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***“THE ROLE OF THE ICC IN THE TRANSITIONAL JUSTICE PROCESS IN
COLOMBIA”***

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INTRODUCTION

Opening remarks

1. May I begin by expressing my appreciation to the organisers, in Bogotá and Medellín, of these conferences on transitional justice, and especially the Externado University of Colombia in Bogotá, the EAFIT University in Medellín and the Max Planck Institute in Freiburg, Germany, for the opportunity to speak.
2. I thank Professor Yesid Reyes, Professor Alonso Cadavid and Professor Ulrich Sieber for their kind invitation.
3. I was last in Colombia in May of 2015, and it is a great pleasure to be back, especially at this eventful moment in Colombia's history.

Outline of the presentation

4. I will begin and end my presentation in Spanish, but will give the main body of it in English.
5. The full text of my presentation will be available in Spanish.
6. As Deputy Prosecutor of the International Criminal Court, I will be speaking only on behalf of the Prosecutor, and not for the ICC judges or the Court as a whole.
7. I will be speaking about the role of the ICC in the transitional justice process in Colombia, from the perspective of the ICC Office of the Prosecutor, but with sensitivity, I hope, to the viewpoint of Colombia.
8. I will pay particular attention to Colombia's Special Jurisdiction for Peace and how the Office of the Prosecutor of the ICC may continue to play a constructive and helpful role.

Overview of the role of the Office of the Prosecutor

9. I begin, however, with a brief overview.
10. The transitional justice process is an integral feature of the implementation of the peace agreement in Colombia.
11. In such a peace process, transitional justice is of critical importance, not only as an instrument of redress, but also as a means to achieve accountability, security and stability.

12. Justice is an integral part of conflict resolution and the creation of a sustainable peace.
13. The question for the ICC Prosecutor, but, most importantly, for a State Party to the Rome Statute, is how to achieve the requirements of justice under the Statute while securing a lasting peace.
14. During the peace process, the Prosecutor of the ICC has endeavoured to convey clear messages to the Colombian authorities on transitional justice issues and their consistency or compatibility with the Rome Statute.
15. She has done so in the hope that her views would assist the Colombian authorities on important aspects of the system of transitional justice that they were designing as part of the peace.
16. In conveying these messages, the Prosecutor has attempted to explain what her own responsibilities are under the Rome Statute, and what these responsibilities require of her, if she is to discharge the mandate which the States Parties to the Statute, including Colombia, have entrusted to her.
17. States Parties have primary responsibility under the Rome Statute for suppressing international crimes, such as war crimes and crimes against humanity.
18. The ICC is only the failsafe mechanism, to ensure an end to impunity for such crimes and the delivery of justice.
19. The Prosecutor thus has a duty to satisfy herself that justice is being done, because, if national authorities are carrying out their responsibilities under the Rome Statute, then she has no reason to intervene.
20. States Parties to the Rome Statute, such as Colombia, share the values enshrined in the Statute.
21. These values embrace accountability, to put an end to impunity for crimes, such as war crimes and crimes against humanity, and deterrence of the commission of such crimes.
22. The peace process, with its important transitional justice component, is still unfolding and there are many “unknowns”, but it is a noble undertaking.
23. Transitional justice measures offer a broad scope of possibilities to ensure accountability for those most responsible for the gravest crimes.

24. With the Special Jurisdiction for Peace – the justice component of the Comprehensive System for Truth, Justice, Reparation and Non-Repetition – Colombia has put in place an innovative, complex and ambitious system designed to ensure accountability as part of the implementation of the peace agreement.
25. This system raises hopeful expectations, but also confronts many challenges.
26. The Special Jurisdiction for Peace, or SJP, opened its doors just a few months ago and has started operations, while building its legal framework.
27. The SJP is receiving reports from civil society and State institutions and is expected to adopt important decisions in the immediate future.
28. The manner in which the SJP deals with the cases against those possibly bearing the greatest responsibility for the gravest crimes committed in the context of the armed conflict, will be of paramount importance to the ability to nurture a sustainable, lasting peace in Colombia.
29. The measures to achieve this vital goal should be in alignment with the objectives of the Rome Statute, if they are to honour Colombia's commitment under the Statute and ensure that the most serious crimes do not go unpunished.
30. The success of these measures will be judged by the victims of the armed conflict and by Colombian society as a whole.
31. For peace to be sustainable, justice must be done and it must also be seen to be done – it has to be a transparent process.
32. For her part, the Prosecutor will assess the efficacy of transitional justice measures as a function of her own responsibilities under the Rome Statute, always recognising the broad scope of measures that transitional justice offers to ensure accountability.
33. The Prosecutor will thus endeavour to continue to play a positive and constructive role in Colombia, in accordance with her mandate under the Rome Statute.

