



**Cour  
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**International  
Criminal  
Court**

Le Bureau du Procureur  
The Office of the Prosecutor



## **Report on Preliminary Examination Activities 2014**

**2 December 2014**

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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 Court. For this purpose, the Office conducts a preliminary examination of all situations that come to its attention based on the statutory criteria and information available.<sup>1</sup>
2. The preliminary examination of a situation by the Office may be initiated on the basis of: a) information sent by individuals or groups, States, intergovernmental or non-governmental organisations; b) a referral from a State Party or the Security Council; or (c) a declaration accepting the jurisdiction of the Court lodged pursuant to article 12(3) by a State which is not a Party to the Statute.
3. Once a situation is thus identified, the factors set out in article 53(1) (a)-(c) of the Statute establishes the legal framework for a preliminary examination.<sup>2</sup> It 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 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 Security Council; and (iii) material jurisdiction as defined in article 5 of the Statute (genocide; crimes against humanity; war crimes; and aggression<sup>3</sup>).
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 its prosecutorial strategy of investigating and prosecuting those most responsible for the most serious

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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.

<sup>3</sup> With respect to which the Court shall exercise jurisdiction once the provision adopted by the Assembly of States Parties enters into force: RC/Res.6 (28 June 2010).

crime.<sup>4</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. While lack of universal ratification means that crimes may occur in situations outside the territorial and personal jurisdiction of the ICC, this can only be remedied by the relevant State becoming a Party to the Statute or lodging a declaration accepting the exercise of jurisdiction by the Court or through a referral by the Security Council.
10. As required by the Statute, the Office’s preliminary examination activities are conducted in the same manner irrespective of whether the Office receives a referral from a State Party or the Security Council, or acts on the basis of information on crimes obtained pursuant to article 15. In all circumstances, the Office analyses the seriousness of the information received and may seek additional information from States, organs of the UN, intergovernmental and non-governmental organisations and other reliable sources that are deemed appropriate. The Office may also receive oral testimony at the seat of the Court. All information gathered is subjected to a fully independent, impartial and thorough analysis.
11. It should be recalled that the Office does not enjoy investigative powers at the preliminary examination stage. Its findings are therefore preliminary in nature and may be reconsidered in the light of new facts or evidence. The preliminary examination process is conducted on the basis of the facts and information available. The goal of this process is to reach a fully informed determination of whether there is a reasonable basis to proceed with an investigation. The ‘reasonable basis’ standard has been interpreted by Pre-Trial Chamber II (“PTC II”) to require that “there exists a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court ‘has been or is being

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<sup>4</sup> See OTP Strategic Plan – June 2012-2015, para. 22. In appropriate cases the OTP will expand its general prosecutorial strategy to encompass mid- or high-level perpetrators, or even particularly notorious low-level perpetrators, with a view to building cases up to reach those most responsible for the most serious crimes.

committed’.”<sup>5</sup> In this context, PTC II has indicated that all of the information need not necessarily “point towards only one conclusion.”<sup>6</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>7</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>8</sup>

12. Before making a determination on whether to initiate an investigation, the Office also seeks to ensure that the States and other parties concerned have had the opportunity to provide the information they consider appropriate.
13. There are no timelines provided in the Statute for a decision on a preliminary examination. Depending on the facts and circumstances of each situation, the Office may either decide (i) to decline to initiate an investigation where the information manifestly fails to satisfy the factors set out in article 53(1) (a)-(c); (ii) to continue to collect information in order to establish a sufficient factual and legal basis to render a determination; or (iii) to initiate the investigation, subject to judicial review as appropriate.
14. In order to promote transparency of the preliminary examination process the Office aims to issue regular reports on its activities and provides reasoned responses for its decisions either to proceed or not proceed with investigations.
15. In order to distinguish those situations that warrant investigation from those that do not, and in order to manage the analysis of the factors set out in article 53(1), the Office has established a filtering process comprising four phases. While each phase focuses on a distinct statutory factor for analytical purposes, the Office applies a holistic approach throughout the preliminary examination process.
  - Phase 1 consists of an initial assessment of all information on alleged crimes received under article 15 (‘communications’). The purpose is to analyse the

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

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

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

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

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

- Phase 2, which represents the formal commencement of a preliminary examination, focuses on whether the preconditions to the exercise of jurisdiction under article 12 are satisfied and whether there is a reasonable basis to believe that the alleged crimes fall within the subject-matter jurisdiction of the Court. Phase 2 analysis entails a thorough factual and legal assessment of the alleged crimes committed in the situation at hand with a view to identifying potential cases falling within the jurisdiction of the Court. The Office may further gather information on relevant national proceedings if such information is available at this stage.
  - Phase 3 focuses on the admissibility of potential cases in terms of complementarity and gravity. In this phase, the Office will also continue to collect information on subject-matter jurisdiction, in particular when new or ongoing crimes are alleged to have been committed within the situation.
  - Phase 4 examines the interests of justice consideration in order to formulate the final recommendation to the Prosecutor on whether there is a reasonable basis to initiate an investigation.
16. In the course of its preliminary examination activities, the Office seeks to contribute to two overarching goals of the 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 2014

17. This report summarizes the preliminary examination activities conducted by the Office between 1 November 2013 and 31 October 2014.
18. During the reporting period, the Office received 579 communications relating to article 15 of the Rome Statute of which 462 were manifestly outside the Court's jurisdiction; 44 warranted further analysis; 49 were linked to a situation already under analysis; and 24 were linked to an investigation or prosecution. The Office has received a total of 10,797 article 15 communications since July 2002.
19. During the reporting period, the Office completed three preliminary examinations, in relation to the situations in the Central African Republic, the Republic of Korea, and Registered Vessels of Comoros, Greece and Cambodia. On 24 September 2014, the Prosecutor announced the opening of a second investigation in the Central African Republic with respect to crimes allegedly committed since 2012, as a result of the Office's preliminary examination

analysis. With respect to the situation in the Republic of Korea, and the situation on Registered Vessels of Comoros, Greece and Cambodia, following thorough legal and factual assessments of each respective situation, the Office concluded that the statutory criteria for initiation of an investigation under article 53(1) were not met.

20. The Office opened one new preliminary examination on the basis of an article 12(3) declaration lodged by Ukraine, and re-opened one preliminary examination, of the situation in Iraq, based on new facts or evidence received under article 15. The Office also continued its preliminary examinations of the situations in Afghanistan, Colombia, Georgia, Guinea, Honduras and Nigeria.
21. Pursuant to the Office's policy on sexual and gender-based crimes, during the reporting period the Office conducted, where appropriate, a gender analysis of alleged crimes committed in various situations under preliminary examination and sought information on national investigations and prosecutions of sexual and gender-based crimes by relevant national authorities.

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

### HONDURAS

#### *Procedural History*

22. The Office has received 31 communications pursuant to article 15 in relation to the situation in Honduras. The preliminary examination of the situation in Honduras was made public on 18 November 2010.

#### *Preliminary Jurisdictional Issues*

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

#### *Contextual Background*

24. In November 2005, José Manuel Zelaya Rosales, of the Liberal Party, was elected President of Honduras. During his presidency, the relationship between the legislative and executive branches deteriorated significantly and became critical in March 2009, after the adoption of an executive decree establishing a public consultation allowing voters to convene a National Constituent Assembly to approve a new Constitution. The initiative was strongly criticised by the opposition, who feared an attempt of Manuel Zelaya to perpetuate his power.
25. The preliminary examination of the situation in Honduras focuses on events that occurred since the *coup d'état* of 28 June 2009. On that date, following an arrest warrant issued by the Supreme Court of Justice, President José Manuel Zelaya Rosales was arrested by members of the armed forces and forcibly flown to Costa Rica. The same day, the National Congress passed a resolution stripping Mr. Zelaya of the presidency and appointing the then President of the Congress, Roberto Micheletti, as President of Honduras.
26. The Executive Branch immediately implemented a curfew, and the police and military were relied upon for its enforcement. On 6 July, a "crisis room" was established on the premises of the presidential palace for the purpose of coordinating police and military operations. Curfews continued to be used through executive decrees restricting freedom of movement, assembly and expression issued on an intermittent basis throughout the summer and into the early autumn of 2009. The actions were roundly decried as an illegal *coup d'état* by the international community.
27. Following this series of events, thousands of former President Zelaya's supporters marched peacefully in demonstration of their opposition to the *coup d'état*. Many of these demonstrations were met with resistance and violence by state security forces. Checkpoints and roadblocks were set up in various parts of

the country, often preventing the mobilization of larger crowds of demonstrators. In September 2009, after two failed attempts to return to Honduras, ousted President Zelaya took temporary refuge in the Brazilian Embassy in Tegucigalpa. His return triggered further demonstrations severely repressed by security forces.

28. After negotiations to form a government of unity broke down, general elections were held in November 2009. Porfirio Lobo was elected President and declared a general amnesty for crimes committed during the post-coup period (excluding crimes against humanity and serious human rights violations), and instituted a Truth and Reconciliation Commission (*Comisión de la Verdad y Reconciliación*) to shed light on the events of 28 June 2009. In May 2010, Honduran human rights organizations sponsored a Truth Commission (*Comisión de Verdad*) to carry out an alternative inquiry. Following Porfirio Lobo's election, many governments restored their ties with Honduras and Manuel Zelaya fled to the Dominican Republic. He returned to Honduras in May 2011 and created a new opposition political party Libre (*Libertad y Refundación*) to participate in the November 2013 general elections.
29. After the 2009 coup, violence in Honduras has reportedly continued to increase significantly, owing partly to the armed forces' involvement in matters related to citizen security and to the expansion of drug trafficking and criminal organisations. In the Bajo Aguán region, private corporations have reportedly turned to private security companies to ensure *de facto* control of their lands.
30. In this context, since the 2009 coup, various domestic and international actors have drawn particular attention to the alleged targeting of categories of civilians, including political dissidents, human rights defenders, members of the legal profession, journalists, teachers, union members, lesbian, gay, trans, bisexual and intersex (LGTBI) persons, indigenous groups and land rights activists. In the Bajo Aguán region, an increasing number of crimes were reported, mainly against members of *campesino* movements, members of their families and other individuals associated with their movement.

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

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

31. During the period between the coup and former President Lobo's inauguration on 27 January 2010 ("post-coup period"), it is alleged that the *de facto* regime developed a policy of targeting and persecuting their opponents. As explained in previous reporting, while there is little doubt that the events surrounding the June 2009 *coup d'état* and the measures taken in its aftermath constituted human rights violations directly attributable to the *de facto* regime, the information available does not provide a reasonable basis to believe that this conduct during that discrete time period constituted crimes against humanity because the existence of a widespread or systematic attack could not be established.

*Legal analysis of alleged crimes committed during the post-2010 election period*

32. Allegations of crimes committed after Porfirio Lobo's inauguration on 27 January 2010 ("post-election period") relate mainly to crimes committed against various groups of civilians, based on their perceived political affiliation or standing vis-à-vis the coup or the *de facto* regime, including opposition leaders, political activists, human rights defenders, journalists, members of the legal profession and *campesinos*. Some sources allege that crimes committed during this period are a continuation of the alleged attack which originated with the coup against the regime's political opponents. Killings, arbitrary detentions followed in some instances by acts of torture and sexual violence and, in general, the existence of a policy implemented by the government of targeting its opponents, have been alleged.
33. Accordingly, the Office is analysing whether the information available regarding the circumstances of commission of the alleged crimes and the identities of the alleged perpetrators indicate that these crimes are part of a particular pattern or course of conduct, or rather stem from a context of chronic and general violence. The information available substantiating the existence of a widespread or systematic attack against a civilian population is, however, limited.

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

34. Another focus of the preliminary examination in Honduras has been the Bajo Aguán region, where it is alleged that up to a hundred *campesinos* have been killed since the coup. According to some sources, 78 of these cases relate to land property disputes between *campesinos* and private corporations operating in the Bajo Aguán region. Other sources attribute high rates of criminality in the region to the activities carried out by criminal and drug trafficking organisations.
35. In this context, in addition to killings, it has been reported that since June 2009, acts of torture and other acts of violence, including severe beatings, cases of enforced disappearances, and instances of forcible transfer of population have been allegedly committed by state security forces against members of *campesino* movements and their families, as well as against journalists, human rights activists and lawyers associated with these movements.
36. In the particular context of the Bajo Aguán region, it may be possible to consider that members of *campesino* associations constitute a "civilian population" in the sense of article 7. While the Office is analyzing whether a nexus may be established between the individual acts and the alleged attack, the information available at this stage is insufficient to attribute the alleged crimes to identifiable actors, and to a particular course of conduct.

### *OTP Activities*

37. Over the reporting period, the Office has sought and analysed information on the situation in Honduras from multiple sources, including from the Inter-American Commission on Human Rights, the UN system, various reports from domestic civil society organisations and international non-governmental organisations, article 15 communications submitted to the Office, as well as information submitted on behalf of the Honduran government.
38. During the reporting period, the Office conducted its third mission to Tegucigalpa in March 2014. The purpose of the mission was to verify and gather further information on allegations of crimes allegedly committed against groups of civilian population, especially those who resisted the 2009 coup, including political activists, journalists, members of the legal profession and human rights defenders; and on allegations of crimes committed in the Bajo Aguán region.
39. The Office held consultations with Honduran authorities, national and international NGOs monitoring human rights violations in Honduras and representatives of *campesino* movements of the Bajo Aguán region. The Office has also liaised with a number of UN bodies, as well as with international organisations, to corroborate and verify information on alleged crimes committed since the June 2009 *coup d'état*. The Office also monitored closely the protests organised by the opposition in the context of the November 2013 presidential elections and the inauguration of President Juan Orlando Hernández in January 2014.

### *Conclusion and Next Steps*

40. Whereas the June 2009 coup in Honduras was accompanied by serious human rights violations directly attributable to authorities in the *de facto* regime, the Office has concluded that there is no reasonable basis to believe that this conduct constitutes crimes against humanity under the Statute.
41. In relation to more recent allegations of crimes, the Office intends to reach a determination on whether acts reported constitute crimes within the jurisdiction of the Court in the near future.

