



**Cour  
Pénale  
Internationale**  
**International  
Criminal  
Court**

Le Bureau du Procureur  
The Office of the Prosecutor

## **Report on Preliminary Examination Activities 2017**

**4 December 2017**

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## I. INTRODUCTION

1. The Office of the Prosecutor (“Office” or “OTP”) of the International Criminal Court (“Court” or “ICC”) is responsible for determining whether a situation meets the legal criteria established by the Rome Statute (“Statute”) to warrant investigation by the Office. For this purpose, the OTP conducts a preliminary examination of all communications and situations that come to its attention based on the statutory criteria and the information available.<sup>1</sup>
2. The preliminary examination of a situation by the Office may be initiated on the basis of: a) information sent by individuals or groups, States, intergovernmental or non-governmental organisations; b) a referral from a State Party or the United Nations (“UN”) Security Council; or (c) a declaration lodged by a State accepting the exercise of jurisdiction by the Court pursuant to article 12(3) of the Statute.
3. Once a situation is thus identified, the factors set out in article 53(1) (a)-(c) of the Statute establish the legal framework for a preliminary examination.<sup>2</sup> This article provides that, in order to determine whether there is a reasonable basis to proceed with an investigation into the situation, the Prosecutor shall consider: jurisdiction (temporal, either territorial or personal, and material); admissibility (complementarity and gravity); and the interests of justice.
4. *Jurisdiction* relates to whether a crime within the jurisdiction of the Court has been or is being committed. It requires an assessment of (i) temporal jurisdiction (date of entry into force of the Statute, namely 1 July 2002 onwards, date of entry into force for an acceding State, date specified in a 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) subject-matter 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 the Office’s prosecutorial strategy of investigating and prosecuting those most responsible for the most

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

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

<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: see RC/Res.6 (28 June 2010).

serious crimes.<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 (“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 – 2016-2018, para. 35-36. In appropriate cases the OTP will expand its general prosecutorial strategy to encompass mid- or high-level perpetrators, or even particularly notorious low-level perpetrators, with a view to building cases up to reach those most responsible for the most serious crimes. The Office may also consider prosecuting lower level perpetrators where their conduct was particularly grave and has acquired extensive notoriety.

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

- 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 2017

17. This report summarises the preliminary examination activities conducted by the Office between 1 October 2016 and 30 November 2017.
18. Between 1 October 2016 and 31 October 2017, the Office received 568 communications pursuant to article 15 of the Statute of which 347 were manifestly outside the Court's jurisdiction; 62 warranted further analysis; 80 were linked to a situation already under preliminary examination; and 79 were linked to an investigation or prosecution. The Office has received a total of 12,590 article 15 communications since July 2002.
19. During the reporting period, the Office completed three preliminary examinations, including two resulting in a decision to seek judicial authorisation to open an investigation and one concluding that further action from the Court was not warranted. On 5 September 2017, the Office requested authorisation from PTC III to proceed with an investigation into the situation in the Republic of Burundi from 26 April 2015 onwards. Such authorisation was subsequently granted on 25 October 2017. On 20 November 2017, the Office requested authorisation from PTC III to proceed with an investigation of the situation in the Islamic Republic of Afghanistan in the period since 1 July 2002. At the time of writing, the Prosecutor's Request was still pending review by the Pre-Trial Chamber.
20. During the reporting period, the Office also completed its review of its prior decision regarding the situation on certain registered vessels of Comoros, Greece, and Cambodia, and notified PTC I of the Prosecutor's final decision on 29 November 2017.
21. The Office further continued its preliminary examinations of the situations in Colombia, the Gabonese Republic, Guinea, Iraq/United Kingdom ("UK"), Nigeria, Palestine, and Ukraine. During the reporting period, the Office sent preliminary examination missions to Abuja, Bogota, Conakry, Kyiv, Lagos, Libreville and London and held numerous consultations at the seat of the Court with State authorities, representatives of international and non-government organisations, article 15 communication senders and other interested parties.
22. Pursuant to the Office's policy on sexual and gender-based crimes and policy on children, during the reporting period the Office conducted, where appropriate, an analysis of alleged sexual and gender-based crimes and crimes against children that may have been committed in various situations under preliminary examination and sought information on national investigations and prosecutions by relevant national authorities on such conduct.

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

### GABONESE REPUBLIC

#### *Procedural History*

23. The situation in the Gabonese Republic has been under preliminary examination since 29 September 2016. The Office has received a total of 17 communications pursuant to article 15 in relation to this situation.
24. On 21 September 2016, the Office received a referral on behalf of the Government of the Gabonese Republic with respect to alleged crimes potentially falling within the ICC's jurisdiction committed in its territory since May 2016, with no end-date.<sup>9</sup>
25. On 28 September 2016, the Office received a supplementary note from the Gabonese authorities' legal representatives clarifying the scope of the referral and providing additional details on alleged crimes.
26. On 29 September 2016, the Prosecutor issued a statement informing the public of the referral and announcing the opening of a preliminary examination of the situation in the Gabonese Republic since May 2016.<sup>10</sup>
27. On 4 October 2016, the Presidency of the ICC assigned the situation to PTC II. This was a procedural step in accordance with regulation 46(2) of the Regulations of the Court, and as such does not signify the beginning of an investigation. Pursuant to article 53(1), it is for the Prosecutor to determine whether there is a reasonable basis to proceed with an investigation.

#### *Preliminary Jurisdictional Issues*

28. The Gabonese Republic deposited its instrument of ratification to the Statute on 20 September 2000. The ICC therefore has jurisdiction over Rome Statute crimes committed on the territory of the Gabonese Republic or by its nationals from 1 July 2002 onwards.

#### *Contextual Background*

29. On 27 August 2016, a presidential election was held in the Gabonese Republic. Incumbent President Ali Bongo Ondimba, elected in 2009 after the death of his father who served as President for 42 years, ran for a second term against the main opposition candidate, former Minister of Foreign Affairs, Jean Ping. In

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<sup>9</sup> [Referral under Article 14 of the Rome Statute](#), 20 September 2016.

<sup>10</sup> [Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, concerning referral from the Gabonese Republic](#), 29 September 2016.



spite of growing tensions reported between the supporters of both candidates in the previous months, the election was generally held in a peaceful climate and with a relatively high voter turnout. A joint mission from the African Union (“AU”) and the Economic Community of Central African States (“ECCAS”) and an electoral observation mission from the European Union (“EU”) were deployed to monitor the process.

30. Prior to the publication of the official results, both camps declared victory and accused each other of attempting to commit fraud. On 31 August 2016, the Minister of Interior, Decentralization, Security and Public Hygiene, Pacôme Moubelet Boubeya, announced Ali Bongo Ondimba’s victory by a slender margin. According to the official results, Ali Bongo Ondimba won 49.8% of the vote against 48.2% for Jean Ping with a voter turnout of 59.5%. The opposition contested the results and resigned from the National Electoral Commission (*Commission électorale nationale autonome et permanente*, “CENAP”) denouncing widespread irregularities, in particular in Ali Bongo’s home province Haut-Ogooué. According to the electoral commission, President Bongo Ondimba won 95.46% of the votes in the province with a turnout of 99.93%. The EU Electoral Observation Mission in Gabon flagged “evident anomalies” in the results registered in Haut-Ogooué.
31. Immediately after the announcement of the provisional results, thousands of Jean Ping’s supporters held public demonstrations in Libreville and other cities claiming the rigging of the elections and calling Ali Bongo to step down. In this context, violent clashes between opposition supporters and security forces broke out in at least nine neighbourhoods of the Gabonese capital and other cities resulting, according to some reports, in hundreds of detentions. A more limited number of deaths and injuries on both sides were also initially reported, although there are important discrepancies between the number of victims announced by the Government and those claimed by the opposition. During violent riots in Libreville, the Gabonese National Parliament and other Government buildings, as well as various private residences and businesses, were reportedly looted and set ablaze by demonstrators.
32. In the early hours of 1 September 2016, the Gabonese security forces reportedly raided the opposition’s headquarters and subsequently broke into the premises, facing strong resistance from hundreds of opposition supporters. While the opposition claims that their supporters in the headquarters were brutally assaulted, the Gabonese authorities argue that the raid was conducted to arrest armed criminals for their alleged implication in riots and various acts of violence in Libreville.
33. On 27 September 2016, President Ali Bongo Ondimba was sworn in for his new term, after the Constitutional Court, rejecting an appeal by Jean Ping who had called for a recount over widespread allegations of fraud, upheld his election.

