

On the decision of the ICC Prosecutor to close the preliminary examination in Honduras

WHAT IS THE CONCLUSION OF THE OFFICE OF THE PROSECUTOR IN RELATION TO THE PRELIMINARY EXAMINATION IN HONDURAS?

The Office of the Prosecutor (“Office”) has concluded that the information available does not provide a reasonable basis to believe that crimes within the jurisdiction of the International Criminal Court (“ICC” or the “Court”) have been committed in Honduras. After carefully weighing the information available against the legal requirements of the Rome Statute (“Statute”), the Office determined that crimes allegedly committed between 28 June 2009 and 27 January 2010 (“post-coup period”), between 27 January 2010 and September 2014 (“post-election period”), as well as in the Bajo Aguán region, do not qualify as crimes against humanity under the Rome Statute. Accordingly, the Office lacks a reasonable basis to proceed with an investigation and has decided to close this preliminary examination.

DOES THIS DECISION MEAN THAT NO CRIMES/HUMAN RIGHTS VIOLATIONS WERE COMMITTED BY THE HONDURAN *DE FACTO* GOVERNMENT ON 28 JUNE 2009, THE DAY OF THE COUP, AND IN ITS AFTERMATH?

No. Although the Office concluded that there is not a reasonable basis to believe that crimes against humanity were committed in Honduras, it found that a significant number of serious human rights violations (e.g. restrictions on the freedom of movement, assembly and expression, and interference with personal liberty through a large number of generally brief detentions), directly attributable to the *de facto* regime, occurred on 28 June 2009 and in its aftermath.

The Office also found that crimes that could potentially fall within the subject-matter jurisdiction of the Court (e.g. killings, instances of torture, acts of rape and other acts of sexual violence, detentions of long duration or under severe conditions, and serious injuries) were also committed in the post-coup and post-election periods, as well as in the Bajo Aguán region. However, they did not meet the criteria set out in the Statute to constitute crimes against humanity.

WHAT MOTIVATED THE OPENING OF A PRELIMINARY EXAMINATION IN HONDURAS?

The preliminary examination into the situation in Honduras was initiated by the Office of the Prosecutor on the basis of its *proprio motu* powers under article 15 of the Statute.

On 18 November 2010, the then Prosecutor Luis Moreno-Ocampo announced the opening of the preliminary examination in Honduras based on information received by the Office on allegations of crimes committed following the *coup d'état* of 28 June 2009 that could potentially fall within the ICC jurisdiction, including a large number of detentions and cases of torture.

WHAT SOURCES WERE CONSULTED BY THE OFFICE OF THE PROSECUTOR DURING THE PRELIMINARY EXAMINATION?

The main sources the Office relied upon in its analysis came from the Honduran Truth and Reconciliation Commission, the Honduran civil society-supported Truth Commission, the Inter-American Commission on Human Rights, the UN Office of the High Commissioner for Human Rights and other UN agencies, various reports from domestic civil society organisations and international non-governmental organisations, *campesino* movements, and reports of the Honduran National Commissioner for Human Rights.

The Office received a total of 31 article 15 communications during the period of July 2009 to April 2014, as well as information submitted by the Honduran government, and conducted three missions to Honduras in 2009, 2011 and 2014 in order to consult with the competent national authorities, civil society and other relevant stakeholders.

WHY HAS THE OFFICE OF THE PROSECUTOR FOCUSED IN THREE DIFFERENT AREAS, NAMELY: THE POST-COUP PERIOD, THE POST-ELECTION PERIOD AND THE SITUATION IN THE BAJO AGUÁN REGION? ARE THESE THREE DIFFERENT PRELIMINARY EXAMINATIONS?

The Office has conducted only one preliminary examination in Honduras. Based on the information available, the Office focused first on crimes allegedly committed during the post-coup period and concluded that, although serious human rights violations occurred, there was no reasonable basis to believe that crimes against humanity were committed during that discrete time period.

