



**Cour  
Pénale  
Internationale**

**International  
Criminal  
Court**

**Le Bureau du Procureur**

**The Office of the Prosecutor**

# Report on Preliminary Examination Activities (2018)

5 December 2018



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## I. INTRODUCTION

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

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<sup>1</sup> See [ICC-OTP, Policy Paper on Preliminary Examinations, November 2013](#).

<sup>2</sup> See also rule 48, ICC Rules of Procedure and Evidence.

serious crimes.<sup>3</sup> Where relevant domestic investigations or prosecutions exist, the Office 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. As long as universal ratification is not yet a reality, crimes in some situations may fall outside the territorial and personal jurisdiction of the ICC. This can be remedied only 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 UN 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 UN 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 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 possess 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 (“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 ‘has been or is being

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<sup>3</sup> See OTP Strategic Plan – 2016-2018, paras. 35-36. 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 was particularly grave and has acquired extensive notoriety.

committed’.”<sup>4</sup> In this context, PTC II has indicated that all of the information need not necessarily “point towards only one conclusion.”<sup>5</sup> This reflects the fact 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.<sup>6</sup> In particular, at the 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>7</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 decide either (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 issues regular reports on its activities and provides reasons for its decisions either to proceed or not proceed with investigations.
15. In order to distinguish the situations that do 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>4</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>5</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>6</sup> Kenya Article 15 Decision, para. 32.

<sup>7</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. In practice, the Office may occasionally encounter situations where alleged crimes are not manifestly outside the jurisdiction of the Court, but do not clearly fall within its subject-matter jurisdiction. In such situations, the Office will first consider whether the lack of clarity applies to most, or a limited set of allegations, and in the case of the latter, whether they are nevertheless of such gravity to justify further analysis. The Office will then consider whether the exercise of the Court's jurisdiction may be restricted due to factors such as a narrow geographic and/or personal scope of jurisdiction and/or the existence of national proceedings relating to the relevant conduct. In such limited situations, the Office will also take into account its prosecutorial strategy of focusing on those most responsible for the most serious crimes under the Court's jurisdiction, and as a general rule, will follow a conservative approach in terms of deciding whether to open a preliminary examination. It will, however, endeavour to give a more detailed response to the senders of such communications outlining the Office's reasoning for its decisions.

- Phase 2, represents the formal commencement of a preliminary examination, and 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 also seeks to contribute to two overarching goals of the 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 2018

17. This report summarises the preliminary examination activities conducted by the Office between 1 December 2017 and 30 November 2018.
18. Between 1 November 2017 and 31 October 2018, the Office received 673 communications pursuant to article 15 of the Statute. Of these, 443 were manifestly outside the Court's jurisdiction; 28 warranted further analysis; 158 were linked to a situation already under preliminary examination; and 44 were linked to an investigation or prosecution. The Office has received a total of 13,273 article 15 communications since July 2002.
19. During the reporting period, the Office opened three new preliminary examinations. On 8 February 2018, following review of a number of communications and reports documenting alleged crimes, the Prosecutor opened preliminary examinations, respectively, into the situation in the Republic of the Philippines ("the Philippines") since at least 1 July 2016 and the situation in the Bolivarian Republic of Venezuela ("Venezuela") since at least April 2017. On 18 September 2018, the Prosecutor announced the opening of a preliminary examination concerning the alleged deportation of the Rohingya people from the Republic of the Union of Myanmar ("Myanmar") to the People's Republic of Bangladesh ("Bangladesh").
20. During the reporting period, two situations were referred to the Office pursuant to article 14 of the Statute. On 22 May 2018, the Office received a referral from the Government of the State of Palestine regarding the situation in Palestine since 13 June 2014 with no end date. On 27 September 2018, the Office received a referral from a group of States Parties, namely the Argentine Republic, Canada, the Republic of Colombia, the Republic of Chile, the Republic of Paraguay and the Republic of Peru, regarding the situation in Venezuela since 12 February 2014. At the time of receipt of these referrals, both situations were already subject to preliminary examination.
21. During the reporting period, the Office also completed and closed one preliminary examination. On 21 September 2018, following a thorough factual and legal analysis of all the information available, the Prosecutor concluded that there was no reasonable basis to proceed with an investigation into the situation in the Gabonese Republic ("Gabon"), and decided to close the preliminary examination for lack of subject-matter jurisdiction.
22. At the time of writing, the Prosecutor's Request for authorisation to proceed with an investigation of the situation in the Islamic Republic of Afghanistan, submitted on 20 November 2017, was still pending review by PTC II. With respect to the situation on the registered vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, on 29 November 2017, the Prosecutor notified PTC I of her final decision not to proceed with an investigation. On 15 November 2018, however, PTC I decided by majority that

the Prosecutor's decision of 29 November 2017 could not be considered final within the meaning of rule 108(3) of the ICC Rules of Procedure and Evidence, and requested the Prosecutor to reconsider her prior decision of 6 November 2014 closing this preliminary examination. On 21 November 2018, the Prosecutor filed her request for leave to appeal this decision with the Pre-Trial Chamber.

23. The Office further continued its preliminary examinations of the situations in Colombia, Guinea, Iraq/United Kingdom ("UK"), Nigeria, Palestine, and Ukraine. During the reporting period, the Office sent preliminary examination missions to Abuja, Bogota, Conakry, and Kyiv and held numerous consultations at the seat of the Court with State authorities, representatives of international and non-government organisations, article 15 communication senders and other interested parties.
24. Pursuant to the Office's Policy Paper on Sexual and Gender-based crimes and Policy on Children, during the reporting period, the Office conducted, where appropriate, an analysis of alleged sexual and gender-based crimes and crimes against children that may have been committed in various situations under preliminary examination and sought information on national investigations and prosecutions by relevant national authorities on such conduct.

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

### BANGLADESH/MYANMAR

#### *Procedural History*

25. The situation in the People's Republic of Bangladesh ("Bangladesh")/ Republic of the Union of Myanmar ("Myanmar") has been under preliminary examination since 18 September 2018. The Office has received a total of 34 communications pursuant to article 15 in relation to this situation, pertaining to events occurring since August 2017.
26. On 9 April 2018, the Office filed a Request pursuant to regulation 46(3) of the Regulations of the Court and article 19(3) of the Rome Statute, seeking a ruling from the Pre-Trial Chamber on the question of whether the Court may exercise jurisdiction pursuant to article 12(2)(a) of the Statute over the alleged deportation of members of the Rohingya people from Myanmar to Bangladesh.<sup>8</sup>
27. On 11 April 2018, the President of the Pre-Trial Division assigned the Request to PTC I.<sup>9</sup>
28. On 20 June 2018, a status conference took place in closed session, in the presence of the Prosecutor only. The transcript of the status conference was made public, in redacted form, on 26 July 2018.<sup>10</sup>
29. On 6 September 2018, Pre-Trial Chamber I issued a decision confirming that the Court may exercise jurisdiction over the alleged deportation of the Rohingya people from Myanmar to Bangladesh, as well as potentially other crimes under article 7 of the Rome Statute.<sup>11</sup>
30. On 18 September 2018, the Prosecutor issued a statement announcing the opening of a preliminary examination concerning the alleged deportation of the Rohingya people from Myanmar to Bangladesh.<sup>12</sup>

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<sup>8</sup> [Prosecution's Request for a Ruling on Jurisdiction under Article 19\(3\) of the Statute](#), 9 April 2018.

<sup>9</sup> [Decision assigning the "Prosecution's Request for a Ruling on Jurisdiction under Article 19\(3\) of the Statute" to Pre-Trial Chamber I](#), 11 April 2018.

<sup>10</sup> [Transcript of the status conference](#), 20 June 2018. The transcript was made public pursuant to Pre-Trial Chamber I's [Decision on the Reclassification of Certain Documents and Orders](#), 11 July 2018.

<sup>11</sup> [Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19\(3\) of the Statute"](#), 6 September 2018.

<sup>12</sup> [Statement of ICC Prosecutor on opening a Preliminary Examination concerning the alleged deportation of the Rohingya people from Myanmar to Bangladesh](#), 18 September 2018.

### *Preliminary Jurisdictional Issues*

31. Bangladesh deposited its instrument of ratification to the Statute of the Rome Statute on 23 March 2010. The ICC therefore has jurisdiction over Rome Statute crimes committed on or after 1 June 2010 on the territory of Bangladesh, pursuant to article 12(2)(a) of the Statute, or by its nationals, pursuant to article 12(2)(b) of the Statute.
32. Furthermore, in its decision of 6 September 2018, PTC I found that the Court may assert jurisdiction pursuant to article 12(2)(a) of the Statute if at least one element of a crime within the jurisdiction of the Court or part of such a crime is committed on the territory of a State Party to the Statute.<sup>13</sup> Specifically, the Chamber held that acts of deportation initiated in a State not Party to the Statute (through expulsion or other coercive acts) and completed in a State Party to the Statute (by virtue of victims crossing the border to a State) fall within the parameters of article 12(2)(a) of the Statute. The Chamber went on to hold that the same rationale may apply to other crimes within the jurisdiction of the Court as well, citing as examples the crimes against humanity of persecution and other inhumane acts under articles 7(1)(h) and 7(1)(k) of the Statute.<sup>14</sup>
33. As a result, while Myanmar is not a State Party to the Statute and has not lodged a declaration under article 12(3) accepting the jurisdiction of the Court, the Chamber held that the Court has jurisdiction over alleged crimes occurring in part in Bangladesh, provided that such allegations are established to the required threshold.

### *Contextual Background*

34. Bangladesh is located in southern Asia at the Bay of Bengal and shares a border with Myanmar in the south-east of the country. Since its independence in 1948, Myanmar's political history has been marked by a number of insurgencies and internal struggles for ethnic and sub-national autonomy, in particular in the Kachin, Kayin, Rakhine and Shan states. These ethnically-based conflicts, which persist to this day, have seen a number of episodes of violence and clashes between State military forces, local government forces and a number of armed groups, as well as between such groups.
35. Rakhine state, the northern part of which borders Bangladesh, is home to various ethnic and religious minority groups. In particular, members of the Rohingya population, a Muslim ethnic minority group, have reportedly suffered years of severe systemic oppression as a result of State policies and practices which have led to their gradual denial of legal status, identity, citizenship and political participation, restrictions on their right to freedom of movement, access to food, livelihoods, health care and education. In 2012, and again in 2016,

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<sup>13</sup> ICC-RoC46(3)-01/18, para.72.

<sup>14</sup> ICC-RoC46(3)-01/18, paras.74-79.

violence erupted and security forces allegedly committed a number of serious human rights violations against Muslim minorities across Rakhine State, accompanied by further tightening of general restrictions against them, and the spreading of a hate campaign portraying the Rohingya and other Muslims as an existential threat to Myanmar and to Buddhism.

36. Events significantly deteriorated on 25 August 2017, when the Arakan Rohingya Salvation Army, an armed opposition group in Rakhine State, allegedly launched a number of coordinated attacks on a military base and up to 30 security force outposts across the northern Rakhine State of Myanmar. These attacks were reportedly immediately followed by “clearance operations” targeted at the Rohingya population that continued for more than two months. During the course of these operations more than 40 per cent of all villages in northern Rakhine State were reportedly partially or totally destroyed and it is estimated that by September 2018, over 725,000 Rohingya had fled to the neighbouring state of Bangladesh.

### *Alleged Crimes*

37. The preliminary examination focuses on alleged crimes committed in part on the territory of Bangladesh since June 2010, in particular in the context of the escalation of violence which occurred in Myanmar in August 2017 and resulted in the alleged deportation of hundreds of thousands of members of the Rohingya people from Myanmar into Bangladesh.
38. In this context, the preliminary examination takes into account a number of alleged coercive acts which may have resulted in the forced displacement of the Rohingya people, including deprivation of fundamental rights, killing, sexual violence, enforced disappearance, destruction and looting.

### *OTP Activities*

39. Since the formal announcement of the initiation of the preliminary examination in September 2018, 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 has 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.
40. The Office has also engaged and consulted with relevant stakeholders, including by holding meetings at the seat of the Court, on all matters relevant to the preliminary examination.

### *Conclusion and Next Steps*

41. 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 the alleged crimes fall within the subject-matter jurisdiction of the Court. In accordance with its Policy Paper on Preliminary Examinations, the Office may gather available information on relevant national proceedings at this stage of analysis. Building on the PTC's prior jurisdictional ruling, the Office will seek to ensure completion of this preliminary examination within a reasonable time.

## REPUBLIC OF THE PHILIPPINES

### *Procedural History*

42. The situation in the Republic of the Philippines (“the Philippines”) has been under preliminary examination since 8 February 2018. The Office has received a total of 52 communications pursuant to article 15 in relation to this situation.
43. On 13 October 2016, the Prosecutor issued a statement on the situation in the Philippines, expressing concern about the reports of alleged extrajudicial killings of purported drug dealers and users in the Philippines.<sup>15</sup> The Prosecutor also recalled that those who incite or engage in crimes within the jurisdiction of the Court are potentially liable to prosecution before the Court, and indicated that the Office would closely follow relevant developments in the Philippines.
44. On 8 February 2018, following a review of a number of communications and reports documenting alleged crimes, the Prosecutor opened a preliminary examination of the situation in the Philippines since at least 1 July 2016.<sup>16</sup>

### *Preliminary Jurisdictional Issues*

45. The Philippines deposited its instrument of ratification to the Statute on 30 August 2011. The ICC therefore has jurisdiction over Rome Statute crimes committed on the territory of the Philippines or by its nationals since 1 November 2011.
46. On 17 March 2018, the Government of the Philippines deposited a written notification of withdrawal from the Statute with the UN Secretary-General. In accordance with article 127, the Philippines’ withdrawal will become effective one year after this date. The Court retains jurisdiction with respect to alleged crimes that have occurred on the territory of the Philippines during the period when it was a State Party to the Statute.

### *Contextual Background*

47. From 1988 to 2016, Mr Rodrigo Duterte served as Mayor of Davao City, one of the largest and most urban cities in the Philippines. Throughout his tenure as mayor, a central focus of his efforts was purportedly fighting crime and drug use. On different occasions, then-Mayor Duterte reportedly publicly supported and encouraged the killing of petty criminals and drug dealers in Davao City. During the mentioned period, it is reported that police officers in Davao City as

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<sup>15</sup> [Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda concerning the situation in the Republic of the Philippines](#), 13 October 2016.

<sup>16</sup> [Statement of the Prosecutor of the International Criminal Court, Mrs Fatou Bensouda, on opening Preliminary Examinations into the situations in the Philippines and in Venezuela](#), 8 February 2018.

well as the Davao Death Squad carried out at least 1,000 killings in incidents that share a number of common features.

48. In 2016, Mr Duterte ran as a candidate for president of the Philippines. As part of his campaign platform, he promised to launch a war on crime and drugs, *inter alia*, through replicating the strategies he implemented in Davao City during his time as mayor. On 9 May 2016, Mr Duterte was elected President of the Philippines, and was sworn in on 30 June 2016. On 1 July 2016, the Philippine National Police (“PNP”) launched a nationwide anti-drug campaign in line with President Duterte’s pronouncement to eradicate illegal drugs during the first six months of his term. In the context of that campaign, PNP forces have reportedly conducted tens of thousands of operations to date which have reportedly resulted in the killing of thousands of alleged drug users and/or small-scale dealers. It is also reported that, since 1 July 2016, unidentified assailants have carried out thousands of attacks similarly targeting such individuals.
49. Since July 2016, President Duterte has repeatedly and publicly confirmed his commitment to the continuation of this anti-drug campaign. Other senior government and PNP officials have also reportedly made regular public statements in support of the operations and activities carried out pursuant or in connection to the adopted anti-crime/drug policies.
50. The UN Secretary General, UN bodies and experts, various States, international NGOs and national civil society representatives have expressed serious concern about the alleged extrajudicial killings and criticised statements by President Duterte which have been viewed as endorsing the killings and fostering an environment of impunity and violence.