## *Alleged Crimes*

34. The following summary of alleged crimes is preliminary in nature and is based on the referral submitted by the Gabonese authorities, article 15 communications received by the Office and other open sources available. The descriptions below should not be taken as indicative of, or implying any particular legal qualifications or factual determinations regarding the alleged conduct. Additionally, the summary below is without prejudice to the identification of any further alleged crimes which may be made by the Office in the course of its continued analysis.
35. The preliminary examination focuses on alleged crimes committed in the Gabonese Republic since May 2016 in the context of the 2016 presidential election. The referral from the Gabonese Government alleges that the main opposition leader and former presidential candidate, Jean Ping, incited his supporters to genocide during a political rally and that hundreds of opposition supporters resorted to various acts of violence amounting to crimes against humanity.
36. According to the information available, violent clashes between the security forces and anti-government demonstrators broke out on 31 August 2016, resulting in hundreds of arrests. According to some reports, some detainees were subjected to acts of torture and ill-treatment. Furthermore, an unclear number of killings were also reported between 31 August and 4 September 2016. In this context, the alleged attack on Jean Ping's headquarters on 1 September 2016 appears to mark a peak of violence. A limited number of crimes are also alleged to have occurred after 4 September 2016.
37. *Killings and injuries*: the number of civilians killed in the period from 31 August to 4 September 2016 is subject to highly diverging estimates provided by the opposition (up to 300) and by the Government (four). Based on publicly available sources, between 7 and 27 civilians appear to have been killed during the post-election period. Additionally, between 38 and 41 civilians would have been injured during the same period.
38. As thousands of anti-government demonstrators rallied in Libreville and other cities against the provisional results announced on 31 August 2016, the alleged killings were reportedly committed during violent clashes between State security forces and demonstrators, and during security operations conducted across the country to repress various acts of violence attributed to supporters of Jean Ping. The information available also suggests that one police officer was reportedly killed, and that 67-70 members of the Gabonese security forces were injured during the events.
39. According to the information available, at least one person was reportedly killed by State security forces during the alleged attack on the opposition's

headquarters. No casualties among the State forces were recorded during this incident.

40. *Enforced disappearances*: between 31 August and 28 September 2016, the opposition recorded 47 alleged instances of enforced disappearances related to the post-electoral unrest. It is also alleged that medical facilities and morgues withheld from family members information on the number of dead bodies in their premises.
41. *Deprivation of liberty*: the information available suggests that between 800 and 1,100 individuals were arrested in Gabon in the period from 31 August to 4 September 2016, in particular on the first two days. On 1 September 2016, the Minister of Interior reported that State security forces had arrested between 600 and 800 individuals in Libreville, including during the alleged attack on Jean Ping's headquarters, and conducted between 200 and 300 arrests in other cities. International media outlets generally reported over a thousand arrests during the same five-day period.
42. *Torture and other forms of ill-treatment*: the opposition alleges that a few opposition supporters were subjected to acts of torture and/or ill-treatment during their detention. It is also alleged that one civilian was tortured by members of the opposition for his perceived affiliation with the Government.
43. *Rape and other forms of sexual violence*: the opposition alleges that at least three incidents of rape and other forms of sexual violence were also reported in the context of post-electoral unrest.
44. *Incitement to commit genocide*: the Gabonese Government alleges that a public statement made by Jean Ping during the presidential campaign would amount to the crime of inciting to commit genocide. Namely, during a public meeting held during his political campaign, Mr Ping reportedly called on his supporters to "fight to the death" to defend their votes and would have referred to Ali Bongo's supporters as "cockroaches that should be eliminated". According to Jean Ping, these allegations are ill-founded and the video that circulated in the media was edited and disseminated by the Government to undermine his candidacy.

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

45. Over the reporting period, the Office has continued to conduct a thorough factual and legal assessment of all the information available from various sources, including article 15 communications, media reports and the supporting materials and documentation accompanying the referral. The Office notes, however, that the events in questions have not been the subject of any independent fact-finding mission or international inquiry.

46. Consistent with standard practice, the Office has subjected the information available to rigorous source evaluation, including in terms of the reliability of the sources and credibility of the information received. In this regard, the Office has continued to take steps to verify and corroborate a number of relevant factual issues, including by requesting additional information from relevant actors.
47. The Office also engaged and consulted with relevant stakeholders, including by holding meetings at the seat of the Court. In December 2016, the Office met with Jean Ping's legal counsel, who submitted an article 15 communication on behalf of his client and various victims and Gabonese civil society organisations. In April 2017, the Office met with a delegation of representatives of Gabonese civil society organisations, who provided additional information on crimes allegedly committed against the civilian population in the context of the situation.
48. In June 2017, the Office conducted its first mission to Libreville with a view to informing the relevant stakeholders and the general public of the preliminary examination process; seeking clarification on a number of incidents disputed by the Government and the opposition; and gathering and verifying further information available on the electoral period and the crimes allegedly committed in this context. During the mission, the OTP delegation met with political and judicial authorities, including the Ministers of Justice, Interior, Defence and Communications, as well as with the General and the Public Prosecutors of Libreville. The Office also held separate meetings with the *Coalition pour la Nouvelle République*, including with its President Jean Ping, as well as with civil society organisations, the UN Regional Office for Central Africa ("UNOCA") and diplomatic representations in Libreville. The OTP delegation further engaged with the national and international press in Libreville to provide clarifications on the scope and the process of the preliminary examination.

### *Conclusion and Next Steps*

49. The Office is continuing its assessment of the information available in order to reach a determination on whether there is a reasonable basis to believe that the alleged crimes fall within the subject-matter jurisdiction of the Court. Strictly guided by the requirements of the Statute, the Office intends to reach a determination in due course.
50. Given the open-ended nature of the situation referred, any alleged crime occurring in the future in the context of the situation in the Gabonese Republic could also be included in the Office's analysis.

## PALESTINE

### *Procedural History*

51. The situation in Palestine has been under preliminary examination since 16 January 2015.<sup>11</sup>
52. The Office has received a total of 98 communications pursuant to article 15 in relation to the situation in Palestine since 13 June 2014.

### *Preliminary Jurisdictional Issues*

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

### *Contextual Background*

#### *West Bank and East Jerusalem*

54. In June 1967, an international armed conflict (the Six-Day War) broke out between Israel and neighbouring states, as a result of which Israel acquired control over a number of territories including the West Bank and East Jerusalem. Immediately after the end of the Six-Day War, Israel established a military administration in the West Bank, and adopted laws and orders effectively extending Israeli law, jurisdiction and administration over East Jerusalem. In November 1981, a separate Civilian Administration was established to “run all regional civil matters” in the West Bank. On 30 July 1980, the Knesset passed a ‘Basic Law’ by which it established the city of Jerusalem “complete and united” as the capital of Israel.
55. Pursuant to the Oslo Accords of 1993-1995, the Palestine Liberation Organization and the State of Israel formally recognised each other, and agreed on a progressive handover of certain Palestinian-populated areas in the West Bank to the Palestinian National Authority (or Palestinian Authority, “PA”). Under the 1995 Interim Agreement, the West Bank was divided into three administrative areas (Area A – full civil and security control by the PA; Area B – Palestinian civil control and joint Israeli-Palestinian security control; Area C – full civil and security control by Israel).

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<sup>11</sup> [The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine, 16 January 2015.](#)

56. The peace talks between the parties grounded to a halt in 1995 and were followed over the years by a number of rounds of negotiations including the Camp David Summit of 2000, the 2002/2003 Road Map for Peace, as well as intermittent peace talks and related initiatives since 2007. To date, no final peace agreement has been reached and a number of issues remain unresolved, including the determination of borders, security, water rights, control of the city of Jerusalem, Israeli settlements in the West Bank, refugees, and Palestinians' freedom of movement.

#### *Gaza*

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

#### *Alleged Crimes*

58. The following summary of alleged crimes is without prejudice to any future determinations by the Office regarding the exercise of territorial or personal jurisdiction by the Court. It should not be taken as indicative of, or implying any particular legal qualifications or factual determinations regarding the alleged conduct. Additionally, the summary below is without prejudice to the identification of any further alleged crimes which may be made by the Office in the course of its continued analysis.

#### *West Bank and East Jerusalem*

59. *Settlements activities:* the Israeli authorities have allegedly been involved in the settlement of civilians onto the territory of the West Bank, including East Jerusalem, and the forced removal of Palestinians from their homes in the West Bank and East Jerusalem. Settlement-related activities have reportedly included the confiscation and appropriation of land; the planning and authorisation of settlement expansions and, in at least one instance, of a new settlement; constructions of residential units and related infrastructures in the settlements; the regularisation of constructions built without the required authorisation from Israeli authorities (so-called outposts); and public subsidies, incentives and funding specifically allocated to settlers and settlements' local authorities to encourage migration to the settlements and boost their economic development.