I. THE ICC AND TRANSITIONAL JUSTICE

Establishment of the ICC

34. I come now to the subject of the ICC and transitional justice.

35. The ICC was created in response to the horrors of twentieth century genocides, crimes against humanity and war crimes, so that such crimes would not go unpunished, so that there would be an end to impunity.
36. The Rome Statute is based on the belief that the effective prosecution of these crimes will contribute to their prevention.
37. By agreeing on a common legal order to protect individuals and communities from mass atrocities, the States Parties to the Rome Statute promote peace and international security.
38. The Rome Statute principles reflect the consensus of the international community on the essential role that justice plays in creating sustainable peace.
39. Today, 123 States Parties adhere to the Rome Statute system of international criminal justice, and they are collectively committed to bringing to account those responsible for mass atrocity crimes, even those committed on their own territory.
40. Among these States, of course, is Colombia, which ratified the Rome Statute in 2002.

The role of the ICC in a transitional justice process

41. The concept of “transitional justice” embraces a full range of processes that societies employ to deal with the legacy of past human rights abuses and to achieve accountability, justice and reconciliation.
42. To fulfil these aims, transitional justice systems commonly include four measures: criminal justice, mechanisms for the establishment of the truth, reparations programs and guarantees of non-recurrence.
43. There may be other measures too.
44. The peace agreement in Colombia embraces these four measures and other features within a single transitional justice system.
45. Transitional justice is not a special kind of justice, but simply an approach to achieving justice in a time of transition from armed conflict, for example, or a condition of State oppression.
46. The ICC’s mandate relates mainly to the criminal justice component of such a system.

47. This does not mean that other aspects of a transitional justice system, such as truth commissions or reparations, are irrelevant to the ICC.
48. It simply means that these mechanisms are not the main focus for the Office of the Prosecutor, which I will refer to as the OTP, in its assessment of whether cases are admissible before the ICC.
49. A situation of transitional justice only engages the mandate of the ICC Prosecutor, if the authorities of the State concerned are not themselves conducting genuine proceedings for Rome Statute crimes.
50. To assess whether the national authorities are conducting genuine national proceedings, the OTP considers, first, whether the State has initiated proceedings in relation to the potential cases that could be investigated by the Office, and, if so, whether such proceedings are genuine.
51. In the context of transitional justice, this assessment should be holistic: the criminal justice features of the system may be considered in the broader context of other relevant transitional justice mechanisms.
52. If it does not appear, however, that the State has initiated proceedings in relation to cases that could be the subject of investigation by the ICC, or that the proceedings initiated are not genuine, but only designed to shield perpetrators, then – and only then – would the OTP step in to deliver one component of “transitional justice”, namely, criminal investigations and prosecutions.
53. By “proceedings”, of course, the Rome Statute refers to *criminal* proceedings, in the traditional sense, that is, proceedings involving a criminal prosecution, a decision on guilt or innocence of the person charged and, in the event of a conviction, the imposition of a penal sanction.
54. Non-criminal proceedings, such as proceedings to establish reparations for victims, may be considered for the purposes of assessing the seriousness of national efforts, in the context of a holistic evaluation, but, in and of themselves, would not be capable of rendering a case inadmissible before the ICC.

