

III. SITUATIONS UNDER PHASE 3 (ADMISSIBILITY)

COLOMBIA

Procedural History

121. The situation in Colombia has been under preliminary examination since June 2004. The OTP has received a total of 199 communications pursuant to article 15 of the Statute in relation to the situation in Colombia.
122. 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

123. 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

124. 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.
125. 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. In May 2017, the Selection Committee appointed the Executive Secretary of the SJP. The Committee announced the 51 magistrates selected to sit on the SJP and appointed the Director of the Investigation and Prosecution Unit in September and October 2017, respectively.

126. On 8 February 2017, the Government of Colombia officially initiated peace negotiations with the ELN in Quito, Ecuador. The six agenda items include: (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.

Subject-Matter Jurisdiction

127. The Office has determined that the information available provides a reasonable basis to believe that crimes against humanity under article 7 of the Statute have been committed in the situation in Colombia by different actors, since 1 November 2002, including murder under article 7(1)(a); forcible transfer of population under article 7(1)(d); imprisonment or other severe deprivation of physical liberty under article 7(1)(e); torture under article 7(1)(f); rape and other forms of sexual violence under article 7(1)(g) of the Statute.¹⁵
128. 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.
129. During the reporting period, the Office has continued to receive and gather information on crimes allegedly committed during the armed conflict. This information together with relevant open sources information is being analysed to continue informing the identification of potential cases that would likely arise from an investigation of the situation.

Admissibility Assessment

130. During the reporting period, the Office received further information on national proceedings from the Colombian authorities, including 63 judgments issued by Colombian courts. The submission includes decisions relating to cases of enforced disappearance, conscription or use of child soldiers, forced displacement, abduction and killings of civilians staged by State forces to look like combat deaths, known as “false positives” cases as well as decisions rendered by the Justice and Peace Law Tribunals. As with previous submissions, the Office has closely reviewed this material for the purpose of updating its ongoing admissibility analysis.

¹⁵ See ICC-OTP, [Situation in Colombia, Interim Report](#), November 2012.

Proceedings relating to “false positives” cases

131. As indicated in previous reporting, the OTP has identified five potential cases relating to “false positives”. The identification of potential cases resulted from a mapping exercise of killings of civilians allegedly committed between 2002 and 2009, and based on information gathered from multiple sources, including international and non-governmental organisations, civil society organisations, international and national media and information provided by the Colombian authorities. The information relied on is not exhaustive, but provides a representative sample that reflects the gravest crimes that allegedly occurred since November 2002.
132. The potential cases were identified on the basis of the high reported number of false positives killings allegedly committed by brigades acting under five divisions within defined time periods in specific regions of the country. The scale, manner and impact of the crimes ascribed to the relevant military units were also considered. Each case represents one division and one or more brigade(s) attached to it:
- The First Division (10th Brigade) allegedly committed approximately 146 false positives killings between 2004 and 2008 in the department of Cesar.
 - The Second Division (30th Brigade and 15th Mobil Brigade) allegedly committed approximately 123 false positives killings between 2002 and 2009 in the departments of Norte de Santander and Magdalena.
 - The Fourth Division (7th, 16th and 28th Brigades) allegedly committed approximately 224 false positives killings between 2002 and 2008 in the departments of Meta, Casanare and Vichada.
 - The Fifth Division (9th Brigade) allegedly committed approximately 119 false positives killings between 2004 and 2008 in the department of Huila.
 - The Seventh Division (4th, 11th and 14th Brigades) allegedly committed approximately 677 false positives killings between 2002 and 2008 in the departments of Antioquia and Cordoba.
133. At the preliminary examination stage, allegations of crimes have not been subject to an actual investigation. Thus, the issue of whether one or more persons should be charged under article 25 or article 28 of the Statute for their participation in a crime goes beyond the scope of a preliminary examination, which is not meant to establish criminal responsibilities.
134. Nonetheless, for the purpose of assessing the level of judicial activity by the competent national authorities, and bearing in mind the Office’s policy of focusing on those allegedly most responsible for the most serious crimes, the OTP has identified 29 commanding officers who were reportedly in charge of

the divisions and brigades in question from 2002 to 2009, and under whose command high numbers of false positives killings were allegedly committed. The identification of commanders was further informed by judgments rendered by different district courts of Colombia against mid and low-level perpetrators, including information suggesting the involvement by action or omission of the persons concerned.

135. Based on information from multiple sources, it appears that the Colombian authorities have instituted proceedings against 17 of the 29 commanders identified, albeit there is conflicting information about the status of some of the reported cases. The OTP has yet to receive detailed information from the Colombian authorities on the cases being reportedly investigated and on whether concrete and progressive investigate steps have been or are being taken.