60. In particular, in recent years, Israeli authorities are alleged to have endorsed plans and taken a number of administrative steps for the construction of thousands of residential units in the West Bank, including in East Jerusalem. According to the UN Office of the High Commissioner for Human Rights (“OHCHR”), Israeli authorities have advanced settlement plans for 2,264 housing units in Area C in 2016, while plans for 710 units reached a final approval stage in the same year. With regards to East Jerusalem, between 2014 and the end of 2016, plans for at least 6,157 units were advanced. In addition, according to official Israeli data, construction work began on 2,884 new dwellings in 2016 in the settlements and 4,196 remained until active construction at the end of that year. These figures do not include construction in East Jerusalem which Israel considers an integral part of its capital.
61. In March 2017, for the first time in decades, Israel’s security cabinet reportedly approved the construction of an entirely new settlement to ensure the relocation of the residents of the Amona outpost, who had been evacuated in February 2017 following a December 2014 ruling by the Israeli High Court of Justice.
62. Israeli authorities are also alleged to have been involved in the demolition of Palestinian property and eviction of Palestinian residents from homes in the West Bank and East Jerusalem. Between 1 August 2016 and 30 September 2017, according to figures published by the UN Office for the Coordination of Humanitarian Affairs, Israeli authorities have confiscated and/or demolished 734 Palestinian-owned structures, including 180 residential inhabited structures, of which 48 were located in East Jerusalem. These demolitions and evictions reportedly resulted in the alleged displacement of 1,029 individuals, including 493 women and 529 children. Moreover, during the reporting period, Israeli authorities have reportedly continued to advance plans to relocate Bedouin and other herder communities present in and around the so-called E1 area, including through the seizure and demolition of residential properties and related infrastructure.
63. *Other alleged crimes:* in addition to allegations directly related to settlement activities, the Office has also received information regarding the purported establishment of an institutionalised regime of systematic discrimination that allegedly deprives Palestinians of a number of their fundamental human rights.

#### *Gaza conflict*

64. The conflict in Gaza between 7 July and 26 August 2014 resulted in a high number of civilian casualties, significant damage to or destruction of civilian buildings and infrastructure, and massive displacement. According to multiple sources, over 2,000 Palestinians, including over 1,000 civilians, and over 70 Israelis, including 6 civilians, were reportedly killed, and over 11,000 Palestinians and up to 1,600 Israelis were reportedly injured as a result of the hostilities. Figures reported by various sources, however, differ on the number of overall casualties, the proportion of civilian-to-combatant casualties, and the

proportion of civilian casualties that were incidental to the targeting of military objectives.

65. It has been reported that the conflict also had a significant impact on children. Reportedly, more than 500 Palestinian children and one Israeli child were killed, and more than 3,000 Palestinian children and around 270 Israeli children were wounded during the conflict. In addition, several instances of child recruitment by Palestinian armed groups have been reported.
66. All parties are alleged to have committed crimes during the 51-day conflict. It has been alleged that the Israel Defense Forces directed attacks affecting civilians and civilian objects, such as attacks on or affecting: residential areas and buildings; medical facilities, ambulances, and medical personnel; UN Relief and Works Agency for Palestine Refugees in the Near East (“UNRWA”) schools serving as designated emergency shelters; and various other civilian objects and infrastructure. In addition, it has been alleged that members of Palestinian armed groups committed crimes in relation to, *inter alia*, rocket and mortar attacks launched against Israel, the alleged use of protected persons as shields, and the alleged ill-treatment and execution of persons accused of collaborating with Israel.

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

67. The preliminary examination of the situation in Palestine raises specific challenges relating to both factual and legal determinations. In the latter respect, the Office has in particular to consider the possible challenges to the Court’s jurisdiction, and/or to the scope of any such jurisdiction.
68. A number of novel and/or complex legal issues have also arisen in relation to the Office’s analysis of crimes allegedly committed in the West Bank and East Jerusalem and during the 2014 Gaza conflict. In conducting its analysis, the Office has sought to address key legal issues through an in-depth and thorough study of the applicable law and relevant commentary. Some of these issues are briefly highlighted below.
69. With regard to the specific legal regime applicable to the situation in the West Bank, Israel considers that the area should not be viewed as occupied territory but as a “disputed territory”, subject to competing claims, whose status will ultimately be resolved in the course of peace process negotiations. For this reason, Israel has taken the position to reject the *de jure* application of the Geneva Conventions to the territory but to apply humanitarian provisions *de facto*. On the other hand, intergovernmental and international judicial bodies have periodically made determinations that the West Bank, including East Jerusalem, has been occupied by Israel since 1967. These include the International Court of Justice (“ICJ”) in its 2004 Israeli Wall advisory opinion and the UN Security Council and General Assembly in various resolutions adopted over the past 50 years. On 23 December 2016, the UN Security Council adopted resolution 2334



which reaffirmed the occupied status of the West Bank, and explicitly condemned the “construction and expansion of settlements, transfer of Israeli settlers, confiscation of land, demolition of homes and displacement of Palestinian civilians, in violation of international humanitarian law and relevant resolutions”.

70. With respect to the Office’s analysis of the 2014 Gaza conflict, the appropriate legal characterisation of the conflict presents several difficulties in light of the *sui generis* nature of the conflict. While most agree on the existence of an armed conflict, the classification of the conflict as one of an international or non-international character, or both existing in parallel, remains subject to significant debate and diverging views. In this respect, the controversy stems primarily not from the facts but rather turns on different legal perspectives. The classification of the 2014 Gaza conflict has an impact on the Office’s analysis of particular crimes allegedly committed during the 2014 conflict. While a number of crimes of possible relevance to the situation are substantially similar in the context both of international and non-international armed conflicts, certain war crimes provisions under the Statute appear to be applicable to international armed conflicts only.
71. The analysis of alleged crimes committed in the course of the 2014 Gaza conflict raises other issues concerning the interpretation and application of various conduct of hostilities offences under article 8 of the Statute. Many of such issues have yet to be addressed by the Court and, in some instances, involve international humanitarian law concepts which may lack consensus among States, experts and academics.

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

72. During the reporting period, the Office has continued to consider relevant submissions and other available information on issues pertaining to the exercise of territorial and personal jurisdiction by the Court in Palestine.
73. In the past year, the Office has also progressed in its analysis of the alleged crimes committed by both parties to the 2014 Gaza conflict as well as certain alleged crimes committed in the West Bank and East Jerusalem since 13 June 2014. In addition, the OTP continued to closely follow relevant developments and events in the region.
74. In order to conduct its legal and factual analysis, the Office has reviewed and assessed a large body of information from various types of sources, including publicly available information as well as information and materials provided to the Office by relevant individuals, local and international NGOs, international organisations, and States. Consistent with standard practice, the Office has subjected such information to rigorous source evaluation, including in terms of the reliability of the sources and credibility of the information received. In this regard, the Office has continued to take steps to verify and corroborate a number

of relevant factual issues, including, for example, by requesting additional information from relevant actors.

75. In relation to the 2014 Gaza conflict, the Office has focused on certain reported incidents, out of the thousands previously documented by the Office and compiled in comprehensive databases. In this regard, the Office has sought to select incidents which appear to be the most grave in terms of the alleged harm to civilians and civilian objects and/or are representative of the main types of alleged conduct, such as in terms of the *modus operandi* employed, the types of alleged targets or objects affected by attacks, and the geographical areas which appear to have been particularly affected during the conflict. Additionally, the Office prioritised incidents for which there was a range of sources and sufficient information available to enable an objective and thorough analysis. Specifically, the Office has sought to gather additional information on, and cross-check, certain key facts relevant for the assessment of the requisite elements of potentially applicable crimes under the Statute, such as information related to the circumstances of an alleged attack, the presence and nature of any military objective, the weapons used, any precautionary measures taken, the intent and knowledge of alleged perpetrators, and the level and nature of any resulting damage.
76. With regard to the situation in the West Bank and East Jerusalem, the Office has focused its analysis on settlement-related activities, in particular as they relate to alleged movement of persons into and from the territories in question. During the reporting period, the Office has continued to gather pertinent information and closely followed factual, legislative and judicial developments on the ground, including processes related to the acquisition of land, the approval of settlement plans, the start of new constructions, budget allocation procedures, as well as the issuance and enforcement of eviction and demolition notices and other measures affecting the displacement of Palestinian residents.
77. The Office also continued to engage and consult with State authorities and intergovernmental and non-governmental organisations on issues relevant to the preliminary examination. This included, for example, a series of meetings with different relevant stakeholders held at the seat of the Court, such as a meeting with senior officials and representatives of the Government of the State of Palestine in June 2017. During the reporting period, the latter also continued to submit monthly reports to the Office with information on alleged ongoing crimes as well as other developments relevant to the preliminary examination.

### *Conclusion and Next Steps*

78. The Office has made significant progress in its assessment of the relevant factual and legal matters necessary for the determination of whether there is a reasonable basis to proceed with an investigation. In particular, the Office has reviewed thousands of pages of material and drafted multiple analytical products. This assessment will continue, under the strict guidance of the Statute

and with a view to reaching conclusions on jurisdictional issues within a reasonable time frame. In accordance with its policy on preliminary examinations, the Office will also assess information on potentially relevant national proceedings, as necessary and appropriate. Any alleged crimes occurring in the future in the context of the same situation could also be included in the Office's analysis.