## IRAQ

### *Procedural History*

42. On 10 January 2014, the European Center for Constitutional and Human Rights (ECCHR) together with Public Interest Lawyers (PIL) submitted an article 15 communication alleging the responsibility of United Kingdom (UK) officials for war crimes involving systematic detainee abuse in Iraq from 2003 until 2008. The senders also submitted additional information in support of these allegations on several occasions during the reporting period.
43. On 13 May 2014, the Prosecutor announced that the preliminary examination of the situation in Iraq, previously concluded in 2006, was re-opened following submission of further information on alleged crimes within the 10 January 2014 communication.<sup>9</sup>

### *Preliminary Jurisdictional Issues*

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

### *Contextual Background*

46. On 20 March 2003, an armed conflict began between a US-led coalition which included the UK, and Iraqi armed forces, with two rounds of air strikes followed by deployment of ground troops. On 7 April 2003, UK forces took control of Basra, and on 9 April, US forces took control of Baghdad, although sporadic fighting continued. On 1 May 2003, the US declared an end to major combat operations.
47. 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.<sup>10</sup>

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

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

48. On 30 June 2004, the occupation officially ended when an Interim Government of Iraq assumed full authority from the occupying powers.<sup>11</sup> In a letter addressed to the President of the Security Council, the Interim Government of Iraq informed the Council about its consent to the presence of multinational forces and the close cooperation between these forces and the Government to establish security and stability in Iraq.<sup>12</sup> Multinational forces withdrew from the country on 30 December 2008 at the expiration of the mandate provided for by UN Security Council Resolution 1790.<sup>13</sup>

### *Alleged Crimes*

49. The 10 January 2014 communication alleges that UK Services personnel systematically abused hundreds of detainees in different UK-controlled facilities across the territory of Iraq over the whole period of their deployment from 2003 through 2008.
50. Alleged crimes occurred in 14 military detention facilities and other locations under the control of UK Services personnel in southern Iraq, including 'The Guesthouse,' Camp Akka, the Provincial Hall and the Civil-Military Co-Operation House, Camp Abu Naji, Camp Breadbasket, Shiabah Logistics Base, the Temporary Holding Facility, the Shatt-Al Arab Hotel, Basra Palace and Camp Bucca.
51. Torture and other forms of ill-treatment: The initial communication based allegations of ill-treatment on 85 cases brought before UK courts concerning 109 Iraqi detainees. These 109 victims were presented as a detailed sample of abuses allegedly committed on a large scale against at least 412 victims of ill-treatment in total. On 17 September 2014, the Office received information on an additional 372 cases of ill-treatment in support of allegations of detainee abuse.
52. The alleged ill-treatment reportedly involved *inter alia* the following techniques: hooding of detainees; the use of sensory deprivation and isolation; sleep deprivation; food and water deprivation; the use of prolonged stress positions; various forms of physical assault, including beating, burning and electrocution or electric shocks; direct and implied threats to the health and safety of the detainee and/or friends and family, including mock executions and threats of rape, death, torture, indefinite detention and further violence; environmental manipulation, such as exposure to extreme temperatures; forced exertion; cultural and religious humiliation; and various forms of sexual assault and humiliation, including forced nakedness, sexual taunts and attempted seduction, touching of genitalia, forced or simulated sexual acts, as well as forced exposure to pornography and sexual acts between soldiers.

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

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

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

53. *Killings:* The alleged killings of civilians include at least 8 Iraqi persons who died in UK custody and 8 civilians who were killed by UK Services personnel in other situations outside of custody.

#### *OTP Activities*

54. Having re-opened the preliminary examination of the situation in Iraq, the Office has begun verifying and analysing the seriousness of the information received, in accordance with article 15(2) of the Statute. In addition to the information on alleged crimes, the Office has also gathered information on relevant national proceedings during the reporting period.
55. In this context, the Office has been in close contact with the senders of the article 15 communication and the UK government on a number of occasions, both of whom provided full cooperation with the Office's preliminary examination activities during the reporting period. The Office held meetings at the seat of the Court with PIL and ECCHR, and separately, with the UK national authorities, in order to discuss the Office's preliminary examination process, policies and analysis requirements as well as the provision of additional information relevant to the preliminary examination of the situation in Iraq.
56. On 24-25 June 2014, the Office conducted a first mission to the UK when it met with the relevant investigative and prosecutorial authorities for Iraq-related allegations, namely the Iraq Historic Allegations Team (IHAT) and the Service Prosecuting Authority (SPA). IHAT and SPA representatives provided the Office with further information on alleged crimes as well as on the scope and methodology of their on-going national proceedings.

#### *Conclusion and Next Steps*

57. The Office is in the process of conducting a thorough factual and legal assessment of the information received in order to establish whether there is a reasonable basis to believe that the alleged crimes fall within the subject-matter jurisdiction of the Court. In accordance with its policy on preliminary examination, the Office will also continue to gather information on relevant national proceedings at this stage of analysis.

## UKRAINE

### *Procedural History*

58. 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.<sup>14</sup>
59. On 25 April 2014, in accordance with the Office's policy on preliminary examinations,<sup>15</sup> the Prosecutor opened a preliminary examination into the situation in Ukraine.<sup>16</sup>
60. The Office has received six other communications under article 15 of the Statute in relation to this situation. The Office has also received several communications under article 15 concerning allegations of crimes committed since March 2014 in Ukraine, such as those related to the events in Crimea and eastern Ukraine. However, such alleged crimes are outside of the Court's temporal jurisdiction, which is limited to the period from 21 November 2013 to 22 February 2014.

### *Preliminary Jurisdictional Issues*

61. Ukraine is not a party to the Rome Statute. However, pursuant to the article 12(3) declaration lodged by the Government of Ukraine on 17 April 2014, the Court may exercise jurisdiction over Rome Statute crimes committed on the territory or by nationals of Ukraine during the period of 21 November 2013 to 22 February 2014. This acceptance of jurisdiction was made on the basis of the 25 February 2014 declaration of the Verkhovna Rada of Ukraine (the Parliament of Ukraine), recognising the jurisdiction of the Court in respect of crimes allegedly committed during the Maidan protests in Ukraine.<sup>17</sup>

### *Contextual Background*

62. In 1991, Ukraine became an independent state, following the break-up of the Soviet Union. At the time of the events that are the subject of the Office's preliminary examination, the democratically-elected Government of Ukraine was dominated by the Party of Regions, which was also the party of then-President Yanukovich. The Maidan protests which provided the context for the alleged crimes committed were prompted by the decision on 21 November 2013 by the Ukrainian Government not to sign an Association Agreement with the European Union. This decision was resented by pro-Europe Ukrainians and was perceived

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<sup>14</sup> [Declaration by Ukraine lodged under Article 12\(3\) of the Statute, 9 April 2014](#); [Note Verbale of the Acting Minister for Foreign Affairs of Ukraine, Mr. Andrii Deshchytsia, 16 April 2014](#).

<sup>15</sup> See ICC-OTP, Policy Paper on Preliminary Examinations, November 2013, para. 76.

<sup>16</sup> [The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination in Ukraine, 25 April 2014](#).

<sup>17</sup> [Declaration of the Verkhovna Rada of Ukraine \(English Translation\), 25 February 2014](#).

as a move closer to Russia. The same day, mass protests began in Independence Square, Kyiv.

63. Over the following weeks, protesters continued to occupy Independence Square and clashes between the demonstrators and security forces increased.<sup>18</sup> The protest movement continued to grow in strength and reportedly diversified to include individuals and groups who were generally dissatisfied with the Yanukovich government and demanded his removal from office.<sup>19</sup> Following the adoption on 16 January 2014 by the Ukrainian Parliament of laws which imposed tighter restrictions on freedom of expression, assembly and association, relations between the protesters and the authorities deteriorated further. From 23 January 2014, protests also grew in other Ukrainian cities, for example, in Kharkiv, Luhansk, Donetsk, Rivne, Ivano-Frankivsk, Dnipropetrovsk, Vinnytsya, Zhytomyr, Zaporizhzhya, Lviv, Odessa, Poltava, Sumy, Ternopil, Cherkasy and Sevastopol. In some cities, protesters forcibly occupied state buildings.
64. Violent clashes in the context of the Maidan protests continued over the following weeks, causing injuries both to protesters and members of the security forces, and the deaths of some protesters. On the evening of 18 February, the authorities reportedly initiated an operation to try to clear the square of protesters. The violence escalated sharply from that time onwards, causing scores of deaths and hundreds of injuries within the following three days. On 21 February 2014, under European Union mediation, President Yanukovich and opposition representatives agreed on a new government and fixed Presidential elections for May 2014. On 22 February, the Ukrainian Parliament voted to remove President Yanukovich, who left the country that day.

### *Alleged Crimes*

65. Injuries and killings of both protesters and members of the security forces were reported in the context of the Maidan events from 24 November 2013 onwards. Some of these alleged crimes appear to have resulted from an excessive use of force by security forces against protesters.
66. Killings: Information available indicates that at least 118 people were killed in the context of the Maidan events between 21 November 2013 and 22 February 2014. This figure reportedly includes some 17 members of the security forces. Three of those killed were reported to be women, and 115 men. Eight of the deceased died after 22 February 2014 but as a result of injuries received between 21 November and 22 February. A large majority of the deaths reportedly resulted from injuries received during the violent clashes. Some 83 persons were reportedly protesters

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<sup>18</sup> The protests were initially known as the “Euromaidan” movement (literally “Euro Square”, in reference to the location of the protests, Independence Square in Kyiv, and the pro-European inclination of the movement’s members initially). As others joined the protests, voicing more general dissatisfaction with the Yanukovich Government, the protests became more commonly referred to as the “pro-Maidan” movement.

who died as a result of gunshot or blunt-force trauma injuries resulting from being beaten. Some 16 protestors reportedly died from other causes related to the protests including burning (of two people, allegedly caused by arson), heart failure and pneumonia. At least 110 of the fatalities occurred in Kyiv, including 15 members of the security forces. Two people were killed in Khmelnytsky, two in the region of Cherkasy and one in the Zaporizhzhya region. Two members of the security forces were also killed in the context of protests in Lviv. The highest number of reported killings of protestors occurred between 18 and 22 February 2014 in Kyiv, and at least 60 persons were allegedly killed on 20 February, the majority as a result of gunshot wounds.

67. Injuries: Statistics obtained from medical sources indicate that some 1,890 people were treated in hospitals in Kyiv in the context of the Maidan events. This figure includes protestors and other members of the general public as well as members of the security forces. Some injured protestors were also treated at “clandestine” hospitals operated by voluntary medical staff, and thus not included in these statistics. Injuries reported included blunt force trauma injuries, gunshot injuries and blast injuries and burns caused by “flash bang” grenades. Other medical conditions that were reportedly related to the protests but not necessarily caused directly by violence included frostbite and physical symptoms caused by psychological trauma.
68. Disappearances: Some 39 persons reportedly went missing during the Maidan events. Some or all of these people may have been amongst those killed or arrested during the events. Some of the “missing” may also have gone into (voluntary) hiding. Further information is thus required to determine whether some or all of these cases may meet the definition of enforced disappearance.
69. Torture and or other inhumane acts: A number of incidents of alleged ill-treatment during the course of arrest, during detention and/or following abduction were also reported in the context of the Maidan protests. In one widely reported incident, two men were allegedly abducted and severely beaten by their captors whilst being questioned about their involvement in the protests. One of the men survived and was released but the body of the other man was later discovered showing signs of torture. Other examples of alleged torture or inhumane acts include forced undressing and hosing with water cannons in sub-zero temperatures and beatings of protestors with truncheons in the context of the protests.

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

70. During the reporting period, the preliminary examination has focused on gathering available information from reliable sources in order to assess whether the alleged crimes fall within the subject-matter jurisdiction of the Court.
71. The Office has engaged with representatives of Ukrainian civil society on several occasions for the purpose of gathering such relevant information. Additionally,

the Office has requested information from the Government of Ukraine, and subsequently received two submissions from the Ukrainian authorities, which are being analysed by the Office.

72. In September 2014, the Office also met with a delegation of members of the Ukrainian Parliamentary Committee on the Rule of Law and Justice and provided the clarifications requested on the preliminary examination process and mechanisms for accepting and triggering the jurisdiction of the Court.
73. The Office conducted a mission to Kiev in early November 2014 in order to discuss and follow-up with the relevant Ukrainian authorities and other actors on matters relevant to the preliminary examination of the situation in Ukraine.

### *Conclusion and Next Steps*

74. The Office will continue to gather, verify, and analyse information in order to determine whether there is a reasonable basis to believe that crimes within the jurisdiction of the Court have been committed during the Maidan events in Ukraine.

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

#### AFGHANISTAN

##### *Procedural History*

75. The Office has received 102 communications pursuant to article 15 in relation to the situation in Afghanistan. The preliminary examination of the situation in Afghanistan was made public in 2007.

##### *Preliminary Jurisdictional Issues*

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

##### *Contextual Background*

77. After the attacks of 11 September 2001, in Washington D.C. and New York City, a United States-led coalition launched air strikes and ground operations in Afghanistan against the Taliban, suspected of harbouring Osama Bin Laden. The Taliban were ousted from power by the end of the year and in December 2001, under the auspices of the UN, an interim governing authority was established in Afghanistan. In May-June 2002, a new transitional Afghan government regained sovereignty, but hostilities continued in certain areas of the country, mainly in the south. Subsequently, the UN Security Council in Resolution 1386 established an International Security Assistance Force (ISAF), which later came under NATO command.
78. The Taliban and other armed groups have rebuilt their influence since 2003, particularly in the south and east of Afghanistan. At least since May 2005, the armed conflict has intensified in the southern provinces of Afghanistan between organised armed groups, most notably the Taliban, and the Afghan and international military forces. The conflict has further spread to the north and west of Afghanistan, including the areas surrounding Kabul. Today ISAF, US forces and Government of Afghanistan (GOA) forces combat armed groups which mainly include the Taliban, the Haqqani Network, and Hezb-e-Islami Gulbuddin (HIG). With the combat mission of US and ISAF forces scheduled to end by 31 December 2014, international military forces have been transferring security responsibilities to the Afghan National Security Forces, while remaining in a training, advisory and support role during the 2014-2016 period.