II. THE OTP'S PRELIMINARY EXAMINATION OF THE SITUATION IN COLOMBIA

Recapitulation of the preliminary examination to date

55. To understand the ICC's role in the transitional justice process in Colombia, it is important to recall some of the activities carried out in relation to the OTP's preliminary examination of the situation here.
56. A preliminary examination is not an investigation; it is an information-gathering and analytical process that permits the Prosecutor to determine matters of jurisdiction and admissibility before deciding whether a reasonable basis exists to open an investigation.
57. In light of the criteria in the Rome Statute, the Prosecutor did determine that a reasonable basis existed to believe that war crimes and crimes against humanity had been committed in Colombia by the FARC-EP, ELN, the national army and paramilitary groups from the time the jurisdiction of the Court came into effect.
58. However, no investigation was opened.
59. This was because the principle of complementarity of jurisdictions came into play.
60. National proceedings have been conducted, and continue to be conducted, in relation to these alleged crimes.
61. Nonetheless, in 2012, the OTP identified certain areas of concern, respecting which further judicial efforts were necessary to ensure that those most responsible for the most serious crimes were brought to account.
62. These areas included sexual or gender-based crimes, forced displacement and the killing of civilians staged to look like combat deaths, commonly called "false positives", as well as actions taken in support of paramilitary groups.
63. In addition, the Office indicated it would follow legislative developments that could have an impact on national proceedings relating to Rome Statute crimes, such as legislation establishing any new jurisdiction mandated to investigate and prosecute such crimes.
64. It appeared to the Prosecutor that those within the FARC-EP and ELN, allegedly most responsible for the most serious crimes, had been the subject of genuine national proceedings.

65. This conclusion was reached on the basis of sentences passed by Colombian courts against FARC-EP and ELN leaders for conduct relevant to the jurisdiction of the ICC.
66. The OTP's conclusion was, however, made subject to the appropriate execution of the sentences.
67. With respect to "false positives" cases, the Office noted in 2012 that a number of investigations had been initiated.
68. However, proceedings that had been initiated by that time appeared to have largely failed to focus on the persons who might bear the greatest responsibility within the military hierarchy for the alleged crimes.
69. Since then, the situation has evolved.
70. The Attorney General's Office has been conducting a number of proceedings to inquire into the responsibility of high-ranking military officers for "false positives" killings.
71. Our Office is taking this development into account in assessing whether genuine national proceedings are addressing potential cases for the ICC that arise out of the situation in Colombia, and we will continue to follow this progress.
72. The OTP identifies potential cases on the basis of criteria that include:
 - identification of the persons, or groups of persons, alleged to be involved that are likely to be the focus of an ICC investigation, and
 - the crimes within the ICC's jurisdiction allegedly committed during incidents that are likely to be the focus of an investigation, for the purpose of shaping future cases.
73. This assessment is by definition only preliminary in nature and it is conducted for the specific purpose of making the admissibility assessment.
74. On the issue of admissibility, the judges of the ICC have held that, in the context of article 15 of the Rome Statute, the assessment should be based on a comparison between potential ICC cases arising out of a given situation and the cases being investigated by the national authorities.
75. In other words, at the preliminary examination stage, the focus of the Prosecutor is on assessing whether the potential cases identified by the OTP have been or are being addressed at the national level in a genuine manner.

76. Under the Rome Statute, genuine national proceedings occur where the proceedings:
- are not undertaken merely to shield persons concerned from criminal responsibility;
 - do not suffer from an unjustified delay that is inconsistent with an intent to bring the persons to justice; and
 - are conducted independently and impartially in a way that is consistent with the intent to bring the persons to justice.
77. If these criteria of genuineness are met, then the cases are inadmissible before the ICC and the Prosecutor will not intervene.
78. An assessment of genuineness necessarily relates to specific national proceedings in given cases, not to transitional justice mechanisms or the national judicial system as a whole.
79. This is an aspect of the matter that is sometimes misunderstood – not here in Colombia, but in certain other situations – since it is not the system of justice that is under examination, but simply whether it has been engaged in specific cases in a genuine way.
80. In assessing specific national proceedings, the Office will consider, ultimately, whether the competent national authorities are taking concrete and progressive investigative or prosecutorial steps aimed at ascertaining the responsibility of individuals possibly bearing the greatest responsibility for the most serious crimes.
81. The assessment embraces all of the relevant stages of the particular proceedings, from investigation to trial and appeal.
82. It considers the totality of the facts and circumstances bearing on an intent by national authorities to bring perpetrators to justice.
83. In what I believe is a worthwhile relationship, the OTP is in regular contact with the Attorney General's Office of Colombia to assess the progress of cases relevant to the ICC.
84. We have also had the privilege of initiating our engagement with the Special Jurisdiction for Peace, or SJP.
85. I would like now to focus upon the SJP.

