policy of Boko Haram to intentionally launch attacks against civilians perceived as "disbelievers" forms the subject of a first potential case. Abuabakar Shekau has explicitly defined the group's policy in public video messages.<sup>44</sup> This

case includes attacks conducted against civilians when taking control of towns and villages as well as bomb attacks launched against civilians in civilian areas.

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<sup>42</sup> Office of the Prosecutor, Situation in Nigeria: Article 5 Report, 5 August 2013.

<sup>43</sup> On 25 November 2013, the Office published its Report on Preliminary Examination Activities 2013, in which it considered that since at least May 2013, the violence in Nigeria qualified as an armed conflict of non-international character. See Office of the Prosecutor, Report on Preliminary Examination Activities 2013, 25 November 2013, para. 218.

In a video disclosed on 17 February 2015, Shekau declared that anyone who supports the "disbelievers" (meaning anyone supporting democracy or western values) is "[...] an enemy to us and a target to our forces and we will enslave him and sell him in the markets".

197. The group's *modus operandi* varied according to the intended objective of the respective attacks. Some attacks were carried out by just two or three gunmen on a motorcycle, others by hundreds of fighters supported by tanks and anti-aircraft weapons mounted on trucks. Boko Haram reportedly divided its forces during larger attacks, specifically assigning different groups to pillage houses and shops prior to setting them on fire. Groups were tasked with killing people, abducting residents or preventing them from fleeing. Other Boko Haram attacks included bombings of civilian areas, such as places of worship, markets or bus stations, often by suicide bombers.

198. According to the Office's analysis, from January 2013 to March 2015, 356 reported incidents of killings can be attributed to Boko Haram in Borno, Adamawa, Yobe, Plateau, Kano, the Federal Capital Territory (Abuja), Gombe, Kaduna, Bauchi in Nigeria as well as occasionally in Cameroon (since February 2013) and Niger (Dumba and Diffa, since January 2015) which led to the killing of over 8,000 civilians. Following military operations since February 2015 during which territory previously held by Boko Haram was recaptured, mass graves or other sites with decomposed bodies were discovered allegedly containing the bodies of civilians killed by Boko Haram.

199. A second potential case against Boko Haram relates to the abductions and imprisonment of civilians, leading to alleged murders, cruel treatments and outrages upon personal dignity. Between January 2014 and March 2015, the Office recorded 55 incidents of abductions, totalling at least 1,885 abductees mostly in Borno, Yobe and Adamawa States. Some of the abductees were later released or liberated. In 2014 alone at least 1,123 persons were abducted, of which 536 were female victims. From May 2013 to April 2015, open sources reported the abduction of more than 2,000 women and girls.

45

200. Boko Haram reportedly also detained thousands of civilians in its camps and in towns under its control in Borno state and other undetermined areas in the north-east of Nigeria, including in the Sambisa forest, around Lake Chad, and near the Gorsi mountains in Cameroon. For example, in Bama town, hundreds of men were reportedly held by Boko Haram in the town's prison for several weeks before being executed.

46

201. Attacks on buildings dedicated to education, teachers and students form the subject of a third potential case against Boko Haram. School buildings were allegedly bombed, attacked with firearms and/or burned down by Boko Haram. Boko Haram allegedly targeted primarily state schools pursuant to a policy that such schools are the main conduits through which western values are being transmitted to the local society. From mid-2013, Boko Haram attacks on schools, on schoolchildren and teachers increased significantly.

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<sup>45</sup> Amnesty International, Our job is to shoot, slaughter and kill': Boko Haram's reign of terror in north east Nigeria, 13 April 2015, p. 59.

<sup>46</sup> Ibid.

202. Between January 2012 and October 2013, 70 teachers and more than 100 schoolchildren and students were reportedly killed or wounded. In May 2014, Nigeria Union of Teachers reported that at least 173 teachers had been killed between 2009 and 2014, Borno State officials have cited a slightly higher figure of 176 teachers. At least 50 schools were either burned down or badly damaged and 60 more were forced to close. In March 2014, the Borno State government decided to close all secondary schools in the state in order to protect students and teachers from further attacks. In addition, as a result of direct threats from Boko Haram, 120 schools were forced to close in 10 districts of the Far North of Cameroon. Boko Haram was included as a new party on the list of the Secretary-General's Annual Report on Children and Armed Conflict (2014) for attacks against schools among other alleged conduct.

47

203. A fourth potential case relates to Boko Haram's policy of recruitment and use of children under the age of 15 years to participate in hostilities. While there is no information available on the total number of child soldiers, the UN reported the recruitment and use of children as young as 12 years old by Boko Haram. Several witnesses reported that they saw children in the ranks of Boko Haram during attacks. Boko Haram reportedly pressured boys to join their group by threatening their families through cash payments. Others may be recruited through Quranic schools.

48

204. Most of the children are allegedly used for intelligence gathering, tracking the movements of enemy forces, transportation of weapons and for participating in the attacks including for the torching of buildings dedicated to education and religion. In propaganda videos attributed to Boko Haram, child soldiers can be seen being trained to use firearms. Up to 80 children were reportedly rescued from a Boko Haram camp in Cameroon where they were being trained as soldiers.

205. Boko Haram's attacks against women and girls form the subject of a fifth potential case. An analysis of alleged gender-based crimes in Nigeria shows that since 2013, Boko Haram increased its attacks against women and girls for punitive reasons, i.e. on the basis of their religion or for attending schools, and tactical reasons, for example forcing them to carry out cleaning and cooking or other operational tasks.