### *Subject-Matter Jurisdiction*

79. The situation in Afghanistan is usually considered as an armed conflict of a non-international character between the Afghan Government, supported by the ISAF and US forces on the one hand (pro-government forces), and non-state armed groups, particularly the Taliban, on the other (anti-government groups). The participation of international forces does not change the non-international character of the conflict since these forces became involved in support of the Afghan Transitional Administration established on 19 June 2002.
80. As detailed in previous reporting,<sup>20</sup> the Office has found that the information available provides a reasonable basis to believe that crimes under articles 7 and 8 of the Statute have been committed in the situation in Afghanistan, including crimes against humanity of murder under article 7(1)(a), and imprisonment or other severe deprivation of physical liberty under article 7(1)(e); murder under article 8(2)(c)(i); cruel treatment under article 8(2)(c)(i); outrages upon personal dignity under article 8(2)(c)(ii); the passing of sentences and carrying out of executions without previous judgement pronounced by a regularly constituted court under article 8(2)(c)(iv); intentionally directing attacks against the civilian population or against individual civilians under article 8(2)(e)(i); intentionally directing attacks against personnel, material, units or vehicles involved in a humanitarian assistance under article 8(2)(e)(iii); intentionally directing attacks against buildings dedicated to education, cultural objects, places of worship and similar institutions under article 8(2)(e)(iv); and treacherously killing or wounding a combatant adversary under article 8(2)(e)(ix).
81. The Office has continued to gather and receive information on alleged crimes committed during the reporting period, including alleged killings, abductions, torture and other forms of ill-treatment, attacks on civilian objects, the use of human shields, the imposition of punishments by parallel judicial structures, and the recruitment and use of children to participate actively in hostilities.
82. According to the United Nations Assistance Mission in Afghanistan (UNAMA), over 17,500 civilians have been killed in the conflict in Afghanistan in the period between January 2007 and June 2014. Members of anti-government armed groups were responsible for at least 12,100 civilian deaths, while pro-government forces were responsible for at least 3,552 civilian deaths. A number of reported killings remain unattributed.
83. Whereas in previous years, the majority of civilians were killed and injured by improvised explosive devices, during the reporting period, more civilians were found to have been killed and injured in ground engagements and crossfire between anti-government armed groups and pro-government forces. UNAMA reported that civilian casualties increased by 24% in the first six months of 2014 compared with 2013, with child casualties more than doubling, and two-thirds

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<sup>20</sup> See ICC-OTP, Report on Preliminary Examination Activities 2013 (November 2013).

more women killed and injured as a result of the armed conflict. Since 2013, more than 383 women and 856 children have reportedly been killed as a result of the armed conflict.

### *Admissibility Assessment*

84. Following a thorough legal assessment of the information available, the Office identified potential cases in the situation in Afghanistan falling within the jurisdiction of the Court, on the basis of which the Office is analysing admissibility. The selection of potential cases identified below is without prejudice to any further findings on subject-matter jurisdiction to be made pursuant to additional information that the Office could receive at a later stage of analysis. In addition, the legal characterisation of these cases and any alleged crimes may be revisited at a later stage of analysis.

### *Anti-Government Groups*

85. The Taliban policy of attacking particular categories of civilians forms the subject of a first potential case identified by the Office. The Taliban, whose leaders sit on their Leadership Council (*Rahbari Shura*, more often dubbed the '*Quetta Shura*'), and their affiliated Haqqani Network, are allegedly responsible for a wide range of criminal conduct in the period 2006 – present. Their policy of attacking particular categories of civilians perceived as supporting the Afghan government or foreign entities is made explicit in their Code of Conduct (*Layha*), as well as in other public statements such as the announcement of their annual spring offensive.
86. The particular categories of civilians that the Taliban leadership have identified as legitimate targets include labourers involved in public-interest construction work, interpreters, truck drivers, UN personnel, NGO employees, journalists, doctors and other health workers, teachers and students, tribal and religious elders, judicial authorities, election workers, and individuals with a high public profile such as members of parliament, governors and mullahs, district governors, provincial council members, government employees at all levels, as well as individuals who joined the Afghanistan Peace and Reintegration Program and their relatives. Most recently, the Taliban's May 2014 statement announcing the commencement of their *Khaibar* Spring Offensive listed civilian contractors, translators, administrators, logistics personnel, Cabinet ministers, members of parliament, attorneys and judges as potential targets.
87. A second potential case against the Taliban relates to attacks on girls' education (i.e., female students, teachers and their schools). The Taliban allegedly target female students and girls' schools pursuant to their policy that girls should stop attending school past puberty. The Office has received information on multiple alleged incidents of attacks against girls' education, which have resulted in the destruction of school buildings, thereby depriving more than 3,000 girls from attending schools and in the poisoning of more than 1,200 female students and

teachers. While the attribution of specific incidents to the Taliban, and in particular the Taliban central leadership remains challenging, there is a reasonable basis to believe that the Taliban committed the war crime of intentionally directing attacks against buildings dedicated to education, cultural objects, places of worship and similar institutions.

88. The alleged conduct further indicates that some of the elements of the crime against humanity of persecution on gender grounds are met. As part of the attack against the civilian population, thousands of Afghan female students and teachers were targeted across the country with the aim to deprive Afghan girls of the right to education. In addition, Afghan women holding public office or with a high public profile have been targeted by the Taliban pursuant to their organisational policy discussed in the first case above. This includes government officials, parliamentarians, provincial councillors, police officers, journalists, writers, and health care workers. However, while for some of these incidents there is information suggesting that these women were targeted on the basis of their gender in addition to their affiliation with the Afghan government, for other incidents there is specific information indicating they were targeted solely on the basis of the latter. Therefore, further information on the attribution of specific incidents to the Taliban, and on the existence of an organizational policy, would be required for the Office to determine that the reasonable basis threshold has been met for the crime against humanity of persecution on gender grounds.
89. The Taliban's alleged practice of recruiting and using children under the age of 15 as suicide bombers, to plant explosives and transport munitions and goods, or to act as guards or scouts for reconnaissance, forms the subject of a third potential case identified by the Office. For instance, the UN Special Representative for Children and Armed Conflict and UNAMA reported more than 200 incidents of child recruitment by anti-government armed groups in the period from 2010 to 2013.
90. While continuing to assess the seriousness and reliability of such allegations, the Office is analysing the relevance and genuineness of national proceedings by the competent national authorities for the alleged conduct described above as well as the gravity of the alleged crimes.

#### *Pro-Government Forces*

91. As noted in previous reporting,<sup>21</sup> there is information available that the war crimes of torture, and outrages upon personal dignity, in particular humiliating and degrading treatment, have allegedly been committed by members of pro-government forces.
92. The practice of torturing conflict-related detainees in order to obtain information or confessions appears to be a common practice, particularly in Afghanistan's

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<sup>21</sup> See ICC-OTP, Report on Preliminary Examination Activities 2013 (November 2013).

principal intelligence agency, the National Directorate for Security (NDS), and therefore forms a potential case identified by the Office. Other alleged incidents of torture or ill-treatment have also been attributed to members of the Afghan National Police (ANP), the Afghan Local Police (ALP), and the Afghan National Army (ANA). The vast majority of documented cases have been attributed to the NDS and the ANP as detaining authorities.

93. The pattern of use of interrogation techniques includes beatings (with kicks, punches, electrical cables, etc.), suspension by the wrists or ankles, electric shocks, twisting and wrenching of the genitals, stress positions, and burning with cigarettes. Victims were captured in the context of the armed conflict suspected of being Taliban fighters, suicide attack facilitators, producers of IEDs and others implicated in crimes associated with the armed conflict in Afghanistan.
94. The Office has been assessing available information relating to the alleged abuse of detainees by international forces within the temporal jurisdiction of the Court. In particular, the alleged torture or ill-treatment of conflict-related detainees by US armed forces in Afghanistan in the period 2003-2008 forms another potential case identified by the Office. In accordance with the Presidential Directive of 7 February 2002, Taliban detainees were denied the status of prisoner of war under article 4 of the Third Geneva Convention but were required to be treated humanely. In this context, the information available suggests that between May 2003 and June 2004, members of the US military in Afghanistan used so-called “enhanced interrogation techniques” against conflict-related detainees in an effort to improve the level of actionable intelligence obtained from interrogations. The development and implementation of such techniques is documented *inter alia* in declassified US Government documents released to the public, including Department of Defense reports as well as the US Senate Armed Services Committee’s inquiry. These reports describe interrogation techniques approved for use as including food deprivation, deprivation of clothing, environmental manipulation, sleep adjustment, use of individual fears, use of stress positions, sensory deprivation (deprivation of light and sound), and sensory overstimulation.
95. Certain of the enhanced interrogation techniques apparently approved by US senior commanders in Afghanistan in the period from February 2003 through June 2004, could, depending on the severity and duration of their use, amount to cruel treatment, torture or outrages upon personal dignity as defined under international jurisprudence. In addition, there is information available that interrogators allegedly committed abuses that were outside the scope of any approved techniques, such as severe beating, especially beating on the soles of the feet, suspension by the wrists, and threats to shoot or kill.
96. While continuing to assess the seriousness and reliability of such allegations, the Office is analysing the relevance and genuineness of national proceedings by the

competent national authorities for the alleged conduct described above as well as the gravity of the alleged crimes.

97. Having analysed the information available on civilian casualties caused by air strikes, “night raids” and escalation-of-force incidents attributed to pro-government forces, the Office assesses that the information available does not provide a reasonable basis to believe that the war crime of intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities pursuant to article 8(2)(e)(i) has been committed. In relation to allegations over proportionality, the Office recalls that the Rome Statute does not contain a provision for the war crime of intentionally launching a disproportionate attack in the context of a non-international armed conflict. Similarly, while the Office has received allegations regarding the recruitment and use of children by Afghan government forces to participate actively in hostilities, the Office has been unable to verify the seriousness of the information received; these allegations remain insufficiently substantiated to provide a reasonable basis to believe that war crimes have been committed.

#### *OTP Activities*

98. From 15-19 November 2013, the Office conducted a mission to Kabul and participated in an international seminar on peace, reconciliation and transitional justice held at Kabul University. During the mission, the Office held a number of meetings with representatives of Afghan civil society and international non-governmental organizations in order to discuss possible solutions to challenges raised by the situation in Afghanistan such as security concerns, limited or reluctant cooperation, and verification of information.
99. During the reporting period, the Office has continued to gather and verify information on alleged crimes committed in the situation in Afghanistan, and to refine its legal analysis of potential cases for the purposes of assessing admissibility. In particular, the Office has taken successful steps to verify information received on incidents in relation to the above potential cases, in order to overcome information gaps in relation to *inter alia* the attribution of incidents, the military or civilian character of a target, or the number of civilian and/or military casualties resulting from a given incident. The Office also gathered further information in order to enable a more thorough evaluation of the reliability of sources of information on alleged crimes.
100. The Office further engaged with relevant States and cooperation partners with a view to assess alleged crimes and national proceedings. The Office gathered and received information on national proceedings in relation to the above types of conduct.
101. Pursuant to the Office’s policy on sexual and gender-based crimes, the Office examined, in particular, whether there is a reasonable basis to believe that the crime against humanity of persecution on gender grounds has been or is being

committed in the situation in Afghanistan. The results of the Office's analysis are summarised above in the legal assessment.

*Conclusion and Next Steps*

102. The Office will continue to analyse allegations of crimes committed in Afghanistan, and to assess the admissibility of the potential cases identified above in order to reach a decision on whether to seek authorization from the Pre-Trial Chamber to open an investigation of the situation in Afghanistan pursuant to article 15(3) of the Statute.

## COLOMBIA

### *Procedural History*

103. The OTP has received 157 communications pursuant to article 15 in relation to the situation in Colombia. The situation in Colombia has been under preliminary examination since June 2004.
104. On 2 March 2005, the Prosecutor informed the Government of Colombia that he had received information on alleged crimes committed in Colombia that could fall within the jurisdiction of the Court. Since then, the Office of the Prosecutor has requested and received on an ongoing basis additional information on (i) crimes within the jurisdiction of the Court and (ii) the status of national proceedings.
105. In November 2012, the OTP published an Interim Report on the Situation in Colombia, which summarized the analysis undertaken in the course of the preliminary examination including the Office's findings with respect to jurisdiction and admissibility, and identified five areas of continuing focus: (i) follow-up on the Legal Framework for Peace and other relevant legislative developments, as well as jurisdictional aspects relating to the emergence of "new illegal armed groups"; (ii) proceedings relating to the promotion and expansion of paramilitary groups; (iii) proceedings relating to forced displacement; (iv) proceedings relating to sexual crimes; and, (v) *false positive* cases.

### *Preliminary Jurisdictional Issues*

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

### *Contextual Background*

107. Colombia has experienced over 50 years of violent conflict between government forces, paramilitary armed groups and rebel armed groups, as well as amongst those groups. The most significant actors include the *Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo* (FARC) and the *Ejército de Liberación Nacional* (ELN); paramilitary armed groups; and the national armed forces and the police. In recent decades, the Government of Colombia has held several peace talks and negotiations with various armed groups, with differing degrees of success. The Justice and Peace Law (JPL) adopted in 2005 was designed to encourage paramilitary armed groups and others to demobilize and confess their crimes in exchange for reduced sentences. Recent years have seen the counter-insurgency activities of the paramilitaries diminish, including

through demobilization. Some demobilized fighters, however, have allegedly reconfigured into smaller and more autonomous units.

108. On 18 October 2012, peace talks between the Government of Colombia and the FARC began in Oslo, and then moved to Havana where they remain on-going. The six agenda items, as agreed to in the framework for the peace talks, are: (1) rural development and agrarian reform; (2) political participation; (3) disarmament and demobilization; (4) drug trafficking; (5) victims (human rights of victims and truth-telling); (6) implementation and verification mechanisms. Preliminary agreements were reached on the first, second and fourth agenda items in May and November 2013 and May 2014, respectively. In 2014, the Government of Colombia and the FARC initiated discussions on item 5, including a process of meetings with selected victims from all sides of the conflict.

### *Subject-Matter Jurisdiction*

109. As detailed in previous reporting,<sup>22</sup> the Office has determined that the information available provides a reasonable basis to believe that crimes against humanity under article 7 of the Statute have been committed in the situation in Colombia, 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). There is also a reasonable basis to believe that war crimes under article 8 of the Statute have been committed in the situation in Colombia since 1 November 2009, including murder under article 8(2)(c)(i); attacks against civilians under article 8(2)(e)(i); torture and cruel treatment under article 8(2)(c)(i); outrages upon personal dignity under article 8(2)(c)(ii); taking of hostages under article 8(2)(c)(iii); rape and other forms of sexual violence under article 8(2)(e)(vi); and conscripting, enlisting and using children to participate actively in hostilities under article 8(2)(e)(vii).
110. The Office continued to gather and receive information on alleged crimes committed during the reporting period, including alleged killings, abductions, forced displacement, and sexual and gender-based crimes.