The Special Jurisdiction for Peace

86. How the Special Jurisdiction for Peace, or SJP, deals with proceedings addressing Rome Statute crimes will obviously affect the OTP's assessment of the admissibility before the ICC of cases arising out of the situation in Colombia.
87. The OTP has been following the developments subsequent to the signature of the peace agreement between the Government of Colombia and the FARC-EP, including the adoption of several pieces of legislation implementing the transitional justice system and regulating different aspects of the SJP's operations.
88. The Prosecutor's review of the SJP's legislative framework revealed some aspects that could possibly raise issues about consistency or compatibility with the Rome Statute.
89. Of particular concern were the definition of command responsibility, the definition of "grave" war crimes, and how sentences involving "effective restrictions of freedoms and rights" should be implemented.
90. The Prosecutor also considered the meaning of "active or determinative" participation in the crimes by persons who were not part of any organisation or armed group at the relevant time.
91. On this last point, my understanding is that, based on the recent decision of the Constitutional Court, the participation of third parties ("*terceros*") before the SJP will be on a voluntary basis.
92. It will then be for the Attorney General's Office diligently to investigate and prosecute individuals who contributed to the commission of conflict-related crimes.
93. The Prosecutor conveyed her views on these aspects of the legislation in a brief filed with the Constitutional Court, at the request of that Court.
94. She did so in the hope that her views would assist the Constitutional Court with its review of important aspects of the legislation governing the SJP.
95. Let me take some of the Prosecutor's concerns in turn, beginning with the matter of command responsibility.

The definition of command responsibility (“responsabilidad del mando”)

96. The definition of command responsibility in Legislative Act 01, it appeared to the Prosecutor, departed in certain respects from both customary international law and the Rome Statute.
97. Therefore, depending upon how the definition was interpreted in practice, its application could affect the capacity of the SJP to hold accountable those individuals possibly bearing the greatest responsibility for serious crimes.
98. It appeared to the Prosecutor that the following five concurrent requirements of the definition of command responsibility in Legislative Act 01 departed from customary international law and the Rome Statute, namely, the requirements that:
 - responsibility for the acts of subordinates is based on effective control *over the conduct* of those subordinates;
 - the crime was committed *within the area of responsibility* of the superior;
 - the superior had *legal* and material capacity to issue orders, modify them and enforce them;
 - the superior had the material and *direct* capacity to take appropriate measures to prevent or repress the crimes; and
 - the superior possessed either actual or *updatable knowledge* of the commission of the crimes.
99. I will touch very briefly on each of these points.

Effective command or control over the criminal conduct

100. First, the requirement that the superior exercise effective control over the criminal conduct is not an element under customary international law or the Rome Statute, which only require the superior to exercise effective command or control *over his or her subordinates* who committed the crimes.
101. The only issue is whether the superior had the material ability to prevent future crimes or punish past crimes committed by his or her subordinates.
102. By contrast, control over the conduct would seem to suggest a more restrictive interpretation of the scope of the subordinates’ conduct for which the superior may be held liable, a restriction absent in customary international law or the Rome Statute.

Committed within the area of responsibility

103. Secondly, considerations relating to whether the conduct was committed within the superior's area of responsibility, and whether the superior had effective capacity to develop and execute operations assigned to his unit, could restrict the superior's responsibility to the area to which he or she was formally assigned.
104. This would amount *de jure* requirements to establish effective control, and ignore the reality of what the superior's powers actually were.

Legal and material capacity to issue, modify and enforce orders

105. Thirdly, to establish effective command and control, Legislative Act 01 requires the superior to have legal and material capacity to issue, modify and enforce orders.
106. However, in customary international law and the Rome Statute, it is enough if the superior has the material ability to prevent or punish the subordinates' crimes – that is, effective control of those subordinates.
107. This is the formulation adopted in the Rome Statute, so that the issue really then comes down to a matter of evidence, not law.
108. The superior's legal authority to issue orders is just one piece of evidence for a tribunal to take into account in determining whether the superior had effective control, but this legal authority is neither required, nor alone sufficient, to establish the fact of effective control.