## UKRAINE

### *Procedural History*

79. The situation in Ukraine has been under preliminary examination since 25 April 2014. The Office has received a total of 70 communications under article 15 of the Statute in relation to crimes alleged to have been committed since 21 November 2013.
80. 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.
81. On 25 April 2014, in accordance with the Office's policy on preliminary examinations, the Prosecutor opened a preliminary examination of the situation in Ukraine relating to the so-called "Maidan events".<sup>12</sup>
82. On 8 September 2015, the Government of Ukraine lodged a second declaration under article 12(3) of the Statute accepting the exercise of jurisdiction of the ICC in relation to alleged crimes committed on its territory from 20 February 2014 onwards, with no end date. On 29 September, the Prosecutor announced, based on Ukraine's second declaration under article 12(3), the extension of the preliminary examination of the situation in Ukraine to include alleged crimes occurring after 20 February 2014 in Crimea and eastern Ukraine.<sup>13</sup>

### *Preliminary Jurisdictional Issues*

83. Ukraine is not a State Party to the Statute. However, pursuant to the two article 12(3) declarations lodged by the Government of Ukraine on 17 April 2014 and 8 September 2015, the Court may exercise jurisdiction over Rome Statute crimes committed on the territory of Ukraine from 21 November 2013 onwards.

### *Contextual Background*

#### *Maidan events*

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

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<sup>12</sup> [The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination in Ukraine, 25 April 2014.](#)

<sup>13</sup> [ICC Prosecutor extends preliminary examination of the situation in Ukraine following second article 12\(3\) declaration, 29 September 2015.](#)

on 21 November 2013, prompted by the decision of the Ukrainian Government not to sign an Association Agreement with the EU. Over the following weeks, the protest movement, which became known as the “Maidan” protests, continued to grow in strength and reportedly diversified to include individuals and groups who were generally dissatisfied with the Yanukovych Government and demanded his removal from office.

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

#### *Events in Crimea and Eastern Ukraine from 20 February 2014 onwards*

##### *Crimea*

86. From the last days of February 2014, protests against the new Ukrainian Government began to grow, notably in the eastern regions of the country and in Simferopol, the capital of the Autonomous Republic of Crimea. On 27 February 2014, armed and mostly uniformed individuals wearing no identifying insignia seized control of government buildings in Simferopol, including the Crimean parliament building. The Russian Federation later acknowledged that its military personnel had been involved in taking control of the Crimean peninsula.
87. The incorporation of Crimea and the city of Sevastopol into the Russian Federation was announced on 18 March 2014, following a referendum held two days earlier that was declared invalid by the interim Ukrainian Government and by a majority of States of the UN General Assembly.
88. In 2016, the Office made public its assessment that the situation within the territory of Crimea and Sevastopol would amount to an international armed conflict between Ukraine and the Russian Federation which began at the latest on 26 February 2014, and that the law of international armed conflict would continue to apply after 18 March 2014 to the extent that the situation within the territory of Crimea and Sevastopol factually amounts to an ongoing state of occupation.<sup>14</sup> This assessment, while preliminary in nature, provides the legal framework for the Office’s ongoing analysis of information concerning crimes

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<sup>14</sup> See [Report on Preliminary Examination Activities 2016](#), para. 158.

alleged to have occurred in the context of the situation in Crimea since 20 February 2014.

### *Eastern Ukraine*

89. In parallel to events in Crimea, anti-government protests took place in other regions of Ukraine following the departure of President Yanukovich, most notably in the east of the country. The situation deteriorated rapidly into violence and on 15 April 2014, the Ukrainian Government announced the start of an “anti-terror operation”, deploying its armed forces to the eastern provinces of the country. By the end of April, the acting Ukrainian President announced that the Ukrainian Government was no longer in full control of the provinces of Donetsk and Luhansk, declared that the country was on “full combat alert”, and reinstated conscription to the armed forces by decree. On 2 May 2014, protests in Odessa between pro-unity and pro-federalism supporters turned violent and ended in more than 40 deaths, mainly of pro-federalism protesters who had taken refuge inside a trade union building, in which a fire then started.
90. Following “referendums” held on 11 May 2014 that were deemed illegitimate by the Ukrainian Government, representatives of the self-proclaimed “Donetsk and Luhansk People’s Republics” (“DPR”/“LPR”) made declarations claiming “independence” from Ukraine. Both the DPR and the LPR also appealed to be incorporated into the Russian Federation. Both of the self-declared “republics” remain unrecognised by the vast majority of States.
91. The intensity of hostilities in eastern Ukraine rapidly increased. In spite of several attempts to broker a lasting ceasefire, including the “Minsk II” agreement of February 2015, which is monitored by the Organization for Security and Co-operation in Europe (“OSCE”), multiple violations of the ceasefire continue to be reported daily. Fighting of varying degrees of intensity, and involving the use of heavy military weaponry by both sides, has persisted for over three years.
92. During the course of the conflict, periods of particularly intense battles were reported in Ilovaisk (Donetsk oblast) in August 2014 and in Debaltseve (Donetsk) from January to February 2015. The increased intensity of fighting during these periods has been attributed to alleged corresponding influxes of troops, vehicles and weaponry from the Russian Federation to reinforce the positions of the armed groups.
93. In January and February 2017, intense shelling was reported in Avdiivka and Yasynuvata, on both sides of the contact line in Donetsk oblast, notably in built-up residential areas, prompting the UN Security Council to express in a press statement dated 31 January 2017 “grave concern” over the “dangerous deterioration” in eastern Ukraine, and the consequent “severe impact on the local civilian population”.

94. In its *Report on Preliminary Examination Activities 2016*, the Office assessed that by 30 April 2014 the level of intensity of hostilities between Ukrainian government forces and anti-government armed elements in eastern Ukraine had reached a level that would trigger the application of the law of armed conflict and that the armed groups operating in eastern Ukraine, including the LPR and DPR, were sufficiently organised to qualify as parties to a non-international armed conflict. The Office also cited additional information, pointing to direct military engagement between the respective armed forces of the Russian Federation and Ukraine, suggesting the existence of an international armed conflict in eastern Ukraine from 14 July 2014 at the latest, in parallel to the non-international armed conflict.
95. For the purpose of determining whether the otherwise non-international armed conflict involving Ukrainian armed forces and anti-government armed groups could be actually international in character, the Office continues to examine allegations that the Russian Federation has exercised overall control over armed groups in eastern Ukraine. The existence of a single international armed conflict in eastern Ukraine would entail the application of articles of the Statute relevant to armed conflict of an international character for the relevant period.

#### *Alleged crimes*

96. The following summary of alleged crimes is preliminary in nature and is based on publicly available reports and other information received by the Office, including during the reporting period. The descriptions below are without prejudice to the identification of any further alleged crimes which may be made by the Office in the course of its analysis, and should not be taken as indicative of, or implying any particular legal qualifications or factual determinations regarding the alleged conduct.

#### *Crimea*

97. *Alleged disappearances and killings*: information available suggests that during the period under consideration at least 10 people went missing and are believed to have been killed, allegedly by members of self-defence militias. Reportedly, some of the victims had openly opposed the new status of Crimea, while others were members of the Crimean Tatar community.
98. *Alleged ill-treatment*: between March and June 2014 members of self-defence militias are alleged to have ill-treated at least 10 people who were perceived to be “pro-Ukrainian” activists, including by means of beatings and the use of electric shocks. Ill-treatment reportedly occurred at checkpoints and in irregular places of detention.

99. *Alleged forced conscription of Crimean residents to serve in the armed forces of the Russian Federation:* reportedly, male residents of Crimea of conscription age were subjected to conscription into the armed forces of the Russian Federation on two occasions - in the spring of 2016 and in the period from April to July 2017. It is alleged that the *de facto* authorities threatened with legal sanctions those who refused to serve. As a result, some men reportedly fled Crimea to avoid conscription or criminal proceedings.
100. *Alleged deprivation of the rights of fair and regular trial:* in at least six criminal cases, it is alleged that the defendants' rights to fair and regular trial were not respected and that the trials lacked fundamental judicial guarantees.
101. *Alleged transfer of part of the civilian population of the Russian Federation into Crimea and of part of the population of Crimea outside the territory:* allegedly, the authorities of the Russian Federation have facilitated, through a number of means, the migration to Crimea of a significant number of Russian citizens, with the intention to settle there permanently. Furthermore, it has been reported that the *de facto* authorities transferred a certain number of prisoners from Crimea to prisons located in the Russian Federation.
102. *Alleged seizure of property:* the *de facto* authorities in Crimea have reportedly taken measures to transfer ownership of all public property in Crimea to themselves and to seize the private immovable property of individuals who opposed the new status of the peninsula.
103. *Alleged harassment of Crimean Tatar population:* since February 2014, members of the Crimean Tatar population and other Muslims residents of Crimea have allegedly been subjected to harassment and intimidation, including through a variety of measures such as house searches, arrests, trials, and restrictions to freedoms of expression, assembly and association. Reportedly, the Mejlis, the highest executive body of the Crimean Tatar people, was banned from operating on the alleged grounds that it was an "extremist" organisation. Reportedly, these measures have led members of the Crimean Tatar population to flee the territory.