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<sup>47</sup> The other conduct includes killing and maiming of children and attacks on hospitals. See e.g., Office of the Special Representative of the Secretary-General for Children and Armed Conflict, Secretary-General's Annual Report on Children and Armed Conflict Documents Continued Child Suffering in 23 Conflict Situations, 1 July 2014. See also Amnesty International, Keep away from schools or we'll kill you, 5 October 2013; Watchlist, Who will care for us? Grave violations against children, 3 September 2014.

Human Rights Watch, Nigeria: Boko Haram Abducts Women, Recruits Children, 29 November 2013,<sup>48</sup> pp. 1, 7. See also U.S. Department of State, Country Report on Human Rights Practices for 2013, p. 21; Watch List on Children and Armed Conflict, Who Will Care For Us?, 3 September 2014, pp. 26-27.



206. The Office identified different conducts related to Boko Haram attacks against women and girls: abductions, rapes, sexual slavery and other forms of sexual violence, forced marriages, the use of women for operational tasks and murders. Between November 2014 and February 2015 alone, more than 500 women and 1,000 children were reportedly abducted from Gwoza local government area. The most notorious case is arguably the abduction of 276 girls from the Government Girls Secondary School in Chibok, Borno State on 14 April 2014. Most of the persons abducted by Boko Haram were unmarried women and girls, many of whom were reportedly forced into marriage with Boko Haram fighters. Forced marriages reportedly entail repeated rapes or violence and death threats in cases of refusal. Many of these attacks have specifically targeted Christian

49

women.

207. Since mid-2014, Boko Haram has increasingly used women and girls in suicide attacks on civilian targets. The Office's analysis shows that since the beginning of January 2015, killings committed by female suicide bombers have further increased, including girls as young as seven. In 2015 Boko Haram fighters allegedly murdered their so-called "wives", often women forcibly married to Boko Haram fighters, and other captives as Nigerian Security Forces and forces supporting them advanced.

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208. The intentional targeting of buildings dedicated to religion, including churches and mosques constitutes a sixth potential case against Boko Haram. According to the Office's analysis, the number of destructions of civilian buildings, including churches and mosques, gradually increased since January 2014 and peaked between November 2014 and March 2015.

209. For example, in June 2014, Boko Haram allegedly attacked three villages near Chibok, Borno State, killing at least 48 people and setting five churches on fire.

On 28 November 2014, in Kano, capital of Kano State, Boko Haram attacked the central mosque, killing more than 100 people, injuring 260 others and causing extensive damage to the building.

#### *Nigerian Security Forces*

210. The Office has analysed allegations of crimes committed by the Nigerian Security Forces in the course of their operations against Boko Haram.

211. The first potential case relates to the alleged mass arrests of boys and young men suspected of being Boko Haram members or supporters, followed by large-scale abuses, including summary executions and torture. The arrest operations and

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<sup>49</sup> United Nations, Report of the Secretary-General, Conflict-related sexual violence, S/2015/203 (23 March 2015), para. 80.

<sup>50</sup> Human Rights Council Special Session on terrorist attacks and human rights abuses by Boko Haram, Opening Statement by the High Commissioner for Human Rights, 1 April 2015.

<sup>51</sup> Punch, Boko Haram kills 48, burns churches near Chibok, 30 June 2014.

<sup>52</sup> BBC News, Boko Haram Kano attack: Loss of life on staggering scale, 30 November 2014.

subsequent abuses were reportedly committed systematically and repeatedly over a long period of time pursuant to a policy of the Security Forces deployed to address Boko Haram in Borno, Yobe and Adamawa States.

212. During such arrest operations boys and men were reportedly arbitrarily targeted and arrested by Nigerian Security Forces. Since 2011, Nigerian Security Forces have reportedly arrested at least 20,000 people, mostly young men in Borno, Yobe and Adamawa States. Altogether, more than 7,000 people reportedly died in military detention since March 2011 due to illness, poor condition and overcrowding of detention facilities, torture, ill-treatment and extrajudicial executions.

53

213. Other crimes were also reported. For example, on 14 March 2014, over 500 former detainees who were liberated during a Boko Haram attack on the Giwa military barracks in Maiduguri, Borno State, were recaptured and allegedly executed by the Nigerian Security Forces, in some cases by slitting their throats.

54

214. Attacks against civilians form the subject of a second potential case against the Nigerian Security Forces. In the town of Baga, Borno State, up to 228 persons may have been killed following a security operation on 17 April 2013.<sup>55</sup> Human

Rights Watch published geospatial images of the area affected, alleging that at least 2,275 dwellings were destroyed in the attack.

215. Finally, although the central government prohibits the recruitment and use of child soldiers, it is reported that the Civilian Joint Task Force recruited and used children, sometimes by force. Further information on these allegations is however required.

216. While continuing to assess the seriousness and reliability of the allegations against Boko Haram and the Nigerian Security Forces, the Office is analysing the relevance and genuineness of national proceedings by the competent national authorities for the alleged conduct described above as well as the gravity of the alleged crimes. In February 2015, the Nigerian authorities informed the Office that about 150 cases relating to Boko Haram members at different levels had been submitted to the Attorney-General of the Federation for approval. The cases were identified for prosecution by a mixed commission including members

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<sup>53</sup> Amnesty International, *Stars on their shoulders. Blood on their hands*, June 2015, p. 58 and 75; Amnesty International, *Welcome to hell fire, torture and other ill-treatment in Nigeria*, September 2014, pp. 9-14. See also Human Rights Watch, *Nigeria: Boko Haram Abducts Women, Recruits Children*, 29 November 2013, p. 8; Amnesty International, *Gruesome footage implicates military in war crimes*, 05 August 2014, pp. 5-6.