### *Alleged Crimes*

51. The preliminary examination focuses on crimes allegedly committed in the Philippines since at least 1 July 2016, in the context of the so-called “war on drugs” campaign launched by the government to fight the sale and use of illegal drugs. In particular, it focuses on allegations that President Duterte and other senior government officials promoted and encouraged the killing of suspected or purported drug users and/or dealers, and in such context, members of PNP forces and private individuals (such as vigilante groups) have carried out thousands of killings throughout the Philippines and in particular in the Metro Manila area.
52. In particular, it has been alleged that since 1 July 2016, over 12,000 persons have been killed for reasons related to their alleged involvement in drug use or dealing, or otherwise due to mistaken identity or as collateral damage in the course of police anti-drug operations. Reportedly, over 4,800 of these total killings were committed in acknowledged anti-drug police operations. Thousands of killings were also reportedly carried out by unknown assailants. While some of these killings have reportedly occurred in the context of fights

between or within gangs, it is alleged that many of the reported killings by unidentified assailants took place in the context of, or in connection to, the government's anti-drug campaign. In this regard, it has also been alleged that some of these vigilante-style executions committed by private citizens were coordinated or planned by members of the PNP, and/or were actually committed by members of the police (who wore disguises in order to conceal their identity as members of the police).

53. Reportedly, most of the victims have been young men, especially from urban areas and poorer backgrounds, who were suspected of having some involvement in crime- or drug-related activities. In addition, it has been reported that some local public officials were allegedly killed because of their purported links to the trafficking of narcotics. It is also alleged that over 70 persons aged 18 and under have been killed in the context of the anti-drug operations conducted since 1 July 2016, including five alleged cases where the victims were seven years old or younger.

#### ***OTP Activities***

54. During the reporting period, the Office has been conducting a thorough factual and legal assessment of the information available 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 this regard, the Office has continued to gather, receive and review information available from a wide range of sources on the crimes allegedly committed in the context of the "war on drugs" in the Philippines. This includes publicly available information and information from individuals or groups, non-governmental or intergovernmental organisations. Consistent with its standard practice, the Office has subjected such information to rigorous source evaluation, including assessment of reliability of sources and credibility of information received.
55. In order to conduct its legal and factual analysis, the Office has focussed on recording, on an ongoing basis, relevant alleged incidents and examining the circumstances in which such incidents reportedly occurred and particular key features, such as in relation to the profile of alleged victims, the identity of the perpetrators and *modus operandi* employed. The Office has also collected and analysed information relevant to the overall context in which the alleged acts occurred. The Office has also engaged and consulted with relevant stakeholders, including by holding meetings at the seat of the Court.
56. The Office has further closely followed relevant developments in the Philippines and will continue to do so.

#### ***Conclusion and Next Steps***

57. The Office is continuing its assessment of the information available in order to reach a determination on whether there is a reasonable basis to believe that the

alleged crimes fall within the subject-matter jurisdiction of the Court. This assessment is strictly guided by the requirements of the Statute and being conducted with a view to reaching conclusions within a reasonable time frame. The Office will also continue to engage with a variety of reliable sources and relevant stakeholders on all matters relevant to the preliminary examination of the situation in the Philippines. In accordance with its Policy Paper on Preliminary Examinations, the Office may further gather available information on relevant national proceedings, as necessary and appropriate at this stage.

58. Any alleged crimes occurring in the future in the context of the same situation could also be included in the Office's analysis. Accordingly, the Office will also continue to record allegations of crimes committed in the Philippines to the extent that they may fall within the jurisdiction of the Court.

## UKRAINE

### *Procedural History*

59. The situation in Ukraine has been under preliminary examination since 25 April 2014. The Office has received a total of 86 communications under article 15 of the Statute in relation to crimes alleged to have been committed since 21 November 2013.
60. 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.
61. On 25 April 2014, in accordance with the Office's Policy Paper on Preliminary Examinations, the Prosecutor opened a preliminary examination of the situation in Ukraine relating to the so-called "Maidan events."<sup>17</sup>
62. On 8 September 2015, the Government of Ukraine lodged a second declaration under article 12(3) of the Statute accepting the exercise of jurisdiction of the ICC in relation to alleged crimes committed on its territory from 20 February 2014 onwards, with no end date. On 29 September, based on Ukraine's second declaration under article 12(3), the Prosecutor announced the extension of the preliminary examination of the situation in Ukraine to include alleged crimes occurring after 20 February 2014 in Crimea and eastern Ukraine.<sup>18</sup>

### *Preliminary Jurisdictional Issues*

63. Ukraine is not a State Party to the 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.

### *Contextual Background*

#### *Maidan events*

64. At the start of the events that are the subject of the Office's preliminary examination, the Government of Ukraine was dominated by the Party of Regions, led by the President of Ukraine at the time, Viktor Yanukovich. Mass protests in the area of Independence Square (*Maidan Nezalezhnosti*) in Kyiv began on 21 November 2013, prompted by the decision of the Ukrainian Government

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<sup>17</sup> [The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination in Ukraine, 25 April 2014.](#)

<sup>18</sup> [ICC Prosecutor extends preliminary examination of the situation in Ukraine following second article 12\(3\) declaration, 29 September 2015.](#)

not to sign an Association Agreement with the European Union (“EU”). Over the following weeks, the protest movement, which became known as the “Maidan” protests, continued to grow in strength and reportedly diversified to include individuals and groups who were generally dissatisfied with the Yanukovich Government and demanded the President’s removal from office.

65. Violent clashes occurred at several points in the context of the demonstrations, resulting in injuries both to protesters and members of the security forces, and deaths of some protesters. Violence escalated sharply on the evening of 18 February 2014 when the authorities reportedly initiated an operation to attempt to clear the square of protesters. Scores of people were killed and hundreds were injured within the following three days. On 21 February 2014, under EU mediation, President Yanukovich and opposition representatives agreed on a new government and scheduled the presidential election for May 2014. However, on 22 February 2014, the Ukrainian Parliament voted to remove President Yanukovich, who left the country that day for the Russian Federation.

#### *Crimea*

66. From the last days of February 2014, protests against the new Ukrainian Government began to grow, notably in the eastern regions of the country and in Simferopol, the capital of the Autonomous Republic of Crimea. On 27 February 2014, armed and mostly uniformed individuals wearing no identifying insignia seized control of government buildings in Simferopol, including the Crimean parliament building. The Russian Federation later acknowledged that its military personnel had been involved in taking control of the Crimean peninsula.
67. The incorporation of Crimea and the city of Sevastopol into the Russian Federation was announced on 18 March 2014, following a referendum held two days earlier that was declared invalid by the interim Ukrainian Government and by a majority of States of the UN General Assembly.
68. In 2016, the Office made public its assessment that the situation within the territory of Crimea and Sevastopol would amount to an international armed conflict between Ukraine and the Russian Federation which began at the latest on 26 February 2014, and that the law of international armed conflict would continue to apply after 18 March 2014 to the extent that the situation within the territory of Crimea and Sevastopol factually amounts to an ongoing state of occupation.<sup>19</sup> This assessment, while preliminary in nature, provides the legal framework for the Office’s analysis of information concerning crimes alleged to have occurred in the context of the situation in Crimea since 20 February 2014.

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<sup>19</sup> See [Report on Preliminary Examination Activities 2016](#), para. 158.

*Eastern Ukraine*

69. From late February 2014 onwards, in parallel to events in Crimea, anti-government protests took place in other regions of Ukraine following the departure of President Yanukovich, most notably in the east of the country. The situation deteriorated rapidly into violence and on 15 April 2014, the Ukrainian Government announced the start of an “anti-terror operation”, deploying its armed forces to the eastern provinces of the country. By the end of April, the acting Ukrainian President announced that the Ukrainian Government was no longer in full control of the provinces of Donetsk and Luhansk, declared that the country was on “full combat alert”, and reinstated conscription to the armed forces by decree. On 2 May 2014, protests in Odessa between pro-unity and pro-federalism supporters turned violent and ended in more than 40 deaths, mainly of pro-federalism protesters who had taken refuge inside a trade union building, in which a fire then started.
70. Following “referendums” held on 11 May 2014 that were deemed illegitimate by the Ukrainian Government, representatives of the self-proclaimed “Donetsk and Luhansk People’s Republics” (“DPR”/“LPR”) made declarations claiming “independence” from Ukraine. Both the DPR and the LPR also appealed to be incorporated into the Russian Federation. Both self-declared “republics” are not recognised by the vast majority of states.
71. The intensity of hostilities in eastern Ukraine rapidly increased. The highest numbers of casualties were recorded in the first year of the conflict, prior to the implementation of the Minsk II agreement, signed in February 2015. Nevertheless, fighting of varying degrees of intensity, and involving the use of heavy military weaponry by both sides, has persisted for more than four years.
72. In its *Report on Preliminary Examination Activities 2016*, the Office assessed that by 30 April 2014, the level of intensity of hostilities between Ukrainian government forces and anti-government armed elements in eastern Ukraine had reached a level that would trigger the application of the law of armed conflict and that the armed groups operating in eastern Ukraine, including the LPR and DPR, were sufficiently organised to qualify as parties to a non-international armed conflict. The Office also assessed that direct military engagement between the respective armed forces of the Russian Federation and Ukraine, indicated the existence of an international armed conflict in eastern Ukraine from 14 July 2014 at the latest, in parallel to the non-international armed conflict.
73. For the purpose of determining whether the otherwise non-international armed conflict involving Ukrainian armed forces and anti-government armed groups could in fact be international in character, the Office has considered information suggesting that the Russian Federation has been exercising overall control over armed groups in eastern Ukraine. The existence of a single international armed conflict in eastern Ukraine would entail the application of articles of the Statute relevant to armed conflict of an international character for the relevant period.

Taking into account the possible alternative classifications of the armed conflict(s) in eastern Ukraine, the Office has considered provisions of the Rome Statute applicable in both international and non-international armed conflict in conducting its analysis of the alleged crimes committed by the different parties to the conflict.

### *Subject Matter Jurisdiction*

74. In conducting its subject-matter assessment in relation to the situation in Crimea and eastern Ukraine, the Office has examined several forms of alleged conduct and considered the various possible legal qualifications under the Statute. It is recalled that offences under article 7 of the Statute may constitute crimes against humanity only when committed as part of an attack directed against any civilian population, involving the multiple commission of such acts referred to in article 7(1), pursuant to or in furtherance of a State or organisational policy. The descriptions below are without prejudice to the identification by the Office of any further alleged crimes, or alternative legal qualifications or factual determinations regarding the alleged conduct.

#### *Crimea*

75. *Enforced disappearances and killing*: since March 2014, at least nine individuals who opposed or were perceived to be opposed to the occupation have reportedly disappeared in Crimea and remained unaccounted for with no information on their whereabouts, from one to four years since they were last seen alive. While the majority of the alleged disappearances took place in 2014, and in particular in the period immediately before and after the referendum, several individuals disappeared later, with the latest reported case occurring in May 2016. In addition, one individual, who was reported missing in February 2014, was reportedly found dead several days later with injuries indicating that he had been killed. In its analysis, the Office considered whether any of these alleged incidents may amount to the war crime of wilful killing pursuant to article 8(2)(a)(i); murder as a crime against humanity pursuant to article 7(1)(a); or enforced disappearance of persons as a crime against humanity pursuant to article 7(1)(j).
76. *Torture and other forms of ill-treatment*: at least nine persons were allegedly ill-treated since 2014. The forms of alleged ill-treatment ranged from humiliation and degradation to the use of electric shocks, severe beatings, and threats of sexual violence. Victims reportedly included Crimean Tatars, pro-Ukrainian activists, and journalists, and in the majority of cases, the alleged ill-treatment occurred in the context of detention. The Office considered whether any of these instances of alleged ill-treatment may amount to the war crime of torture, pursuant to article 8(2)(a)(ii); outrages upon personal dignity, pursuant to article 8(2)(b)(xxi); or torture as a crime against humanity pursuant to article 7(1)(f).

77. *Forced conscription of Crimean residents to serve in the armed forces of the Russian Federation:* since 2014, male residents of Crimean peninsula who were of conscription age have reportedly been called to serve in the armed forces of the Russian Federation by means of four conscriptions, which took place in the spring of 2016, from April to July 2017, in October 2017, and in the spring of 2018. Taking into consideration that some residents of Crimea maintained their allegiance to Ukraine and would therefore consider the armed forces of the Russian Federation as a hostile force, the Office considered whether any individuals may have been compelled to serve in conditions that may amount to the war crime of compelling protected persons to serve in the forces of a hostile Power, pursuant to article 8(2)(a)(v).
78. *Deprivation of defendants' rights of fair and regular trial:* following the extension of the laws of the Russian Federation to Crimea, including legislation on terrorism and extremist activity, at least 24 pro-Ukrainian activists and Crimean Tatars were reportedly prosecuted before courts that were not established in accordance with the rules of international humanitarian law and in processes which allegedly lacked fundamental judicial guarantees. The Office considered whether the treatment of any of these 24 persons may amount to the war crime of wilfully depriving protected persons of the rights of fair and regular trial, pursuant to article 8(2)(a)(vi); or imprisonment or other severe deprivation of physical liberty as a crime against humanity pursuant to article 7(1)(e).
79. *Deprivation of liberty:* at least nine individuals were allegedly deprived of their liberty without legal basis, two of whom were reportedly held for 11 days in an irregular place of detention. Further, at least eight persons were reportedly detained and later imprisoned in cases of criminal prosecutions of activists and Crimean Tatars before the courts in Crimea. These persons were reportedly deprived of their liberty for periods ranging from two to four years, in procedures that allegedly lacked important judicial guarantees and before courts that were not constituted in accordance with the relevant rules of international humanitarian law. The Office considered whether any of these alleged instances of deprivation of liberty may amount to the war crime of unlawful confinement, pursuant to article 8(2)(a)(vii); or imprisonment or other severe deprivation of physical liberty as a crime against humanity, pursuant to article 7(1)(e).
80. *Transfer of part of the civilian population of the Russian Federation into Crimea and of part of the population of Crimea outside the territory:* the Office considered in its analysis whether any reported movements of population in and out of the territory of Crimea may amount to a crime under the Statute. In particular, it considered specific information related to 59 individuals out of a total of more than 2,200 persons in pre-trial detention or serving sentences in Crimean prisons who were reportedly transferred to correctional facilities in the Russian Federation. The Office considered whether this or any other alleged conduct associated with movements of persons may amount to the war crime of transfer, directly or indirectly, of the Occupying Power's own population into the

occupied territory and the transfer of parts of the population of the occupied territory outside this territory, pursuant to article 8(2)(b)(viii).

81. *Seizure of property*: immediately after the referendum, all public property in Crimea was reportedly transferred either to the new *de facto* institutions established in Crimea or to the institutions of the Russian Federation. Additionally, at least 280 properties of individuals, companies or cultural and scientific bodies have been allegedly seized since February 2014. The Office considered whether in any instances this alleged conduct may amount to the war crime of seizing the enemy's property that is not imperatively demanded by the necessities of war, pursuant to article 8(2)(b)(xiii).
82. *Alleged persecutory acts*: reportedly, victims of certain acts mentioned above were identified and targeted on the basis of their expressed political views or because they belonged to religious or ethnic groups perceived to oppose the occupation, such as Crimean Tatars or ethnic Ukrainians. In particular, Crimean Tatars were allegedly subjected to harassment and intimidation, including through a variety of measures such as house searches, arrests, trials, and restrictions to freedom of expression, assembly and association. The Office considered whether any of the above acts may amount to the crime against humanity of persecution against any identifiable group or collectivity on political grounds, pursuant to article 7(1)(h).

#### *Eastern Ukraine*

83. Between April 2014 and August 2018, at least 2,737 civilians were allegedly killed in armed hostilities. A further 298 civilians, including 80 children, were killed in the downing of the civilian aircraft flight MH17 on 17 July 2014. In the same period, between 7,300 and 9,300 civilians were reportedly injured. Most civilian deaths – particularly in the first two years of the conflict – reportedly resulted from the shelling of populated areas in both government-controlled territory and areas controlled by armed groups with smaller numbers allegedly killed or injured by mines, explosive remnants of war, booby traps, improvised explosive devices, and firearms.
84. In addition to extensive loss of life and life-altering injuries, the use of heavy weaponry by all parties to the conflict has reportedly caused widespread damage and destruction of civilian infrastructure, residential property, hospitals and other medical facilities, schools and kindergartens in both government-controlled territory and areas controlled by armed groups. The impact on children has been particularly acute. Restrictions on movement as a result of the fighting, and exacerbated conditions of poverty have resulted in higher levels of malnutrition and affected children's physical and psychological development. In early 2016, the United Nations International Children's Emergency Fund ("UNICEF") reported that one in five schools in Donbas had been damaged or destroyed, obliging children to travel greater distances to continue their

schooling, putting them at even greater risk from shelling and other conflict-related harm.