#### *Eastern Ukraine*

104. The Office has recorded more than 1,200 incidents involving crimes allegedly committed since 20 February 2014 in the context of events in eastern Ukraine.
105. *Killings:* according to the OHCHR, some 10,225 people have been killed and 24,541 injured, including members of the armed forces and armed groups and civilians, since the start of the conflict. Between April 2014 and August 2017, at least 2,505 civilians were allegedly killed in armed hostilities. A further 298 civilians, including 80 children, were killed in the downing of the civilian aircraft



flight MH17 on 17 July 2014. In the same period, between 7,000 and 9,000 civilians were reportedly injured. Most civilian deaths resulted from the shelling of populated areas in both government-controlled territory and areas controlled by armed groups, with smaller numbers allegedly killed or injured by firearms. A number of summary executions of persons who were *hors de combat*, including members of armed groups and of Ukrainian forces who had been captured by the opposing side were also alleged. Such incidents were attributed to both pro-government forces and armed groups.

106. *Destruction of civilian objects*: in the course of the conflict hundreds of civilian objects, including residential properties, schools and kindergartens have allegedly been destroyed or damaged, largely by shelling, in both government-controlled territory and areas controlled by armed groups. In some cases, it is alleged that the shelling of such objects was deliberate or indiscriminate or that civilian buildings including schools have been improperly used for military purposes.
107. *Detention*: all sides have allegedly captured and detained both civilians and fighters of the opposing side in the context of the conflict in eastern Ukraine. Ukrainian security forces are alleged to have held both civilians and alleged armed group members without due process, while DPR and LPR forces are alleged to have arbitrarily detained, and in many cases ill-treated, civilians suspected of being pro-Ukrainian and members of Ukrainian armed forces. Irregular places of detention were reportedly used by both pro-Ukrainian forces and anti-government armed groups. Several hundred detentions have occurred during the conflict and in many instances those detained have been exchanged in mutual prisoner releases by both sides, though often after long periods of detention.
108. *Torture/ill-treatment*: torture or ill-treatment was reportedly perpetrated by both sides in the context of the conflict, involving several hundred alleged victims. Beatings, electric shocks and other forms of physical abuse, as well as mock executions and other threats causing severe psychological trauma were allegedly inflicted on civilians, including persons suspected of allegiance to the opposing side in the conflict, and on members of both Ukrainian armed forces and armed groups. In the majority of the alleged incidents, torture or ill-treatment occurred in the context of detention, frequently in “irregular” detention facilities and often during interrogation. Torture and ill-treatment were reportedly used to attempt to extract confessions from detained persons or to force them to cooperate.
109. *Sexual and gender-based crimes*: while there are some documented instances of alleged sexual and gender-based crimes in the context of the conflict in eastern Ukraine, the information available might suffer from underreporting due to social and cultural taboos, and a lack of support services for victims in conflict-affected areas, among other factors. The majority of documented instances allegedly occurred in the context of detention and targeted male and female

victims, including civilians and members of the armed forces and volunteer battalions or armed groups. These alleged crimes were attributed to both state and non-state forces. In several reported cases, sexual violence, including rape, threats of rape, beating of genitals and forced nudity were perpetrated in the context of interrogations.

110. *Disappearance*: official statistics suggest that more than 15,000 persons have been reported as “missing” in the conflict zone since April 2014. However, many of these individuals were believed to be dead, detained *incommunicado*, or to have since reappeared. In spite of the lack of clear statistics on the actual number of alleged disappearances, reliable sources have documented several instances of alleged forced disappearance, the majority of which were attributed to pro-government forces.

### *OTP Activities*

111. In the past year the Office has continued to review and consider additional information of relevance to the classification of the situation in Crimea and eastern Ukraine under international law.
112. In parallel, the Office has continued to gather, receive and review available information from a range of sources on alleged crimes committed in Crimea and Eastern Ukraine, as well as to review further information received related to the Maidan events. The Office took a number of steps to gather further information on the methodology used by various sources and to verify the seriousness of information received, including through external verification of information by consulting multiple reliable sources.
113. The Office has further developed its database of over 1,200 reported incidents alleged to have occurred in the context of the situation in Eastern Ukraine. This database has been updated as additional information became available and provides a basis for the preliminary crime pattern analysis conducted by the Office. This analysis focusses on identifying key features of the conflict and of the alleged conduct of the different parties, such as the most affected locations, time frames and types of targets, the different *modus operandi* employed, as well as casualty figures.
114. Due to the volume of information in its possession, and the broad range of types of conduct, the Office has sought to prioritise certain types of alleged conduct believed to be most representative of the patterns of alleged crimes and to analyse a selection of incidents in greater detail with regard to the specific elements of crimes under the Statute. The alleged crimes that have been the subject of analysis by the Office to date, including detention-related conduct and shelling in eastern Ukraine, require complex factual and legal assessments, such as in relation to the conduct of hostilities and the applicable legal framework.

115. In its analysis, the Office is also considering the relevance of information presented by both parties to the proceedings that Ukraine initiated before the ICJ against the Russian Federation for alleged violations of the International Convention for the Suppression of the Financing of Terrorism and the International Convention on the Elimination of All Forms of Racial Discrimination.
116. During the reporting period, the Office continued to engage with State authorities and intergovernmental and non-governmental organisations in order to address a range of matters relevant to the preliminary examination and to seek additional information to further inform its assessment of the alleged crimes and other connected issues. For that purpose, it has held a number of meetings with relevant stakeholders both at the seat of the Court and during a mission to Ukraine in April 2017. During this mission, the Office held extensive consultations with the Office of the Prosecutor General of Ukraine in order to assess the availability of information relevant to the Office's analysis. The Office also met with other stakeholders, including a number of civil society organisations, to further verify the seriousness of information received, and discuss cooperation and progress in the preliminary examination.
117. The Office is analysing additional information related to the Maidan events that it has received in 2017. The new information is being examined with regard to the Office's previous preliminary analysis that the crimes allegedly committed during the period 21 November 2013 to 22 February 2014 would not amount to crimes against humanity under the Statute.
118. In September 2017, a representative of the Office also travelled to Ukraine to participate in a panel discussion hosted by the International Renaissance Foundation in the margins of the Yalta European Strategy annual meeting. The event took place before an audience of conference participants, experts in international and Ukrainian law and other interested civil society stakeholders and focused on the topic of "Returning justice to Crimea and eastern Ukraine".

### *Conclusion and Next Steps*

119. The Office will continue to engage with the Ukrainian authorities, civil society and other relevant stakeholders on all matters relevant to the preliminary examination of the situation in Ukraine.
120. The Office will continue its detailed analysis of the alleged crimes, under the strict guidance of the Statute and with a view to reaching conclusions on jurisdictional issues within a reasonable time frame. Given the open-ended nature of Ukraine's acceptance of ICC jurisdiction the Office will also continue to record allegations of crimes committed in Ukraine to the extent that they may fall within the subject-matter jurisdiction of the Court. In accordance with its

policy on preliminary examination, the Office may further gather available information on relevant national proceedings at this stage of analysis.

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

#### COLOMBIA

##### *Procedural History*

121. The situation in Colombia has been under preliminary examination since June 2004. The OTP has received a total of 199 communications pursuant to article 15 of the Statute in relation to the situation in Colombia.
122. In November 2012, the OTP published an Interim Report on the Situation in Colombia, which summarised the Office's preliminary findings with respect to jurisdiction and admissibility.

##### *Preliminary Jurisdictional Issues*

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

##### *Contextual Background*

124. Colombia experienced over 50 years of armed conflict between Government forces, paramilitary armed groups and rebel armed groups, as well as amongst those groups. The most significant actors included: the Revolutionary Armed Forces of Colombia – People's Army (*Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo, "FARC-EP"*), the National Liberation Army (*Ejército de Liberación Nacional, "ELN"*), paramilitary armed groups and the Colombian armed forces.
125. On 24 November 2016, the Government of Colombia and the FARC-EP signed the Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace (*"Acuerdo Final Para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera"*). The agreement stipulates the setting-up of a Comprehensive System for Truth, Justice, Reparation and Non-Repetition, including the establishment of a Special Jurisdiction for Peace (*"SJP"*) designed to investigate and punish serious conflict-related crimes and to bring perpetrators to account. In May 2017, the Selection Committee appointed the Executive Secretary of the SJP. The Committee announced the 51 magistrates selected to sit on the SJP and appointed the Director of the Investigation and Prosecution Unit in September and October 2017, respectively.