### *Admissibility Assessment*

111. During the reporting period, the Office received 239 judgments from the Government of Colombia relating to members of the FARC and ELN armed groups, members of paramilitary armed groups, army officials and members of successor paramilitary armed groups (new illegal armed groups), of which 129 referred to events within the temporal jurisdiction of the ICC. The Office has continued to analyse the relevance of these decisions for the preliminary

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<sup>22</sup> See [ICC-OTP, Situation in Colombia: Interim Report \(November 2012\)](#)

examination, including whether those proceedings relate to potential cases being examined by the Office and in particular, whether the focus is on those most responsible for the most serious crimes committed. Where this is the case, the Office analyses whether those proceedings are vitiated by an unwillingness or inability to genuinely carry out the proceedings.

(i) *Legislative developments relevant to the preliminary examination*

*Legal Framework for Peace*

112. On 18 December 2013, the Constitutional Court of Colombia published the full text of its judgment rejecting a challenge to the constitutionality of the Legal Framework for Peace (LFP). In addition to declaring the LFP to be constitutional, the Constitutional Court set forth nine parameters of interpretation that the Colombian Congress must observe when adopting LFP implementing legislation. One of the parameters states that “[t]he mechanism of total suspension of the execution of a sentence cannot be applied to those convicted as most responsible for crimes against humanity, genocide and war crimes committed in a systematic manner.” The parameters outlined by the Constitutional Court appear to highlight its commitment to ensure the compatibility of national laws with Colombia’s international obligations.
113. On 7 June 2014, the Government of Colombia and the FARC issued a joint statement of principles for the discussion of the agenda item on victims. The statement indicated that the discussion would be framed upon principles of, *inter alia*, recognition of victims, recognition of responsibility, elucidation of the truth, and satisfaction of victims’ rights. The discussion of this agenda item remains on-going.
114. Pursuant to its positive approach to complementarity, the Office will continue to engage with relevant Colombian authorities regarding the admissibility standards set forth in the Statute in an effort to ensure that any eventual peace agreement, as well as legislation implementing the LFP, remain compatible with the Statute. In this respect, the Office has informed the Colombian authorities that a sentence that is grossly or manifestly inadequate, in light of the gravity of the crimes and the form of participation of the accused, would vitiate the genuineness of a national proceeding, even if all previous stages of the proceeding had been deemed genuine.

*Military Justice Reform*

115. The Office has continued to monitor and analyse developments with a potential impact on the conduct of national proceedings for alleged killings by members of the armed forces, known in Colombia as *false positives*. The Office notes that during the reporting period, various pieces of draft legislation including constitutional reform bills have been brought before Congress, relating *inter alia* to the military criminal justice system; jurisdictional rules and terms for the

investigation and prosecution of members of the security forces as well as the suspension, renunciation and review of criminal proceedings, and the reform or replacement of the judicial entity currently responsible for resolving jurisdictional conflicts.<sup>23</sup>

116. In common with the previous constitutional reform which was declared invalid on procedural grounds in 2013, the most recently proposed reform package would establish new definitions and rules of interpretation for the qualification of conduct and the application of modes of liability including in relation to the concepts of direct participation in hostilities, legitimate targets, command responsibility and superior orders. It also proposes that crimes against humanity, torture, forced displacement, sexual violence, genocide, enforced disappearances and extrajudicial killings be tried by civilian courts while all other violations of International Humanitarian Law be tried in military courts. On the basis of this demarcation, the draft bill requires the Attorney General to identify which current criminal proceedings against members of the security forces should remain under the jurisdiction of civilian courts within one year of the reforms' enactment. All other ongoing cases would be transferred to the military and police justice system.
117. The Office takes note of the views expressed by national civil society, international NGOs and international institutions, including the UN Office of the High Commissioner for Human Rights and twelve Special Procedure mandate-holders of the UN Human Rights Council concerning the implications that the proposed reforms could have for the independent and impartial investigation and prosecution of crimes relevant to the OTP's preliminary examination.<sup>24</sup>
118. The Office will continue to assess these developments and proposals, and will seek further information and clarification from the Colombian authorities as part of the Office's assessment of the admissibility of potential cases.
- (ii) *Proceedings relating to the promotion and expansion of paramilitary groups*
119. With regard to national proceedings relating to the promotion and expansion of paramilitary groups, the Office has gathered information indicating that until July 2014, 1,124 cases against politicians, 1,023 cases against members of the armed forces and 393 cases against public authorities were transmitted by the Justice and Peace Law Chambers, on the basis of testimonies given in the course of JPL hearings, to the Office of the Attorney General (*Fiscalía General de la Nación*) for investigation under ordinary laws. The Office will seek further information from the Colombian authorities on these investigations with a view

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<sup>23</sup> Including Ordinary Bill 085/2013 Senate – 210/2014 Chamber of Representatives; Constitutional Bills 017/2014, 018/2014, 019/2014, 22/2014 and Ordinary Bill 129/2014.

<sup>24</sup> UN OHCHR, Observaciones a los proyectos de acto legislativo n° 010 y 022 de 2014 senado, 28 October 2014; [Open letter by Special procedures mandate-holders of the United Nations Human Rights Council to the Government and the Congress of the Republic of Colombia](#), 29 September 2014.

to assessing whether they are directed at uncovering the political, military and economic support network of paramilitary armed groups.

(iii) *Proceedings relating to forced displacement*

120. Over the reporting period, the Office received from the Government of Colombia information on 16 cases of forced displacement within the ICC's temporal jurisdiction, with convictions against nine individuals in the ordinary justice system. The Office notes that, of these, seven were against members of paramilitary armed groups, one against a guerrilla commander, and one against a member of another illegal armed group. Since 2013, the Unit against Crimes of Forced Disappearance and Forced Displacement, in the Office of the Attorney General, is investigating two additional cases against paramilitary groups for forced displacement.
121. Furthermore, the Office has received additional information from the JPL Unit in the Office of the Attorney General about 16 on-going "macro-investigations" against 13 paramilitary commanders and two mid-level FARC commanders. All of these proceedings include, *inter alia*, charges of forced displacement affecting around 200,000 victims in 23 departments of Colombia. Until February 2014, one conviction of first instance has been issued against a commander of a paramilitary group. In addition, the Working Group on FARC within the Directorate of National Analysis and Context (*Dirección Nacional de Análisis y Contextos*, DINAC) is investigating five "situations" comprising 37 assigned cases that include, *inter alia*, charges of forced displacement committed against indigenous communities. The Office will continue to follow up on the investigations conducted by this working group, as well as by the Uraba Working Group, which focuses on the contextual analysis of violence related to forced displacement in the Uraba region, for the purpose of assessing their relevance and genuineness.
122. The Colombian Constitutional Court's Working Group on Forced Displacement (*Sala Especial de Seguimiento a la Sentencia T-025*) also issued its Auto 173 on 6 June 2014 to follow up on the situation of displaced persons living with disabilities. In this decision, the Chamber noted that the "unconstitutional state of affairs in relation to the fundamental rights of the displaced population" persists and raised its concern on the close link existing between disability and vulnerability to sexual violence, in particular in the context of forced displacement.

(iv) *Proceedings relating to sexual crimes*

123. Despite the scale of the phenomenon, the number of proceedings concerning rape and other forms of sexual violence committed in the armed conflict remains limited. During the reporting period, the Office received from the Government of Colombia information on one conviction for rape against a member of the armed forces. Furthermore, with regard to the the 183 conflict-related cases of sexual violence which the Constitutional Court ordered the AGO to investigate and

accelerate legal procedures, the working group in charge of monitoring its implementation notes that, as of March 2013, only five convictions and one acquittal for acts of sexual violence have been issued, while 95 cases remain at the preliminary stage of investigation, 16 were in the investigation phase, four were terminated at the investigation phase, 26 were inactive and five have resulted in indictments.<sup>25</sup>

124. Regarding the 16 “macro-investigations” conducted by the Attorney General’s JPL Unit, the Office notes that 15 cases include charges of sexual crimes affecting 2,906 victims. In parallel, the five “situations” comprising 37 cases currently being investigated by the DINAC’s Working Group on FARC also include charges of sexual violence in the context of the armed conflict. This working group has also identified five additional “situations” that could potentially comprise new cases including charges of sexual violence. DINAC’s Montes de María Region Working Group is also investigating one case of sexual violence affecting 9 victims. The Office will continue to follow-up on the investigations conducted by these working groups, as well as by the working group in charge of investigating cases of gender-based violence.
125. The Office notes that in June 2014, the President approved new legislation on access to justice for victims of sexual violence in the context of the armed conflict,<sup>26</sup> which provides for, *inter alia*, the elimination of any statutes of limitation for sexual crimes; it includes additional sexual crimes in the Colombian Penal Code, such as forced sterilization, forced pregnancy, forced nudity, and forced abortion; precludes the investigation of sexual crimes by military courts; and considers that acts of sexual violence in armed conflict may constitute crimes within the jurisdiction of the ICC. The adoption of the new legislation is a positive step taken by Colombian authorities to investigate and prosecute crimes of sexual violence. The Office will follow-up closely on concrete progress in terms of national proceedings.

(v) “False positives” cases

126. Over the reporting period, the Office has been in communication with the Colombian authorities to follow-up on the progress of national proceedings concerning alleged *false positives* cases. During its November 2013 mission, the OTP met with the Office of the Attorney General and received information relating to a mapping of *false positives* cases on the basis of completed national proceedings conducted for the purpose of identifying the military units that were involved in the alleged crimes. The outcome of this mapping effort appears to be partly consistent with information analysed by the OTP regarding the military units allegedly involved in the crimes across the country.

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<sup>25</sup> As noted by the Working Group to monitor compliance with Auto 092 of 2008 of the Colombian Constitutional Court, confidential annex in its fifth follow-up report of October 2013, figures presented do not cover the 183 cases listed in the confidential annex and include other cases not listed.

<sup>26</sup> Law 1719 adopted on 18 June 2014.

127. The information received by the OTP also indicates that, on the basis of the Attorney General's findings, some of the most serious cases have been prioritized for investigation. The OTP will continue analysing information relating to these proceedings as part of its admissibility assessment, and will continue to engage with the Colombian authorities and other actors to follow-up on the progress of these cases.

### *OTP Activities*

128. During the reporting period, the Office has continued to consult with the Colombian authorities on issues relevant to the preliminary examination. The Office conducted a mission to Bogota from 11 to 16 November 2013, gathered additional information on the areas of focus of the preliminary examination, analysed information submitted through article 15 communications, and held numerous meetings with international organizations, international NGOs and Colombian civil society. During the mission, the OTP met with senior officials from the Office of the Attorney General, national civil society, international NGOs and international organizations. On 14 and 15 November 2013, the Office participated in the conference on "*Strengthening the Attorney General's Office on Transitional Justice*" organized by the Attorney General's Office and the Colombian current affairs magazine *Semana*. The Government of Colombia facilitated the mission. In addition, the Office conducted a mission to Göttingen on 7 January 2014 to participate as observers in the seminar "*Analysis of the decision of the Constitutional Court relating to the Legal Framework for Peace,*" organized by the Center of Studies of Latin-American Substantive and Procedural Criminal Law and the Rule of Law Program for Latin America of the Konrad Adenauer Foundation.
129. The Office also agreed with the Colombian Government to perform a new mission to Colombia in the early 2015 in order to follow-up with the relevant Colombian authorities and other actors on national proceedings relevant to the preliminary examination of the situation in Colombia.

### *Conclusion and Next Steps*

130. During the reporting period, the Colombian authorities took steps to prioritize investigations and prosecutions of those most responsible for conduct relevant to the preliminary examination. The Colombian authorities appear to have made some progress in their investigations for *false positives* cases relevant to the preliminary examination. However, the Office is concerned with the limited progress relating to sexual crimes, although the creation of a working group in charge of investigating cases of gender-based violence within the DINAC could constitute a positive step.
131. During the coming year, the Office will continue engaging with the Colombian authorities to assess whether genuine national proceedings are carried out

against those most responsible for the most serious crimes in order to reach determinations on admissibility. The Office will also continue to monitor and analyse the implementation of the Legal Framework for Peace and legislative and other developments regarding the investigation and prosecution of *false positive* cases as part of its assessment of the conduct of national proceedings relating to crimes under ICC jurisdiction.

## GEORGIA

### *Procedural History*

132. The OTP has received 3,854 communications pursuant to article 15 in relation to the situation in Georgia. The preliminary examination of the situation in Georgia was made public on 14 August 2008.

### *Preliminary Jurisdictional issues*

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

### *Contextual Background*

134. The armed conflict that occurred in Georgia in August 2008 has its roots in the dismantling of the Soviet Union. A first conflict over South Ossetia, Georgia's northern autonomous entity, took place between 1990 and 1992. The conflict ended with the peace agreement signed on 24 June 1992 in Sochi by the then Georgian President Eduard Shevardnadze and Russian President Boris Yeltsin, which provided for *inter alia* the deployment of a joint peacekeeping force.
135. For 12 years there was no serious military confrontation, until skirmishes between South Ossetian forces and the Georgian army degenerated, on 7 August 2008, into an armed conflict, which was rendered international by Russia's involvement. On 12 August 2008, under the auspices of the EU, a six-point ceasefire plan was reached calling all parties to the conflict to end hostilities indefinitely. Alleged crimes however continued to be committed thereafter.

### *Subject-Matter Jurisdiction*

136. Following a thorough legal assessment of the information available on alleged crimes gathered in the process of the preliminary examination, the Office has focused on potential cases in the situation in Georgia falling within the jurisdiction of the Court.
137. The selection of potential cases is without prejudice to any further findings on subject-matter jurisdiction to be made pursuant to additional information that the Office could receive at a later stage of analysis. In addition, the legal characterisation of these cases and any alleged crimes may be revisited at a later stage of analysis.

### *Alleged forcible transfer of ethnic Georgians*

138. The available information indicates that more than 138,000 ethnic Georgians were displaced from South Ossetia and adjacent areas in the context of the August 2008 armed conflict. Most of those internally displaced people (IDPs) from the “buffer zone”, i.e. around 108,000 persons, were able to return after the withdrawal of Russian armed forces behind the administrative border between Georgia and South Ossetia on 10 October 2008. By May 2009, however, some 30,000 IDPs remained displaced. Of these, the UN High Commissioner for Refugees (UNHCR) estimated that some 18,500 displaced people from South Ossetia were unlikely to return in the short term,<sup>27</sup> because their villages had been practically destroyed and the South Ossetian authorities openly opposed their return.<sup>28</sup>
139. Reportedly, in the period from at least August 2008 through the end of October 2008, South Ossetian forces have been responsible for systematically beating, killing and intimidating ethnic Georgians, and for pillaging, burning and destroying their houses with the aim to forcibly transfer this part of the population from South Ossetian territory to areas under the control of the Georgian government. These forces looted and burnt houses of ethnic Georgians and harassed the local population in villages such as Akhhalgori, Pkhvenisi, Karaleti, Tkviavi, Tirdznisi, Brotsleti, Adzvi, Abisi, Atotsi, Dvani, Ditsi, Megvrekisi, Zardiantkari, Mereti and Koshka. The South Ossetian leadership indicated in a number of public statements that Georgian civilians were not allowed to return to South Ossetia.<sup>29</sup>
140. Based on the information available, the Office concluded that there is a reasonable basis to believe that South Ossetian forces carried out a widespread and systematic attack against the ethnic Georgian civilian population in South Ossetia and adjacent areas in the context of the armed conflict in the period from August 2008 through October 2008 that amounted to the crime against humanity of forcible transfer of ethnic Georgians under article 7(1)(d). There is a reasonable basis to believe that these forces also committed war crimes of pillaging under 8(2)(b)(xvi) and/or article 8(2)(e)(v) and destroying civilian property belonging to ethnic Georgians under article 8(2)(a)(iv) and/or article 8(2)(e)(xii) in the same period.