<sup>54</sup> Amnesty International, *Nigeria: more than 1500 killed in armed conflict in north-eastern Nigeria in early 2014*, March 2014, p. 7 (alleging 600 killed); *The New York Times*, *Nigerian army facing questions as death toll soars after prison attack*, 20 March 2014 (referring to over 500 people killed).

<sup>55</sup> Nigerian military authorities claim the death of only 36 persons. U.S. Department of State, *Country Reports on Human Rights Practices for 2013*, Bureau of Democracy, Human Rights and Labor, p. 17.

<sup>56</sup> Human Rights Watch, *Massive Destruction, Deaths from Military Raid*, 1 May 2013, p. 1. For view of HRW's geospatial images, See BBC, *Baga raid: images 'show Nigeria army abuse'*, 1 May 2013, pp. 1-5.

of the military, security services, the Office of the Director of Public Prosecutions and the Attorney-General's Office among others, which reviewed the detention of persons arrested by the military in the context of the military operations against Boko Haram.

### *OTP Activities*

217. During the reporting period, the Office has been in contact with Nigerian authorities, international and Nigerian NGOs, the UN, and diplomatic actors on issues pertaining to the preliminary examination. In addition, it systematically collected and analysed available open source information for the purpose of the ongoing subject-matter and admissibility assessments. Information received and analysed in the period under review includes information on ongoing crimes as well as contextual information on the regionalisation of the conflict.

218. On 20 January 2015, the Prosecutor issued a statement following reports of escalating violence in north-eastern Nigeria and the use of women and children as suicide bombers.

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219. Preventive action independently taken by the Prosecutor ahead of the general and state elections held in Nigeria early 2015 added to an international and regional preventive effort that have contributed to the largely peaceful conduct of elections. On 2 February 2015 and 16 March 2015, the Prosecutor issued preventive statements following reports of potential violence around the general and state elections.

<sup>58</sup> Between 3 and 5 February 2015, the Office conducted a mission to Abuja to reiterate and amplify the preventive statement ahead of the elections issued by the Office on 2 February 2015 by engaging national authorities, the national press and civil society actors. The mission furthermore served the purpose of requesting updates from the national judiciary on relevant national proceedings and gathering additional information on ongoing crimes. Following the mission, the Office sent a detailed request for information to the Nigerian authorities.

220. Cooperation with the Nigerian authorities has been marked by the change in Government. Until the elections, the Office was in regular contact with the Office of the former Attorney-General of the Federation. Replies to the Office's requests for information however remain pending. The Prosecutor has furthermore written to President Buhari following his swearing-in on 29 May 2015.

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<sup>57</sup> Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, following reports of escalating violence in Nigeria, 20 January 2015.

<sup>58</sup> Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, ahead of the general and state elections in Nigeria, 2 February 2015; Statement by the ICC Prosecutor ahead of elections in Nigeria: "I reiterate my call to refrain from violence", 16 March 2015.

### *Conclusion and Next Steps*

221. The Office will continue to analyse allegations of crimes committed in Nigeria and to assess the admissibility of the potential cases identified above in order to reach a decision on whether the criteria for opening an investigation are met.

222. Based on the cooperation with the new Nigerian authorities and any new information on relevant national proceedings, the Office will determine its next steps. The Prosecutor has repeatedly stressed the seriousness of the situation in Nigeria and the need to bring alleged perpetrators of war crimes and crimes against humanity to justice. Ability and willingness to conduct national proceedings against all sides of the conflict will remain a key area of focus of the Office's admissibility assessment.

223. The Office is planning to carry out a mission to Abuja to inform the new authorities about the status of the preliminary examination and share information on the potential cases with the Attorney-General of the Federation as soon as the new cabinet has been appointed.

224. The Office is devoting particular efforts to determine the gender component of crimes committed in Nigeria. This includes specific analysis of whether any of the alleged conduct constitutes the crime against humanity of persecution on gender grounds.

## IV. COMPLETED PRELIMINARY EXAMINATIONS

### GEORGIA

#### *Procedural History*

225. The Office has received 3,854 communications pursuant to article 15 in relation to the situation in Georgia.

226. The preliminary examination of the situation in Georgia was made public on 14 August 2008. In 2011 the Office confirmed that it had determined that there was a reasonable basis to believe crimes within the jurisdiction of the Court had been committed in the context of the Situation in Georgia. Since 2011, the main focus<sup>59</sup>

of the preliminary examination has been on the existence and genuineness of relevant national proceedings.

227. On 17 March 2015, the Office was informed by the Government of Georgia that national proceedings have been indefinitely suspended.

228. By letter of 5 October 2015, the Prosecutor notified the President of the Court, in accordance with regulation 45 of the Regulations of the Court, of her intention to submit a request for authorisation of an investigation into the situation pursuant to article 15(3) of the Statute.

229. On 8 October 2015, the Presidency assigned the Situation in Georgia to Pre-Trial Chamber I.

230. On 13 October 2015, the Prosecutor requested authorisation from the Pre-Trial Chamber, pursuant to article 15(3) of the Rome Statute, to proceed with an investigation into the Situation in Georgia covering the period from 1 July 2008 to 10 October 2008. On the same day, the Prosecutor informed the victims of<sup>60</sup>

her decision in accordance with Rule 50 of Rules of Procedure and Evidence.<sup>61</sup>

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<sup>59</sup> Office of the Prosecutor, "[OTP Report on Preliminary Examinations](#)", 13 December 2011, para. 97.