Direct ability to take appropriate measures

109. Fourthly, Legislative Act 01 requires that the superior have the material and direct capacity to take appropriate measures to prevent or repress the crimes.
110. However, the failure of a more senior commander, up the chain of command, to take the necessary steps to prevent or punish the crimes of his or her subordinates further down the chain would still trigger the criminal responsibility of that more senior commander.
111. Whether or not there are intermediate subordinates between the superior and the criminal perpetrators is immaterial, provided effective control of the senior commander is shown.

112. The separate question of whether, due to proximity or remoteness, the superior actually possessed effective control is again a matter of evidence, not of substantive law.

Updatable knowledge

113. Finally, while the concept of actual knowledge is found in customary international law, as one possible mental element relevant to command responsibility, issues may arise with the alternative concept of “updatable” knowledge.

114. Under customary international law, commanders and superiors are criminally liable, if they knew, or had reason to know, that their subordinates were about to commit, or had already committed, the crimes.

115. The Rome Statute adopts a slightly different formulation, under which responsibility arises, if the commander knew or “owing to the circumstances at the time, should have known” that the crimes were about to occur or had occurred.

116. Legislative Act 01, however, does not include the “had reason to know” standard under customary international law, or the “should have known” standard of the Rome Statute, and appears to have adopted the possibly more restrictive definition of “updatable knowledge”.

117. The Prosecutor has thus been concerned that Legislative Act 01 contains language that could be interpreted to restrict the concept of command responsibility in a way that runs counter to international customary law and the Rome Statute.

118. This is not, however, a foregone conclusion, and how this will play out is yet to be seen.

119. It will be up to the magistrates of the SJP to interpret their governing legislation, and the definition of command responsibility in particular, with an awareness of how the concept of command responsibility has developed in international law.

120. If, as a practical matter, justice is done in command responsibility cases, then, not only will this ensure that Colombia can meet its international treaty obligations as a State Party to the Rome Statute, but it will also ensure effective investigations and prosecutions at the national level, in line with the principle of complementarity.

121. This is certainly the outcome that the ICC Office of the Prosecutor hopes for, as the transitional justice measures are implemented and applied in Colombia.
122. I would like now to touch upon some further issues of interest to the OTP in the transitional justice process in Colombia.

Amnesties and similar measures

123. The Office of the Prosecutor has stated on several occasions that it takes no view with respect to amnesties for so-called “political crimes”, such as rebellion, sedition or treason, because these crimes do not fall within the ICC’s jurisdiction.
124. The ICC’s jurisdiction extends to genocide, crimes against humanity, war crimes and, very soon, the crime of aggression, but nothing else.
125. Amnesty for conduct that amounted to Rome Statute crimes would raise very different issues, of course; but otherwise, amnesty for crimes not falling within the Rome Statute is of no concern to the ICC Prosecutor.
126. Respecting crimes potentially within the ICC’s jurisdiction, the Prosecutor noted with optimism that the decision of the Constitutional Court of Colombia, respecting the enforceability of the Amnesty Law, adjusted the provisions relating to amnesties, pardons and the special benefit of waiver of criminal prosecution (“*renuncia de la persecución penal*”) for war crimes.
127. While the original text of the Amnesty Law had excluded amnesties, pardons and waivers of criminal prosecution only for “grave” war crimes, which were defined as all violations of international humanitarian law committed in a systematic manner, the Constitutional Court, according to the communiqué it issued, has found that these benefits may not be granted to individuals in respect of *any* war crimes, whether they were committed in a systematic manner, or not.
128. The Constitutional Court indicated that defining the term “‘grave’ war crimes” as violations of international humanitarian law committed in a systematic manner was not enforceable, because systematicity is not an element required for conduct to amount to war crimes under international criminal law.
129. This is a significant finding.
130. It certainly supports, incidentally, the position that the OTP takes.

131. The finding is also consistent with the duty of States to investigate and prosecute the most serious crimes, including war crimes, as an established principle of international law.