### *Alleged attacks on Russian peacekeepers*

141. The alleged attack on Russian peacekeepers occurred in the night between 7 and 8 August 2008. Georgian and Russian authorities gave contradicting accounts of the events that happened just before and right after 7 August as well as during

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<sup>27</sup> UNHCR, “Displacement Figures and Estimates - August 2008 Conflict”.

<sup>28</sup> NGO Memorial, [Humanitarian consequences of the armed conflict in the South Caucasus](#).

<sup>29</sup> Korrespondent.net, [“Kokoity: Georgians face no threat of discrimination in South Ossetia”](#), 23 August 2008; Komersant, [“Eduard Kokoity: We have practically cleaned all out there”](#), 15 August 2008.

the subsequent aerial and ground offensive. The Independent International Fact-Finding Mission on the Conflict in Georgia as well as international NGOs such as Amnesty International and Human Rights Watch were unable to corroborate claims by either side in their reports.

142. According to Russian authorities, Georgian armed forces deliberately attacked the headquarters of the Joint Peacekeeping Forces (JPKF) as well as the compound and 12 other observation posts of the Russian Peacekeeping Battalion (RPKB) located in different areas in South Ossetia at the moment when the Russian peacekeepers were implementing the mandate of the joint peacekeeping mission. Ten peacekeepers belonging to the RPKB were killed while 30 of them were wounded as a result of the alleged attack.
143. Georgia claimed that the Georgian Central Front forces reacted in response to heavy shelling and sniper fire that originated from the outskirts of the RPKB compound. Georgia also alleged that Russian peacekeepers directly participated in hostilities prior to the alleged attack and in that way became legitimate military targets.
144. The information available on the alleged attack remains inconclusive.

#### *Admissibility Assessment*

145. According to the information available at this stage, both Georgia and Russia are still conducting national investigations into the crimes allegedly committed during the armed conflict of August 2008.
146. *National proceedings in Georgia*: The Office of the Chief Prosecutor of Georgia (OCP) is the principal national authority responsible for conducting the investigation into alleged crimes committed in the context of the August 2008 armed conflict. The investigation was officially opened immediately after the end of active hostilities in August 2008 with more than 100 investigators deployed under the supervision of the Chief Prosecutor of Georgia. The authorities have been investigating the alleged forcible transfer of ethnic Georgians from South Ossetia as well as allegations against members of Georgian armed forces, in particular with respect to the alleged attack on Russian peacekeepers.
147. The Georgian investigation has however been hampered by several obstacles, including the lack of access to South Ossetia and lack of mutual legal assistance with Russia. In addition, the work of investigative bodies was halted by three successive changes in the OCP leadership in 2013. In the course of 2014, the Georgian authorities informed the Office that investigative activities had been focused on overcoming the said obstacles with a view to taking concrete and identifiable steps that would lead to possible prosecutions.

148. *National proceedings in Russia*: The national investigation of alleged crimes related to the August 2008 armed conflict in the Russian Federation is carried out by the Investigative Committee of the Russian Federation. The investigation has been focused on the alleged attacks against Russian civilians and peacekeepers by Georgian armed forces and the verification of allegations against Russian servicemen. Alleged crimes attributed to South Ossetian forces fall outside of the scope of this investigation. In the course of its work, the investigative committee claims to have collected a vast amount of evidentiary material, including witness statements, photo and video material, forensic evidence, expert reports, etc.
149. During the Office's mission to Moscow on 22-24 January 2014, the Russian authorities informed the Office that the lack of cooperation from Georgia and the issues related to the immunity of foreign officials no longer constituted obstacles to the progress of their investigation.

### *OTP Activities*

150. As was the case during previous reporting periods, the Office continued to assess relevant national proceedings in Georgia and Russia.
151. On 22-24 January 2014, the Office paid its third visit to Moscow in the context of the Office's admissibility assessment. The Office held consultations with the Russian Ministry of Justice, the Ministry of Foreign Affairs, the Ministry of Defence and in particular with members of the Investigative Committee of the Russian Federation. As a result, the Office was provided with an update on investigative steps that relevant Russian authorities have taken since June 2012.
152. The Office also conducted its fifth mission to Georgia on 29 April-1 May 2014, in order to receive updated information on ongoing national proceedings from the Office of the Chief Prosecutor. On 6 June 2014, the Office sent a letter to the Georgian authorities requesting information on concrete, tangible and pertinent evidence that would demonstrate that genuine national investigations or prosecutions are ongoing against those who appear to bear the greatest responsibility for the most serious crimes arising from the armed conflict of August 2008. The Office of the Chief Prosecutor provided some of the information requested in the form of a progress report submitted to the Office on 6 November 2014.
153. In the process of seeking additional information related to both the alleged crimes and the relevant national proceedings, the Office received support and continuous cooperation from other relevant stakeholders, including civil society organizations, the Parliamentary Assembly of the Council of Europe, and the European Court of Human Rights.

### *Conclusion and Next Steps*

154. While national investigations for the alleged crimes described above remain ongoing in both Georgia and Russia, both sets of investigations have suffered from significant delays, as documented in this report and in previous annual reports from the Office. Progress in these investigations appears limited, and more than six years after the end of the armed conflict, no alleged perpetrator has been prosecuted, nor has there been any decision not to prosecute the persons concerned as a result of these investigations. The Office will therefore analyse the updated information received on national proceedings in order to reach a decision in the near future on whether to seek authorization from the Pre-Trial Chamber to open an investigation of the situation in Georgia pursuant to article 15(3) of the Statute.

## GUINEA

### *Procedural History*

155. The Office has received 32 communications pursuant to article 15 in relation to the situation in Guinea. The preliminary examination of the situation in Guinea was made public on 14 October 2009.

### *Preliminary Jurisdictional Issues*

156. Guinea ratified the Rome Statute on 14 July 2003. The ICC therefore has jurisdiction over Rome Statute crimes committed on the territory of Guinea or by its nationals from 1 October 2003 onwards.

### *Contextual Background*

157. In December 2008, after the death of President Lansana Conté, who had ruled Guinea since 1984, Captain Moussa Dadis Camara led a group of army officers who seized power in a military coup. Dadis Camara became the Head of State, established a military junta, the *Conseil national pour la démocratie et le développement* (CNDD), and promised that the CNDD would hand over power to a civilian president upon the holding of presidential and parliamentary elections. However, subsequent statements that appeared to suggest that Dadis Camara might run for president led to protests by 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*

158. In October 2009, the United Nations established an international Commission of Inquiry (“UN Commission”) to, *inter alia*, investigate the alleged gross human rights violations that took place on 28 September 2009 and, where possible, identify those responsible. In its report of 13 January 2010, the 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 Commission considered that there was a strong presumption that crimes against humanity were committed and determined, where it could, possible individual responsibilities.
159. 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.

160. The 28 September 2009 events in the Conakry stadium can be characterised as a widespread and systematic attack directed against a civilian population, namely the demonstrators present at the stadium, in furtherance of the CNDD's policy to prevent political opponents from, and punish them for, challenging Dadis' intention to keep his group and himself in power.<sup>30</sup>
161. The Office has concluded that the information available provides a reasonable basis to believe that the following crimes against humanity were committed in the national stadium in Conakry on 28 September 2009 and in their immediate aftermath: murder under article 7(1)(a); imprisonment or other severe deprivation of liberty under article 7(1)(e); torture under article 7(1)(f); rape and other forms of sexual violence under article 7(1)(g); persecution under article 7(1)(h); and enforced disappearance of persons under article 7(1)(i).

### *Admissibility Assessment*

162. Since 8 February 2010, a panel of Guinean investigative judges ("Panel of Judges"), appointed by the Guinean General Prosecutor, has been conducting a national investigation into the 28 September 2009 events. Accordingly, the Office has focused its admissibility assessment on whether the national authorities are unwilling or unable genuinely to carry out the proceedings, including within a reasonable delay.
163. During the reporting period, the national investigation has been hampered by several factors, including security concerns for the judges and for the victims and administrative hurdles causing delays in the transmission of national and international requests for judicial assistance. The Panel of Judges has, however, benefitted from advice and logistical support from the judicial expert assigned by the Team of Experts on the Rule of Law and Sexual Violence in Conflict ("UN Judicial Expert"), as well as from the political support of the newly-appointed Minister of Justice.
164. At the time of writing, the national investigation remains at the investigation stage; however, the Panel of Judges has taken an important number of investigative steps, such as interviewing victims (over 450 victims have been heard since the commencement of the investigation, including approximately 200 victims of sexual violence and over 80 witnesses of enforced disappearance); seeking to locate alleged mass graves; summoning high-level government

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<sup>30</sup> As Chambers of the Court have found, "an attack in a small geographical area, but directed against a large number of civilians" may meet the requirement of a widespread attack. Situation in the Democratic Republic of the Congo, *the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Decision on the confirmation of charges", para. 395; Situation in the Central African Republic, *the Prosecutor v. Jean-Pierre Bemba Gombo*, "Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", para. 83.

officials and high-ranking military officers for interview; and conducting proceedings relating to individuals residing abroad.

### *OTP Activities*

165. In February 2014, the Office conducted its ninth mission to Guinea to follow-up on the investigative steps undertaken by the national authorities; identify any gap or shortfall; and to assess the prospects for a domestic trial in the near future. During the mission, the Office held extensive consultations with the Panel of investigative judges in charge of the case, the Guinean judicial and political authorities, victims' representatives, as well as relevant international actors. The Office has also maintained contact with international NGOs monitoring or assisting the victims in the proceeding, including the *Fédération internationale des ligues des droits de l'Homme* (FIDH) and Human Rights Watch.
166. During the Global Summit to End Sexual Violence in Conflict, organized by the Preventing Sexual Violence Initiative, held in London in June 2014, the Office met with the Panel of Judges and the UN Judicial Expert to follow up on concrete investigative steps taken in relation to the national investigation. The Office also discussed potential areas for technical assistance, including medical and forensic expertise and investigation and prosecution of sexual and gender-based crimes.
167. On 26 September 2014, ICC Prosecutor Fatou Bensouda issued a statement, on the occasion of the fifth anniversary of the 28 September 2009 events, encouraging the Guinean authorities to continue their efforts to ensure that justice is done for the victims as swiftly as possible and to pay particular attention to the commission of sexual and gender-based crimes.
168. In October 2014, the Office held a series of meetings with the UN Judicial Expert supporting the Panel of Judges, in The Hague, to follow up in detail on the progress of the investigation and discuss issues relating to sexual crimes and the protection of victims and witnesses.
169. Lastly, over the reporting period, the Prosecutor held meetings at the seat of the Court with Guinean officials interested in the case, including the former Interim President, General Sékouba Konaté.

### *Conclusion and Next Steps*

170. The national investigation into the events of 28 September 2009 is underway and although the case remains at the investigation stage, significant steps have been taken by Guinean judicial authorities, including over the reporting period. Several persons who may be amongst those most responsible for the crimes committed have been charged and hundreds of victims have been heard. The Office will continue to encourage the Guinean authorities to pursue their efforts and to pay particular attention to the commission of sexual and gender-based

crimes. Considering the aspirations and anxiety of the victims five years after the facts, the Office expects that the investigation will soon be terminated and those responsible for the crimes committed on 28 September 2009 will be brought to account without further delay.

## NIGERIA

### *Procedural History*

171. The Office has received 73 communications pursuant to article 15 in relation to the situation in Nigeria. The preliminary examination of the situation in Nigeria was made public on 18 November 2010.
172. On 5 August 2013, the Office published the Article 5 report on the Situation in Nigeria, presenting its preliminary findings on jurisdictional issues.<sup>31</sup>

### *Preliminary Jurisdictional Issues*

173. Nigeria deposited its instrument of ratification to the Rome Statute on 27 September 2001. The ICC therefore has jurisdiction over Rome Statute crimes committed on the territory of Nigeria or by its nationals from 1 July 2002 onwards.

### *Contextual Background*

174. During the course of its preliminary examination, the Office has analysed information relating to a wide and disparate series of allegations against different groups and forces at different times throughout the various regions of the country. This includes inter-communal, political and sectarian violence in central and northern parts of Nigeria as well as violence among ethnically-based gangs and militias and/or between such groups and the national armed forces in the Niger Delta. During the reporting period the Office has focused on alleged crimes arising from the activities of Boko Haram, a militant Islamist group that operates mainly in north-eastern Nigeria and the counter-insurgency operations by the Nigerian security forces against Boko Haram.
175. Hostilities between security forces and Boko Haram have increased in the period under review. Upon request of President Jonathan, the Nigerian Senate twice prolonged the state of emergency in Borno, Yobe and Adamawa States, each time for six months. The state of emergency enables the Federal Government to deploy security forces in military operations against Boko Haram in these States.