Proceedings relating to forced displacement

136. Over the reporting period, two paramilitary top commanders subjected to “macro-investigations” were convicted in first instance and in appeal, under the Justice and Peace Law (“JPL”) framework. In August 2017, paramilitary leader Iván Roberto Duque (a.k.a. “Ernesto Báez”) was convicted, together with 31 other members of the Central Bolivar bloc, of 222 counts of forced displacement, among others, by the Bogota JPL Tribunal. In October 2016, the Criminal Appellate Chamber of the Supreme Court upheld the “macro-judgment” rendered in November 2014 by the JPL tribunal of Bogotá against Salvatore Mancuso and other 11 mid-level commanders on 405 charges of forced displacement involving 6,845 victims, and several other crimes.
137. Additionally, 13 mid-level members of paramilitary groups were convicted of forced displacement as indirect perpetrator and/or co-perpetrator by JPL Tribunals in first instance. In this regard, the decision rendered by the Medellín JPL Tribunal against three of these paramilitaries highlighted the existence of a systematic, generalised and/or repetitive criminal pattern of forced displacement committed by the Pacífico-Héroes de Chocó bloc against the Afro-Colombian and indigenous communities, as part of a strategy of appropriation and control of their territories and natural resources.
138. There is, however, limited information available on tangible and concrete investigative steps adopted by the Attorney General’s Office (“AGO”) to investigate or prosecute members of the FARC-EP leadership for allegations of forced displacement. Open sources also indicate that the AGO would have issued a “macro-imputation” against five members of the ELN’s Central Command, in May 2016. While the imputation reportedly includes 2,989 incidents of forced displacement, among various other crimes, allegedly committed between 1986 and 2016, specific details relating to the scope of the investigation are yet unavailable to the Office.

Proceedings relating to sexual and gender-based crimes (SGBC)

139. During the reporting period, proceedings relating to SGBC against paramilitary groups continued to make progress under the JPL framework. In addition to forced displacement, paramilitary top commanders Iván Roberto Duque and Salvatore Mancuso were convicted of various counts of SGBC. According to the decisions rendered in first instance and in appeal against both paramilitary leaders, respectively, the paramilitary structures under their command were found responsible of committing acts of sexual violence as part of macro-criminal patterns.
140. By contrast, proceedings concerning both the FARC-EP's and the ELN's leadership remain at the investigation stage. In July 2016, the AGO announced the completion of an investigation against members of the FARC-EP, including its leadership, which would reportedly document 232 cases of sexual crimes committed mainly against minors within the FARC-EP's ranks. According to open sources, the investigative file would be transferred to the SJP once this jurisdiction becomes operative.
141. Reportedly, the AGO's "macro-imputation" of five senior members of the ELN's Central Command would comprise over 15,000 crimes committed between 1986 and 2016, including 87 SGBC cases committed against both ELN's own members and civilians, and 36 cases of forced abortion, forced sterilisation and rape of minors under the age of 14.
142. During the reporting period, no specific information on on-going or completed investigations or prosecutions against State agents was made available to the Office.

The Special Jurisdiction for Peace

143. In the framework of the implementation of the peace agreement, various pieces of legislation were adopted to establish the SJP and to regulate the participation of FARC-EP members, State agents and "third parties" (i.e. persons who were not part of any organisation or armed group at the relevant time but allegedly participated in the commission of conflict-related crimes) in SJP proceedings. The relevant legislation includes the Legislative Act 01 of 04 April 2017 ("Legislative Act 01") and the Law 1820 of 30 December 2016 ("Amnesty Law") as well as various decrees. On 14 November 2017, the Constitutional Court announced its decision on the overall enforceability ("*exequibilidad*") of Legislative Act 01, with some exceptions, and provided parameters for the interpretation of some of its provisions. At the time of writing, the Constitutional Court's full decision was yet to be published.
144. The OTP's review of the legislation adopted by the Colombian Congress found that four aspects of the SJP legislative framework may raise issues of consistency or compatibility with customary international law and the Rome Statute,

namely: the definition of command responsibility, the definition of “grave” war crimes, the determination of “active or determinative” participation in the crimes, and the implementation of sentences involving “effective restrictions of freedoms and rights”.