85. The Office has recorded more than 1,200 incidents involving crimes allegedly committed since 20 February 2014 in the context of events in eastern Ukraine. Although the highest numbers of incidents occurred in 2014 and 2015, during the most intense phase of hostilities, all forms of alleged conduct described below continued to be reported up to the present time.
86. *Conduct of hostilities*: the Office analysed in detail information relating to a number of particular instances of shelling to determine whether in these incidents any conduct may amount to the war crime of directing intentional attacks on civilians under article 8(2)(b)(i) or article 8(2)(e)(i); intentional attacks on civilian objects under article 8(2)(b)(ii); intentionally launching attacks in the knowledge that they will cause disproportionate harm, under article 8(2)(b)(iv); or intentionally directing attacks against protected objects such as medical and educational facilities, under article 8(2)(b)(ix) or article 8(2)(e)(iv).
87. *Treacherous killing*: The battle of Ilovaisk in August 2014 was one of the deadliest periods of the armed conflict, and allegedly resulted in the deaths of approximately 1000 Ukrainian servicemen. It is alleged that many Ukrainian troops were killed as they attempted to retreat from the area, when they came under fire from armed anti-government entity/Armed Forces of the Russian Federation troops, some of whom were disguised as Ukrainian troops. The Office analysed whether any alleged conduct at Ilovaisk may amount to the war crime of killing or wounding treacherously, under article 8(2)(b)(xi) or 8(2)(e)(ix); making improper use of the flag, insignia or uniform of the enemy, under article 8(2)(b)(vii); or attacks against objects bearing the distinctive emblems of the Geneva Conventions, under article 8(2)(b)(xxiv) or 8(2)(e)(ii).
88. *Murder*: A number of alleged summary executions of persons who had been captured by the opposing side and were *hors de combat*, including members of armed groups and of Ukrainian government forces, were also attributed to both pro-government forces and armed groups. The Office considered whether in any instances this conduct may amount to the war crime of wilful killing, under article 8(2)(a)(i); or murder, under article 8(2)(c)(i).
89. *Torture and ill-treatment in detention*: according to available estimates, at least 4,000 persons have been arrested and detained in connection to the conflict in eastern Ukraine since April 2014, including both civilians and persons *hors de combat*. Whereas the information available indicates that abuses against conflict-related detainees continued during the reporting period, their gravity and frequency appear to have been reduced compared to the previous years of the conflict. In addition, as part of the Minsk II agreements, a significant number of prisoners were reportedly released during the relevant period.

90. Since 2017, reliable sources have nevertheless continued to document cases of alleged arbitrary detention, torture and ill-treatment, including instances of reportedly inhuman or poor conditions of detention, particularly in the territory controlled by armed groups. For instance, between November 2017 and September 2018, the United Nations Office of the High Commissioner for Human Rights (“OHCHR”) documented 17 incidents of alleged abuse in detention that had reportedly occurred on both sides of the contact line. Reported incidents involved repeated beatings, electric shocks, burning, stabbing, sexualised torture, primarily consisting of the threat of rape, or other means of ill-treatment. In most cases, the treatment was reportedly inflicted to obtain information or force confession. Victims reportedly included persons who were *hors de combat* and civilians perceived to be associated with the opposing side of the conflict, either due to their actions or (real or perceived) political affiliation, including local residents of Donetsk and Luhansk, representatives of local authorities, journalists and bloggers, civil activists, aid workers, and businesspeople.
91. The Office analysed this information to determine whether in any instances the alleged conduct may amount to the war crime of unlawful confinement, under article 8(2)(a)(vii); the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognised as indispensable, under article 8(2)(c)(iv); torture and inhuman/cruel treatment, under article 8(2)(a)(ii) or article 8(2)(c)(i); or outrages upon personal dignity, under article 8(2)(b)(xxi) or article 8(2)(c)(ii).
92. *Sexual and gender-based crimes*: the Office has received and reviewed allegations of rape and other forms of sexual violence linked to the armed conflict in eastern Ukraine. It appears that a significant number of these allegations concern incidents that occurred in the initial phase of the armed conflict but which were often reported only years after their alleged commission, due to fear of retaliation or persecution by alleged perpetrators, social stigma, lack of services for victims and/or other reasons. Information available indicates that this form of alleged conduct, in particular, is underreported. According to the information available as of September 2018, forms of sexual violence documented in relation to the conflict include rapes, beatings and electric shocks in the genital area, threats of rape and castration, and forced nudity. These methods were allegedly used to punish perceived political opponents, exert pressure, intimidate and humiliate the victims. Non-state actors were alleged to be responsible for the vast majority of documented instances of sexual and gender-based crimes, and most of these alleged crimes were reportedly committed in the context of detention. Sexual and gender-based crimes were allegedly committed against both male and female victims, including civilians and captured combatants. The Office considered whether in any instances such conduct may amount to the war crime of rape and other forms of sexual violence, under article 8(2)(b)(xxii) or article 8(2)(e)(vi); torture and inhuman/cruel treatment, under article 8(2)(a)(ii)

or article 8(2)(c)(i); or outrages upon personal dignity, under article 8(2)(b)(xxi) or article 8(2)(c)(ii).

93. *Use of child soldiers*: Information more recently available has alleged that non-state armed groups recruited child soldiers. The Office analysed this information to determine whether any such alleged conduct may amount to the war crime of conscripting or enlisting children under the age of 15 years or using them to participate actively in hostilities, pursuant to article 8(2)(b)(xxvi) or article 8(2)(e)(vii).

### *OTP Activities*

94. In the past year, the Office has focused its analysis on alleged crimes in Crimea and eastern Ukraine and has also considered new information of relevance to the classification of the situation in eastern Ukraine under international law.
95. In conducting its assessment of subject matter jurisdiction, due to the volume of information in its possession, and the broad range of different types of conduct, the Office has sought to prioritise certain forms of alleged conduct believed to be most representative of the patterns of alleged crimes and to analyse a selection of incidents in greater detail with regard to the specific elements of crimes under the Statute. The alleged crimes that have been the subject of analysis by the Office to date, including detention-related conduct and shelling in eastern Ukraine, required complex factual and legal assessments, such as in relation to the conduct of hostilities and the applicable legal framework.
96. The Office has also received and is currently reviewing additional information related to the period specified in Ukraine's first declaration under article 12(3) of the Statute in order to determine whether this information would alter the previous assessment of the alleged crimes that occurred in the context of the Maidan events.
97. During the reporting period, the Office continued to engage with State authorities, intergovernmental organisations and NGOs in order to address a range of matters relevant to the preliminary examination and to seek additional information to further inform its assessment of subject matter jurisdiction and other connected issues. For that purpose, it has held a number of meetings with relevant stakeholders both at the seat of the Court and during a mission to Ukraine in June 2018. During this mission, the Office held extensive consultations with the Office of the Prosecutor General of Ukraine in order to assess the availability of information relevant to the Office's analysis. The Office also met with other stakeholders, including a number of civil society organisations, to further verify the seriousness of information received, and discuss cooperation and progress in the preliminary examination.

### *Conclusion and Next Steps*

98. The Office expects to finalise its analysis of subject matter jurisdiction in relation to both the situation in Crimea and eastern Ukraine in the near future, with a view to assessing admissibility as appropriate. In this regard, the Office will continue to gather available information on relevant national proceedings and to engage with the Ukrainian authorities, civil society and other relevant stakeholders. Given the open-ended nature of Ukraine's acceptance of ICC jurisdiction, the Office will also continue to consider allegations of crimes committed in Ukraine to the extent that they may fall within the subject-matter jurisdiction of the Court.

## VENEZUELA

### *Procedural History*

99. The situation in the Bolivarian Republic of Venezuela (“Venezuela”) has been under preliminary examination since 8 February 2018. The Office has received a total of 110 communications pursuant to article 15 in relation to this situation, including 43 pertaining to events occurring since April 2017.
100. On 8 February 2018, following a careful, independent and impartial review of a number of communications and reports documenting alleged crimes potentially falling within the ICC’s jurisdiction, the Prosecutor opened a preliminary examination of the situation in Venezuela since at least April 2017.<sup>20</sup>
101. On 27 September 2018, the Office received a referral from a group of States Parties to the Statute, namely the Argentine Republic, Canada, the Republic of Colombia, the Republic of Chile, the Republic of Paraguay and the Republic of Peru (the “referring States”), regarding the situation in Venezuela. Pursuant to article 14 of the Statute, the referring States requested the Prosecutor to initiate an investigation for crimes against humanity allegedly committed in the territory of Venezuela since 12 February 2014, with the view to determining whether one or more persons should be charged with the commission of such crimes.<sup>21</sup> In this regard, noting the findings of a number of reports pertaining to the human rights situation in Venezuela, the referring States indicated that the report of the General Secretariat of the Organisation of American States (“OAS”) on the possible commission of crimes against humanity in Venezuela is to be considered as supporting documentation.
102. On 28 September 2018, the Presidency of the ICC assigned the situation in Venezuela to Pre-Trial Chamber I.<sup>22</sup>

### *Preliminary Jurisdictional Issues*

103. Venezuela deposited its instrument of ratification to the Statute on 7 June 2000. The ICC therefore has jurisdiction over Rome Statute crimes committed on the territory of Venezuela or by its nationals from 1 July 2002 onwards.

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<sup>20</sup> ICC-OTP, [Statement of the Prosecutor of the International Criminal Court, Mrs Fatou Bensouda, on opening Preliminary Examinations into the situations in the Philippines and in Venezuela](#), 8 February 2018.

<sup>21</sup> ICC-OTP, [Statement of the Prosecutor of the International Criminal Court, Mrs Fatou Bensouda, on the referral by a group of six States Parties regarding the situation in Venezuela](#), 27 September 2018.

<sup>22</sup> ICC Presidency, Decision assigning the situation in the Bolivarian Republic of Venezuela to Pre-Trial Chamber I, [ICC-02/18-1](#), 28 September 2018.

### *Contextual Background*

104. Between April and July 2017, Venezuela experienced an upsurge in political unrest, including a new wave of demonstrations with thousands of protestors against President Nicolás Maduro's Government, after the Supreme Court issued two rulings assuming the powers of the National Assembly and limiting parliamentary immunity. Venezuelan opposition parties described the Supreme Court's initiative as a "coup", and called for demonstrations demanding the Government to re-institute the division of powers, hold presidential elections, release political prisoners, and alleviate the severe shortages of medical supplies and food. The Government's response to the protests held between April and July 2017 included the frequent deployment of State security forces to carry out public order operations. Open sources also report on the existence of an emergency plan - known as "*Plan Zamora*" - activated by President Maduro between April and June 2017 to curb the demonstrations.
105. In late April 2017, the Venezuelan Government also announced that it would begin the two-year process to withdraw from the OAS, after OAS members States voted to hold a special session to discuss the crisis in Venezuela.
106. On 1 May 2017, President Maduro announced plans to replace the National Assembly with a new National Constituent Assembly (*Asamblea Nacional Constituyente*, "ANC"), which would be tasked with drafting a new constitution – a move which was met with further widespread protests. On 17 May 2017, a second phase of *Plan Zamora* was launched. Reportedly, this second phase included the participation of police and military officers as well as armed civilian groups, and involved the deployment of around 2,000 members of the Bolivarian National Guard and 600 military troops to control public demonstrations in Venezuela.
107. The election for the ANC was held on 30 July 2017 and President Maduro's Party and allies won all of the 545 seats in the new assembly. The opposition had boycotted the election, alleging that it was fraudulent and would erode democracy in the country. The election was also criticised by a number of States and observers.
108. Regional elections were held in Venezuela on 15 October 2017, with President Maduro's party winning the majority of governorships. The opposition vowed to contest the results and called upon its supporters to take to the streets.
109. According to open sources, State security forces frequently used excessive force to disperse and put down demonstrations held between April and July 2017, resulting in deaths and injuries. Thousands of actual or perceived members of the opposition were also reportedly arrested, of which a significant number have allegedly been brought before military courts. It has also been reported that, in a number of cases, individuals detained by State authorities have been subjected

to serious abuse and ill-treatment. Further, open sources indicate that security forces may have continued carrying out arbitrary detentions, torture, ill-treatment and other human rights abuses after August 2017.

110. Additionally, it was reported that some groups of anti-government protestors resorted to violent means, in some cases targeting security forces, resulting in some members of such forces being injured or killed.
111. On 20 May 2018, a presidential election, boycotted by part of the opposition, was held in Venezuela. According to official results, incumbent President Maduro was re-elected for a second six-year term with 67.7 % of the vote, amid allegations of fraud and widespread irregularities. Following the announcement of Maduro's victory, the Lima Group, a body composed of 14 Latin-American States and Canada created in 2017 to address the political crisis in Venezuela, decided not to recognize the legitimacy of the electoral process alleging that it failed to meet "international standards for a democratic, free, fair and transparent process." Other States and international organisations further condemned President Maduro's election and imposed sanctions against high-ranking Venezuelan officials.
112. As the country continues to endure a severe economic crisis, marked by acute shortages of food, medicines and medical supplies, rampant criminality and escalating risks of political violence, hundreds of thousands of Venezuelans have reportedly fled to neighboring countries. It is estimated that approximately 1.6 million Venezuelans have left the country since 2015. In August 2018, the Government of Venezuela launched the "Return to the Homeland Plan" to facilitate the return of Venezuelan migrants through an air-bridge. By October 2018, official sources reported that over 8,000 Venezuelan nationals had been repatriated under this programme.

### *Alleged Crimes*

113. The preliminary examination focuses on crimes allegedly committed in Venezuela since at least April 2017, in the context of anti-government demonstrations and related political unrest. In particular, it has been alleged that State security forces frequently used excessive force to disperse and put down demonstrations, and arrested and detained thousands of civilians, a number of whom were allegedly subjected to serious abuse and ill-treatment in detention. It has also been reported that some groups of protestors resorted to violent means, resulting in some members of security forces being injured or killed.
114. According to the information available, State security forces and Government authorities, including high-level officials, are responsible for various acts of violence amounting to crimes against humanity reportedly committed against actual or perceived opponents to the Government of President Maduro. These allegations include several instances of murder; imprisonment or other severe deprivation of physical liberty; torture; other inhumane acts; rape and other

forms of sexual violence; enforced disappearances; and persecution on political grounds. It is further alleged that State forces resorted to excessive force during security operations and raids outside the context of anti-government demonstrations.

115. It has also been reported that State forces have, on some occasions, collaborated with pro-Government armed civilians, including groups referred to as "*colectivos*", who are also alleged to have perpetrated a number of violent acts against demonstrators, actual or perceived opposition members and activists, elected officials and students.
116. In the referral submitted to the Office, the referring States allege that the crimes against humanity of murder, imprisonment, torture, rape and other forms of sexual violence, persecution (on political grounds), and enforced disappearances have been committed against the Venezuelan civilian population, particularly against actual or perceived members of the opposition, since at least 12 February 2014.

#### *OTP Activities*

117. During the reporting period, the Office initiated a thorough and independent examination of all the information available in order to reach a fully-informed determination on whether the legal criteria to proceed with an investigation under the Rome Statute have been met.
118. Since the initiation of the preliminary examination, the Office has analysed article 15 communications received in 2018 and in previous years and consulted a number of open sources, including reports from both Venezuelan and international civil society organisations, the UN OHCHR, the UN Working Group on Arbitrary Detention, the Inter-American Commission on Human Rights and the OAS General Secretariat, as well as multiple reports from think-tanks and media outlet.
119. After receiving the referral in September 2018, the Office continued to gather and review available information from a range of sources on alleged crimes committed within the temporal scope of the preliminary examination, including public sources identified in the referral. Consistent with standard practice, the Office continuously subjects the information reviewed to a rigorous source evaluation process, including in terms of the reliability of the sources and the credibility of the information received.
120. Furthermore, the Office has gathered significant factual and contextual information of relevance to its legal analysis. In particular, the Office has sought to obtain detailed information on specific alleged incidents with a view to determining whether all the constitutive elements of crimes against humanity required by the Statute have been met. In the past year, the Office has also

closely followed relevant developments and events that could further inform the Office's assessment of the situation.

121. During the reporting period, the Office held numerous meetings with relevant stakeholders and information providers to discuss a range of matters relevant to the preliminary examination. In this regard, the Office solicited additional specific information on a number of allegations as well as on the methodology and the information-gathering process employed by article 15 communication senders.