<sup>60</sup> Office of the Prosecutor, "[Request for authorization of an investigation pursuant to article 15](#)", ICC-01/15-4, 13 October 2015. See also Press Release, [The Prosecutor of the International Criminal Court, Fatou Bensouda requests judges for authorization to open an investigation into the Situation in Georgia](#), 13 October 2015. ("the Request")

<sup>61</sup> [Public notice of the ICC Prosecutor](#): Victims of violence committed in the context of the August 2008 armed conflict in Georgia have 30 days to make representations to the ICC in The Hague on the opening of an investigation, 13 October 2015.

### *Preliminary Jurisdictional issues*

231. Georgia deposited its instrument of ratification to the Rome Statute on 5 September 2003. The ICC therefore has jurisdiction over Rome Statute crimes committed on the territory of Georgia or by its nationals from 1 December 2003 onwards.

### *Contextual Background*

232. The armed conflict that occurred in Georgia in August 2008 has its roots in the dismantling of the Soviet Union. A first conflict over South Ossetia, Georgia's northern autonomous entity, took place between 1990 and 1992. The conflict ended with the peace agreement signed on 24 June 1992 in Sochi by the then Georgian President Eduard Shevardnadze and Russian President Boris Yeltsin. The Sochi agreement established a civilian commission, a Joint Control Commission ("JCC") and a Joint Peacekeeping Forces ("JPKF") for South Ossetia. The JPKF consisted of three battalions of 500 servicemen each, provided by Russia, Georgia and North Ossetia (the autonomous Republic within the Russian Federation neighbouring South Ossetia) under the command of a Russian officer. The Conference for Security and Cooperation in Europe ("CSCE") established an observation mission in November 1992 in the context of the South Ossetian conflict, mandated to assist conflicting parties in reaching a peaceful political settlement.

233. For 12 years there was no serious military confrontation, until skirmishes between South Ossetian forces and the Georgian army degenerated, on 7 August 2008, into an armed conflict, which was rendered international by Russia's involvement. On 12 August 2008, Russian President Dmitry Medvedev and French President Nicolas Sarkozy, the latter acting on behalf of the European

Union ("EU"), agreed in Moscow on a six-point peace plan providing, *inter alia*, for the cessation of hostilities and the withdrawal of forces to their positions prior to the armed conflict. Later that day, the plan was approved by Georgian President Saakashvili. Presidents Saakashvili and Medvedev signed the agreement on 15 and 16 August 2008 respectively.

234. From 15 August 2008 onwards, Russian troops began to withdraw from undisputed Georgian territory but created a 20km wide "buffer zone" in the area adjoining the administrative boundary line of South Ossetia inside Georgian administered territory. The "buffer zone" was established purportedly with the aim of keeping peace and order. Entry and exit of civilians into the zone was regulated by the use of Russian military checkpoints. Georgian security forces were denied access. While most of the Russian troops withdrew from their positions beyond the administrative boundaries of South Ossetia and Abkhazia after 22 August 2008, some of them remained in the "buffer zone" and only withdrew when an implementation agreement was reached on 8 September 2008 in Moscow. According to the agreement, at least 200 EU observers were to be deployed to the conflict zone while Russian armed forces were supposed to

withdraw from areas adjacent to the administrative boundary lines of Abkhazia and South Ossetia by midnight on 10 October 2008.

### *Subject-Matter Jurisdiction*

235. The Office has been conducting a preliminary examination into the Situation in Georgia since August 2008, in the course of which it has gathered information on alleged crimes attributed to the three parties involved in the armed conflict—the Georgian armed forces, the South Ossetian forces, and the Russian armed forces. As a result of its examination, the Office has identified the following war crimes and crimes against humanity which it reasonably believes fall within the Court’s jurisdiction, thus triggering its request to the Pre-Trial Chamber to authorise its investigation:

- Killings, forcible displacements and persecution of ethnic Georgian civilians, and destruction and pillaging of their property, by South Ossetian forces (with possible participation by Russian forces); and
- Intentionally directing attacks against Georgian peacekeepers by South Ossetian forces; and against Russian peacekeepers by Georgian forces.

236. The crimes are alleged to have taken place in South Ossetia and areas within the “buffer zone” from at least 7 August until 10 October 2008. The Office has requested authorisation to investigate the situation from 1 July 2008 in order to be able to also investigate precursor events that immediately preceded the formal commencement of the hostilities. This will enable it to determine, in the context of any future investigation, whether a sufficient nexus exists between such acts and the required contextual elements for war crimes or crimes against humanity. The end date specified for any authorised investigation is 10 October 2008, the date by which, at the latest, Russian armed forces are reported to have withdrawn behind the administrative boundary line of South Ossetia.

237. The Office has also examined the information available on other crimes allegedly committed by the parties to the conflict. In particular, both the Georgian and Russian armed forces are alleged to have launched indiscriminate and disproportionate attacks against civilian targets. Given the inherent difficulties with determining issues related to the conduct of hostilities in the absence of an investigation, the limited information available has not permitted the Office to reach a determination, at this stage, on whether war crimes within the jurisdiction of the Court may have been committed. Nonetheless, this has no impact on its conclusion that an investigation is warranted, and such allegations can be submitted for proper investigation and qualification in the context of any authorised investigation.

238. Likewise, the Office has gathered information on a limited number of reports of sexual and gender-based violence including rape, although at this stage no clear information has emerged on the alleged perpetrators or the link between these crimes and the armed conflict or wider context. Such allegations could also be investigated in the context of any authorised investigation.