### *Subject-Matter Jurisdiction*

176. In its article 5 report on the situation in Nigeria, published on 5 August 2013, the Office concluded that there is a reasonable basis to believe that, since July 2009, Boko Haram has committed the crimes of (i) murder constituting a crime against humanity under article 7(1)(a) of the Statute, and (ii)

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

persecution constituting a crime against humanity under article 7(1)(h) of the Statute.<sup>32</sup>

177. Since the Office's last activity report, Boko Haram has intensified its attacks on civilians in Nigeria. According to Human Rights Watch, the group killed more than 2,000 civilians in an estimated 95 attacks during the first six months of 2014.<sup>33</sup> Most of the attacks took place in northern Nigeria, in particular in Borno, Yobe and Adamawa States. The bombings of a business area in Jos, Plateau State on 20 May 2014, for which Boko Haram claimed responsibility, reportedly killed at least 118 persons and wounded 45 others. Boko Haram leader Abubakar Shekau has also claimed responsibility for bomb attacks in the capital of Abuja on 14 April 2014 (killing at least 75 persons and injuring over 100 others), on 1 May 2014 (killing at least 19 persons and injuring approximately 60 others) and on 25 June 2014 (killing at least 21 persons and injuring approximately 21 others). Attacks were also carried out in other regions of Nigeria. The abduction by the group of over 200 girls from a government primary school in Chibok, Borno State on 14-15 April 2014 has drawn unprecedented international attention to the Boko Haram insurgency.
178. In its 2013 Report on Preliminary Examination Activities, the Office further determined that since at least May 2013, the situation in Nigeria relating to the activities of Boko Haram and the counter-insurgency response by the Nigerian authorities constitutes a non-international armed conflict; allegations of crimes occurring in this context should therefore be considered within the scope of articles 8(2)(c) and (e) of the Statute.
179. In the period under review the Office has thus conducted an assessment of subject-matter jurisdiction with respect to alleged war crimes committed by all parties to the conflict. Acts of murder allegedly committed by Boko Haram constituting crimes against humanity may also qualify as war crimes if committed in the context of the armed conflict. This includes for example the above mentioned killing of civilians during the May 2014 bombings in Jos as well as the bombings in Abuja in April, May and June 2014.
180. During the reporting period, the Office continued to receive and analyse reports about alleged crimes committed by Nigerian security forces in the context of the armed conflict. This includes reports of the alleged summary executions of more than 600 people in Maiduguri, Borno State, following an attack by Boko Haram on the main military barracks in the city on 14 March 2014.<sup>34</sup>

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<sup>32</sup> ICC-OTP, [Situation in Nigeria: Article 5 Report](#), 5 August 2013.

<sup>33</sup> HRW, [Nigeria: Boko Haram kills 2,053 Civilian in 6 Months](#), 15 July 2014.

<sup>34</sup> Amnesty International, [Nigeria: More than 1,500 killed in armed conflict in North-Eastern Nigeria in early 2014](#), 31 March 2014; Amnesty International, [Nigeria: Gruesome footage implicates military in war crimes](#), 5 August 2014.

181. The Office is also analysing information alleging acts of torture inflicted by security forces on suspected Boko Haram members or supporters in the context of the armed conflict.

### *Admissibility Assessment*

182. Nigerian authorities have been conducting proceedings against members of Boko Haram for conduct which could constitute crimes under the Rome Statute. In response to the Office's requests for information, the Nigerian authorities have twice provided information on national proceedings in the reporting period, which the Office analysed as part of its admissibility assessment. This includes the submission of copies of 20 judgments issued by the Federal High Court of Nigeria against a total of 83 defendants and one judgment by the Court of Appeal of Nigeria against 13 defendants. The decisions were issued between December 2010 and October 2013.
183. There remains however a discrepancy between information available on a high number of more recently arrested persons associated with Boko Haram and information available on legal proceedings against Boko Haram suspects within the reporting period. It remains to be seen whether the implementation of new legislation providing Nigerian Courts further tools to prosecute crimes that could fall under the ICC's jurisdiction, such as the Terrorism (Prevention) (Amendment) Act 2013, will remedy this situation.
184. The Office is analyzing whether the proceedings being conducted by the Nigerian authorities are substantially the same as those that would likely arise from an investigation into the situation by the Office. In line with its prosecutorial strategy, the Office's assessment seeks to establish whether those most responsible for the most serious crimes are being brought to justice. The Office is expecting further information from the Nigerian authorities on national proceedings including, but not limited to, those most responsible for alleged crimes by Boko Haram.

### *OTP Activities*

185. During the reporting period, the Office has been in contact with Nigerian authorities, international NGOs, and diplomatic actors on issues regarding all aspects of the preliminary examination.
186. On 23-25 February 2014, the Prosecutor responded to the invitation extended by the Attorney General of the Federation and Minister of Justice, Mohammed Bello Adoke to speak at the *International Seminar on the Imperatives of the Observance of Human Rights and International Humanitarian Law Norms in Internal Security Operations*, held in Abuja. The seminar took place following the Office's determination regarding the existence of a non-international armed conflict in Nigeria. During her visit to Nigeria, the Prosecutor also met with Nigerian President Johnathan. President Jonathan,

as well as other civilian and military leaders, stressed that either Nigerian judicial authorities or the ICC would investigate and prosecute alleged violations of international humanitarian law committed in the course of internal security operations.

187. On 8 May 2014, the Prosecutor publicly condemned the abduction of over 200 school girls in Borno State, reminding that such acts, which shock the conscience of humanity, could constitute crimes that fall within the jurisdiction of the ICC and that those responsible should be brought to justice either in Nigeria or at the ICC.<sup>35</sup>

### *Conclusion and Next Steps*

188. In the period under review, the Office has received additional information from the Nigerian authorities relevant to the admissibility assessment. However, information gaps remain with respect to national proceedings, in particular regarding the high discrepancy between the reported number of arrests of persons associated with Boko Haram and information on relevant legal proceedings. The Office will request further information on and continue to analyze the relevance and genuineness of national proceedings by the competent national authorities.
189. In addition, the Office will continue its analysis of alleged war crimes committed by Boko Haram and by the Nigerian security forces in the context of the armed conflict in Nigeria, in order to refine its identification of potential cases for purposes of the Office's admissibility assessment.

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<sup>35</sup> ICC-OTP, [Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the abduction of schoolgirls in Nigeria](#), 8 May 2014.

## IV. COMPLETED PRELIMINARY EXAMINATIONS

### CENTRAL AFRICAN REPUBLIC

#### *Procedural History*

190. The Office has been analysing the recent situation in the Central African Republic (CAR) since the end of 2012.
191. On 30 May 2014, the transitional government of the CAR referred to the Prosecutor pursuant to article 14 of the Statute “*la situation qui prévaut sur le territoire de la République Centrafricaine depuis le 1er août 2012*” (“the situation on the territory of the Central African Republic since 1 August 2012”).<sup>36</sup>
192. On 18 June 2014, the Presidency assigned the Situation in the Central African Republic II to Pre-Trial Chamber II.<sup>37</sup>
193. On 24 September 2014, the Office published its Article 53(1) Report concluding its preliminary examination of the situation in the Central African Republic II.<sup>38</sup> The same day, the Prosecutor announced the opening of a new investigation in the CAR.<sup>39</sup>
194. In the reporting period, the Office received seven communications pursuant to article 15 in relation to the situation in the Central African Republic II.

#### *Preliminary Jurisdictional Issues*

195. The CAR deposited its instrument of ratification on 3 October 2001. The ICC therefore has jurisdiction over Rome Statute crimes committed on the territory of the CAR or by its nationals since 1 July 2002.
196. On 30 May 2014, the CAR authorities referred the situation in the CAR to the ICC with respect to alleged crimes committed “since 1 August 2012” with no end date. The Office may therefore investigate on the basis of the referral any alleged crimes within the jurisdiction of the Court committed in the context of the situation in the CAR since 1 August 2012.<sup>40</sup> The CAR authorities furthermore referred the situation with no limitations on the

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<sup>36</sup> See referral of the Central African Republic, [annexed](#) to the [Decision](#) Assigning the Situation in the Central African Republic II to Pre-Trial Chamber II, ICC-01/14-1-Anx1, 18 June 2014. See also ICC OTP, [Statement by the ICC Prosecutor, Fatou Bensouda, on the referral of the situation since 1 August 2012 in the Central African Republic](#), 12 June 2014.

<sup>37</sup> [Decision](#) Assigning the Situation in the Central African Republic II to Pre-Trial Chamber II, ICC-01/14-1, 18 June 2014.

<sup>38</sup> ICC OTP, [Situation in the Central African Republic II: Article 53\(1\) Report](#), 24 September 2014.

<sup>39</sup> ICC OTP, [Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a second investigation in the Central African Republic](#), 24 September 2014.

scope of the territorial jurisdiction of the Court.<sup>41</sup> The Court may therefore exercise jurisdiction with respect to any crimes committed anywhere on the territory of the CAR in the context of this situation if warranted. It may also exercise its jurisdiction if the person accused of the crime committed in the context of this situation is a national of a State Party or a State accepting jurisdiction of the Court under article 12(3).

### *Contextual Background*

197. The Central African Republic is a landlocked country in central Africa sharing borders with Chad, Sudan, South Sudan, the Democratic Republic of the Congo, the Republic of Congo and Cameroon. It is one of the poorest countries in the world. Prior to the conflict, 15% of the population (estimated at 5,277,959) was reportedly Muslim, 25% Roman Catholic, 25% Protestant and 35% followers of indigenous beliefs.
198. Political instability and armed conflict have plagued the country since 2001. President François BOZIZÉ, who ousted President PATASSÉ from power in 2003, dominated the political landscape for several years. In August 2012, the armed, organized rebel movement Séléka (meaning “alliance” in Sango) emerged as a coalition of militant political and armed groups representing Muslims in the north-east and other groups dissatisfied with President BOZIZÉ, including some of his former close associates. A number of Sudanese and Chadian nationals also joined Séléka.
199. Séléka launched a major military offensive on 10 December 2012. Facing little resistance from the Central African Armed Forces (“FACA”), the group advanced quickly until they were stopped close to Bangui by forces from Chad and from the Mission for the Consolidation of Peace in the CAR (“MICOPAX”) of the Economic Community of Central African States (“ECCAS”). ECCAS-facilitated negotiations resulting in the Libreville Agreements of 11 January 2013 prevented an imminent coup but ultimately failed to bring lasting peace. Séléka resumed its offensive, took Bangui and, on 24 March 2013, seized power. President BOZIZÉ was forced into exile and Séléka leader Michel DJOTODIA was appointed as President.
200. Following the *coup d’état*, Séléka forces continued to expand their control over CAR territory and sought to suppress resistance, in particular in regions associated with former President BOZIZÉ and his (Gbaya) ethnic group. Civilians in those regions were reportedly frequently subjected to attacks by Séléka fighters, involving mass looting, destruction of property, killings, wounding and sexual violence. In the face of criticism over the conduct of the group, President DJOTODIA declared in September 2013 the dissolution of Séléka, while several thousand “former Séléka” members were integrated into the FACA by decree. However, Séléka continued to

exist *de facto* and allegedly continued to commit crimes, particularly as “anti-balaka” groups started to generate armed resistance to Séléka’s rule.

201. Anti-balaka began to engage Séléka forces militarily from June 2013 but became more organized over the following weeks and months, apparently with the integration of numerous former FACA members.
202. As the conflict between Séléka and anti-balaka escalated, the violence also became more sectarian. Anti-balaka attacks allegedly targeted Muslim civilians, associating them with Séléka on the basis of their religion, while Séléka targeted non-Muslims in return, in particular those of the Gbaya ethnic group or those associated with former President BOZIZÉ.
203. The majority of the (minority) Muslim population of Bangui fled, either towards neighbouring countries or perceived safe areas such as Bangui airport, mosques, and the bases of international forces. Some non-Muslims also sought safety in displacement sites. Similar attacks and counter-attacks by both armed groups spread throughout the country. Séléka forces largely retreated from Bangui towards the east of the country, leaving Muslim civilians in Bangui and western CAR vulnerable to anti-balaka attacks which included rapes, killings, and the mutilation of victims’ bodies. The country broadly became divided in two, with some on the Séléka side reportedly calling for a permanent partition. Anti-Muslim hate speech by some anti-balaka elements was reported, with some describing anti-balaka attacks against Muslim civilians as “cleansing” operations.

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

204. The information available provides a reasonable basis to believe that Séléka has committed the following war crimes (at the latest from December 2012 onwards) and crimes against humanity (at the latest from February 2013 onwards): murder as a war crime under article 8(2)(c)(i) and as a crime against humanity under article 7(1)(a); mutilation, cruel treatment and torture as war crimes under article 8(2)(c)(i) and torture and/or other inhumane acts as crimes against humanity under articles 7(1)(f) and (k); intentionally directing attacks against the civilian population as such under article 8(2)(e)(i); attacking personnel or objects involved in a humanitarian assistance mission under article 8(2)(e)(iii); intentionally directing attacks against protected objects under article 8(2)(e)(iv); pillaging under article 8(2)(e)(v); rape as a war crime under article 8(2)(e)(vi) and as a crime against humanity under article 7(1)(g); conscripting or enlisting children under the age of fifteen years into armed groups or using them to participate actively in hostilities under article 8(2)(e)(vii); and persecution in connection with the above-mentioned alleged crimes of murder, rape, torture and/or other inhumane acts under article 7(1)(h).

205. The information available also provides a reasonable basis to believe that anti-balaka have committed the following war crimes (at the latest from June 2013 onwards) and crimes against humanity (at the latest from September 2013 onwards): murder as a war crime under article 8(2)(c)(i) and as a crime against humanity under article 7(1)(a); committing outrages upon personal dignity under article 8(2)(c)(ii); intentionally directing attacks against the civilian population as such under article 8(2)(e)(i); attacking personnel or objects involved in a humanitarian assistance mission under article 8(2)(e)(iii); intentionally directing attacks against protected objects under article 8(2)(e)(iv); pillaging under article 8(2)(e)(v); rape as a war crime under article 8(2)(e)(vi) and as a crime against humanity under article 7(1)(g); conscripting or enlisting children under the age of fifteen years into armed groups or using them to participate actively in hostilities under article 8(2)(e)(vii); deportation or forcible transfer of population under article 7(1)(d); and persecution in connection with the above-mentioned alleged crimes of murder, rape and deportation or forcible transfer of population under article 7(1)(h).
206. While there is some information about alleged crimes committed by members of the FACA, in particular the Presidential Guard of former President BOZIZÉ, between at least 1 January and 23 March 2013, there is insufficient information at this stage to reach a determination on whether such alleged crimes constitute war crimes under article 8 of the Statute.

### *Admissibility Assessment*

207. *Complementarity*: To date, a limited number of proceedings have been launched in the CAR in relation to crimes within the jurisdiction of the ICC. Some of these proceedings relate to groups of persons and conduct which could potentially be the subject of investigations by the Office. Existing proceedings remain, however, at the preliminary stage and the Office understands that the prosecutors and police generally lack the capacity and security to conduct investigations and apprehend and detain suspects.
208. Furthermore, the referral from the CAR authorities indicated that the national judicial system is not able to conduct the necessary investigations and prosecutions successfully.<sup>42</sup>
209. The information currently available indicates that no other State with jurisdiction is conducting or has conducted national proceedings in relation to crimes allegedly committed in the context of the Situation in the CAR II.