### *Conclusion and Next Steps*

122. The Office is continuing its assessment of the information available in order to reach a determination on whether there is a reasonable basis to believe that the alleged crimes fall within the subject-matter jurisdiction of the Court. This assessment is strictly guided by the requirements of the Statute and is being conducted with a view to reaching conclusions within a reasonable time frame. As a general matter, the receipt of a referral may expedite the process of opening an investigation only to the extent that judicial review of the Prosecutor's decision would not be required under the Statute.
123. The Office will also continue to engage with a variety of reliable sources and relevant stakeholders on all matters relevant to the preliminary examination of the situation in Venezuela, such as the Government of Venezuela, the referring States, international organisations and civil society. In accordance with its Policy Paper on Preliminary Examinations, the Office may further gather available information on relevant national proceedings, as necessary and appropriate at this stage.
124. Given the open-ended nature of the referred situation, the Office will continue to record allegations of crimes committed in Venezuela to the extent that they may fall within the subject-matter jurisdiction of the Court. The Office may also include in its analysis any alleged crime connected to the situation and falling within the Court's jurisdiction that may have been committed since 12 February 2014.



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

#### COLOMBIA

##### *Procedural History*

125. The situation in Colombia has been under preliminary examination since June 2004. The OTP has received a total of 229 communications pursuant to article 15 of the Statute in relation to the situation in Colombia.
126. In November 2012, the OTP published an Interim Report on the Situation in Colombia, which summarised the Office's preliminary findings with respect to jurisdiction and admissibility.

##### *Preliminary Jurisdictional Issues*

127. Colombia deposited its instrument of ratification to the 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 Statute.

##### *Contextual Background*

128. Colombia experienced over 50 years of armed conflict between Government forces, paramilitary armed groups and rebel armed groups, as well as amongst those groups. The most significant actors included: the Revolutionary Armed Forces of Colombia – People's Army (*Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo, "FARC-EP"*), the National Liberation Army (*Ejército de Liberación Nacional, "ELN"*), paramilitary armed groups and the Colombian armed forces.
129. On 24 November 2016, the Government of Colombia and the FARC-EP signed the Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace (*"Acuerdo Final Para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera"*). The agreement stipulates the setting-up of a Comprehensive System for Truth, Justice, Reparation and Non-Repetition, including the establishment of a Special Jurisdiction for Peace (*"SJP"*) designed to investigate and punish serious conflict-related crimes and to bring perpetrators to account. On 15 March 2018, the SJP started its operations.
130. On 8 February 2017, the Government of Colombia officially initiated peace negotiations with the ELN in Quito, Ecuador. The six agenda items included: (i) societal participation in the construction of peace; (ii) democracy for peace; (iii)

transformations for peace; (iv) victims; (v) end of the armed conflict, and (vi) implementation. On 10 May 2018, the Government of Colombia and the ELN decided to continue the peace negotiations in Cuba, after Ecuador announced that it would no longer host the talks.

### *Subject-Matter Jurisdiction*

131. 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. These include 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); and rape and other forms of sexual violence under article 7(1)(g) of the Statute.<sup>23</sup>
132. There is also a reasonable basis to believe that since 1 November 2009 war crimes under article 8 of the Statute have been committed in the context of the non-international armed conflict in Colombia, 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 Statute.

### *Admissibility Assessment*

133. Since November 2017, the Colombian authorities have carried out a number of national proceedings of relevance to the potential cases identified by the OTP, including in relation to alleged killings of civilians staged by members of the State forces to look like combat deaths, known as “false positives” killings, sexual and gender-based crimes (“SGBC”) and forced displacement.
134. During the reporting period, the Colombian authorities have provided information on national proceedings to the Office, including through oral briefings and in the form of official documentation. Among other documents, the Office has received 206 judgments against members of paramilitary groups and members of the armed forces issued between 29 June 2010 and 11 September 2017 by different Colombian courts, including Justice and Peace Law (“JPL”) tribunals. These judgments address multiple forms of conduct, including “false positives” killings, forced displacement, enforced disappearance, illicit recruitment, abduction, murder of protected persons, rape, sexual enslavement, enforced abortion and torture. As with previous submissions, the Office has closely reviewed this material for the purpose of updating its ongoing admissibility analysis.

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<sup>23</sup> See ICC-OTP, [Situation in Colombia, Interim Report](#), November 2012.

*Proceedings relating to “false positives” cases*

135. As indicated in previous reporting, the OTP identified five potential cases relating to hundreds of “false positives” killings allegedly committed by members of brigades acting under the Divisions First (10<sup>th</sup> Brigade), Second (30<sup>th</sup> Brigade and 15<sup>th</sup> Mobil Brigade), Fourth (7<sup>th</sup>, 16<sup>th</sup> and 28<sup>th</sup> Brigades), Fifth (9<sup>th</sup> Brigade) and Seventh (4<sup>th</sup>, 11<sup>th</sup> and 14<sup>th</sup> Brigades) of the National Army.<sup>24</sup> The information made available to the Office in the course of 2018 indicates that the Colombian authorities, under the ordinary justice system, are conducting, a number of proceedings relevant to the admissibility assessment of these potential cases.

- *Potential case 1:* the information available indicates that investigations were carried out against four generals of the Colombian National Army in relation to “false positives” killings allegedly committed by members of the First Division between 2004 and 2008 in the department of Cesar. By November 2018, the Attorney General’s Office (“AGO”) was reportedly carrying out 74 cases against 472 members of the Division, including against 12 majors. Of the 74 cases, 40 are at the investigation stage and five are at the trial stage.
- *Potential case 2:* reportedly, two generals have been investigated in relation to “false positives” killings committed by members of the Second Division between 2002 and 2009 in Magdalena and Norte de Santander. By November 2018, 141 cases were reportedly ongoing against 813 members of the Second Division, including against two colonels and 20 majors. Of the 141 cases, 96 are at the investigation stage and five are at the trial stage.
- *Potential case 3:* several investigations are reportedly ongoing against one general for multiple “false positives” incidents allegedly committed by members of the Fourth Division between 2002 and 2008 in Casanare, Meta y Vichada. By November 2018, 276 cases were reportedly ongoing against 1,247 members of the Division, including against one colonel and 53 majors. Of the 276 cases, 141 are at the investigation stage and five are at the trial stage.
- *Potential case 4:* the information available indicates that, by November 2018, the AGO was investigating two generals for alleged killings committed by members of the Fifth Division between 2004 and 2008 in the department of Huila. Until November 2018, 84 investigations were being carried out against 167 members of the Fifth Division, including against five majors. Of the 84 cases, 27 are at the investigation stage and six are at the trial stage.
- *Potential case 5:* reportedly, three generals have been investigated in relation to killings allegedly committed by members of the Seventh Division between

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<sup>24</sup> ICC-OTP, [Report on Preliminary Examination Activities 2017](#), paras. 131-132.

2002 and 2008 in Antioquia and Córdoba. In addition, 604 cases against members of the Seventh Division are being reportedly carried out, including against two colonels and 24 majors. Of these, 328 are at the investigation stage and 32 are at the trial stage.

136. In relation to proceedings under the SJP, on 17 July 2018, the SJP Judicial Panel for Acknowledgement of Truth, Responsibility and Determination of Facts and Conduct (“Panel for Acknowledgement of Truth” or “Panel”) issued an order to prioritize “deaths illegitimately presented as casualties during combat by agents of the State”, committed from 1985 until 1 December 2016 in 29 of the 32 departments of Colombia. The order notes that, after an assessment of the initial information considered by the Panel, it appears that approximately 60% of the alleged crimes were committed by members of the First, Second, Fourth and Seventh Divisions of the National Army.
137. The order was based on reports submitted by national organisations and State authorities, including reports submitted by the AGO. According to the order, the Panel also took into consideration the OTP’s findings, as reported in the 2017 Report on Preliminary Examination Activities.
138. The order marked the initiation of the “Stage of Recognition of Truth, Responsibility and Determination of Facts and Conduct”, called for voluntary submissions and requested the transmission of files against any members of the Divisions concerned to the Panel for Acknowledgement of Truth. Further to the order, the Panel for the Determination of Legal Situations summoned members of military units operating under the Second and Fourth Divisions allegedly implicated in killings committed in the departments of Cundinamarca (Soacha), Norte de Santander (Ocaña) and Casanare. The Panel further held hearings to inform the concerned individuals about the procedure, to explain and verify the fulfilment of conditions to be granted benefits under the SJP framework and to hear the victims’ views, as well as to order security measures for them, as necessary.
139. In this context, members of the armed forces, including at least five commanders of the military units allegedly implicated in “false positives” killings identified as part of the OTP’s potential cases have voluntarily requested to appear before the SJP.

*Proceedings relating to forced displacement*

140. Over the reporting period, the Justice and Peace Law (“JPL”) Tribunals convicted 29 members of paramilitary groups for crimes committed in the context of the armed conflict, including for forced displacement. In May and June 2018, respectively, paramilitary leaders Freddy Rendón Herrera (a.k.a “El Aleman”), former commander of Elmer Cárdenas Bloc, and Ramiro Vanoy Murillo (a.k.a. “Cuco Vanoy”), former commander of the Mineros Bloc, were convicted for various counts of forced displacement. In addition, the AGO

initiated an investigation (“*imputación*”) against 341 former members of paramilitary groups, including against high level commanders, for allegations of 5,449 acts of forced displacement involving 12,711 victims.

141. Further, the AGO issued arrest warrants against five leaders of the ELN Central Command, four of which are the subject of INTERPOL red notices. Arrest warrants were also issued against five commanders of the *Guerra Suroccidental* front; six commanders of the *Guerra Occidental*; one commander of the *Guerra Nororiental* front; three commanders of the *Guerra Dario De Jesús Ramírez Castro* front; and nine commanders of the *Guerra Oriental* front.
142. With regard to proceedings before the SJP, on 10 July 2018, the Panel for Acknowledgement of Truth issued an order prioritizing Case No. 002 addressing multiple conflict-related crimes, including forced displacement, committed by former members of the FARC-EP and members of the military forces in the department of Nariño between 1990 and 2016. Following the same territorial approach and in accordance with the criteria and methodology of prioritization of cases and situations, the Panel prioritized two additional cases for conduct including forced displacement on 25 September 2018 and on 08 November 2018, respectively. Case No. 004 on Urabá and Case No. 005 on the North of Cauca address conflict-related crimes committed by former members of the FARC-EP and members of the military forces between 1986 and 2016 and between January 1993 and December 2016, respectively.
143. The decisions to prioritize the cases were taken based on several reports submitted by State authorities, the National Centre of Historic Memory and civil society organizations. With the orders initiating the cases, the Panel called for submissions of information relating to crimes committed in the three departments, including voluntary submissions. The Panel also ordered State authorities to submit reports addressing relevant proceedings relating to the aforementioned crimes committed in these regions, and ordered the publication of the decisions to inform the victims and civil society organizations concerned.

*Proceedings relating to sexual and gender-based crimes*

144. During the reporting period, JPL tribunals issued convicting sentences against the paramilitary leaders Freddy Rendón Herrera (a.k.a “El Aleman”), Ramiro Vanoy Murillo (a.k.a. “Cuco Vanoy”) and Marco Tulio Pérez Guzmán (a.k.a. “El Oso”) of the front of *Golfo de Morrosquillo del Bloque Heroes de los Montes de Maria de las Autodefensas Unidas de Colombia (“AUC”)* for different counts of conflict-related SGBC. In addition, the AGO initiated an investigation (“*imputación*”) against 31 members of paramilitary groups, including against paramilitary leaders Manuel de Jesús Pirabán (a.k.a. “Pirata”) of the *Centauros* Bloc; Diego Fernando Murillo (a.k.a. “Don Berna”) of the Nutibara, Granada and Héroes de Tolová blocs; Ramón Isaza Arango (a.k.a “*Caruso*”) of the *Autodefensas Campesinas del Magdalena Medio*; Rodrigo Zapata Sierra (a.k.a “Ricardo”) of the *Suroeste Antioqueño* Bloc; Iván Roberto Duque (a.k.a “Ernesto Báez”); Rodrigo

Pérez Alzate (a.k.a “Julian Bolivar”); and Guillermo Pérez Alzate (a.k.a “Pablo Sevillano”) of the *Central Bolívar* bloc.

145. In 2008 and 2015, the Constitutional Court (“CC”) rendered two rulings (Auto 092/2008 and Auto 009/2015) in the context of Sentence T-025 of 2004 addressing the special situation of internally displaced women. The rulings held that internally displaced women are subject to the risk of sexual violence in the context of the armed conflict and ordered State authorities to implement measures to protect the rights of those affected.
146. With regard to national proceedings relating to the 183 SGBC cases submitted to the AGO by the CC in the confidential annex to Auto 092/2008, the AGO reported that there are 176 criminal investigations, of which, until May 2018, 167 are at the preliminary investigation stage, four are at the trial stage and sentences were rendered in relation to five cases. The AGO further indicated that of 442 facts reported in the confidential annex to Auto 009/2015, there are 428 criminal investigations, of which, until May 2018, 420 are at a preliminary investigation stage, four are at the trial stage and sentences were rendered in relation to four cases.
147. With respect to national proceedings against the ELN, on 29 June 2018, the AGO ordered the detention (“*detención preventiva*”) of five members of the ELN Central Command for multiple crimes, including SGBC, committed against women in Antioquia between 1995 and 2003.
148. On 24 August 2018, the AGO submitted two reports to the SJP on 1,080 SGBC cases allegedly committed by members of the armed forces and former members of the FARC-EP involving approximately 1,246 victims, including civilians and members of their own ranks. The reports further provide details about SGBC cases committed with particular cruelty against women, minors, indigenous communities, members of LGBTI groups and social leaders. While the prevailing form of violence was rape, the AGO also reported on other sexual crimes, including forced nudity, femicide, sexual slavery and forced prostitution.
149. Further, the AGO publicly reported on 206 proceedings against 234 members of the Army, the Navy, the Air Force and the Police involving 281 victims. The information available indicates that the number of victims might be underreported, as many of them fear retaliatory acts. The reports refer to SGBC committed by members of the armed forces in collusion with paramilitaries to humiliate, punish or exercise control over civilians in the context of the armed conflict.
150. With regard to proceedings before the SJP, Case No. 002 on Nariño, Case No. 004 on Urabá and Case No. 005 on the North of Cauca address, amongst other, conflict-related SGBC committed by members of the armed forces and former members of the FARC-EP. The SJP has requested the parties involved in the

proceedings to submit reports containing information on SGBC in July, September and November 2018.

*Proceedings relating to the promotion and expansion of paramilitary groups*

151. During the reporting period, the AGO initiated proceedings against businessmen allegedly involved in financing the operations of paramilitary groups operating in different regions of Colombia since at least 2002. In August 2018, the AGO issued an indictment (“*resolución de acusación*”) against 13 executives and employees of the company Chiquita brands (Banadex and Banacol branches), for the alleged agreement (“*concierto para delinquir*”) to finance the paramilitary front “Arlex Hurtado” which operated in the regions of Urabá and Santa Marta from 1996 to 2004.
152. Further, in August 2018, the AGO ordered the initiation of an investigation against cattle businessmen from Córdoba, who reportedly acted as links between some businessmen and the AUC commanders, Carlos y Vicente Castaño. According to statements provided by former members of paramilitary groups before the JPL tribunals, the Calima bloc was financed, among other sources, with the contributions of cattle breeders, flour makers, merchants and some businessmen allegedly linked to the sugar industry operating in Colombia from 1996 to 2002.

*The Special Jurisdiction for Peace*

153. Since the SJP started its operations, the Colombian authorities have adopted various pieces of legislation to establish and regulate its operations. The relevant legislation includes the Legislative Act 01 of 04 April 2017 (“*Legislative Act 01*”), the Law 1820 of 30 December 2016 (“*Amnesty Law*”), the Statutory Law for the Administration of Justice of the SJP (“*Statutory Law*”) and the Rules of Procedure of the SJP (Law 1922) as well as various decrees. In addition, during the reporting period, the SJP has issued its General Regulations, Criteria and Methodology for the Prioritization of Cases and Situations as well as protocols regulating the conduction of its proceedings.
154. On 1 March and 13 July 2018, the CC published the full text of its decisions on the enforceability (“*exequibilidad*”) of the Amnesty Law and of the Legislative Act 01, respectively. Further, on 15 August 2018, the CC issued Communiqué No. 32 announcing the constitutionality of the Statutory Law. The CC declared the overall constitutionality of the three pieces of legislation, with some exceptions, and provided parameters for the interpretation of provisions regulating different aspects of the SJP operations.
155. The decisions on the Legislative Act 01 and the Amnesty Law addressed three of the issues raised by the Prosecutor in her *Amicus Curiae* brief submitted to the CC on 18 October 2017, namely: the definition of command responsibility, the

definition of “grave” war crimes and the implementation of sentences involving “effective restrictions of freedoms and rights.”