However, in the light of subsequent allegations of crimes committed after 27 January 2010, the Office decided to continue its preliminary examination to determine whether such allegations could either affect the legal characterisation of the conduct analysed in the post-coup period, or could independently constitute crimes against humanity. In addition, the Office decided to assess whether allegations on an increasing number of crimes in the Bajo Aguán region, in particular after the coup, could amount to crimes under the jurisdiction of the Court.

WHY CRIMES THAT COULD POTENTIALLY FALL WITHIN THE JURISDICTION OF THE COURT HAVE NOT BEEN CONSIDERED AS CRIMES AGAINST HUMANITY?

The Office found that although a number of acts that could potentially constitute crimes against humanity were committed in Honduras, the information available was insufficient to conclude that they were committed “as part of an attack carried out pursuant to or in furtherance of a State policy to commit such attack”; an essential constitutive element of crimes against humanity under the Rome Statute that distinguish them from ordinary crimes over which the Court has no jurisdiction.

In relation to the post-coup period, the Office found that alleged crimes that could potentially amount to crimes against humanity (e.g. killings, instances of torture, acts of rape and other acts of sexual violence, detentions of long duration or under severe conditions, and serious injuries) had not been committed “pursuant to or in furtherance of a State policy”. While it appears that the *de facto* regime developed a plan to take over power and assert control over the country, the Office found that the design of this plan and the implementation of measures pursuant to this plan did not entail or amount to a policy to commit an “attack against the civilian population”.

With regard to the post-election period and the Bajo Aguán region, against a backdrop of high levels of criminality and impunity, the Office found scant information on links and common features (in terms of their characteristics, nature, aims, targets and alleged perpetrators, as well as times and locations) between the alleged crimes that could demonstrate that they were committed as part of a campaign or operation carried out against the civilian population. Instead, they reflect more an aggregate of random acts, appearing to stem from a context of chronic and general violence in Honduras. Therefore, the Office concluded that they did not constitute an “attack directed against a civilian population”.

DOES THE ICC HAVE JURISDICTION OVER CRIMES COMMITTED BY CRIMINAL AND DRUG TRAFFICKING ORGANISATIONS?

Yes. Crimes committed by non-State actors, such as criminal and drug trafficking organisations, may fall under the ICC jurisdiction provided that all jurisdictional requirements set out in the Rome Statute (temporal, territorial or personal, and subject-matter) are satisfied. Furthermore, the criminal group has to qualify as an “organisation” under the Statute. Although this determination is made by the Office on a case-by-case basis, factors taken into account include: a) whether the group is under a responsible command, or has an established hierarchy; b) whether the group possesses the means to carry out a widespread or systematic attack against a civilian population; c) whether the group exercises control over part of the territory of the State; d) whether the group directed its criminal activities against the civilian population as a primary purpose; e) whether the group articulates, explicitly or otherwise, an intention to attack a civilian population; and f) whether the group is part of a larger group, which fulfils some or all of the abovementioned criteria.

Should these requirements be satisfied, as a State Party to the Rome Statute, Honduran authorities have the primary responsibility to investigate and prosecute all crimes within the jurisdiction of the Court. Only where a State Party fails to discharge its duties under the Rome Statute, then the ICC, as the “court of last resort”, must intervene.

IS THERE ANY RECOURSE TO CHALLENGE THE PROSECUTOR’S DECISION TO CLOSE THE PRELIMINARY EXAMINATION?

No. Since the preliminary examination was initiated by the Office’s own initiative, pursuant to article 15 of the Statute, the decision of the Prosecutor is final. Only referring States may request (within 90 days) the Pre-Trial Chamber to review the Prosecutor’s decision not to investigate, pursuant to article 53(3)(a).

CAN THE PRELIMINARY EXAMINATION BE RE-OPENED AT A LATER STAGE?

Yes. Should new facts or information become available in the future, the Office may reconsider its conclusions and re-open the preliminary examination.