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<sup>42</sup> "Les juridictions centrafricaines [...] ne sont pas en mesure de mener à bien les enquêtes et les poursuites nécessaires sur ces crimes". See referral of the Central African Republic, [annexed](#) to the [Decision](#) Assigning the Situation in the Central African Republic II to Pre-Trial Chamber II, ICC-01/14-1-Anx1, 18 June 2014.

210. *Gravity*: On the basis of the information available, the allegations identified in the Article 53(1) report indicate that potential cases identified for investigation by the Office would be of sufficient gravity to justify further action by the Court, based on an assessment of the scale, nature, manner of commission and impact of the alleged crimes.
211. Accordingly, the potential cases that would likely arise from an investigation of the situation would be admissible pursuant to article 53(1)(b).

### *Interests of Justice*

212. Based on the available information, there are no substantial reasons to believe that an investigation into the Situation in the CAR II would not serve the interests of justice.

### *OTP Activities*

213. On 9 December 2013, the Prosecutor expressed her concerns over the unfolding events in the CAR, in particular over reports of serious ongoing crimes. The Prosecutor called upon all parties involved in the conflict (including Séléka elements and other militia groups, such as anti-balaka) to stop attacking civilians and committing crimes or to risk being investigated and prosecuted by the Office.<sup>43</sup>
214. On 7 February 2014, the Prosecutor announced that the incidents and serious allegations of crimes potentially falling within the jurisdiction of the ICC constituted a new situation unrelated to the situation previously referred to the ICC by the CAR authorities in December 2004. The Prosecutor therefore decided to open a preliminary examination into this new situation.<sup>44</sup>
215. From 6-13 May 2014, the Office conducted a mission to Bangui to verify the seriousness of the information received and collected by the Office on alleged crimes committed in the CAR since 2012 and to gather additional information as necessary for the purpose of the preliminary examination. During the mission, the Office established contacts with the new transitional authorities and national and international partners.

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<sup>43</sup> ICC-OTP, [Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, in relation to the escalating violence in the Central African Republic](#), 9 December 2013.

<sup>44</sup> ICC-OTP, [Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a new Preliminary Examination in the Central African Republic](#), 7 February 2014.

## *Conclusion*

216. On 24 September 2014, the Office published its Article 53(1) report, concluding that there is a reasonable basis to proceed with an investigation into the Situation in the Central African Republic II,<sup>45</sup> and announced the opening a new investigation in the Central African Republic.<sup>46</sup>
217. The Office will now undertake parallel investigations to directly collect criminal evidence with a view to identifying and prosecuting those responsible for the most serious crimes on both sides of the conflict. As the investigation moves forward, the Office will continue to record any new crime committed in situation of the CAR and that might fall under the Court's jurisdiction.

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<sup>45</sup> ICC OTP, [Situation in the Central African Republic II: Article 53\(1\) Report](#), 24 September 2014.

<sup>46</sup> ICC OTP, [Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a second investigation in the Central African Republic](#), 24 September 2014.

## REPUBLIC OF KOREA

### *Procedural History*

218. On 6 December 2010, the Office of the Prosecutor announced that it had opened a preliminary examination to evaluate whether two incidents that occurred in 2010 in the Yellow Sea, namely the sinking of a South Korean warship, the *Cheonan*, on 26 March 2010 and the shelling of South Korea's Yeonpyeong Island on 23 November 2010, could amount to war crimes under the jurisdiction of the Court.
219. On 23 June 2014, the Prosecutor concluded that the Statute requirements to seek authorization to initiate an investigation of the situation in the Republic of Korea have not been satisfied, based on a thorough legal and factual analysis of the information available.<sup>47</sup> A detailed report has been issued by the Prosecutor presenting the Office's findings with respect to jurisdictional matters.<sup>48</sup>
220. In accordance with article 15, the Office sought and obtained additional information on the two incidents from multiple sources. The Government of the Republic of Korea ("ROK" or "South Korea") provided information to the Office on multiple occasions in response to the OTP's requests for information of 7 January 2011 and 13 July 2011. The Government of the Democratic People's Republic of Korea ("DPRK" or "North Korea") has not responded to or acknowledged the request for information of 25 April 2012 sent by OTP. The Prosecutor expresses her appreciation for the full cooperation her office received from the Government of the ROK.

### *Preliminary Jurisdictional Issues*

221. The Republic of Korea is a State Party to the Rome Statute since 13 November 2002. The Court may therefore exercise jurisdiction over conduct occurring on the territory of ROK or on vessels and aircraft registered in the ROK on or after 1 February 2003. The attack on Yeonpyeong Island was launched from the Democratic People's Republic of Korea and it is therefore likely that the perpetrators were DPRK nationals. The DPRK is not a state party. However, because the territorial requirement has been met, the Court may exercise its jurisdiction over the perpetrators. The same applies to the nationals of any non-State Party involved in the alleged attack against the *Cheonan*.

### *Contextual Background*

222. Since the armistice agreement was signed at the end of the Korean War (1953), both South and North Korea have acknowledged and respected the Northern

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<sup>47</sup> ICC-OTP, [Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the conclusion of the preliminary examination of the situation in the Republic of Korea](#), 23 June 2014.

<sup>48</sup> ICC-OTP, [Situation in the Republic of Korea: Article 5 Report](#), June 2014.

Limit Line as a practical maritime demarcation in the Yellow Sea (West Sea) and reconfirmed its validity as the maritime demarcation in the Basic Agreement between South and North Korea in 1991 and its Protocol on Non-Aggression in 1992. However, in 1999 North Korea proclaimed the so-called “Chosun Sea Military Declaration Line,” unilaterally modifying the previously agreed Northern Limit Line.

223. The shelling of Yeonpyeong Island occurred after military exercises with prior notification by the ROK Marine Corps stationed on the island, including an artillery firing exercise. Such exercises have been conducted annually since 1974. The shelling by the DPRK on 23 November 2010 came in two waves, the first between 14h33 and 14h46, and the second between 15h11 and 15h29. It resulted in the killing of four people (two civilians and two military), the injuring of sixty-six people (fifty civilians and sixteen military) and the destruction of military and civilian facilities on a large scale, estimated to cost \$4.3 million. In addition to the military base in the southwestern part of the island and other marine positions, several civilian installations were hit, including the History Museum, locations close to Yeonpyeong Police Station and the Maritime Police Guard Post, the township office, a hotel, a health center and other civilian structures in the town of Saemaoul. As to the total number of artillery shells and rockets fired by the DPRK, the report of the U.N. Command<sup>49</sup> states that a total of 170 rounds were fired, of which 90 landed in the water surrounding Yeonpyeong Island. The ROK Government indicated that 230 rounds were fired, of which 50 landed in the surrounding waters. The DPRK publicly acknowledged responsibility for the shelling.
224. In contrast, the DPRK denied responsibility for the sinking of the *Cheonan*, a Patrol Combat Corvette of the ROK Navy’s Second Fleet. At 21h22 on 26 March 2010, the *Cheonan* was hit by an explosion, broke in half and sank, resulting in the deaths of 46 ROK Navy sailors. A Joint Investigation Group led by the ROK with participation from the US, UK, Australia, Canada and Sweden concluded that an underwater explosion from a torpedo manufactured by North Korea caused the sinking. Furthermore, the Multinational Combined Intelligence Task Force (MCITF), composed of South Korea, the US, Australia, Canada and the UK found that the torpedo was launched from a North Korean submarine. The U.N. Command Military Armistice Commission also established a Special Investigation Team that reached the same conclusion and found that the evidence was “so overwhelming as to meet the ... standard of beyond reasonable doubt.”<sup>50</sup>

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<sup>49</sup> Special investigation into the Korean People’s Army attack on Yeonpyeong-Do and the Republic of Korea Marine Corps response on 23 November 2010, U.N. Doc. S/2010/648, 19 December 2010.

<sup>50</sup> Letter dated 23 July 2010 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2010/398, p.7.

### *Subject-Matter Jurisdiction*

225. Contextual Elements: The fundamental contextual element needed to establish the commission of a war crime is the existence of an armed conflict. There are two possible bases for the existence of an international armed conflict between the ROK and the DPRK. The first is that the two countries are technically still at war; the Armistice Agreement of 1953 is merely a ceasefire agreement and the parties are yet to negotiate the peace agreement expected to formally conclude the 1950-53 conflict. The second is that the 'resort to armed force between States' in the form of the alleged launching of a torpedo into the *Cheonan* or the launching of shells into Yeonpyeong, created an international armed conflict under customary international law.
226. The classic position adopted by many authorities, including the ICRC, is that no element of scale is necessary to the application of the definition of international armed conflict so long as there is a resort to armed force between states. According to this position, the contextual requirement of the existence of an international armed conflict is met in the present situation, as the alleged launching of a torpedo into the *Cheonan* and the launching of artillery shells into Yeonpyeong created an international armed conflict.
227. Whether the technical state of war between the DPRK and ROK is sufficient to establish an international armed conflict would impact upon an assessment of whether the alleged acts by the DPRK constitute acts of aggression and breaches of Article 2(4) of the UN Charter. However, as resort to armed force creates an international armed conflict, for the present purposes, it is unnecessary to determine this issue. Because the fundamental contextual element to establish the commission of a war crime appears to be met, the OTP further examined the two incidents in question.
228. The incidents in question were analyzed only from the perspective of the *jus in bello* (law in war; international humanitarian law), and not for their conformity with the *jus ad bellum* (law on the use of force), as the ICC does not have jurisdiction over the crime of aggression until 2017 at the earliest.
229. Underlying acts – sinking of the *Cheonan*: The *Cheonan* was a naval vessel and all those on board who drowned in the sinking were military personnel. In general, it is not a war crime to attack military objectives including naval ships or to kill enemy military personnel including sailors on a naval ship. If this incident was a result of a military attack, it was not a violation of any of the provisions in Article 8 of the Rome Statute.
230. However, if it could be found that the sinking of the *Cheonan* itself precipitated a state of international armed conflict between the parties, which were until that point governed by the Armistice Agreement, then, and to the extent that the sinking may be attributed to the DPRK, the war crime of killing or wounding treacherously (article 8(2)(b)(xi)) may require further examination. Specifically, if

ROK forces were invited to believe that they were entitled to the protections of the Armistice Agreement, and the DPRK intentionally betrayed the ROK's confidence that the Armistice was still in effect, then the question arises as to whether the attack might be considered as "killing or wounding treacherously."

231. The conclusion of an agreement to suspend combat with the intention of attacking by surprise the adversary relying on it is, in itself, considered a violation of customary international humanitarian law and has been set forth in numerous military manuals. However, this prohibition is not listed as such as a war crime in the Rome Statute and customary law is unclear on whether this violation can be considered as a form of perfidy, generally understood to include several categories of conduct in which a combatant feigns protected status, such as "simulating surrender or an intent to negotiate under the white flag".<sup>51</sup> More importantly, in the case at hand, it would need to be shown that the DPRK entered into an armistice agreement in 1953 with the specific intent to conduct surprise attacks, such as the alleged attack on the *Cheonan* of 2010.
232. Therefore, based on the current internationally accepted definition of the war crime of killing or wounding treacherously under article 8(2)(b)(xi) and the specific circumstances of the incident in question, the OTP is unable to conclude that the alleged attack on the *Cheonan* would meet the definition of this war crime.
233. Underlying acts – shelling of Yeonpyeong Island: The shells fired onto Yeonpyeong hit both military and civilian objects. The targeting of the military base, the killing of two ROK Marines and the wounding of a number of ROK Marines do not constitute war crimes, as such objects and persons are legitimate military targets. However, with respect to the civilian impact, it is necessary to inquire whether there was intentional targeting (articles 8(2)(b)(i) or (ii)) or excessive incidental death, injury or damage (article 8(2)(b)(iv)).
234. Although the attack resulted in injury to civilians and damage to civilian objects, it is not clear that they were the objects of the attack. There are other possible explanations for the striking of civilian objects other than intentional targeting. The fact that military objectives, including the military base on the southwestern part of Yeonpyeong island, were attacked eliminates any reasonable basis to believe that civilians or civilian objects were the *sole* object of the attack.
235. Furthermore, the DPRK had apparent targeting difficulties. According to most sources, including the U.N. Command's report on the incident, of the 170 rounds fired only 80 rounds landed on the island and approximately 90 rounds landed in waters surrounding the island.<sup>52</sup> Approximately 40-50 shells, the majority of those that landed on the island, directly hit military targets. A significant

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<sup>51</sup> International Committee of the Red Cross, [Customary IHL Database, Rule 65](#) "Perfidy."

<sup>52</sup> Special investigation into the Korean People's Army attack on Yeonpyeong-Do and the Republic of Korea Marine Corps response on 23 November 2010 (U.N. Doc. S/2010/648; 19 December 2010), pp.6-7.

number landed in the area immediately surrounding those targets. According to information provided by the ROK Government, 230 rounds were fired, of which approximately 180 rounds landed on the island and 50 in the surrounding waters. Out of 180 rounds, approximately 150 landed in and around 8 different military areas in various locations on the island and 30 on the civilian area immediately surrounding.

236. On balance, the available information does not provide a reasonable basis to believe that the DPRK intentionally targeted the civilian population or civilian objects. The fact that civilian objects were damaged may in some cases, without more, provide a reasonable basis to believe that there was an intention to damage civilian objects. However, in this case, the majority of the attack was directed towards military objectives, the majority of the impact was upon military objectives and there are alternative explanations for the civilian impact (targeting accuracy of artillery weapons). An argument that the DPRK had knowledge that the targets were civilian and they deliberately targeted them nonetheless would, without more information, be based on speculation or suspicion rather than reasonable grounds.
237. The war crime of excessive incidental death, injury or damage requires an assessment of: (a) the anticipated civilian damage or injury; (b) the anticipated military advantage; and, (c) whether (a) was “clearly excessive” in relation to (b). The difficulties of calculating anticipated civilian losses and anticipated military advantage and the lack of a common unit of measurement with which to compare the two make this assessment difficult to apply, both in military decision making and in any *ex post facto* assessment of the legality of that action.
238. In assessing the *anticipated* civilian damage or injury, a number of factors are relevant. The DPRK had access to maps of Yeonpyeong island and thus would have been aware of the proximity of the civilian areas to the military objects. The DPRK allegedly conducted a firing drill near the Northern Limit Line in January 2010 using the same ‘time on target’ method used in the Yeonpyeong attack.<sup>53</sup> If the DPRK equipment did have low targeting accuracy, leading to the incidental civilian impact, one can presume that the DPRK was aware of this and of the likelihood of the subsequent civilian impact after the January drill.
239. However, the island is a total 7.3km<sup>2</sup> and at the time of the attack had a civilian population of 1,361. Thus, while the DPRK could have anticipated a likely civilian impact from its attack, it does not appear that a reasonably well-informed person in the circumstances of the actual perpetrator would have expected such civilian impact to be very high. The civilian population on the island (1,361) was concentrated in one area near the island’s main port; this population does not appear to have been the intended object of the attack, for the reasons described above. The size of the island and its civilian areas meant that

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<sup>53</sup> Korea Joongang Daily, "N. Korea fired thermobaric bombs", 26 November 2010.

many of the shells that missed their targets would fall in uninhabited areas of the island or in the surrounding waters (rather than on civilian areas) – in fact, of the 230 shells fired, 50 landed in the surrounding waters and approximately 30 fell on civilian objects.