156. With respect to command responsibility, the Prosecutor had expressed concerns that the language contained in article 24 of the Legislative Act 01 could be interpreted to restrict the concept of command responsibility in a way that runs counter to international customary law and the Statute. While the CC decision declared the constitutionality of article 24 without modifications, it will be up to the magistrates of the SJP to interpret the governing national legislation, and the definition of command responsibility in particular, mindful of how the notion of command responsibility has developed in international law.
157. In the CC’s decision on the constitutionality of the Amnesty Law, the CC rejected the notion that war crimes must be committed in a systematic manner to be considered “grave”. In so doing, the CC recalled the State’s duty to investigate, prosecute and sanction grave HR and IHL violations, whether committed in a systematic manner or not.
158. With respect to the implementation of sentences under the SJP framework, the CC stated, in its Comunicado No. 55 of 14 November 2017, that the SJP must: “(...) determine whether the sanctions are compatible with a genuine intent to bring the convicted person to justice, taking into consideration the proportionality of the sanction in relation to the gravity of the crime, the degree of responsibility of the perpetrator and the type and degree of restriction on liberty.”<sup>25</sup> In addition, the CC stressed the importance of determining sentences on a case-by-case basis and of ensuring their compatibility with the right to participate in public affairs in accordance with the principle of *effectiveness of sentences*.
159. The Office has further taken notice of recent changes to the SJP Rules of Procedure, pertaining to objectives of investigations into crimes allegedly committed by members of the armed forces (second paragraph of article 11), and to the creation of a special and differentiated procedure for state agents (article 75). While the new legislative provisions have been challenged before the CC, this matter and any other legislative initiative that could result in delays in bringing perpetrators to account, restrict the scope and thoroughness of investigations into complex crimes and, overall, call into question the genuineness of the proceedings, are of great interest to the Office to the extent it may impact on the admissibility of potential cases pertaining to state agents.

### ***OTP Activities***

160. During the reporting period, the Office continued its factual and legal assessment of information relating to the status and progress of national

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<sup>25</sup> Constitutional Court of the Republic of Colombia, [Fe de Erratas al Comunicado No.55](#), 14 November 2017 (last accessed 05 October 2017).

proceedings carried out by the Colombian authorities under the ordinary justice, the JPL and the SJP systems. Further, the OTP held consultations with national authorities; gathered additional information on the areas of focus of the preliminary examination; provided input to public discussions on accountability, the role of the OTP and transitional justice issues; and held multiple meetings with State authorities, international organisations, international NGOs and Colombian civil society in Bogotá, The Hague and New York.

161. The Office conducted three missions to Colombia in 2018: from 12 to 16 March, 26 May to 2 June and 27 October to 02 November, to discuss a variety of issues relating to contextual and legislative developments as well as matters relating to jurisdiction and admissibility. During the visits, the OTP met with senior officials from the executive and the judiciary, including with President Iván Duque Márquez, the Attorney General, the President of the SJP and the President of the CC. The Office also held meetings with the diplomatic community in Bogotá, including the UN and the EU, as well as with representatives of international organisations and Colombian civil society. All the visits were facilitated by the Government of Colombia.
162. On 30 and 31 May 2018, the Deputy Prosecutor delivered speeches during a series of conferences on “Transitional justice. The Colombian model. Reestablishment of peace and security” organized by the Max-Planck-Institute for Foreign and International Criminal Law in Freiburg, the University *Externado* in Bogotá and the University EAFIT in Medellín.<sup>26</sup> In addition, on 1 November 2018, the Deputy Prosecutor delivered a presentation on article 28 of the Statute in the conference “*Complementariedad: Papel de los tribunales nacionales y de la CPI en el enjuiciamiento de crímenes internacionales*” organised by the International Center for Transitional Justice (ICTJ) with the support of the Embassy of Sweden in Bogotá.<sup>27</sup>
163. On 23-24 April, the OTP received a high-level delegation from the AGO to follow up on technical consultations held between both offices during the March 2018 mission to Bogotá. The AGO’s visit was part of extensive consultations held between the two Offices on matters relating to the status and progress of national proceedings relevant to the OTP’s analysis. Further, on 11 July 2018, the Prosecutor received a high-level delegation from the SJP. The OTP published a statement on the occasion of the visit of the SJP to the seat of the Court,<sup>28</sup> expressing the Prosecutor’s continued support for the jurisdiction’s efforts to

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<sup>26</sup> ICC-OTP, “[The Role of the ICC in the Transitional Justice Process in Colombia](#)”, speech by Mr. James Stewart, Deputy Prosecutor of the ICC, 30 and 31 May 2018.

<sup>27</sup> ICC-OTP, “[El artículo 28 del Estatuto de Roma](#)”, presentation by Mr. James Stewart, Deputy Prosecutor of the ICC, 1 November 2018.

<sup>28</sup> ICC- OTP, [Statement of the Prosecutor of the International Criminal Court Fatou Bensouda, on occasion of the visit of the President of Colombia’s Special Jurisdiction for Peace to the Seat of the Court](#), 11 July 2018.

ensure justice to the victims in accordance with the letter and spirit of the peace agreement, as well as the principles, values and requirements of the Statute.

### *Conclusion and Next Steps*

164. In the context of its ongoing admissibility assessment, the Office will continue to engage with the Colombian authorities to receive information on concrete and progressive investigative steps and prosecutorial activities carried out with respect to the potential cases it has identified. By the same token, the Office will continue engaging with other stakeholders who continue to inform the OTP's assessment of the situation.
  
165. The OTP will continue assessing the genuineness of the proceedings carried out under the ordinary justice system, the JPL tribunals and the SJP. While noting with appreciation that the SJP is now fully operational, the OTP will continue examining developments relating to its regulations, operations and proceedings to the extent that the functioning of the jurisdiction will have a critical impact on the OTP's assessment of the admissibility of potential cases arising out of the situation in Colombia. In this context, the OTP will closely follow individual proceedings that arise from the cases initiated so far, as well as the identification of new cases selected for investigation and prosecution.

## GUINEA

### *Procedural History*

166. The situation in Guinea has been under preliminary examination since 14 October 2009. The Office has received 35 communications pursuant to article 15 in relation to the situation in Guinea.

### *Preliminary Jurisdictional Issues*

167. Guinea deposited its instrument of ratification to the 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*

168. 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. Moussa 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 Captain 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*

169. In October 2009, the United Nations established an international commission of inquiry (“UN Commission”) to 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.

170. 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.

171. 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) of the Rome Statute.

### *Admissibility Assessment*

172. On 8 February 2010, in accordance with the recommendations of the reports of the UN Commission and of the CNEI, the General Prosecutor of the Conakry Appeal Court appointed three Guinean investigative judges (“panel of judges”) to conduct a national investigation into the 28 September 2009 events, which was completed in December 2017. Therefore, since national proceedings are ongoing, the Office’s admissibility assessment has focussed on whether the national authorities are willing and able to conduct genuine investigations and prosecutions, and in particular whether proceedings are conducted with the intent to bring to justice the alleged perpetrators within a reasonable time frame.

### *Completion of the investigation*

173. On 29 December 2017, seven years after its appointment, the panel of judges formally completed the national investigation into the 28 September 2009 events. On that date, after considering the prosecution’s final submissions, the investigative judges rendered their decision of closing orders referring the case to trial.
174. In the course of its investigation, the panel of judges took a number of concrete and progressive steps to identify the most responsible perpetrators of the crimes committed. These steps include the interrogation and indictment of high-ranking officials, in Conakry and abroad; the interview of key witnesses, including government officials and opposition leaders; and the hearing of over 400 victims, of which approximately 50 are victims of sexual violence.
175. In its closing orders decision, the panel of judges referred 13 of the 15 individuals indicted throughout the investigation to the Tribunal of Dixinn, the territorially competent jurisdiction in Conakry. The former Head of State, Moussa Dadis Camara, as well as other former and current high-level officials have been sent to trial. Charges retained against the accused include various counts of murder, rape, looting, torture, abduction and illegal restraint, obstruction and failure to help a person in danger, and illegal supply of war material.

*Establishment of a steering committee for the organisation of the trial*

176. On 9 April 2018, the Guinean authorities created a steering committee (*comité de pilotage*) tasked with the logistical organisation of the 28 September 2009 events trial. Announced in November 2017, the steering committee was established to decide on a broad range of practical issues to guarantee a fair and effective trial. These include identifying a location and a suitable venue, devising a security plan for all actors involved in the proceedings, preparing a budget, identifying sources of funding, setting up a compensation scheme for victims, and facilitating access to parties, civil society, media and international observers. Chaired by the Justice Minister, the 13-member committee is composed of national authorities, civil society and international partners.
177. The committee's inaugural meeting on 1 June 2018 received broad media coverage and was attended by the newly-appointed Prime Minister, Ibrahima Kassory Fofana, who stressed the Government's commitment to organise a fair and exemplary trial. On 1 August 2018, the committee held its first working session at the seat of the Ministry of Justice. While discussions reportedly focussed on the planning of activities related to the organisation of the trial, financial sources, security measures for all actors involved in the proceedings, and access to parties, civil society, media and international observers, no decisions were adopted during this meeting.
178. The committee held further meetings on 19 October and 9 November 2018, during which it was decided to hold the trial in Conakry and a provisional budget, primarily funded by the Guinean Government, was presented. International donors are also expected to cover part of the costs of the trial.

***OTP Activities***

179. Over the reporting period, the Office has continued to assess the Guinean authorities' efforts and political will to conduct genuine criminal proceedings into the 28 September 2009 events. To this end, the Office has remained in regular contact with relevant stakeholders, including the Guinean authorities, civil society organisations and international partners.
180. In February and October 2018, the Office conducted its fifteenth and sixteenth missions to Conakry, respectively, to obtain detailed information on the status of national proceedings and gauge the prospect of organising a trial within a reasonable time frame. During both missions, the OTP held meetings with the Minister of Justice, the panel of investigative judges, judicial authorities, civil society, victims' counsel and the diplomatic community in Conakry, including the UN, the EU and other relevant States. As in previous missions, the OTP informed the general public of the purpose of the visits and the status of the preliminary examination.

181. Following the panel of judges' closing orders decision sending the case to trial rendered in December 2017, the Office has taken stock of the completed national investigation. The Office has also examined the work of the steering committee tasked with the logistic organisation of the trial. After the Justice Minister announced its creation in November 2017, the Office has closely followed-up on the committee's installation and the outcome of its working sessions.
182. Additionally, the Office met with Guinean civil society and victims' representatives on multiple occasions. During meetings held on the margins of the Assembly of States Parties in December 2017 in New York, at the seat of Court in May 2018, as well as during its visits to Conakry in February and October 2018, the Office listened to their views and concerns and exchanged on suitable next steps to promote accountability.

### *Conclusion and Next Steps*

183. Following the completion of the national investigation in December 2017, the Guinean authorities have continued to make progress in their efforts to prosecute those most responsible for the crimes allegedly committed at the Conakry stadium on 28 September 2009. The formal completion of the national investigation resulting in 13 individuals being sent to trial, including former and current high-level officials, and the subsequent establishment of a steering committee tasked with the trial's preparation are concrete steps in this regard.
184. A number of key aspects for the holding of the trial, however, are still pending, including the finalisation of the budget, the setting-up of a security plan for all actors involved in the proceedings, the participation and protection scheme for victims and witnesses, the planning of communication and outreach activities, and the identification of a suitable time frame. In the upcoming months, the Office will continue to closely examine any possible obstacles and to mobilise relevant stakeholders towards the organisation of a trial, meaningful to the victims and in accordance with the principles of due process.

## IRAQ/UK

### *Procedural History*

185. The situation in Iraq/the United Kingdom (“UK”) has been under preliminary examination since 13 May 2014. The Office has received a total of 33 communications or additional submissions pursuant to article 15 in relation to the situation in Iraq/UK.
186. 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 UK (or “British”) officials for war crimes involving systematic detainee abuse in Iraq from 2003 until 2008.
187. 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.

### *Preliminary Jurisdictional Issues*

188. Iraq is not a State Party to the 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.
189. The UK deposited its instrument of ratification to the Statute on 4 October 2001. The ICC therefore has jurisdiction over Rome Statute crimes committed on UK territory or by UK nationals from 1 July 2002 onwards.

### *Contextual Background*

#### *UK military operations in Iraq from March 2003 until July 2009*

190. On 20 March 2003, an armed conflict began between a United States (“US”) and UK-led coalition, 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 16 April 2003, the Coalition Provisional Authority disestablished the Ba’ath Party of Iraq, resulting in the removal of Ba’th leadership from positions of authority within Iraqi society.
191. On 8 May 2003, the US and UK Governments notified the President of the UN Security Council about their specific authorities, responsibilities, and obligations under applicable international law as Occupying Powers under unified

command. The occupying States, acting through the Commander of Coalition Forces, created the Coalition Provisional Authority (“CPA”) to act as a “caretaker administration” with power, *inter alia*, to issue legislation until an Iraqi government could be established.

192. On 8 June 2004, the UN Security Council adopted Resolution 1546 stipulating that the occupation would end and the Interim Government of Iraq would assume full responsibility and authority for Iraq by 30 June 2004. This transfer of authority, however, took place two days earlier, on 28 June 2004, when the Interim Government, created by the Governing Council, assumed the control of Iraq and the CPA consequently ceased to exist. Thereafter, the Multinational Force-Iraq (“MNF-I”), including a large contingent from the UK, remained in Iraq pursuant to UN Security Council authorisation and the request of the Government of the Republic of Iraq. At the expiry of this mandate on 30 December 2008, foreign forces still present in Iraq remained with the consent of the Iraqi government.
193. UK military operations in Iraq between the start of the invasion on 20 March 2003 and the withdrawal of the last remaining British forces on 22 May 2011 were conducted under the codename Operation Telic (“Op TELIC”).

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

194. The crimes allegedly committed by the UK forces occurred in the context of an international armed conflict in Iraq from 20 March 2003 until 28 June 2004, and in the context of a non-international armed conflict from 28 June 2004 until 28 July 2009. The UK was a party to these armed conflicts over the entire period.

#### *Alleged crimes committed against detainees in the custody of the UK*

195. The information available provides a reasonable basis to believe that in the period from 20 March 2003 through 28 July 2009 the UK servicemen committed the following war crimes against at least 61 victims in their custody in the context of armed conflicts in Iraq: wilful killing/murder (article 8(2)(a)(i) or article 8(2)(c)(i)); torture and inhuman/cruel treatment (article 8(2)(a)(ii) or article 8(2)(c)(i)); outrages upon personal dignity (article 8(2)(b)(xxi) or article 8(2)(c)(ii)); rape and other forms of sexual violence (article 8(2)(b)(xxii) or article 8(2)(e)(vi)).
196. Specifically, the Office has documented at least seven deaths as a result of abuse in custody and 24 separate instances of detainees’ mistreatment involving 54 victims in total. At this stage, these incidents should not be considered as either complete or exhaustive, but rather illustrative of the alleged criminal conduct.

*Alleged crimes committed in the course of UK military operations*

197. Allegedly, the UK armed forces also committed acts of killings in the course of their military operations involving air strikes and ground supporting combat operations. The Office had analysed the same allegations in 2006, in the context of the preliminary examination of the situation in Iraq when it found that there was no reasonable basis to believe that these allegations amounted to war crimes within the jurisdiction of the Court.
198. In relation to the previously selected incidents in 2006, the new information available does not alter the previous determination that, in the absence of information indicating that UK servicemen intentionally directed attacks against the civilian population or civilian objects, or with the knowledge they would cause clearly excessive civilian damage or casualties, there is no reasonable basis to believe that war crimes within the jurisdiction of the Court were committed by British armed forces in the course of their military operations not related to the situations of arrests and detentions. With respect to additional incidents brought to the Office's attention, the factual information provided does not indicate a clear intention of British armed forces to target civilians.

*Admissibility Assessment*

199. In conducting its admissibility assessment, the Office is considering two categories of alleged perpetrators, with respect to the crimes referred to above allegedly committed against persons in the custody of the UK armed forces between 2003 and 2009, namely: (i) physical perpetrators and their immediate supervisors and (ii) other military or civilian personnel who may bear responsibility as an accessory or as a commander/superior.