*Alleged forcible transfer of ethnic Georgians*

239. Reportedly, in the period from at least 7 August 2008 through 10 October 2008, South Ossetian forces systematically targeted ethnic Georgians following a consistent pattern of deliberately killing, beating and threatening civilians, and looting and burning their houses and other property on a selective basis. These attacks were allegedly committed pursuant to the policy of the South Ossetian leadership to forcibly expel ethnic Georgians from the territory of South Ossetia in furtherance of the overall objective to sever any remaining links with Georgia and secure full independence, further to the South Ossetian proclamation of 20 September 1990.

240. According to the available information, South Ossetian forces carried out attacks deliberately targeted at the ethnic Georgian population of villages and entire municipalities in the territory of South Ossetia and along the administrative boundary line between South Ossetia and the rest of Georgia, including within the 20km wide “buffer zone”. The main areas where the crimes allegedly occurred include: (i) ethnic Georgian villages of the Kurta municipality located in the north of Tskhinvali; (ii) ethnic Georgian villages of the Eredvi municipality located in the north-east of Tskhinvali; (iii) ethnic Georgian villages in the Tighva municipality located in the south-east of Tskhinvali; and (iv) villages of the Gori and Kareli municipalities located in the “buffer zone”.

241. The first wave of crimes allegedly occurred during the active phase of hostilities on the territory of South Ossetia and along the administrative boundary line with the rest of Georgia (7-12 August 2008) while the second wave followed after the end of active hostilities (12 August 2008 - 10 October 2008).

242. The information available to the Office indicates that between 51 and 113 ethnic Georgian civilians were killed in the context of a forcible displacement campaign conducted by South Ossetian forces. A further estimated 13,400 to 18,500 ethnic Georgians were forcibly displaced from South Ossetia and the 20 km “buffer zone” created alongside the administrative boundary line between South Ossetia and the rest of Georgia, while over 5,000 dwellings belonging to ethnic Georgians were reportedly destroyed.

243. The information available provides a reasonable basis to believe that crimes against humanity were committed during the 2008 armed conflict in Georgia. In particular, there is a reasonable basis to believe that South Ossetian forces committed the crimes against humanity of murder (article 7(1)(a)), deportation or forcible transfer of population (article 7(1)(d)), and persecution against any



identifiable group or collectivity on ethnic grounds (article 7(1)(h)).

244. Based on the information available at this stage, the Office also finds that there is a reasonable basis to believe that between at least 7 August and 10 October 2008, the South Ossetian forces committed at a minimum the following war crimes in the context of an armed conflict: war crimes of wilful killing/murder (article 8(2)(a)(i) or article 8(2)(c)(i)), destroying the enemy's property/the property of an adversary (article 8(2)(b)(xiii) or article 8(2)(e)(xii)), and pillage (article 8(2)(b)(xvi) or article 8(2)(e)(v)). These crimes took place in the context of and were associated with the armed conflict.

245. There is conflicting information on the involvement by the Russian armed forces, with credible reports indicating that at least some members of the Russian armed forces participated in the commission of such crimes, while in other instances they stood by passively or intervened to prevent such crimes. Based on the information available, it does not appear at this stage that members of the Russian armed forces were among those most responsible for these crimes.

246. The information available at this stage does not indicate the existence of a State or organisational policy by the Russian armed forces or the Russian Federation in relation to the crimes allegedly committed either by those members of the Russian armed forces who participated in the commission of crimes by South Ossetian forces, or in relation to the crimes allegedly committed by South Ossetian forces themselves.

247. In terms of the potential cases that are likely to arise from an investigation of the situation, the Office considers that the exact involvement of members of the Russian armed forces in the commission of the alleged crimes committed by South Ossetian forces will need to be further explored in the context of any authorised investigation.

*Alleged attack against peacekeepers*

248. There is also a reasonable basis to believe that both South Ossetian forces and Georgian armed forces committed the war crime of attacking personnel or objects involved in a peacekeeping mission (article 8(2)(b)(iii) or article 8(2)(e)(iii)).

249. In particular, on 7 August 2008 members of the Georgian peacekeeping contingent at the Avnevi checkpoint are alleged to have come under heavy shelling from South Ossetian positions, resulting in two deaths and five injuries and the subsequent withdrawal of the Georgian contingent from the Joint Peacekeeping Force Headquarters ("JPKF HQ").

250. During the night of 7 to 8 August 2008, the Georgian armed forces conducted a military operation against JPKF HQ and the base of the Russian

Peacekeeping Forces Battalion ("RUPKFB") claiming that it had lost its protected status. According to the Russian authorities, 10 peacekeepers belonging to the Russian peacekeeping contingent were killed and a further 30 were wounded as a result.

251. There are conflicting allegations from the parties to the conflict that the Georgian and/or Russian peacekeepers had lost their entitlement to the protection given to civilians and civilian objects at the moment of each respective attack. However, bearing in mind the low threshold applicable at this stage of the procedure, and the presumption of civilian character that governs the application of the law in case of doubt, the Prosecution has concluded that there is a reasonable basis, at this stage, to believe that the war crime of intentionally directing an attack against personnel and objects involved in a peacekeeping mission has been committed with respect to the intentional directing of attacks by South Ossetian forces against Georgian peacekeepers as well as the intentional directing of attacks by the Georgian armed forces against Russian peacekeepers.