126. On 8 February 2017, the Government of Colombia officially initiated peace negotiations with the ELN in Quito, Ecuador. The six agenda items include: (i) societal participation in the construction of peace; (ii) democracy for peace; (iii) transformations for peace; (iv) victims; (v) end of the armed conflict; and (vi) implementation.

### *Subject-Matter Jurisdiction*

127. The Office has determined that the information available provides a reasonable basis to believe that crimes against humanity under article 7 of the Statute have been committed in the situation in Colombia by different actors, since 1 November 2002, including murder under article 7(1)(a); forcible transfer of population under article 7(1)(d); imprisonment or other severe deprivation of physical liberty under article 7(1)(e); torture under article 7(1)(f); rape and other forms of sexual violence under article 7(1)(g) of the Statute.<sup>15</sup>
128. There is also a reasonable basis to believe that since 1 November 2009 war crimes under article 8 of the Statute have been committed in the context of the non-international armed conflict in Colombia, including murder under article 8(2)(c)(i); attacks against civilians under article 8(2)(e)(i); torture and cruel treatment under article 8(2)(c)(i); outrages upon personal dignity under article 8(2)(c)(ii); taking of hostages under article 8(2)(c)(iii); rape and other forms of sexual violence under article 8(2)(e)(vi); and conscripting, enlisting and using children to participate actively in hostilities under article 8(2)(e)(vii) of the Statute.
129. During the reporting period, the Office has continued to receive and gather information on crimes allegedly committed during the armed conflict. This information together with relevant open sources information is being analysed to continue informing the identification of potential cases that would likely arise from an investigation of the situation.

### *Admissibility Assessment*

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

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

*Proceedings relating to “false positives” cases*

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

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

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

*Proceedings relating to forced displacement*

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



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

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

*The Special Jurisdiction for Peace*

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

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

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

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

### *OTP Activities*

149. During the reporting period, the Office has conducted analytical activities relating to the areas of focus of the preliminary examination, including in relation to “false positives” killings, SGBC and forced displacement. Further, the OTP has closely reviewed and analysed the provisions set forth in the implementing legislation of the SJP, to the extent that the functioning of this jurisdiction is likely to inform the Office’s admissibility assessment of relevant cases.
150. In this context, the Office has been in regular contact with the Colombian authorities, including by holding consultations at the seat of the Court for the purpose of exchanging views on matters relating, *inter alia*, to the SJP. The Office also held numerous meetings with representatives of international organisations, international NGOs and Colombian civil society both in The Hague and Bogota. On 21 January 2017, the Prosecutor published an op-ed entitled “The peace agreement in Colombia commands respect but also responsibility” in the Colombian magazine *Semana*.<sup>16</sup>
151. On 8 February 2017, the OTP shared with the Colombian authorities a report on its analysis of the status of ongoing national proceedings against commanders of military units allegedly implicated in “false positives” cases. Since the Office does not enjoy full investigative powers at the preliminary examination stage, it is not in a position to categorically assert that the commanding officers included in the OTP’s report are responsible for crimes or must be prosecuted. The report was shared in confidence with the Colombian authorities for the purpose of further clarifying the Office’s information requirements. Since then, the Colombian authorities have expressed their disposition to hold technical meetings to foster cooperation.
152. The Prosecutor conducted her first visit to Bogota from 10 to 13 September 2017.<sup>17</sup> The purpose of the visit was to obtain clarifications on certain aspects of the future SJP, as well as information about the status of relevant national proceedings relating to “false positives” killings, SGBC and forced

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

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

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

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

### *Conclusion and Next Steps*

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

## GUINEA

### *Procedural History*

156. The situation in Guinea has been under preliminary examination since 14 October 2009. The Office has received 48 communications pursuant to article 15 in relation to the situation in Guinea.

### *Preliminary Jurisdictional Issues*

157. Guinea deposited its instrument of ratification to the Statute on 14 July 2003. The ICC therefore has jurisdiction over Rome Statute crimes committed on the territory of Guinea or by Guinean nationals from 1 October 2003 onwards.

### *Contextual Background*

158. In December 2008, after the death of President Lansana Conté, who had ruled Guinea since 1984, Captain Moussa Dadis Camara led a group of army officers who seized power in a military coup. Moussa Dadis Camara became the Head of State, established a military junta, the *Conseil national pour la démocratie et le développement* (“CNDD”), and promised that the CNDD would hand over power to a civilian president upon the holding of presidential and parliamentary elections. However, subsequent statements that appeared to suggest that Captain Camara might run for president led to protests by the opposition and civil society groups. On 28 September 2009, the Independence Day of Guinea, an opposition gathering at the national stadium in Conakry was violently suppressed by the security forces, leading to what became known as the “28 September massacre”.

### *Subject-Matter Jurisdiction*

159. In October 2009, the UN established an international commission of inquiry (“UN Commission”) to investigate the alleged gross human rights violations that took place on 28 September 2009 and, where possible, identify those responsible. In its final report of December 2009, the UN Commission confirmed that at least 156 persons were killed or disappeared, and at least 109 women were victims of rape and other forms of sexual violence, including sexual mutilations and sexual slavery. Cases of torture and cruel, inhuman or degrading treatment during arrests and arbitrary detentions, and attacks against civilians based on their perceived ethnic and/or political affiliation were also confirmed. The UN Commission considered that there was a strong presumption that crimes against humanity were committed and determined, where it could, possible individual responsibilities.

160. 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.

161. 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 Moussa Dadis Camara's intention to keep his group and himself in power.
162. The Office has concluded that the information available provides a reasonable basis to believe that the following crimes against humanity were committed in the national stadium in Conakry on 28 September 2009 and in their immediate aftermath: murder under article 7(1)(a); imprisonment or other severe deprivation of liberty under article 7(1)(e); torture under article 7(1)(f); rape and other forms of sexual violence under article 7(1)(g); persecution under article 7(1)(h); and enforced disappearance of persons under article 7(1)(i) of the Statute.

### *Admissibility Assessment*

163. On 8 February 2010, in accordance with the recommendations of the reports of the UN Commission and of the CNEI, the General Prosecutor of the Conakry Appeal Court appointed three Guinean investigative judges ("panel of judges") to conduct a national investigation into the 28 September 2009 events. Therefore, since a national investigation is underway, the Office's admissibility assessment has focussed on whether the national authorities are willing and able to conduct genuine investigations, and in particular whether proceedings are conducted with the intent to bring to justice the alleged perpetrators within a reasonable time frame.
164. During the reporting period, a joint effort of the Guinean and the Senegalese authorities resulted in the arrest on 16 December 2016 in Dakar, and subsequent extradition to Conakry of Lt. Aboubacar Chérif Diakité (a.k.a. Toumba), former President's aide-de-camp and commander of the presidential close protection unit (red berets). Lt. Diakité was at large since December 2009 after he admittedly attempted to assassinate former Head of State Moussa Dadis Camara. Following his transfer to Conakry, he was interviewed by the panel of judges in March 2017. During the reporting period, the panel of judges also heard over a dozen of additional victims.
165. To date, the panel of judges has indicted 14 individuals for the acts of violence committed on 28 September 2009 including, Moussa Dadis Camara, the former Head of State, Moussa Thégboro Camara, current Minister in charge of the Special Services responsible for combatting drug trafficking and organised crime, and Claude Pivi, current Minister responsible for the President's security. Moreover, the panel of judges has taken the statement of approximately 450 victims, including a number of victims of SGBC.

166. On 9 November 2017, the Guinean Justice Minister, Cheick Sako, announced that the panel of judges had transmitted the investigative dossier pertaining to the 28 September 2009 events to the relevant prosecutor, the "*Procureur de la République près le Tribunal de première instance de Dixinn*", and had informed the parties accordingly. At the time of writing, the investigation phase was to be formally terminated upon the prosecutor's submissions. The Justice Minister further announced the setting-up of a steering committee for the purpose of the logistical preparation of the upcoming trial.