*Complementarity*

200. The information available at this stage indicates that the UK has initiated a number of criminal proceedings in relation to the conduct of UK troops in Iraq over a period of 15 years. In particular, in March 2010 the UK Ministry of Defence set up a specialised body, the Iraq Historic Allegations Team ("IHAT"), a specialised unit made up of Royal Navy Police officers and ex-civilian police detectives, to ensure that credible claims are properly investigated and the facts established. Based on its official figures, between 2010 and its closure in June 2017, IHAT reviewed over 3,600 allegations of unlawful killings and ill treatment. The Service Police Legacy Investigations ("SPLI") took over the remaining IHAT investigations at the beginning of July 2017.
201. Overall, IHAT and other criminal proceedings have resulted in at least: one conviction at court martial (via guilty plea) for ill-treatment in the Baha Mousa incident; abuse and assault convictions of four accused for abuse at Camp Breadbasket; and one IHAT referral resulting in a guilty plea at a summary hearing for the beating of an Iraqi civilian in a UK armed forces vehicle. The

criminal conduct addressed in these proceedings includes beatings, forced simulation of oral and anal sex, and tying up a detainee in a cargo net and suspending him from a forklift truck. There have been no convictions for killing, although there have been several trials for manslaughter resulting in acquittal.

202. The information available indicates that the focus of the UK's investigative and prosecutorial efforts regarding alleged crimes in Iraq has largely focussed on low-level physical perpetrators and mid-level superiors, while also examining pattern evidence. To date, the physical perpetrators and their immediate supervisors allegedly involved in the most notorious incidents have been subject to court martial proceedings. This has included proceedings against a Major, a Warrant Officer and a Colonel for negligently performing their duty with respect to the *Baha Mousa* incident.
203. With respect to alleged pattern evidence, the Office notes that the UK Ministry of Defence established a Systemic Issues Working Group ("SIWG") for the purpose of identifying relevant systemic issues and ensuring that effective corrective action was taken. SIWG has reviewed issues identified in IHAT reports, judicial proceedings and public inquiries. While the UK subsequently enhanced its doctrine, policy and training, it remains unclear to what extent the authorities have examined responsibility or remedies for previous systemic failings.
204. More generally, the information available indicates that the UK authorities have devoted significant financial and human resources to establishing criminal accountability mechanisms for the conduct of UK troops in Iraq during Op. Telic, as well as to ensuring that relevant domestic proceedings were conducted independently and impartially. When the Court of Appeal found that IHAT was not sufficiently independent in the *Ali Zaki Mousa* litigation, IHAT was reconfigured to ensure its hierarchical, institutional and practical independence. The Office notes that IHAT's cases were systematically reviewed in consultation with the Service Prosecuting Authority (SPA) / Director of Service Prosecutions (DSP).
205. The information available indicates that some early investigations of physical perpetrators and their immediate supervisors were beset with challenges, notably the delay in time taken to address certain incidents. This delay appears to have been occasioned by the repetition of processes, itself caused by the inadequacy of some initial investigations. The Office notes, nonetheless, that when the IHAT process was criticised for delay, a Designate Judge was appointed to oversee the investigative process and Fatality Investigations. IHAT has also been criticised for the lack of convictions, apparently resulting from the 'more or less obvious' closing of ranks and lack of forensic evidence.
206. In accordance with its Policy Paper on Preliminary Examinations, the Office is assessing whether any or a combination of the factors above may have impacted on the proceedings to such an extent as to vitiate their genuineness. In so doing, the Office will continue to fully take into account all relevant circumstances,

including the prevailing difficult environment for the investigation of the alleged incidents.

#### *Gravity*

207. As part of its ongoing admissibility assessment, the Office is also analysing the gravity criteria, taking into consideration a generic examination of: (i) the gravity of the alleged crimes, including their scale, nature, manner of commission, and impact; (ii) the persons or groups of persons most responsible for the alleged crimes committed.
208. In its gravity assessment, the Office is giving due regard to the guidance provided in article 8(1) of the Statute, according to which the Court should focus particularly on cases of war crimes committed on a large scale as part of a plan or pursuant to a policy. In the present situation, while there is a significant body of allegations, in light of the circumstances in which some of such allegations were collected, it remains unclear whether the crimes alleged were committed on the scale alleged by communication senders. Additionally, while several failings in army leadership, planning, and training, leading to prisoners' abuses were reported especially in the early phases of Op. Telic, the Office is seeking to assess the gravity of the role of other military or civilian personnel who may bear responsibility as an accessory or as a commander/superior.
209. The Office is continuing its factual and legal assessment of the information available with respect to the gravity of the alleged conduct and the persons or groups of persons allegedly involved in the commission of the reported crimes.

#### *OTP Activities*

210. During the reporting period, the Office has focussed its analysis of the situation in Iraq/UK on the admissibility assessment, namely complementarity and gravity. In this context, in August 2018, the Office received further information on national proceedings from the UK authorities, including an updated overview of the work of IHAT and of its successor, the SPLI. This material was transmitted in response to an earlier request from the Office submitted in February 2018. As with previous submissions, the Office has closely reviewed this material, together with information from other sources, to inform and update its admissibility analysis.
211. The Office also continued to independently gather additional information on domestic proceedings conducted by the UK authorities, including civil trials. In the same vein, the Office has closely followed the course of appeal proceedings before the Solicitors Disciplinary Tribunal in the case of Leigh Day.
212. In this context, the Office has been in regular contact with the UK authorities and article 15 senders, including by holding consultations at the seat of the Court.

The Office also had a number of meetings on matters related to the preliminary examination with other relevant stakeholders, including civil society representatives and academics.

### *Conclusion*

213. The Office expects to finalise its admissibility assessment of any potential case(s) arising from the situation in Iraq/UK in the near future, with a view to reaching a final determination within the best possible timeframe.

## NIGERIA

### *Procedural History*

214. The preliminary examination of the situation in Nigeria was announced on 18 November 2010. The Office has received a total of 169 communications pursuant to article 15 in relation to the situation in Nigeria.
215. On 5 August 2013, the Office published the Article 5 report on the Situation in Nigeria, presenting its preliminary findings on jurisdictional issues.<sup>29</sup>
216. On 12 November 2015, on the basis of an updated subject-matter assessment, the Office identified eight potential cases involving the commission of crimes against humanity and war crimes under articles 7 and 8 of the Statute that form the subject of the ongoing admissibility assessment, including six for conduct by Boko Haram and two for conduct by the Nigerian security forces (“NSF”).<sup>30</sup>

### *Preliminary Jurisdictional Issues*

217. Nigeria deposited its instrument of ratification to the 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*

218. The armed conflict in Nigeria continued during the reporting period. At least three factions of what is jointly referred to as Boko Haram currently operate in Nigeria and the Lake Chad region bordering Niger, Chad, and Cameroon. These include the Boko Haram faction led by Abubakar Shekau, the Ansaru splinter group and the ISIS-supported Islamic State West Africa province led by Abu Musab Al-Barnawi. Whereas the intensity of the hostilities between the NSF and the different Boko Haram factions was lower than in previous years, military operations against Boko Haram in the North East of Nigeria continued under Operation Lafiya Dole. Boko Haram also continued to engage the NSF and to launch further attacks against the civilian population. It is estimated that the armed conflict resulted in over 2,000 deaths during the reporting period, including combatants and civilians.
219. In addition, from January to June 2018, over 1,300 people were reportedly killed as a result of violence between herders and settlers in Plateau, Benue, Nasarawa, Adamawa and Taraba States and about 300,000 persons were displaced.

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<sup>29</sup> See ICC-OTP, [Situation in Nigeria: Article 5 Report](#), 5 August 2013.

<sup>30</sup> See ICC-OTP, [Report on Preliminary Examination Activities 2015](#), paras. 195-216.

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

### *Previous findings of the Office*

220. It is recalled, that in August 2013, the Office found a reasonable basis to believe that since 2009 Boko Haram committed crimes against humanity in Nigeria, including: (i) murder pursuant to article 7(1)(a), and (ii) persecution pursuant to article 7(1)(h) of the Statute.<sup>31</sup> In 2015, the Office updated its subject-matter assessment in light of an increased number of allegations against both the NSF and Boko Haram. Based on the information available, the Office found a reasonable basis to believe that between 1 January 2013 and 31 March 2015, both Boko Haram and the NSF committed crimes under the ICC's jurisdiction.<sup>32</sup>
221. Specifically, the Office found a reasonable basis to believe that the NSF committed the war crimes of murder pursuant to article 8(2)(c)(i); torture, cruel treatment pursuant to article 8(2)(c)(i); outrages upon personal dignity pursuant to article 8(2)(c)(ii); and intentionally directing attacks against the civilian population or against individual civilians pursuant to article 8(2)(e)(i) of the Statute.
222. Furthermore, the Office found a reasonable basis to believe that Boko Haram committed the war crimes of murder pursuant to article 8(2)(c)(i); cruel treatment pursuant to article 8(2)(c)(i) and outrages upon personal dignity pursuant to article 8(2)(c)(ii); intentionally directing attacks against the civilian population or against individual civilians pursuant to article 8(2)(e)(i); intentionally directing attacks against buildings dedicated to education and to places of worship and similar institutions pursuant to article 8(2)(e)(iv); pillaging a town or place pursuant to article 8(2)(e)(v); rape, sexual slavery and sexual violence pursuant to article 8(2)(e)(vi); conscripting and enlisting children under the age of fifteen years into armed groups and using them to participate actively in hostilities pursuant to article 8(2)(e)(vii) of the Statute.
223. In addition, based on the available information at the time, the Office found a reasonable basis to believe that the NSF committed the crimes against humanity of murder pursuant to article 7(1)(a); unlawful imprisonment pursuant to article 7(1)(e); torture pursuant to article 7(1)(f); enforced disappearance of persons pursuant to article 7(1)(i); other inhumane acts pursuant to article 7(1)(k); and persecution pursuant to article 7(1)(h) of the Statute.
224. The Office furthermore found a reasonable basis to believe that Boko Haram committed the crimes against humanity of murder pursuant to article 7(1)(a); imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law pursuant to article 7(1)(e); rape, sexual slavery and other forms of sexual violence pursuant to article 7(1)(g); other

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<sup>31</sup> ICC-OTP, [Situation in Nigeria: Article 5 Report](#), 5 August 2013.

<sup>32</sup> ICC-OTP, [Report on Preliminary Examination Activities 2015](#), paras. 192-216.

inhumane acts pursuant to article 7(1)(k); and persecution pursuant to article 7(1)(h) of the Statute.

225. In 2016, the Office conducted specific analysis regarding Boko Haram's attacks against women and girls and has identified gender-based crimes, such as (a) abductions, (b) forced marriages, rapes, sexual slavery and sexual violence, (c) use of women and girls for operational tasks such as suicide attacks, and (d) murders. The Office further found a reasonable basis to believe that the targeting of females including of student girls for attending public schools, the use of girls as suicide bombers and the targeting of males including student boys by means of forced conscription to fight for the group and through the selective execution of men of fighting age constitute acts of persecution on gender grounds under article 7(1)(h) of the Statute. Similarly, the crimes allegedly committed by the NSF against military aged males suspected of being Boko Haram members or supporters may constitute persecution on gender grounds.<sup>33</sup>
226. The Office further paid specific attention to crimes committed against children, particularly by Boko Haram, including conscripting and enlisting children under the age of fifteen years into armed groups and using them to participate actively in hostilities. The Office identified incidents where the victims of other alleged crimes committed by Boko Haram included children, such as murder, sexual and gender-based crimes, and abductions.<sup>34</sup>

*New alleged crimes*

227. During the reporting period, new crimes were alleged in the context of the armed conflict between Boko Haram and the NSF and with respect to communal violence in Nigeria's North Central and North East geographical zones.
228. Boko Haram reportedly continued to engage in conduct that falls within the potential cases identified by the Office in 2015, relating to the commission of crimes against humanity and war crimes under the Statute.<sup>35</sup> This includes attacks against women and girls and attacks against education (including schools, teachers and schoolchildren). UNICEF estimates that in the last 9 years, at least 2,295 teachers have been killed and more than 1,400 schools have been destroyed in northeastern Nigeria. On 19 February 2018, 113 girls from the Government Girls' Science Technical College in Dapchi, Yobe State, were allegedly abducted by Boko Haram. The group later released 107 of them, while five reportedly died during the abduction and one remains captive. Boko Haram also reportedly continued to intentionally target buildings dedicated to religion. For example, on 21 November 2017, an alleged Boko Haram suicide attack on a mosque in Mubi, Adamawa State, reportedly conducted by a young boy, caused the death of at least 50 persons.

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<sup>33</sup> See also ICC-OTP, [Report on preliminary examination activities 2016](#), paras. 292-294.

<sup>34</sup> ICC-OTP, [Report on preliminary examination activities 2016](#), para. 295.

<sup>35</sup> ICC-OTP, [Report on Preliminary Examination Activities 2015](#), paras. 195-216.

229. There are furthermore allegations on new crimes by Boko Haram, such as attacks against personnel involved in humanitarian assistance and taking protected persons as hostages. On 1 March 2018, Boko Haram members allegedly attacked the town of Rann, Borno State, killed, among other victims, three humanitarian workers and abducted three female health workers, two working for the International Committee of the Red Cross (“ICRC”) and one for UNICEF. Reportedly, the ICRC health workers were then murdered in September and October 2018.
230. The Office is also analysing information related to new allegations implicating the NSF. In particular, different sources reported on alleged sexual violence against women and girls in camps of internally displaced persons in the north-east Nigeria which are under the control of the NSF and the Civilian Joint Task Force.
231. Furthermore, the Office received communications on attacks allegedly carried out by Fulani herders and Christian settlers in the context of the violence in Nigeria’s North Central and North East geographical zones. This violence, which has been observed by the Office since 2016, is often referred to as a conflict between Fulani herders and Christian farmers, stemming from limited access to water, land and other resources.
232. The escalation of violence in late 2017 and 2018 is reportedly the result of the rise of ethnic militias and community vigilantes and the passage of grazing laws in some of the affected States that reportedly imposed restrictions on herders, among others. Militias are also reported to have clashed with NSF deployed in the affected area to address the deteriorating security situation. Some of the attacks on civilians were allegedly committed by criminal gangs involved in cattle-rustling that were subsequently blamed on Fulani herders. The Office has reviewed these communications and continues to gather additional information to determine whether there is a reasonable basis to believe that the crimes allegedly committed in this context fall under ICC jurisdiction.

### *Admissibility Assessment*

233. The admissibility assessment regarding the eight potential cases identified by the Office in 2015 in relation to the non-international armed conflict is ongoing.<sup>36</sup> The Office is in regular contact with the Office of the Attorney-General of the Federation and Minister of Justice (“AGF”) for this purpose. The AGF remains the Office’s main focal point for both ordinary and military proceedings.

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<sup>36</sup> ICC-OTP, [Report on Preliminary Examination Activities 2015](#), paras. 194-216.

### *Legal framework*

234. Short of an implementing legislation of the Statute, the principal legal tools used by the Nigerian authorities to investigate and prosecute the crimes allegedly committed in the context of the armed conflict are the Terrorism (Prevention) Act 2011 as amended in 2013, with respect to acts committed by Boko Haram, and the Nigerian Armed Forces Act of 2004, as regards offences by members of the Armed Forces. Additionally, the Anti-Torture Act 2017, which was signed into law on 20 December 2017, expands the lists of acts of torture under Nigerian law, including with respect to sexual and gender-based crimes (“SGBC”).
235. The absence of relevant provisions and the limitations of the existing legal framework pose a challenge for the admissibility assessment. In that regard, cases against Boko Haram suspects are often based on charges for crimes which are not under the ICC jurisdiction, such as membership to a terrorist organisation or failure to disclose information about a terrorist act to law enforcement. Military prosecutions have focussed so far on individual cases of low ranking soldiers charged under the AFA, and failed to address the contextual elements of crimes against humanity or war crimes identified by the Office.