The implementation of sentences involving “effective restrictions of freedoms and rights”

132. Another important aspect of the legal framework regulating the SJP is the sentencing regime.

133. The sentencing regime provides that individuals responsible for serious crimes would serve sentences of five to eight years of “effective restriction of freedoms and rights,” if they acknowledge responsibility for their crimes and commit to non-repetition at the beginning of proceedings before the SJP.

134. Those who accept responsibility for crimes belatedly would serve the same term under ordinary prison conditions, while those who fail to acknowledge their responsibility could, if convicted, be given prison sentences of up to twenty years.

135. The OTP has expressed its views on sentencing on different occasions, because of its importance for the assessment of the genuineness of national proceedings.

136. As mentioned before, the assessment of genuineness embraces all of the relevant stages of the particular proceedings.

137. Sentencing is obviously an important feature of the overall proceedings.

138. Sentences, including the manner in which they are executed, may reflect upon the genuineness of the intention of the authorities to bring perpetrators to justice.

139. This is why, in the interim report on its preliminary examination, the OTP considered the national proceedings carried out against FARC-EP and ELN leaders, who were convicted in absentia, as genuine – “subject to the appropriate execution of sentences.”

140. Thus, the manner in which existing convictions are addressed by the SJP will be one aspect of the OTP’s assessment.

141. The OTP has noted that, while the Rome Statute does not prescribe the specific type or length of sentences that States should impose for ICC crimes, domestic sentencing schemes must support the overarching goals of the Rome Statute

system of international criminal justice, which are to end impunity for the most serious crimes and contribute to prevention.

142. Effective penal sanctions may take different forms, as long as they serve appropriate sentencing objectives of retribution, rehabilitation, restoration and deterrence.
143. Sentences may achieve these goals in different ways, provided they reflect public condemnation of the criminal conduct and recognition of the suffering of victims, and contribute to deterrence.
144. Whether sentences imposed through a transitional justice system are compatible with Rome Statute principles will depend on the context and particular circumstances of the case.
145. The OTP has already expressed its position that the suspension of sentences would be manifestly inadequate, as this would, in effect, allow individuals who bear the greatest responsibility for the commission of the most serious crimes to avoid any real punishment.
146. Reduced sentences are conceivable, however, as long as the convicted person must fulfil certain conditions that would justify an attenuated sentence.
147. The OTP has noted that such conditions could include acknowledgement of criminal responsibility, demobilization and disarmament, guarantees of non-repetition, full participation in the process of establishing the truth about serious crimes, a possible temporary ban from taking part in public affairs, among other measures.
148. Such conditions might justify reducing a sentence that would otherwise be proportionate to the gravity of the crime and the degree of responsibility of the perpetrator.
149. Alternative or non-custodial sentences, involving restrictions upon liberty, supervision and obligations, must also be consistent with a genuine intent to bring the convicted persons to justice.
150. In assessing such sentences, the OTP will consider a range of factors that would include the usual national practice in sentencing for Rome Statute crimes, the proportionality of the sentence in relation to the gravity of the crime and the degree of responsibility of the offender, the type and degree of restrictions on liberty, any mitigating circumstances, the reasons the sentencing judge gave for passing the particular sentence, and so on.

151. The OTP has noted that the effectiveness of such sentences will depend on the nature and scope of the measures that, in combination, form the full sanction imposed upon the offender and whether, in the particular circumstances of a case, they adequately serve sentencing objectives for the most serious crimes and provide redress for the victims.
152. I understand that, in conformity with the decision of the Constitutional Court on the enforceability of Legislative Act 01, it is expected that the magistrates of the SJP will apply the sentencing regime in a way that is largely consistent with the considerations I have just outlined.
153. In its decision, the Constitutional Court has stressed that it will be important for the SJP to harmonise sanctions restricting the freedoms of convicted persons with their participation in political affairs.
154. Redress for victims will depend on whether the political activities permitted to perpetrators are compatible with the object and purpose of the sentences imposed, and do not frustrate them.
155. A rigorous verification of the execution of sentences by the SJP will also be necessary.
156. As a final point, I would like to speak briefly about case selection and prioritisation.
157. It is reasonable to suppose that this will be one of the challenges that the magistrates of the SJP will face.
158. It is also a challenge that the OTP faces in its own work, and we are prepared to share our experience, for whatever use the SJP might make of it.