### *Admissibility Assessment*

#### *Complementarity*

252. Since it first opened its preliminary examination in August 2008, the Prosecution has engaged closely with the national authorities of both Georgia and Russia, and followed the progress of their national investigations into crimes arising from this situation. Until recently, it appeared that progress was being made. However, in 2015, national proceedings in Georgia have stalled, with the Government confirming to the Prosecution that domestic proceedings for the alleged displacement of ethnic Georgians from South Ossetia have been indefinitely suspended. The same is true for its domestic proceedings into allegations of intentional directing attacks against Georgian peacekeepers. On the other hand, in relation to the attack against Russian peacekeepers, Russian domestic investigations appear to be progressing—a matter which will be kept under review should an investigation be authorised.

253. National proceedings in Georgia: The Office of the Chief Prosecutor of Georgia (OCP) is the principal national authority responsible for conducting the investigation into alleged crimes committed in the context of the August 2008 armed conflict. The investigation was officially opened immediately after the end of active hostilities in August 2008 with more than 100 investigators deployed under the supervision of the Chief Prosecutor of Georgia. The authorities have been investigating the alleged forcible transfer of ethnic Georgians from South Ossetia as well as allegations against members of Georgian armed forces, in particular with respect to the alleged attack on Russian peacekeepers.

254. The Georgian investigation has however been hampered by several obstacles, including the lack of access to South Ossetia and lack of mutual legal assistance with Russia. In addition, the work of investigative bodies was halted by three successive changes in the OCP leadership in 2013. In the course of 2014, the Georgian authorities informed the Office that investigative activities had been focused on overcoming the said obstacles with a view to taking concrete and identifiable steps that would lead to possible prosecutions.

255. On 17 March 2015, the Government of Georgia informed the Office that the national proceedings in relation to the potential cases, which had until recently progressed, have been indefinitely suspended in relation to both: (i) the forcible transfer and persecution of the ethnic Georgian population of South Ossetia and the “buffer zone” by South Ossetian forces, including acts of wilful killing/murder, pillage and destruction of enemy’s property; as well as (ii) the attack by South Ossetian forces against the Georgian peacekeepers stationed at Avnevi checkpoint. With no foreseeable resumption apparent, and no other investigations in relation to such conduct underway in other States, the Office assessed that the potential case identified in its Request would be admissible, due to State inaction.

256. *National proceedings in Russia:* The national investigation of alleged crimes related to the August 2008 armed conflict in the Russian Federation is carried out by the Investigative Committee of the Russian Federation. The investigation has been focused on the alleged attacks against Russian civilians and peacekeepers by Georgian armed forces and the verification of allegations against Russian servicemen. In the course of its work, the Investigative Committee claims to have collected a vast amount of evidentiary material, including witness statements, photo and video material, forensic evidence, expert reports, etc. Alleged crimes attributed to South Ossetian forces fall outside of the scope of this investigation. Accordingly, the Office has determined that, despite a number of reported verification efforts, no concrete and progressive steps have been taken in Russia to ascertain the criminal responsibility of those involved in the alleged crimes related to the potential case(s) identified in the Request.

257. The Office notes that according to the Russian authorities the attack against the Russian peacekeepers is still the subject of on-going investigative activities at the national level. At this stage, the information available does not indicate that the proceedings have been or are being undertaken for the purpose of shielding the person(s) concerned from criminal responsibility, or are conducted in a manner that is inconsistent with an intent to bring the person(s) concerned to justice, whether due to unjustified delay or lack of independence of impartiality. Further, the factors that may have made the Russian authorities unable to obtain the accused or the necessary evidence do not appear to constitute a bar to domestic proceedings. The Office intends to keep this assessment under review in the context of any authorised investigation.

## *Gravity*

258. On the basis of the information available, the allegations assessed in the Prosecution's Request for authorisation of an investigation indicate that potential cases identified for investigation by the Office would be of sufficient gravity to justify further action by the Court, based on an assessment of the scale, nature, manner of commission and impact of the alleged crimes.

259. Accordingly, the potential cases that would likely arise from an investigation of the situation would be admissible pursuant to article 53(1)(b).

## *Interests of Justice*

260. In light of the mandate of the Office, as well as the object and purpose of the Statute, and taking into account the gravity of the crimes and the interests of victims, based on the information available the Office has not identified substantial reasons to believe that the opening of an investigation into the Situation in Georgia would not be in the interests of justice.

## *OTP Activities*

261. During the reporting period, the Office has been in regular contact with relevant actors, including the Governments of Georgia and of the Russian Federation, in order to gather and verify information on alleged crimes committed and the existence and genuineness of relevant national proceedings. This has included formal requests for information pursuant to article 15(2), the conduct of missions, routine contacts with focal points, and ongoing interaction with relevant organisations and experts.

262. Following a submission of the *Update Report Concerning the National Criminal Proceedings of Georgia over the Crimes against Humanity and War Crimes related to the August 2008 Armed Conflict* ("the Report") by the Office of the Chief Prosecutor of Georgia on 5 November 2014, the Office sent a letter to the Georgian authorities on 14 November 2014 explaining the level of specificity and substantiation of concrete, tangible and pertinent evidence that is required to demonstrate that genuine national investigations or prosecutions are ongoing against those who appear to bear the greatest responsibility for the most serious crimes arising from the armed conflict of August 2008. On 6 December 2014, the Office of the Chief Prosecutor substantiated its November 2014 Report with documentation indicating concrete investigative activities that these authorities had been carrying out at the time.