### *OTP Activities*

167. In the past year, the Office has continued to assess the Guinean authorities' efforts to complete the national investigation into the 28 September 2009 events. In March 2017, the Office conducted its 14<sup>th</sup> mission to Conakry to obtain detailed information on the investigative steps taken by the panel of judges and gauge the prospect of organising a trial within a reasonable time frame. During the mission, the OTP delegation held meetings with the Minister of Justice, the panel of judges, prosecution authorities, civil society organisations, victims' legal representatives and the diplomatic community in Conakry, including the UN, the EU and other relevant States. As in previous visits, the OTP delegation also responded to national and international media queries on the purpose of the visit and the status of the preliminary examination.
168. The Office also engaged with Guinean authorities on other multiple occasions during the reporting period. The Prosecutor met with the Minister of Justice in July 2017 in Dakar in the margins of a high-level conference on the "Challenges and Opportunities for the ICC on the eve of the 20th Anniversary of the Rome Statute", and in October 2017 in Niamey, at the high-level regional symposium on cooperation and complementarity. The Office also facilitated the participation of the Prosecutor of the Court of First Instance of Dixinn, with territorial competence over the 28 September 2009 events, in the fifth ICC seminar on cooperation with national focal points, held in September 2017 at the seat of the Court.
169. Additionally, the Office met with Guinean civil society and victims' representatives during the 15<sup>th</sup> session of the Assembly of States Parties in December 2016 in The Hague, to listen to their views and concerns on the prospect of genuine prosecution of all the alleged perpetrators. A follow-up meeting with the ICC Prosecutor was subsequently organised during the NGO-ICC Roundtable Meetings held in June 2017 at the seat of the Court.
170. In October 2017, the Prosecutor further discussed with the newly appointed UN Special Representative of the Secretary-General on Sexual Violence in Conflict, Ms Pramila Patten, ways and means to increase cooperation between their respective offices in support of the Guinean authorities' efforts to bring perpetrators of SGBC to account.

### *Conclusion and Next Steps*

171. Over seven years since the appointment of the panel of judges to investigate the 28 September 2009 events, the completion of the investigation constitutes a most significant progress in the ongoing national proceedings. While this commendable effort should pave the way for the effective holding of a trial in 2018, the Office will continue to closely examine any potential obstacle to genuine accountability and to support, in coordination with other relevant stakeholders, the organisation of a fair and impartial trial, respectful of the rights of the accused and of the victims.



## IRAQ/UK

### *Procedural History*

172. The situation in Iraq/UK has been under preliminary examination since 13 May 2014. The Office has received a total of 32 communications or additional submissions pursuant to article 15 in relation to the situation in Iraq/UK.
173. On 10 January 2014, the European Center for Constitutional and Human Rights (“ECCHR”) together with Public Interest Lawyers (“PIL”) submitted an article 15 communication alleging the responsibility of UK officials for war crimes involving systematic detainee abuse in Iraq from 2003 until 2008.
174. On 13 May 2014, the Prosecutor announced that the preliminary examination of the situation in Iraq, previously concluded in 2006, was re-opened following submission of further information on alleged crimes within the 10 January 2014 communication.

### *Preliminary Jurisdictional Issues*

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

### *Contextual Background*

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

177. On 20 March 2003, an armed conflict began between a United States (“US”) and UK-led coalition, and Iraqi armed forces, with two rounds of air strikes followed by deployment of ground troops. On 7 April 2003, UK forces took control of Basra, and on 9 April, US forces took control of Baghdad, although sporadic fighting continued. On 16 April 2003, the Coalition Provisional Authority disestablished the Ba’ath Party of Iraq, resulting in the removal of Ba’th leadership from positions of authority within Iraqi society.
178. On 8 May 2003, the US and UK Governments notified the President of the UN Security Council about their specific authorities, responsibilities, and obligations under applicable international law as occupying powers under unified command. The occupying States, acting through the Commander of Coalition

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

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

*Relevant developments at the domestic level*

181. At the domestic level, the conduct of British troops during Op TELIC generated a wide array of proceedings before civilian and military authorities, including court martials, civil and criminal cases, as well as judicial and public inquiries.
182. In March 2010, given the large volume of allegations of criminality received, the Ministry of Defence (MoD) established the Iraq Historic Allegations Team (“IHAT”), a specialised unit made up of Royal Navy Police officers and ex-civilian police detectives, to ensure that credible claims are properly investigated and the facts established. Based on its official figures, IHAT received a total of around 3,400 allegations of unlawful killings and ill treatment between 2010 and the end of June 2017.
183. Alleged crimes by UK forces in Iraq have also formed the subject of two public inquiries initiated by the MoD between 2008 and 2009 to examine, respectively, the death in UK custody of an Iraqi civilian, Baha Mousa in September 2003 (“Baha Mousa inquiry”) and allegations of unlawful killings and ill treatment arising from the so-called “Battle of Danny Boy” in May 2004 (“Al-Sweady inquiry”). In both cases, alleged victims were represented jointly by PIL and Leigh Day, two leading UK human rights law firms specialised in the work with Iraqi complainants.
184. In 2016, PIL and Leigh Day were referred by the Solicitor Regulation Authority (“SRA”) to the Solicitors Disciplinary Tribunal (“SDT”) over their conduct during the Al-Sweady inquiry. The inquiry had notably found that no prisoners had been murdered or that their bodies had been mutilated, and that the most

serious claims alleged against UK forces were “deliberate lies, reckless speculation and ingrained hostility”.

185. In February 2017, by then PIL lead counsel, Phil Shiner, was found guilty by a SDT panel of 12 professional misconduct charges and struck off as a solicitor. PIL had collapsed in August 2016 after the Legal Aid Agency (“LAA”) revoked its contract with the firm for breach of its “contractual requirements” unrelated to the disciplinary proceedings. On the other hand, on 9 June 2017, the SDT found all allegations against Leigh Day and its solicitors unproven.
186. On 10 February 2017, the Defence Sub-committee of the UK Parliament issued the final report of an inquiry set up in April 2016 (“IHAT inquiry”) on the issue of the UK Ministry of Defence’s support for former and serving military personnel subject to judicial processes, and, in particular, on the work of IHAT. The report notably criticised the IHAT for alleged inefficiency and lack of professionalism and pressured the MoD to cut the IHAT’s expenditure by closing it down and instead to provide the financial and other support to those UK servicemen under investigation.
187. On the same day of the release of the inquiry’s report, amid concerns of political interference, the Defence Secretary announced the closing of IHAT ahead of the originally scheduled time frame by 30 June 2017, citing IHAT own forecasts that the unit’s caseload was expected to reduce to around 20 investigations by the summer 2017.
188. IHAT was permanently shut-down at the stipulated date of 30 June 2017. As of 1st July 2017, its remaining investigations were reintegrated into the service police system and taken over by a new investigative unit known as the Service Police Legacy Investigations (“SPLI”).

#### *Examination of the information available*

189. In accordance with established practice and article 15(2) of the Statute, the Office paid particular attention to the assessment of reliability of the sources and the seriousness of the information received. Since the more recent allegations against UK forces in Iraq were mostly brought to the Office’s attention by only one information-provider, the Office exercised an abundance of care in this regard.
190. In making this assessment, the Office has independently examined all relevant circumstances bearing impact on the trustworthiness of the main information provider, including the findings of the Solicitors Disciplinary Tribunal (“SDT”) against Phil Shiner, the admissions made by Phil Shiner himself in the course of the disciplinary proceedings, the issues involving at least one of PIL main intermediaries in the field, as well as the overall political context in which the disciplinary proceedings against PIL took place.

191. In assessing the credibility of the claims themselves, the Office has taken the position that individual statements received from PIL could be considered credible enough if substantiated with supporting material (such as detention records, medical certificates, photographs, etc.) and/or corroborated by information available from reliable third sources, including human rights reports, the findings of public inquiries in the UK and data pertaining to out-of-court compensation settlements or other relevant material.

### *Subject-Matter Jurisdiction*

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

### *Alleged crimes committed in the UK custody*

193. PIL and ECCHR have alleged that the UK personnel committed systematically and on a large scale war crimes of torture and related ill-treatment against at least 1071 Iraqi detainees pursuant to “the UK Government’s deliberate policy of abuse of Iraqi detainees in the period from March 2003 through December 2008 on the territory of Iraq”. PIL and ECCHR have further alleged that the British personnel committed 52 cases of unlawful killings against persons in their custody during the same period in Iraq.
194. On the basis of the information available, including some of the allegations brought to its attention since 2014 and considered credible, the Office reaffirms its previous conclusion that there is a reasonable basis to believe that in the period from 20 March 2003 through 28 July 2009 members of the UK armed forces committed the following war crimes in the context of the armed conflicts in Iraq against persons in their custody, including : wilful killing/murder (article 8(2)(a)(i) or article 8(2)(c)(i)), torture and inhuman/cruel treatment (article 8(2)(a)(ii) or article 8(2)(c)(i)), outrages upon personal dignity (article 8(2)(b)(xxi) or article 8(2)(c)(ii)), and rape or other forms of sexual violence (article 8(2)(b)(xxii) or article 8(2)(e)(vi)).

### *Alleged crimes committed outside the UK custody*

195. The Office was seized with a limited number of allegations that the UK armed forces also committed acts of killings in the course of their military operations involving air strikes and ground supporting combat operations. The Office analysed the same allegations in the context of the preliminary examination of the situation in Iraq in 2006 and then concluded that there was no reasonable basis to believe that these acts alleged amounted to war crimes within the jurisdiction of the Court.