III. CASE SELECTION AND PRIORITISATION

159. It is obviously important to develop a sound and transparent strategy to address a large universe of crimes, since dealing with these crimes is the core function of the transitional justice system set up by the peace agreement, specifically, the Special Jurisdiction for Peace.
160. Our experience in developing a policy for case selection and prioritisation may have limited value for how national jurisdictions should determine whom to investigate or prosecute and for what conduct, because the context is different.
161. However, our experience may be of some interest.

162. The OTP's strategy and prosecutorial policies are designed as a function of the global character of the ICC and the particular mandate of the Prosecutor.
163. The ICC system differs significantly from that of national judicial systems, which operate under different circumstances and different legal regimes.
164. So, I refer to how the OTP addresses its workload merely as an example of how a judicial system dealing with mass atrocity situations may develop a reasonably pragmatic and fair approach to advance its mandate effectively.
165. Our practice is described in the OTP's Policy Paper on Case Selection and Prioritisation, published in 2016 and available on the ICC Website.
166. Respecting the situation in Colombia, the SJP faces a daunting task, not least because of the importance of showing results and beginning to deliver judgments for the gravest and most representative crimes in the near future.
167. This will be reassuring for the public and important for the credibility of the transitional justice system that is being implemented.
168. The SJP will need all the support it can get, from all stakeholders in the peace process.
169. In Colombia, the transitional justice system faces a vast universe of crimes committed by numerous perpetrators against hundreds of thousands of victims.
170. This universe of crimes includes thousands acts of killings, abductions, torture, sexual and gender based violence, to name a few forms of criminality, many of which may also amount to ICC crimes.
171. The SJP will be examining the responsibility of those, not only at the top level of hierarchy who may have ordered, directed or otherwise participated in the commission of crimes by action or omission, but also those at the lowest levels of the chain of command.
172. In such circumstances, attending to every case at the same time is clearly impossible.
173. Thus, defining criteria that are clear, justified and proportionate for the selection and prioritisation of cases becomes necessary.
174. Case selection and prioritisation, in any jurisdiction, can generate controversies, because not all crimes will be attended to immediately.

175. For this reason, it is important to establish a process based on clear legal and strategic considerations and a methodology that is consistently applied to cases against different groups of perpetrators in a fair manner.
176. In this way, justice is not only done, but it is seen to be done, and the public will understand and – one hopes – support the process.
177. With respect to our own work, the OTP of the ICC has followed such an approach.
178. The OTP is the organ tasked with choosing among the numerous situations and cases under the Court’s jurisdiction.
179. The OTP therefore follows clear and transparent guidelines for the exercise of prosecutorial discretion in the selection and prioritisation of the cases that it brings before the ICC judges.
180. The Office’s policy flows from the practical reality of a court of international reach exercising jurisdiction over multiple situations simultaneously, but with limited resources.
181. We have already noted that the principle of complementary jurisdictions means that the ICC will only act where States Parties either cannot or will not perform their primary responsibility to investigate and prosecute Rome Statute crimes.
182. However, once the OTP has opened an investigation of a situation, it will select and prioritise specific cases for investigation and eventual prosecution within that situation, based upon a number of legal, factual and strategic considerations.
183. The OTP thus distinguishes between “situations” and “cases”.
184. “Situations” are defined in terms of temporal, territorial and, in some instances, personal parameters.
185. “Cases” are defined in terms of specific incidents within the given situation involving the commission of one or more crimes.
186. The ICC cannot do all things at once.
187. So, the OTP focuses its efforts on cases relating to those who appear to be the most responsible for crimes that are particularly grave or have a very significant impact.