145. The definition of command responsibility included in transitory article 24 of the Legislative Act 01 departs from customary international law and may therefore frustrate Colombia’s efforts to meet its obligations to investigate and prosecute international crimes. Under customary international law, the superior’s duty and responsibility to prevent or punish the crimes of their subordinates does not arise from his or her *de jure* authority, but instead from his or her material abilities. By contrast, a tribunal applying transitory article 24, as formulated, could find itself powerless to enforce customary international law against superiors with *de facto* but not *de jure* powers, if it could only accept as proof of the requisite degree of command a formal appointment. This would mean that persons with the material ability to prevent or punish the crimes of subordinates, and who knowingly failed to do so, could escape liability. This would significantly undermine application of the principle of responsible command and could bring into question whether those proceedings were vitiated by an inability or unwillingness to carry them out genuinely.
146. The exclusion of Rome Statute crimes, such as crimes against humanity and genocide from amnesty, pardons and the special benefit of waiver of criminal prosecution (“*renuncia de la persecución penal*”), as provided in the Amnesty Law, is an important aspect of the legal framework regulating the SJP. However, with respect to war crimes, the legal requirement that the conduct was committed in a *systematic* manner could lead to granting amnesties or similar measures to individuals responsible for war crimes that, while not committed in a systematic manner, may nonetheless fall under the ICC jurisdiction. Such an outcome could render any attendant case(s) admissible before the ICC - as a result of the domestic inaction or otherwise unwillingness or inability of the State concerned to carry out proceedings genuinely - and may also violate rules of customary international law.
147. Regarding the determination of “active or determinative” participation in the crimes referred to in transitory article 16 of the Legislative Act 01, clarification of the scope of this provision is warranted to ensure that the SJP investigates and prosecutes persons responsible for serious contributions to grave crimes. Ambiguities to determine whether a person has played an active or determinative role in the commission of serious crimes may lead to granting special treatment mechanisms, including the waiver of criminal prosecution, to individuals responsible for serious contributions to grave crimes, even if indirectly or by culpable omission.
148. Finally, with respect to the implementation of sentences involving “effective restrictions of freedoms and rights” referred to in transitory article 13 of the Legislative Act 01, the Office has noted that the effectiveness of such sentences

will depend on the nature and the scope of the measures that in combination would form a sanction and whether, in the particular circumstances of a case, they adequately serve sentencing objectives and provide redress for the victims. Fulfilment of those objectives would also depend on an effective implementation of the restrictions of freedoms and rights, a rigorous verification system, and whether their operationalisation with activities that are not part of the sanction, such as participation in political affairs, do not frustrate the object and purpose of the sentence.

OTP Activities

149. During the reporting period, the Office has conducted analytical activities relating to the areas of focus of the preliminary examination, including in relation to “false positives” killings, SGBC and forced displacement. Further, the OTP has closely reviewed and analysed the provisions set forth in the implementing legislation of the SJP, to the extent that the functioning of this jurisdiction is likely to inform the Office’s admissibility assessment of relevant cases.
150. In this context, the Office has been in regular contact with the Colombian authorities, including by holding consultations at the seat of the Court for the purpose of exchanging views on matters relating, *inter alia*, to the SJP. The Office also held numerous meetings with representatives of international organisations, international NGOs and Colombian civil society both in The Hague and Bogota. On 21 January 2017, the Prosecutor published an op-ed entitled “The peace agreement in Colombia commands respect but also responsibility” in the Colombian magazine *Semana*.¹⁶
151. On 8 February 2017, the OTP shared with the Colombian authorities a report on its analysis of the status of ongoing national proceedings against commanders of military units allegedly implicated in “false positives” cases. Since the Office does not enjoy full investigative powers at the preliminary examination stage, it is not in a position to categorically assert that the commanding officers included in the OTP’s report are responsible for crimes or must be prosecuted. The report was shared in confidence with the Colombian authorities for the purpose of further clarifying the Office’s information requirements. Since then, the Colombian authorities have expressed their disposition to hold technical meetings to foster cooperation.
152. The Prosecutor conducted her first visit to Bogota from 10 to 13 September 2017.¹⁷ The purpose of the visit was to obtain clarifications on certain aspects of the future SJP, as well as information about the status of relevant national proceedings relating to “false positives” killings, SGBC and forced

¹⁶ See *Semana*, [El acuerdo de paz de Colombia demanda respeto, pero también responsabilidad](#), 21 January 2017.

¹⁷ ICC – OTP, [Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the conclusion of her visit to Colombia](#), 10-13 September 2017.

displacement. During the visit, the Prosecutor met with senior officials from the executive and the judiciary, including President Juan Manuel Santos, as well as with representatives of Colombian civil society, whose views and concerns continue to inform the assessment of the situation. During her meeting with the Attorney General, the Prosecutor stressed the importance of receiving concrete and specific information on investigative steps taken with respect to the potential cases identified by the OTP.

153. In the course of the visit, the President of the Constitutional Court of Colombia invited the Prosecutor to present the OTP's views on the legislation implementing the SJP. Subsequently, on 18 October 2017, the Prosecutor submitted to the Constitutional Court an *Amicus Curiae* brief summarising the Office's views on certain aspects of the Legislative Act 01 and the Amnesty Law.

Conclusion and Next Steps

154. In the context of its ongoing admissibility assessment, the Office will continue to engage with the Colombian authorities to seek additional details and clarifications on any concrete and progressive investigative steps and prosecutorial activities undertaken with respect to the potential cases it has identified.
155. The Office will continue to examine developments relating to the establishment and implementation of the SJP. In this context, the OTP will follow closely the beginning of the SJP operations, including the identification of cases that will be selected for investigation and prosecution.