### *Proceedings relating to Boko Haram*

236. Since the beginning of the conflict with Boko Haram in 2009, thousands of persons suspected of being members of Boko Haram have reportedly been arrested by the NSF. Only recently, the Nigerian authorities have taken steps to process these cases. According to official sources, over 2,300 Boko Haram suspects arrested during security operations conducted between 2010 and 2017 were held in pre-trial detention by October 2017. According to the figures released to the media by the AGF, as of September 2017, only 13 persons had been tried for “terrorism activities” in connection with Boko Haram and of those, only nine were convicted. However, 33 terrorism cases were ongoing at various Federal High Court Divisions, and in 116 cases, charges were filed and are awaiting trials in Kainji, Niger State. The Nigerian Government made public in October 2017 that 1,669 Boko Haram suspects held at a military detention centre in Kainji, Niger State and 651 Boko Haram suspects detained in a military detention centre and a State prison in Maiduguri, Borno State were awaiting trial. In addition, an unknown number of persons is reportedly held in so-called rehabilitation camps for repentant and surrendered Boko Haram members under the control of the National Security Advisor.
237. Since October 2017, the Nigerian authorities initiated three rounds of mass trials before special courts of the Federal High Court (“FHC”) in Kainji, Niger State, to process thousands of Boko Haram suspects held in military detention in Kainji. Such trials took place in October 2017, February 2018 and July 2018 during which most of the 1,669 Boko Haram suspects detained in Kainji were tried. It appears from the information available that the majority of defendants were

discharged without trial for lack of evidence. Further, the great majority of the more than 360 persons convicted in these trials were charged with providing material and non-violent support to Boko Haram. Several observers also raised fair trial and due process concerns with respect to the Kainji trials.

238. Despite the fact that the Nigerian authorities are conducting trials, it appears that at this stage, there is a limited number of cases against high and mid-level Boko Haram commanders. This seems to be related to the fact that top commanders have yet to be apprehended or were killed during military operations. Nonetheless, the trial of Kabiru Umar, a mid-level Boko Haram commander was successfully concluded in December 2013 and the trial of Mohammed Usman (aka Khalid al-Barnawi), a former high-level Boko Haram commander and subsequent leader of the break-away faction Ansaru commenced in March 2017. The charges in both of these high-profile cases however, appear to be unrelated to the potential cases identified by the Office.
239. During the Kainji mass trials, a few cases were brought against lower-level Boko Haram members for conduct related to the OTP's potential cases. This includes the trial of Haruna Yahaya, who was sentenced by the FHC to fifteen years imprisonment for his participation in the abduction of over 200 Chibok school girls in 2014 and in attacks on Chibok and Gabsuri town in Borno State. The Nigerian authorities also provided information on the case against Abba Umar, an alleged lower-level Boko Haram commander who was sentenced by the FHC in Kainji to 60 years' imprisonment.
240. The Office has further examined relevant documentation received from the AGF with respect to the attacks of Boko Haram against civilians. This includes in particular cases in relation to the April 2012 attack against the premises of a national newspaper in Kaduna, bomb attacks against civilians in Suleja and Dakna in Niger State in 2011, and the April 2014 attack against the Nyanya Motor Park in Abuja. Part of these proceedings led to judgements and prison sentences, suggesting that steps are taken to prosecute suspected Boko Haram members. However, such concrete investigative/prosecutorial activities by the national authorities appear to be rather scarce in quantity and often lacking in progression compared to the quantity of allegations and the numbers of persons in detention. Files provided to the Office further suggest that some of the proceedings considered by the authorities as relevant to the admissibility assessment may be affected by procedural and substantive issues.

*Proceedings relating to the Nigerian Security Forces*

241. According to high-level military prosecutors met by the Office, crimes committed by individual members of the Nigerian Armed Forces that could fall under the Court's jurisdiction are to be investigated and prosecuted by the relevant services in the Nigerian Defense Forces. Several files pertaining to alleged violations by members of the army were submitted to the Office. These files relate to a limited extent to the two potential cases identified by the Office.

Of the 27 files provided to the Office, 24 either lacked information to determine their relevance for the admissibility assessment or did not appear relevant.

242. The three relevant files concern (1) an Nigerian Army investigation report regarding the alleged death of at least 107 men and boys in military detention in Borno State between January and March 2016; (2) a Nigerian Army investigation report on the alleged killing of civilians and burning of houses in Mundu village, Bauchi State; and (3) an assessment report of the Defence Headquarters regarding the Baga incident of 16 and 17 April 2013. The Office's assessment of these reports is ongoing.
243. Other information specifically requested by the Office which was assessed to be potentially relevant to the admissibility assessment has yet to be provided by the Nigerian authorities. This concerns in particular the reports and supporting documentation of two relevant inquiries conducted in 2017, namely the Special Board of Inquiry instituted by the Nigerian Army and the Presidential Investigation Panel to Review Compliance of the Armed Forces with Human Rights Obligations and Rules of Engagement.

#### *OTP Activities*

244. The Office continued its factual and legal assessment of information received on alleged crimes and gathered additional information on relevant national proceedings conducted by the Nigerian authorities. It conducted one mission to Nigeria during the reporting period in relation to its admissibility assessment.
245. In May 2018, building on previous consultations held in September 2016 and May 2017, the Office held a third technical meeting with Nigerian authorities at the Ministry of Justice in Abuja to gather additional information on national proceedings conducted with respect to the eight potential cases identified. Nigerian authorities provided the Office with case files and investigation reports partially addressing the detailed Request for Information sent by the Prosecutor to the Attorney-General of the Federation and Minister of Justice in April 2018. The Office also met with the National Human Rights Commission, civil society actors and members of the diplomatic community to provide an update on the status of the preliminary examination. During the mission, the Office received additional information on crimes allegedly committed in the context of the conflict in the North East as well as the context of the violence in Nigeria's North Central and North East zones.
246. In July 2018, the Prosecutor met with the Attorney-General of the Federation and Minister of Justice, Abubakar Malami in the margins of the Commemoration of the 20<sup>th</sup> Anniversary of the Rome Statute at the ICC in The Hague.
247. The Office also continued to engage with international partners supporting the Nigerian judiciary's activity in relation to crimes that could fall under the jurisdiction of the ICC. This included the presentation of its preliminary findings

to Nigerian prosecuting authorities in a workshop organized by a partner NGO in May 2018 and aimed at reinforcing Nigeria's capacity to address complex and serious crimes. This workshop, the fifth of its kind, enabled the Office to further raise awareness of its potential cases, information requirements and admissibility assessment criteria.

248. Throughout the reporting period, the Office maintained close contact with relevant partners and stakeholders in the situation in Nigeria, including international and Nigerian NGOs, communication senders, and diplomatic actors. In particular, the Office also continued liaising with international partners focussing on SGBC, such as the Office of the UN Special Representative on Sexual Violence in Conflict.

### *Conclusion and Next Steps*

249. Since 2017, the Nigerian authorities appear to have taken concrete steps toward fulfilling their primary responsibility to investigate and prosecute ICC crimes. While there seems to be a tangible prospect of further proceedings against members of Boko Haram, including high-level commanders, at this stage the same cannot be said of the NSF, in particular since the Nigerian authorities tend to deny any allegation against the latter.
250. While acknowledging the cooperation of the Nigerian authorities in the course of the preliminary examination, the Office will require, for the purpose of expediting its complementarity assessment, further information and evidence demonstrating that relevant national proceedings are being or intended to be conducted without delay.

## PALESTINE

### *Procedural History*

251. The situation in Palestine has been under preliminary examination since 16 January 2015.<sup>37</sup> The Office has received a total of 125 communications pursuant to article 15 in relation to the situation in Palestine.
252. On 22 May 2018, the Office received a referral from the Government of the State of Palestine regarding the situation in Palestine since 13 June 2014 with no end date. In reference to articles 13(a) and 14 of the Statute, the State of Palestine requested the Prosecutor “to investigate, in accordance with the temporal jurisdiction of the Court, past, ongoing and future crimes within the court’s jurisdiction, committed in all parts of the territory of the State of Palestine.”<sup>38</sup>
253. On 24 May 2018, the Presidency of the Court assigned the Situation in Palestine to Pre-Trial Chamber I (“PTC I”).<sup>39</sup>
254. On 13 July 2018, PTC I issued a decision concerning the establishment, by the Registry, of “a system of public information and outreach activities among the affected communities and particularly the victims of the situation in Palestine.”<sup>40</sup>

### *Preliminary Jurisdictional Issues*

255. On 1 January 2015, the Government of the State of Palestine lodged a declaration under article 12(3) of the Statute accepting the jurisdiction of the ICC over alleged crimes committed “in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014.” On 2 January 2015, the Government of the State of Palestine acceded to the Statute by depositing its instrument of accession with the UN Secretary-General. The Statute entered into force for the State of Palestine on 1 April 2015.

### *Contextual Background*

#### *West Bank and East Jerusalem*

256. In June 1967, an international armed conflict (the Six-Day War) broke out between Israel and neighbouring states, as a result of which Israel acquired control over a number of territories including the West Bank and East Jerusalem.

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<sup>37</sup> [The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine](#), 16 January 2015.

<sup>38</sup> [Referral Pursuant to Article 13\(a\) and 14 of the Rome Statute](#), 15 May 2018, para.9. See also [Statement by ICC Prosecutor, Mrs Fatou Bensouda, on the referral submitted by Palestine](#), 22 May 2018.

<sup>39</sup> Decision assigning the situation in the State of Palestine to Pre-Trial Chamber I, [ICC-01/18-1](#), 24 May 2018.

<sup>40</sup> Decision on Information and Outreach for the Victims of the Situation, [ICC-01/18-2](#), 13 July 2018.

Immediately after the end of the Six-Day War, Israel established a military administration in the West Bank, and adopted laws and orders effectively extending Israeli law, jurisdiction and administration over East Jerusalem. In November 1981, a separate Civilian Administration was established to “run all regional civil matters” in the West Bank. On 30 July 1980, the Knesset passed a ‘Basic Law’ by which it established the city of Jerusalem “complete and united” as the capital of Israel.

257. Since 1967, the information available suggests that the Israeli civilian presence in the West Bank and East Jerusalem has reportedly grown to nearly 600,000 settlers, living in 137 settlements officially recognised by the Israeli authorities, including 12 large Israeli ‘neighbourhoods’ in the eastern part of Jerusalem, and some 100 unauthorised settlements or ‘outposts’.
258. Pursuant to the Oslo Accords of 1993-1995, the Palestine Liberation Organization and the State of Israel formally recognised each other, and agreed on a progressive handover of certain Palestinian-populated areas in the West Bank to the Palestinian National Authority (or Palestinian Authority, “PA”). Under the 1995 Interim Agreement, the West Bank was divided into three administrative areas (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).
259. The peace talks between the parties ground to a halt in 1995 and were followed over the years by a number of rounds of negotiations including the Camp David Summit of 2000, the 2002/2003 Road Map for Peace, as well as intermittent peace talks and related initiatives since 2007. To date, no final peace agreement has been reached and a number of issues remain unresolved, including the determination of borders, security, water rights, control of the city of Jerusalem, Israeli settlements in the West Bank, refugees, and Palestinians’ freedom of movement.

#### *Gaza*

260. On 7 July 2014, Israel launched ‘Operation Protective Edge’, which lasted 51 days. According to the Israeli authorities, the objective of the operation was to disable the military capabilities of Hamas and other groups operating in Gaza, neutralise their network of cross-border tunnels and halt their rocket and mortar attacks against Israel. The operation consisted of three phases: after an initial phase focussed on air strikes, Israel launched a ground operation on 17 July 2014; a third phase from 5 August onwards was characterised by alternating ceasefires and aerial strikes. Several Palestinian armed groups (“PAGs”) participated in the hostilities, most notably the respective armed wings of Hamas and the Palestinian Islamic Jihad as well as the al-Nasser Salah al-deen Brigades. The hostilities ended on 26 August 2014 when both sides agreed to an unconditional ceasefire.

261. Since the end of the 2014 hostilities, different national and international bodies have conducted inquiries and/or investigations into incidents that occurred during the 2014 Gaza conflict, such as, for example, the United Nations Independent Commission of Inquiry on the 2014 Gaza Conflict, the UN Headquarters Board of Inquiry into certain incidents that occurred in the Gaza Strip between 8 July 2014 and 26 August 2014, the Israel Defense Forces (“IDF”) Military Advocate General, and the Palestinian Independent National Committee.
262. On 30 March 2018, the 42<sup>nd</sup> anniversary of the Palestinian Land Day, tens of thousands of Palestinians participated in a protest, dubbed the “Great March of Return”, near the border fence between the Gaza Strip and Israel. The demonstrations were reportedly organized to draw attention to the Palestinians’ demands for an end of the Israeli occupation and its blockade on the Gaza Strip and the rights of refugees and their descendants to reclaim their ancestral lands in Israel. Although the protests were initially planned to last only six weeks, until 15 May (“Nakba Day”), they have ultimately continued to date.
263. In the context of these events, IDF soldiers have used non-lethal and lethal means against persons participating in the demonstrations, reportedly resulting in the killing of over 170 individuals, including over 30 children, and the wounding of more than 19,000 others. Reportedly, journalists and medical workers have been among those killed and injured.
264. While the majority of demonstrators reportedly engaged in non-violent protest and remained several hundred meters away from the border, some entered the immediate area of the border fence and engaged in violent acts, such as throwing rocks, Molotov cocktails and other explosive devices, deploying incendiary kites and balloons into Israel, and attempting to infiltrate into Israeli territory.
265. Israel has alleged that Hamas and other armed groups in Gaza have sought to instigate a violent confrontation and have exploited the protests as a cover for acts of terrorism against the State of Israel, using the presence of civilians to shield their military activities. However, the IDF’s rules of engagement and the alleged use of excessive and deadly force by Israeli forces in the context of the demonstrations has been heavily criticized by, among others, UN officials and bodies and a number of international and regional NGOs.
266. On 18 May 2018, the UN Human Rights Council adopted Resolution S-28/1 establishing an independent international commission of inquiry to investigate alleged violations and abuses of international humanitarian law and international human rights law committed in the context of the demonstrations that began on 30 May 2018. The IDF has also announced that it is conducting its own examination and investigations of certain alleged incidents involving the shooting of demonstrators.

267. From 11 to 13 November 2018, there was also a marked increase in hostilities between Israel and Palestinian armed groups operating in Gaza. Reportedly, on 12-13 November, Palestinian armed groups fired over 400 rockets and mortar shells from Gaza towards Israel, killing at least one civilian and injuring dozens of others and causing damage to property. The IDF also launched strikes against over one hundred targets throughout Gaza – such attacks reportedly primarily targeted Palestinian armed group members and their infrastructure, though they also caused civilian casualties and damage in certain instances. On 13 November, a ceasefire was reached between the parties.

### *Subject-Matter Jurisdiction*

268. The preliminary examination of the situation in Palestine has raised specific challenges relating to both factual and legal determinations. In the latter respect, the Office, in particular, has to consider the possible challenges to the Court's jurisdiction, and/or to the scope of any such jurisdiction. The following summary is without prejudice to any future determinations by the Office regarding the exercise of territorial or personal jurisdiction by the Court. It should not be taken as indicative of, or implying any particular legal qualifications or factual determinations regarding the alleged conduct. Additionally, the summary below is without prejudice to the identification of any further alleged crimes which may be made by the Office in the course of its continued analysis.

#### *West Bank and East Jerusalem*

269. The Office has focused its analysis on alleged war crimes committed in the West Bank, including East Jerusalem, since 13 June 2014. Namely, the Israeli authorities have allegedly been involved in the settlement of civilians onto the territory of the West Bank, including East Jerusalem, and the forced removal of Palestinians from their homes in the West Bank and East Jerusalem. Settlement-related activities have reportedly included the confiscation and appropriation of land; the planning and authorisation of settlement expansions; constructions of residential units and related infrastructures in the settlements; the regularisation of constructions built without the required authorisation from Israeli authorities (so-called outposts); and public subsidies, incentives and funding specifically allocated to settlers and settlements' local authorities to encourage migration to the settlements and boost their economic development.

270. Israeli authorities are also alleged to have been involved in the demolition of Palestinian property and eviction of Palestinian residents from homes in the West Bank and East Jerusalem. Moreover, Israeli authorities have reportedly continued to advance plans to relocate Bedouin and other herder communities present in and around the so-called E1 area, including through the seizure and demolition of residential properties and related infrastructure.

271. The Office has also received information regarding other crimes allegedly committed by officials of the Israeli authorities in the West Bank, including East

Jerusalem, which may fall under the purview of article 7 of the Statute on crimes against humanity. Specifically, these allegations relate to the crime of persecution, transfer and deportation of civilians, as well as the crime of apartheid.

272. In addition, the Office has also received allegations that Palestinian security and intelligence services in the West Bank have committed the crime against humanity of torture against civilians held in detention centres under their control. These and any other alleged crimes that may occur in the future, require further assessment.