263. On 21-23 January 2015, in the context of its admissibility assessment of potential cases before the Court, the Office conducted its sixth mission to Georgia in order to discuss the status of relevant national proceedings with relevant Georgian authorities, including the Office of the Chief Prosecutor of Georgia and the Ministry of Justice. As a result, the Office was provided with an in-depth update

on investigative steps that relevant Georgian authorities have taken since spring 2014. In addition, on 17 March 2015, the Government of Georgia informed the Office that national proceedings into the alleged crimes committed in the context of the August 2008 armed conflict had been indefinitely suspended.

264. On 16 October 2015, the Prosecutor visited Tbilisi to further inform victims and their representatives about her decision to request an authorisation to open an investigation into the situation in Georgia and explain the process of submitting victims' representations to the Pre-Trial Chamber within 30 days since the Request had been submitted. For this purpose, the Prosecutor met with victims and civil society organisations, including those organisations that directly work with victims as their representatives. On the same occasion, the Prosecutor also had fruitful consultations with the Minister of Justice and the Office of the Chief Prosecutor of Georgia.

### *Conclusion*

265. Following a completion of its assessment of factors set out in article 53(1)(a)-(c), the Office has reached the conclusion that there is a reasonable basis to proceed with an investigation into the situation in Georgia.

266. On 13 October 2015, pursuant to article 15 of the Statute, the Office requested the Pre-Trial Chamber to authorise the commencement of an investigation into the situation in Georgia from the period 1 July 2008 until 10 October 2008.

267. In compliance with Rule 50, on the same day, the Prosecutor provided notice to victims or their legal representatives of her request and informed them that pursuant to Regulation 50(1) of the Regulations of the Court they have 30 days to make representations to the Chamber.

## HONDURAS

### *Procedural History*

268. The Office has received 32 communications pursuant to article 15 in relation to the situation in Honduras. The preliminary examination of the situation in Honduras was made public on 18 November 2010

269. In November 2013, the Prosecutor concluded that the information available did not provide a reasonable basis to believe that the alleged crimes committed between 28 June 2009 and 27 January 2010 amounted to crimes against humanity. However, in the light of subsequent allegations of crimes committed after 27 January 2010, and in the Bajo Aguán region, the Office continued its preliminary examination to determine whether such allegations could either affect the legal characterisation of the conduct previously analysed, or could independently constitute crimes falling within the jurisdiction of the Court.

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270. On 28 October 2015, based on thorough legal and factual analysis of the information available, the Office concluded that there is no reasonable basis to proceed with an investigation, and decided to close the preliminary examination. A detailed report has been issued by the Prosecutor presenting the findings of the Office on subject-matter jurisdiction.

### *Preliminary Jurisdictional Issues*

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

### *Contextual Background*

272. In the years following the 2009 coup, violence in Honduras escalated sharply, owing partly to the political turmoil triggered by the coup, but also as a result of the expansion of drug trafficking and criminal organisations, the proliferation of weapons, and the armed forces' involvement in matters of citizen security. In the Bajo Aguán region, violence related to land struggles between the local population and private corporations has been exacerbated by the increased presence of transnational criminal organisations, robbers and looters of African palm plantations, and rivalries between peasant farmer groups. In this context,

private corporations have turned to private security companies to ensure *de facto* control of pieces of land with almost no state control or oversight.

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<sup>62</sup> ICC, [Report on Preliminary Examination Activities 2103](#), para. 83.

273. In this context, various domestic and international actors have drawn particular attention to the alleged targeting of diverse groups, including political activists of the opposition, human rights defenders, members of the legal profession, journalists and media workers, and members of workers union. In the Bajo Aguán region, an increasing number of crimes were reported, mainly against

members of *campesino* movements, members of their families and other individuals associated with their movement; and to a lesser extent against private security guards, members of state security forces and workers of private corporations.

### ***Subject-Matter Jurisdiction***

#### *Legal analysis of alleged crimes committed during the post-election period*

274. The Office has assessed whether the information available on alleged crimes committed between 27 January 2010 and September 2014 (“post-election period”) could either affect the characterisation of the conduct in the post-coup period through additional factual information, or could independently provide a reasonable basis for finding the existence of an attack against any civilian population, as per article 7(2)(a) of the Rome Statute.

275. According to the information available, over 150 killings of individuals, including political activists of the opposition, journalists and media workers, members of the legal profession, human rights defenders and members of workers union, were allegedly committed during the post-election period. Although the alleged crimes reportedly took place throughout the country, over 90 cases occurred in the departments of Francisco Morazán and Cortés, where Tegucigalpa and San Pedro Sula, the cities with the highest rates of killings and criminality in Honduras, are located. Some sources indicate that victims were allegedly targeted due to their perceived political affiliation, for their work denouncing or criticising governmental authorities for their support to the coup, or for their alleged involvement in criminal activities.

276. According to the information available, it does not appear that the alleged killings occurred primarily in locations that could be perceived as being more associated with the political opposition. In many instances, the information available is insufficient to establish that the alleged victims of killings were targeted owing to their political affiliation or professional activities. Instead, the information available suggests that the alleged crimes may stem from common criminality and the rise of drug trafficking organisations.

277. As documented by the Inter-American Commission on Human Rights (“IACHR”) in its Annual Reports from 2010 to 2013, human rights violations in Honduras prior to and after the 2009 coup are linked to structural situations

concerning, *inter alia*, the situation of citizen security, the weakness of the administration of justice associated with high levels of impunity, and the marginalisation of segments of Honduran society. In the period under analysis,

it appears that this cycle of criminality and impunity has deteriorated further. In general, the increase in killings in the past years appears to be related to the incapacity of the government to deal with criminal and drug trafficking organisations, in particular after the coup.