188. Apart from legal considerations relating to jurisdiction, admissibility and the interests of justice, the OTP focuses upon the gravity of specific incidents as perhaps the most important factor in the selection of cases for investigation and prosecution.
189. The gravity factor encompasses both quantitative and qualitative considerations, such as scale, nature, manner of commission and impact of the crimes.
190. We also consider the degree of responsibility of the alleged perpetrators and the nature of potential charges.
191. Assessing the degree of responsibility of alleged perpetrators requires consideration of the nature of the unlawful behaviour, the degree of the perpetrator's participation and intent, the existence of any discriminatory motives and any form of abuse of power or official capacity, among other factors.
192. When selecting cases, the OTP also seeks to represent as much as possible the true extent of the criminality which has occurred within a given situation.
193. In this context, we try to identify the potential charges that best reflect the principal types of victimisation and the main communities affected by the crimes.
194. So, for example, we will try to determine whether under-reported conduct, such as sexual or gender based crimes, or crimes targeting children, is a feature of the criminality, or what particular forms of criminality are representative of the activities or operations of a given armed group.
195. Selection of some cases over others does not imply a grant of impunity.
196. The OTP consistently encourages national investigations of alleged crimes that do not meet the criteria for ICC prosecution.
197. In particular, it seeks to cooperate with States and the international community to ensure that all appropriate means for bringing other perpetrators to justice are used.
198. After making a selection of cases, the OTP prioritises them within a given situation and across situations.
199. This enables us to ensure adequate management of our overall workload, usually within an estimated time frame, according to the resources the Office

has available to it and other practical constraints, such as security on the ground.

200. In this way, we attempt to roll out, over time, cases that meet our selection criteria.
201. A case that is not prioritised is not de-selected.
202. It remains part of the group of cases identified for ICC investigation, when circumstances permit.
203. The prioritisation of cases, as I say, takes into account the practical realities faced by the OTP in its work, including the number of cases the Office can investigate and prosecute during a given period of time with the resources available to it.
204. The OTP also takes strategic considerations into account in its prioritisation of cases.
205. So, for example, we may consider factors, such as:
 - the comparative gravity of cases;
 - whether a person, or members of the same group, have already been subject to investigation or prosecution;
 - the potential impact of investigations and prosecutions on victims;
 - whether there is ongoing criminality, and the potential for an investigation or prosecution to have a preventive impact; and
 - possible consequences, depending on whether the Office pursues cases involving opposing parties to a conflict in parallel or on a sequential basis.
206. These are, broadly speaking, the strategic and policy criteria applied by the OTP.
207. Other jurisdictions, such as Colombia, in dealing with mass atrocity crimes will have to develop case selection and prioritisation criteria that are responsive to their own particular situations.
208. If delivering significant results in the short term, while pursuing a long term strategy, is an important goal, then it will be necessary to develop case selection and prioritisation criteria that will take this need into account.

IV. CONCLUSION

209. In concluding these remarks, I would like to underscore once again the Prosecutor's support for the peace process and the implementation of sound transitional justice measures in Colombia.
210. Her Office has supported Colombia's efforts to end the armed conflict in this country since the beginning of the peace negotiations, in accordance with the principles and values of the Rome Statute, and will continue to do so during the implementation phase.
211. The existence of the Rome Statute is testimony to the fervent desire of the international community to end impunity for the perpetrators of the worst crimes.
212. In the situation that has so deeply affected Colombia and her people, how the Special Jurisdiction for Peace ensures accountability for the most serious crimes will be of critical importance.
213. In this vital task, the SJP will have the national and international legal framework available to it.
214. The SJP has initiated its operations with energy and anticipation.
215. We can only express our admiration, as the magistrates undertake the formidable task of delivering justice for a vast array of conflict-related crimes.
216. By establishing clear and transparent guidelines to select and prioritise cases, the SJP will build confidence in its work, and will be able respond to the needs of victims and society as a whole.
217. For her part, the Prosecutor must fulfil her mandate under the Rome Statute.
218. This will include satisfying herself that the array of transitional justice measures applied in the situation in Colombia meet, in a genuine way, the Rome Statute goals of ending impunity and contributing to prevention.
219. These goals are goals that Colombia shares, as a State Party to the Rome Statute.
220. The approach Colombia has taken to ensure accountability is innovative, complex and ambitious, and it must be sustained.
221. We therefore wish the Special Jurisdiction for Peace success.

222. The Prosecutor continues to place her Office at the disposition of the Colombian authorities, to offer any support that is within her province to offer to ensure that the cycle of impunity is broken and the war crimes and crimes against humanity alleged to have been committed during the armed conflict do not go unpunished.
223. Thank you for your kind attention.