*Gaza 2014 hostilities*

273. Based on the information available, the hostilities that took place in Gaza between 7 July and 26 August 2014 may be classified as either an international or non-international armed conflict. Accordingly, the Office has taken into account the possible alternative available classifications of the 2014 armed conflict and the related possible alternative legal qualifications of the relevant alleged acts of the various perpetrators. Such an approach, however, has implications for any conclusions to be reached on the commission of particular alleged crimes of relevance, given that certain war crimes that are criminalised under the Statute provisions relevant to international armed conflicts, are by contrast *not* criminalised under the Statute in the case of a non-international armed conflict. Consequently, the Office's conclusions on the commission of alleged crimes in some instances depend on the qualification of the conflict as either international or non-international in character.

274. During the reporting period, the Office continued to analyse allegations of crimes committed by members of the IDF and members of PAGs, respectively, during the hostilities in Gaza in 2014. In conducting its analysis, the Office focused on a sample of illustrative incidents, out of the thousands previously documented by the Office and compiled in comprehensive databases. In this respect, the Office sought to: (i) select incidents which appear to be the most grave in terms of the alleged harm to civilians and damage to civilian objects and/or are representative of the main types of alleged conduct, and (ii) prioritise incidents for which there is a range of sources and sufficient information available to enable an objective and thorough analysis.

*Other alleged conduct since 30 March 2018*

275. The Office has gathered information regarding other crimes allegedly committed by both sides in relation to the violence that has occurred in the context of the protests held along the Israel-Gaza border since 30 March 2018. These and any other alleged crimes that may occur require further assessment.

### *Admissibility Assessment*

276. As set out in article 17(1), admissibility requires an assessment of complementarity and gravity.

#### *West Bank and East Jerusalem*

277. The information available does not seem to indicate the existence of any relevant national investigations or prosecutions being or having been conducted against the persons or groups of persons which are likely to be the focus of an investigation into the crimes allegedly committed in the West Bank, including East Jerusalem. This stems from the fact that on the one hand, the Palestinian authorities are unable to exercise jurisdiction over the alleged Israeli perpetrators, while, on the other hand, the Israeli government has consistently maintained that settlements-related activities are not unlawful and the High Court of Justice (“HCJ”) has held that the issue of the Government’s settlement policy was non-justiciable. The Office has nonetheless considered a number of decisions rendered by the HCJ pertaining to the legality of certain governmental actions connected to settlement activities.

278. In addition, the Office has considered whether, based on the information available, the crimes allegedly committed in the West Bank, including East Jerusalem, since 13 June 2014, are sufficiently grave within the meaning and requirements of the Statue to justify the opening of an investigation, in particular considering their scale, nature, manner of commission, and their impact on victims and affected communities.

#### *Gaza 2014 hostilities*

279. With respect to the alleged crimes committed during the 2014 hostilities in Gaza, the Office has focussed on a sample of incidents that appear to be the gravest, most representative and best documented. With respect to crimes allegedly committed by members of the IDF, the information available indicates that all of the relevant incidents are or have been the subject of some form of investigative activities at the national level within the IDF military justice system. With respect to crimes allegedly committed by Palestinian armed groups, the information available at this stage does not suggest any conflict of jurisdiction between the Court and any relevant States with jurisdiction

280. For the purpose of the gravity assessment, the Office has to consider whether the groups of persons that are likely to be the object of an investigation include those who appear to be most responsible for the most serious crimes, including persons with levels of responsibility in directing, ordering, facilitating or otherwise contributing to the commission of the alleged crimes.

281. Furthermore, taking into account both quantitative and qualitative factors, the crimes allegedly committed must be sufficiently grave considering their scale,

nature, manner of commission, and their impact on victims and affected communities. Additionally, while the considerations outlined in article 8(1) are only meant to provide guidance that the Court should focus on cases meeting these requirements, the Office is also considering whether the alleged war crimes were committed on a large scale or as part of a plan or policy within the meaning of article 8(1) of the Statute.

### *OTP Activities*

282. During the reporting period, the Office has reached an advanced stage of its assessment of statutory criteria for a determination whether there is a reasonable basis to proceed with an investigation into the situation in Palestine pursuant to article 53(1) of the Statute. In the course of this process, the Office engaged with a number of stakeholders – including officials of Palestine and Israel, intergovernmental and non-governmental organisations, and members of civil society – for the purpose of gathering additional information relevant to the Office’s assessment.

283. On 8 April 2018, the Prosecutor issued a statement expressing grave concern at the violence and deteriorating situation in the Gaza Strip related to the events surrounding the Great March of Return demonstrations that began on 30 March 2018 and called for the violence to stop. In addition, on 17 October 2018, the Prosecutor issued a statement expressing concern in relation to the planned eviction of the Bedouin community of Khan al-Ahmar in the West Bank as well as the continued violence, perpetrated by actors on both sides, along the Gaza border with Israel.

### *Conclusion*

284. During 2018, the Office has advanced and significantly progressed its analysis on all of the factors listed in article 53(1)(a)-(c), in line with its holistic approach. Given the detailed focus that the Office has given to this situation since 2015, the Prosecutor intends to complete the preliminary examination as early as possible.



## IV. COMPLETED PRELIMINARY EXAMINATIONS

### GABONESE REPUBLIC

#### *Procedural History*

285. The situation in the Gabonese Republic (“Gabon”) has been under preliminary examination since 29 September 2016. The Office has received a total of 18 communications pursuant to article 15 in relation to the situation in Gabon.
286. On 21 September 2016, the Office received a referral on behalf of the Government of the Gabonese Republic with respect to alleged crimes potentially falling within the ICC’s jurisdiction committed in its territory since May 2016, with no end-date.<sup>41</sup>
287. On 28 September 2016, the Office received a supplementary note from the Gabonese authorities’ legal representatives clarifying the scope of the referral and providing additional details on alleged crimes.
288. On 29 September 2016, the Prosecutor issued a statement informing the public of the referral and announcing the opening of a preliminary examination into the situation in the Gabonese Republic since May 2016.<sup>42</sup>
289. On 4 October 2016, in accordance with regulation 46(2) of the Regulations of the Court, the Presidency of the ICC assigned the situation to PTC II.<sup>43</sup> On 16 March 2018, the situation was reassigned to PTC I.<sup>44</sup>
290. On 21 September 2018, following a thorough factual and legal analysis of all the information available, the Prosecutor concluded that there was no reasonable basis to proceed with an investigation, and decided to close the preliminary examination for lack of subject-matter jurisdiction. A detailed report was issued by the Office presenting and explaining its findings.<sup>45</sup>

#### *Preliminary Jurisdictional Issues*

291. The Gabonese Republic deposited its instrument of ratification to the Statute on 20 September 2000. The ICC therefore has jurisdiction over Rome Statute crimes

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<sup>41</sup> [Referral under Article 14 of the Rome Statute](#), 20 September 2016.

<sup>42</sup> ICC-OTP, [Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, concerning referral from the Gabonese Republic](#), 29 September 2016.

<sup>43</sup> ICC Presidency, Decision assigning the Situation in the Gabonese Republic to Pre-Trial Chamber II, [ICC-01/16-1](#), 4 October 2016.

<sup>44</sup> ICC Presidency, Decision assigning judges to divisions and recomposing Chambers, [ICC-01/11-01/17-7](#), 16 March 2018.

<sup>45</sup> ICC-OTP, Situation in the Gabonese Republic, [Article 5 Report](#), 21 September 2018.

committed on the territory of the Gabonese Republic or by its nationals from 1 July 2002 onwards.

### *Contextual Background*

292. On 27 August 2016, a presidential election was held in Gabon. Incumbent President Ali Bongo Ondimba, elected for the first time in 2009 after the death of his father who had served as President for 42 years, ran for a second term against the main opposition candidate, former Minister of Foreign Affairs, Mr Jean Ping. In spite of growing reported tensions between the supporters of both candidates in the previous months, the election was held in a generally peaceful climate and with a relatively high voter turnout. A joint mission from the African Union and the Economic Community of Central African States and an EU Election Observation Mission (“EU EOM”) was deployed to monitor the process.
293. Prior to the publication of the official results, both camps declared victory and accused each other of attempting to commit fraud. According to the official results, Mr Ali Bongo Ondimba won 49.8% of the vote against 48.2% for Mr Jean Ping with a voter turnout of 59.5%. The opposition contested the results and resigned from the Autonomous and Permanent National Electoral Commission (*Commission électorale nationale autonome et permanente*, “CENAP”) denouncing widespread irregularities, in particular in Mr Ali Bongo Ondimba’s home province Haut-Ogooué. According to the electoral commission, President Ali Bongo Ondimba won 95.46% of the votes in the province with a turnout of 99.93%. The EU EOM flagged “evident anomalies” in the results registered in Haut-Ogooué.
294. Immediately after the announcement of the provisional results on 31 August 2016, thousands of Jean Ping’s supporters held public demonstrations in Libreville and other cities claiming the election was rigged and calling on Mr Ali Bongo Ondimba to step down. In this context, violent clashes between opposition supporters and security forces broke out in the Gabonese capital and other cities resulting, according to some reports, in hundreds of arrests. A more limited number of deaths and injuries on both sides were also initially reported, although there are significant discrepancies between the number of victims confirmed by the Government and those claimed by the opposition. During violent riots in Libreville, the Gabonese National Assembly and other government buildings, as well as various private residences and businesses, were reportedly looted and set ablaze by demonstrators.
295. On the night of 31 August and in the early hours of 1 September 2016, Gabonese security forces reportedly raided the opposition’s headquarters (“HQ”) and conducted hundreds of arrests. While the opposition claims that civilians in the HQ premises were brutally assaulted, the Gabonese authorities argue that the raid was conducted to arrest armed criminals for their alleged implication in riots and various acts of violence in Libreville. On the same night, the premises

of Christian media outlet *Radio Télévision Nazareth* ("RTN"), in the commune of Arkanda near Libreville, were reportedly attacked by armed and masked men.

296. On 27 September 2016, President Ali Bongo Ondimba was sworn in for his new term, after the Constitutional Court, rejecting an appeal by Jean Ping who had called for a recount over widespread allegations of fraud, upheld his election.

### *Subject-Matter Jurisdiction*

297. Following a thorough analysis, the Office has concluded that the information available does not provide a reasonable basis to believe that crimes under the Statute have been committed in Gabon since May 2016.
298. The Office conducted a thorough factual and legal assessment of all the information available from various sources, including article 15 communications, media reports and the supporting materials and documentation accompanying the Gabonese referral. Consistent with standard practice, the Office subjected the information available to a rigorous source evaluation, including in terms of the reliability of the sources and credibility of the information received. The Office however notes that the events in question have not been the subject of any independent fact-finding mission or international inquiry. Overall, the information available appears nonetheless sufficient in volume and quality to enable a determination on the reasonable basis standard.
299. The preliminary examination has focused on alleged crimes committed in the Gabonese Republic since May 2016, in the context of the 2016 presidential election. In its referral, the Gabonese Government alleges that opposition leader and former presidential candidate, Jean Ping, incited his supporters to commit genocide during his 2016 presidential campaign. It is further alleged that, following the announcement of the presidential election's provisional results on 31 August 2016, hundreds of opposition supporters committed various acts of violence amounting to crimes against humanity. These include alleged acts of destruction, arson and looting against government buildings, and against private businesses and properties, including property belonging to government officials. Additionally, one individual is alleged to have been detained and subjected to ill-treatment by Mr Jean Ping's supporters at the opposition's HQ.
300. As thousands of Jean Ping's supporters rallied across the country against the provisional results, the information available indicates that violent clashes between State security forces and anti-government demonstrators broke out in Libreville and in various cities of Gabon. In this context, State security forces allegedly resorted to the use of excessive and at times, deadly, force against demonstrators, as well as during a violent raid on the opposition's HQ on the night from 31 August 2016 to 1 September 2016.

301. Based on the information available, it appears that between three and eight civilians were killed and up to 41 injured by State security forces during the post electoral crisis. Up until 28 September 2016, the opposition had further reported 47 alleged instances of enforced disappearances although no names or further details have been made available since then. In addition, between 800 and 1,100 individuals were allegedly deprived of their liberty, with claims that some were allegedly subjected to ill-treatment and at least three to acts of torture while in detention. Two alleged victims further claim that an unclear number of women were raped; however no specific details on any individual case or any estimation of the number of alleged victims is available. Finally, the opposition and civil society organisations contend that since the above-mentioned crimes were allegedly committed against persons based upon their perceived political affiliation, the Gabonese Government committed the crime of persecution.
302. Overall, the information available does not provide a reasonable basis to believe that crimes under the Statute have been committed in Gabon in the context of the 2016 post-election violence, either by members of the opposition or by the Gabonese security forces.
303. In particular, there is no reasonable basis to believe that the acts allegedly committed by the opposition during the post-election violence, which include a number of violent acts against properties and one instance of deprivation of liberty and ill-treatment, constituted an “attack against a civilian population”, as required under article 7 of the Statute. Specifically, the information available does not provide a reasonable basis to believe that, except for one isolated case of deprivation of liberty, the alleged acts attributed to Mr Jean Ping and other opposition leaders, constitute any of the relevant offences under article 7(1), nor evince a certain pattern of behaviour which could qualify as an “attack” within the meaning of article 7 of the Statute.
304. Furthermore, the information available does not provide a reasonable basis to believe that the leader of the opposition, Mr Jean Ping, directly incited his supporters to commit the crime of genocide during his presidential election campaign. In particular, the information available does not suggest that the incriminated public statement, which constitutes the core of the Government’s allegation, constituted direct incitement to commit genocide. Notably, the statement in question does not appear to have communicated to the addressees the need for them to target any specific national, ethnic, racial or religious group, nor to commit genocide in the sense of article 25(3)(e) of the Statute.
305. Additionally, based on the information available, there is no reasonable basis to believe that the acts allegedly committed by the Gabonese security forces in the aftermath of the announcement of the electoral results formed part of an “attack against a civilian population”, under article 7 of the Statute. In particular, although the use of force may have resulted in a limited number of killings and injuries, three cases of unlawful imprisonment and three cases of ill-treatment,

the acts committed fall short of the definition of an attack as a “campaign” or “operation” targeted against a civilian population.

306. In the case of the raid on Mr Jean Ping’s HQ, although the operation entailed the use of significant force and necessarily required a certain degree of planning and organisation which could be consistent with the definition of “a campaign or operation”, the information available does not establish a reasonable basis to believe that a “quantitative threshold” requiring “more than a few”, “several” or “many” acts listed under article 7(1) of the Statute has been met.
307. In any event, should a different conclusion be reached regarding the existence of an attack in the sense of article 7(2), the information available does not provide a reasonable basis to believe that such attack would be “widespread or systematic”, especially considering the limited geographic area where the alleged crimes reportedly took place, the brief duration of the post-election crisis and the relatively low number of victims. The same would apply to the raid on Jean Ping’s HQ, if it were to be considered as a distinct incident or attack.

#### *OTP Activities*

308. During the reporting period, the Office concluded its assessment of whether the information available provides a reasonable basis to believe that the alleged crimes committed in Gabon since May 2016, in the context of the post-election violence, fall within the subject-matter jurisdiction of the Court.
309. On 21 September 2018, the Prosecutor issued a statement<sup>46</sup> announcing her decision to close the preliminary examination and published a detailed report<sup>47</sup> presenting the Office’s findings with respect to jurisdictional matters. In light of the holding of legislative and local elections in Gabon in October 2018, and given the recent history of election-related violence in Gabon, the Prosecutor also urged all individuals and groups to refrain from acts of violence.

#### *Conclusion and Next Steps*

310. Following the analysis of all information available, the Office has concluded that there is no reasonable basis to believe that any crimes falling within the jurisdiction of the Court have been committed in the situation in Gabon. Accordingly, there is no reasonable basis to proceed with an investigation and this preliminary examination has been brought to a close.
311. This conclusion does not diminish the seriousness of the human rights violations that appear to have occurred in Gabon in the course of the post-election crisis and that should be addressed at the national level. Should further information

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<sup>46</sup> ICC-OTP, [International Criminal Court Prosecutor on Gabon: “The legal criteria for this Court to investigate have not been met”](#), 21 September 2018.

<sup>47</sup> ICC-OTP, Situation in the Gabonese Republic, [Article 5 Report](#), 21 September 2018.

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.

312. While the Prosecutor has declined to initiate an investigation of the referred situation, the referring State, Gabon may, within a specified time period, request the Pre-Trial Chamber to review the Prosecutor's decision not to proceed, pursuant to article 53(3)(a) of the Statute.