278. Against a backdrop of high levels of violent crime and the prevalence of large numbers of criminal groups, the Office found scant information indicating links and common features between the alleged crimes, including in relation to their characteristics, nature, aims, targets, alleged perpetrators, times and locations, so as to demonstrate the existence of a “course of conduct” within the meaning of article 7(2)(a) of the Statute. In this respect, the alleged crimes fail to evidence a certain pattern of behaviour indicating that they were committed as part of a campaign or operation carried out against the civilian population.

279. Consequently, the Office could not find a reasonable basis to believe that the alleged acts were committed as part of an “attack directed against a civilian population” under article 7(1) of the Statute. Therefore, the Office does not consider that such acts amount to crimes against humanity under the Statute and will not assess the other contextual elements of crimes against humanity.

*Legal analysis of alleged crimes committed in the Bajo Aguán region*

280. Another focus of the preliminary examination in Honduras was the Bajo Aguán region, where it is alleged that over 100 members of *campesino* movements, members of their families and other individuals associated with their movements were killed from January 2010 to September 2013. According to the information available, 78 of these cases have been reported as targeted assassinations and other killings allegedly resulted from violent clashes between

*campesinos* and private security guards in the context of land occupations attempts carried out by large groups of *campesinos*, and during forced eviction operations executed by state security forces, in some instances with the support of private security guards. Although various sources indicate that the increasing violence in the region is related to long-standing disputes over land between

*campesino* movements and private owners, other sources attribute the high rates of criminality to activities carried out by criminal and drug trafficking organisations.

281. In this context, it is further alleged that since June 2009 acts of violence, including severe beatings (at least 61 cases), enforced disappearances (at least 6 cases), forced eviction operations (30 incidents have been reported but the number of victims remains unclear as entire communities had been allegedly targeted) have been committed by state security forces and private security

guards against members of *campesino* movements, members of their families, as well as against journalists, human rights activists and members of the legal profession associated with these organisations.



282. According to the information available, the civilian population allegedly targeted is composed of members of *campesino* associations involved in land disputes against large landowners and private corporations, members of their families and other individuals, including journalists, members of the legal profession and human rights defenders associated with their movements. Although most of the victims fall within the civilian population allegedly targeted, in a few cases private security guards and members of state security

forces have also been reportedly killed by *campesinos* in the context of land occupation attempts and under unclear circumstances. In some isolated cases, private security guards have allegedly committed killings and altered the crime scene to incriminate members of peasant movements.

283. The Office notes that the ongoing conflict in the region is not limited to land issues, but it is also closely linked to criminal and drug trafficking organisations' activities, African palm plantation robbers and looters, and rivalries between peasant farmer groups. In this context, the Office found scant information indicating links and common features between the alleged crimes, "in terms of their characteristics, nature, aims, targets and alleged perpetrators, as well as times and locations", so as to establish the existence of a "course of conduct".

284. The prevalence and expansion of criminal and drug trafficking organisations appear to be the main factor behind rampant violence in the region, in particular from 2009 to 2012, rather than land disputes between local populations and

private corporations. Both members of *campesino* associations and owners of private corporations have been accused of having links with these organisations. As confirmed by the information gathered by the Office during its mission to Tegucigalpa in 2014, criminal organisations and international drug cartels are deeply involved in local businesses and criminal activities in the region and seem to be involved in most of the alleged crimes in the Bajo Aguán, including unlawful occupations of land and robbery of African palm fruits, in order to retain control of the region and to continue to operate in total impunity.

285. In light of the expansion of criminal and drug trafficking organisations in the Bajo Aguán region, in particular following the 2009 coup, the Office found that most of the alleged crimes appear to be related to the cycle of violence that has plagued the region for years. Although some of the alleged crimes could be

related to land disputes between *campesino* groups and large landowners and private corporations, in the absence of sufficient information on links and commonality of features between the multiple alleged crimes substantiating the existence of a "course of conduct", the Office found that there is not a reasonable basis to believe that the alleged acts were committed as part of an "attack directed against a civilian population" within the meaning of article 7 of the Statute.

## *OTP Activities*

286. During the reporting period, the Office finalised its analysis of whether there is a reasonable basis to believe that the alleged crimes committed since 2010 fall within the subject-matter jurisdiction of the Court. A detailed report presenting the Office's findings with respect to jurisdictional matters was issued on 28 October 2015.

63

287. The Office conducted a mission to Tegucigalpa, from 29 to 31 October 2015, to announce and explain in detail the conclusions reached by the Office to Honduran authorities and civil society organisations. A Questions and Answers document,

<sup>64</sup> in both English and Spanish, has also been issued to ensure a broader dissemination and understanding of the Prosecutor's conclusion among Honduran population.

## *Conclusion*

288. The situation in Honduras raises a number of issues that characterise it as a "borderline case". However, after carefully weighing the information available against the legal requirements of the Statute, the Office has concluded that the information available does not provide a reasonable basis to believe that crimes within the jurisdiction of the Court have been committed in the situation in Honduras.

289. Accordingly, the Prosecutor lacks a reasonable basis to proceed with an investigation and has decided to close this preliminary examination. Should further information become available in the future which would lead the Office to reconsider these conclusions in the light of new facts or evidence, the preliminary examination could be re-opened. |

OTP

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<sup>63</sup> Office of the Prosecutor, [Situation in Honduras, Article 5 Report](#), October 2015.

<sup>64</sup> [Questions & Answers on the decision of the ICC Prosecutor to close the preliminary examination in Honduras](#).