240. While it has been suggested that the attack was motivated by internal North Korean politics,<sup>54</sup> this does not mean that there was no perceived military advantage to the attack. Given the context of the attack, principally the DPRK fashioning it as a response to South Korean military activity,<sup>55</sup> one may surmise that the perceived *military* advantage of the attack was a reassertion of DPRK territorial control of particular waters and a demonstration of its military power in the area.<sup>56</sup>
241. Ultimately, the attack resulted in two military personnel killed and 16 injured, as compared to two civilians killed and 52 injured. In terms of damage to property and military and civilian objects, the U.N. Command's report of the incident indicated that "considerable damage was suffered by military facilities and destruction of civilian homes."<sup>57</sup>
242. While a reasonably well-informed person in the circumstances of the actual perpetrator would have expected some degree of civilian casualties and damage to result from the attack given the relative proximity of military and civilian objects, the information available is insufficient to provide a reasonable basis to believe that the anticipated civilian impact would have been *clearly excessive* in relation to the anticipated military advantage of the attack, considering the size and population of the island, and the fact that military targets appeared to be the primary object of the attack. Nonetheless, the loss of human life that resulted from the attack is to be greatly regretted.

### *OTP Activities*

243. During the reporting period, additional information was received from the ROK on 19 March 2014 which was analysed by the Office. The Office finalized its analysis of whether there is a reasonable basis to believe that a crime within the jurisdiction of the Court has been committed, and announced its conclusions on 23 June 2014. A detailed report has been issued by the Prosecutor presenting the Office's findings with respect to jurisdictional matters.<sup>58</sup>

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<sup>54</sup> International Crisis Group, North Korea: The Risks of War in the Yellow Sea, Asia Report No. 198 (23 December 2010), p.1.

<sup>55</sup> Special investigation into the Korean People's Army attack on Yeonpyeong-Do and the Republic of Korea Marine Corps response on 23 November 2010 (U.N. Doc. S/2010/648; 19 December 2010), p.6.

<sup>56</sup> See International Crisis Group, 'North Korea: The Risks of War in the Yellow Sea', Asia Report No. 198 (23 December 2010), pp.27, 29-31.

<sup>57</sup> Special investigation into the Korean People's Army attack on Yeonpyeong-Do and the Republic of Korea Marine Corps response on 23 November 2010 (U.N. Doc. S/2010/648; 19 December 2010), p.7

<sup>58</sup> ICC-OTP, [Situation in the Republic of Korea: Article 5 Report](#), June 2014.

### *Conclusion*

244. Following a thorough factual and legal assessment of the alleged crimes, the Office has reached the conclusion that, based on the information available, it currently lacks a reasonable basis to believe that either incident constitutes a crime within the jurisdiction of the Court. Accordingly, the Office lacks a reasonable basis to proceed with an investigation.
  
245. Should further information become available in the future which would lead the Office to reconsider these conclusions in the light of new facts or evidence, the preliminary examination of these two incidents could be re-opened.

## REGISTERED VESSELS OF COMOROS, GREECE AND CAMBODIA

### *Procedural History*

246. On 14 May 2013, the Office of the Prosecutor received a referral on behalf of the authorities of the Union of the Comoros (“Comoros”) with respect to the 31 May 2010 Israeli interception of a humanitarian aid flotilla bound for the Gaza Strip. On the same day, the Prosecutor announced that it had opened a preliminary examination on the basis of the referral.<sup>59</sup> On 5 July 2013, the Presidency of the ICC assigned the situation to Pre-Trial Chamber I.<sup>60</sup>
247. On 6 November 2014, the Prosecutor announced that the information available did not provide a reasonable basis to proceed with an investigation of the situation on the registered vessels of Comoros, Greece, and Cambodia that arose in relation to the 31 May 2010 incident.<sup>61</sup> This conclusion is based on a thorough legal and factual analysis of the information available and pursuant to the requirement in article 17(1)(d) of the Statute that cases shall be of sufficient gravity to justify further action by the Court. A detailed report has been issued by the Prosecutor presenting the findings of the Office on jurisdictional and admissibility issues.<sup>62</sup>

### *Preliminary Jurisdictional Issues*

248. Of the eight vessels in the flotilla, only three were registered in States Parties. Pursuant to article 12(2)(a), the Court has jurisdiction *ratione loci* over crimes committed on board these three vessels, registered respectively in the Comoros (the *Mavi Marmara*), Cambodia (the *Rachel Corrie*) and Greece (the *Eleftheri Mesogios/Sofia*). Although Israel is not a State Party, according to article 12(2)(a) of the Statute, the ICC can exercise its jurisdiction in relation to the conduct of non-Party State nationals alleged to have committed Rome Statute crimes on the territory of, or on vessels and aircraft registered in, an ICC State Party.
249. The Court has jurisdiction over Rome Statute crimes committed on the territory of Comoros or by its nationals as of 1 November 2006. The Court also has jurisdiction over Rome Statute crimes committed on the territory of Cambodia or by its nationals as of 1 July 2002, and those committed on the territory of Greece or by its nationals as of 1 August 2002. The situation forming the subject of the referral began on 31 May 2010 and encompasses all alleged crimes flowing from

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<sup>59</sup> ICC-OTP, [ICC Prosecutor receives referral by the authorities of the Union of the Comoros in relation to the events of May 2010 on the vessel ‘MAVI MARMARA’](#), 14 May 2013.

<sup>60</sup> ICC-OTP, [2010 events on Comorian, Greek and Cambodian vessels: Situation assigned to ICC Pre-Trial Chamber I](#), 5 July 2013.

<sup>61</sup> ICC-OTP, [Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on concluding the preliminary examination of the situation referred by the Union of Comoros: “Rome Statute legal requirements have not been met”](#), 6 November 2014.

<sup>62</sup> ICC-OTP, [Situation on Registered Vessels of Comoros, Greece and Cambodia: Article 53\(1\) Report](#), 6 November 2014.

the interception of the flotilla by the Israeli forces, including the other related interception of the *Rachel Corrie* on 5 June 2010. These events forming the subject of the referral are collectively referred to as the “flotilla incident” for the purposes of this report.

### *Contextual Background*

250. On 3 January 2009, Israel imposed a naval blockade off the coastline of the Gaza Strip up to a distance of 20 nautical miles from the coast. The naval blockade was part of a broader effort to impose restrictions on travel and the flow of goods in and out of the Gaza strip, following the electoral victory of Hamas in 2006 and their extension of control in 2007.
251. The Free Gaza Movement was formed to challenge the blockade. It organised the “Gaza Freedom Flotilla,” an eight-boat flotilla with over 700 passengers from approximately 40 countries, with the stated intentions to deliver aid to Gaza, break the Israeli blockade, and draw international attention to the situation in Gaza and the effects of the blockade.
252. The Israeli Defence Forces (IDF) intercepted the flotilla on 31 May 2010 at a distance of 64 nautical miles from the blockade zone. By that point, one of the vessels in the flotilla had withdrawn due to mechanical difficulties, and another (the *Rachel Corrie*) had been delayed in its departure and thus was not able to join the rest of the flotilla and only continued towards Gaza separately at a later date. The six remaining vessels were boarded and taken over by the IDF. The interception operation resulted in the deaths of ten passengers of the *Mavi Marmara*, nine of whom were Turkish nationals, and one with Turkish and American dual nationality.
253. The situation has been the subject of a United Nations Human Rights Council Fact-Finding Mission, which delivered its report in September 2010, and a separate Panel of Inquiry appointed by the United Nations Secretary-General, which published its report in September 2011. The Governments of Turkey and Israel have also conducted national inquiries.

### *Subject-Matter Jurisdiction*

254. The hostilities between Israel and Hamas at the relevant time do not meet the basic definition of an international armed conflict as a conflict between two or more states. However, as acknowledged by the case law of the Court, the ICC Elements of Crimes clarify that the applicability of the law of international armed conflict also extends to situations of military occupation. While Israel maintains that it is no longer occupying Gaza, the prevalent view within the international community is that Israel remains an occupying power under international law, based on the scope and degree of control that it has retained over the territory of Gaza following the 2005 disengagement. In accordance with the reasoning underlying this perspective, the Office proceeded on the basis that

the situation in Gaza can be considered within the framework of an international armed conflict in view of the continuing military occupation by Israel.

255. The analysis conducted and the conclusions reached would generally not be affected and still be applicable, if the Office was of the view, alternatively, that the law applicable in the present context and in light of the Israel-Hamas conflict is the law of non-international armed conflict. Given the crimes of possible relevance to the referred situation, which are substantially similar in the context of both international and non-international armed conflicts, it is not necessary at the preliminary examination stage to reach a conclusive view on the classification of the conflict. Additionally, as the protection accorded by the rules on international armed conflicts is broader than those relating to internal conflicts, it seems appropriate, for the limited purpose of a preliminary examination, in cases of doubt, to apply those governing international armed conflicts.
256. The flotilla incident occurred in the context of, and was directly related to, Israel's imposition of a naval blockade against the Gaza Strip. The legality of the blockade has been the subject of controversy. The issue is relevant, to a certain extent, to the Office's assessment of the interception of the flotilla. In particular, whether or not the blockade was lawful has an impact on the assessment of the alleged war crime of intentionally directing an attack against civilian objects under article 8(2)(b)(ii) of the Statute. While not taking a position on the legality of the blockade, the Office has conducted its analysis to take into account both possibilities of a lawful and unlawful blockade.
257. Ultimately, in the Office's assessment, the information available provides a reasonable basis to believe that war crimes were committed on board the *Mavi Marmara* during the interception of the flotilla on 31 May 2010 in the context of an international armed conflict, namely: (1) wilful killing pursuant to article 8(2)(a)(i); (2) wilfully causing serious injury to body and health pursuant to article 8(2)(a)(iii); and (3) committing outrages upon personal dignity pursuant to article 8(2)(b)(xxi) of the Statute. In addition, if Israel's naval blockade against Gaza was unlawful, there is consequently also a reasonable basis to believe that the IDF committed the crime of intentionally directing an attack against two civilian objects pursuant to article 8(2)(b)(ii) in relation of the forcible boarding of the *Mavi Marmara* and the *Eleftheri Mesogios/Sofia*.
258. As a general observation, it is noted that protected civilian status does not preclude, in certain circumstances, the possibility for the lawful use of force in individual self-defence against civilians who have resorted to violence. Under the Rome Statute, however, self-defence is recognised as a ground for excluding criminal responsibility. Accordingly, the hypothetical issue of whether a perpetrator committed a crime in self-defence, and therefore may be absolved from criminal responsibility, is to be properly addressed at the investigation and trial stages, and not the preliminary examination stage.

259. Lastly, on the basis of the information available, it does not appear that the conduct of the IDF during the flotilla incident was committed as part of widespread or systematic attack, or constituted in itself a widespread or systematic attack, directed against a civilian population. The Office has therefore concluded that there no reasonable basis to believe that crimes against humanity under article 7 of the Statute were committed within the referred situation.

### *Admissibility Assessment*

260. The Office's assessment of gravity includes both quantitative and qualitative considerations. As stipulated in regulation 29(2) of the Regulations of the Office of the Prosecutor, the factors that guide the Office's assessment include the scale, nature, manner of commission of the crimes, and their impact. This assessment is conducted bearing in mind the potential cases that would be likely to arise from an investigation of the situation.

261. It is further noted that article 8(1) of the Statute provides that "the Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes". Although this threshold is not a prerequisite for jurisdiction, it does, however, provide Statute guidance that the Court should focus on cases meeting these requirements.

262. Having carefully assessed the relevant considerations, the Office has concluded that the potential case(s) that would likely arise from an investigation of the flotilla incident would not be of sufficient gravity to justify further action by the Court, in light of the criteria for admissibility provided in article 17(1)(d) and the guidance outlined in article 8(1) of the Statute.

263. The parameters of the Office's assessment were determined by the limited scope of the situation referred, namely a confined series of events that occurred primarily on 31 May 2010. By virtue of article 12(2)(a) of the Statute, the Court's territorial jurisdiction was further limited to events occurring on three vessels in the flotilla and did not extend to any events that occurred after passengers were taken off those vessels. As such, the potential case(s) that could be pursued is inherently limited to an event encompassing a small number of victims of the alleged ICC crimes, with limited countervailing qualitative considerations.

264. Although the interception of the flotilla took place in the context of the Israel-Hamas conflict, the Court does not have jurisdiction over other alleged crimes committed in this context, nor in the broader context of any conflict between Israel and Palestine. While the situation with regard to the civilian population in Gaza is a matter of international concern, this issue must be distinguished from the present assessment, which is limited to evaluating the gravity of the alleged crimes committed by Israeli forces on board the vessels over which the Court has jurisdiction during the interception of the flotilla.

265. In light of the conclusion reached in respect of the gravity assessment, it is unnecessary for the Office to consider and reach a conclusion on the issue of complementarity.

#### *OTP Activities*

266. Over the reporting period, the Office thoroughly analysed information from multiple sources, including the reports of the four commissions that previously examined the incident and the supporting materials and documentation accompanying the referral.

267. The Office also interacted with the legal representatives for the Comoros, Elmadağ Law Firm and KC Law, and received further submissions from them on 19 May 2014. Additionally, on 19 August 2014, the Office received information from the Turkish Foundation for Human Rights and Freedoms and Humanitarian Relief, which was one of the primary organisers of the 2010 flotilla campaign and owned the *Mavi Marmara*. The Office also offered Turkey and Israel the opportunity to provide additional information but did not receive any in return.

#### *Conclusion*

268. While the Prosecutor has declined to initiate an investigation of the referred situation, the referring State, the Comoros 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.