196. The new information available does not alter the previous determination that, in the absence of information indicating intent to kill or target civilians or civilian objects, or cause clearly excessive civilian injuries, there is no reasonable basis to believe that war crimes within the jurisdiction of the Court were committed by British armed forces in the course of their military operations not related to the context of arrests and detentions. While additional incidents were brought to the Office's attention, the factual information provided does not constitute a reasonable basis to believe that the British armed forces intended to target civilians in these incidents.

### *Admissibility Assessment*

197. In light of the preliminary conclusions reached in respect of jurisdictional aspects, the Office is undertaking an assessment of admissibility. As set out in article 17(1) of the Statute, admissibility requires an assessment of complementarity and gravity. In line with its prosecutorial strategy, the Office will assess complementarity and gravity in relation to the most serious crimes alleged to have been committed and those most responsible for those crimes. The Statute does not stipulate any mandatory sequence in the consideration of complementarity and gravity. The Prosecutor must be satisfied as to admissibility on both aspects before proceeding.

### *OTP Activities*

198. During the reporting period, the Office has focussed its activities on a comprehensive factual and legal assessment of the information available, including a rigorous independent evaluation of all article 15 communications in light of the new information and recent developments that occurred at the domestic level. In the course of this process, the Office engaged with key stakeholders, in particular the senders of the article 15 communications and the UK government, as well as conducted a number of other analytical activities.
199. As part of its close scrutiny of relevant developments at the national level, the Office conducted its third mission to the UK from 13 to 14 February 2017. The mission enabled the Office, *inter alia*, to gather further contextual and other information on the disciplinary proceedings against Phil Shiner, including the views of PIL's associates, and to receive updated information from the IHAT on the progress of their investigations amidst the decision of UK Defence Secretary to close IHAT ahead of the original scheduled time frame.
200. Following the mission, the Office received additional updates and pieces of information from the UK Government, IHAT and from article 15 senders PIL and ECCHR. The Office has furthermore exchanged views on issues pertaining to the preliminary examination with other relevant actors, including NGO representatives and scholars.

201. The Office conducted a comprehensive review of all information available comprising, *inter alia*, new media articles and publications, recent case-law from the European Court of Human Rights, relevant findings by domestic authorities, such as IHAT and the Iraq Fatality Investigations (“IFI”), as well as hearings before the UK Parliament Defence Sub-committee.
202. The Office further received and considered information on relevant national proceedings conducted by the UK authorities, in particular with respect to the incidents of criminalities identified. In so doing, it maintained regular contact with the appropriate interlocutors, including the Service Prosecution Authority and IHAT, senior staff of both agencies, and other relevant State officials. The transition between IHAT and its successor, the SPLI, has also been closely scrutinised by the Office, notably to gauge the effective continuity between the two entities in terms of corporate knowledge, procedures, expertise, and judicial oversight. The Office is grateful to the UK authorities for their ongoing cooperation in the course of this preliminary examination.

### *Conclusion*

203. Following a thorough factual and legal assessment of the information available, the Office has reached the conclusion that there is a reasonable basis to believe that members of the UK armed forces committed war crimes within the jurisdiction of the Court against persons in their custody. The Office’s admissibility assessment is ongoing and is intended to be completed within a reasonable time frame.

## NIGERIA

### *Procedural History*

204. The preliminary examination of the situation in Nigeria was announced on 18 November 2010. The Office has received a total of 131 communications pursuant to article 15 in relation to the situation in Nigeria.
205. On 5 August 2013, the Office published an Article 5 report on the Situation in Nigeria, presenting its preliminary findings on jurisdictional issues.<sup>18</sup>
206. On 12 November 2015, the Office identified eight potential cases involving the commission of crimes against humanity and war crimes under articles 7 and 8 of the Statute that form the subject of the ongoing admissibility assessment, including six for conduct by Boko Haram and two for conduct by the Nigerian security forces.<sup>19</sup>

### *Preliminary Jurisdictional Issues*

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

### *Contextual Background*

208. The armed conflict between Boko Haram and Nigerian security forces continued during the reporting period. The intensity of the hostilities between the Nigerian Security Forces supported by the armed forces of neighbouring States, including Chad, Niger, and Cameroon on the one hand and Boko Haram on the other however appear to have decreased. The coalition forces consolidated their military gains against Boko Haram, including the recapture of the Sambisa Forest from Boko Haram in December 2016, located in Nigeria's north-eastern Borno State. Having been displaced from their strongholds in Nigeria, Boko Haram fighters reportedly continued to cross Nigerian borders into the neighbouring States of Niger, Chad, and Cameroon. Since April 2017, Boko Haram reportedly increased its military activities, including alleged attacks on civilians, in particular in Nigeria's Borno and Adamawa states as well as on the territory of neighbouring countries.
209. Apart from the conflict with Boko Haram, the Nigerian Security Forces were reportedly involved in other security operations, including in clashes with pro-Biafra protesters in the course of 2017.

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<sup>18</sup> See ICC-OTP, [Situation in Nigeria: Article 5 Report](#), 5 August 2013.

<sup>19</sup> See ICC-OTP, [Report on Preliminary Examination Activities 2015](#), paras. 195-214.

### *Subject-Matter Jurisdiction*

210. During the reporting period, the Office continued to gather and examine information on new crimes allegedly committed in Nigeria. New allegations of crimes were reported in particular in the context of the armed conflict between Boko Haram and the Nigerian security forces, including SGBC as well as crimes against children allegedly committed by Boko Haram.
211. Boko Haram reportedly continues to use children under the age of 15 years as child soldiers, with some being used as suicide bombers. New information reviewed by the Office indicates a sharp increase in the use of children under the age of 15 years and women and girls in suicide attacks in 2017. According to UNICEF, between January and August 2017, 83 children have been used as “human bombs”, 55 of whom were girls, most often under 15 years old and 27 were boys; one was a baby strapped to a girl. Amnesty International (“AI”) also reported a sharp rise in civilian deaths in north-eastern Nigeria resulting from Boko Haram’s increased use of suicide bombers, often women and girls who were forced to carry explosives into crowded areas. In September 2017, AI recorded the killing of 381 civilians between April and September 2017 in Cameroon and Nigeria attributable to Boko Haram. Boko Haram reportedly claimed responsibility for some of the attacks. On the basis of a preliminary assessment of targeted groups, *modus operandi*, and geographical patterns, it appears that the majority of the suicide attacks can be attributed to Boko Haram.
212. The above conduct falls within the potential cases against Boko Haram already identified by the Office, relating to the commission of crimes against humanity and war crimes under articles 7 and 8 of the Statute, namely Boko Haram’s attacks against civilians, recruitment and use of children under the age of 15 year to participate in hostilities, and the persecution of women and girls.
213. During the reporting period, the Office further continued its factual and legal analysis of other allegations of crimes unrelated to the armed conflict between Boko Haram and the Nigerian security forces. In that regard, the Office carefully examined the events of December 2015 in Zaria, Kaduna State, involving clashes between members of the Islamic Movement of Nigeria (“IMN”) and Nigerian security forces. It is alleged that members of the IMN armed with batons, knives, and machetes stopped the convoy of the Chief of Army Staff on a principle road in Zaria on 12 December 2015 and that in subsequent security operations, the Nigerian military killed at least 349 persons (men, women, and children) while at least 66 others were injured. On the basis of information available, including the report of a Judicial Commission of Inquiry established by the Kaduna State Government to investigate the events, the Office has reached preliminary findings and will seek further clarifications from the Nigerian authorities.
214. The Office has furthermore received information alleging crimes committed by the Nigerian Security Forces against pro-Biafra protesters in the course of 2017. The examination of this information is ongoing.



### *Admissibility Assessment*

215. During the reporting period, the Office has continued to assess the admissibility of the eight potential cases it has identified in relation to the armed conflict between Boko Haram and the Nigerian security forces.
216. With respect to the crimes allegedly committed by Boko Haram, information provided to the Office by the Attorney-General of the Federation mostly relates to proceedings targeted at low-level Boko Haram members rather than its leadership. A limited number of case files appears to relate to the alleged killings and injuries of civilians by Boko Haram.
217. The Office is however aware of a series of new proceedings initiated by the Nigerian authorities in October 2017, potentially relevant to the admissibility assessment. According to a statement of the Office of the Attorney-General of the Federation, several prosecutors were assigned to bring to court more than 2,300 Boko Haram suspects, currently detained in two military camps in north-western Nigeria. Four judges have been reportedly assigned to try these cases and defence counsels have been identified to represent the suspects. A first phase of proceedings addressing 575 detainees has reportedly concluded, leading to 45 convictions and sentences between 3 and 31 years in jail and 468 acquittals due to the lack of relevant information. 34 cases were struck out for lack of evidence and 28 cases were transferred to the Federal High Court Abuja Division and adjourned until next year due to the absence of relevant witnesses.
218. With respect to crimes allegedly committed by the Nigerian security forces information available to date only relates to some extent to the two potential cases identified by the Office. The Office however notes that the Nigerian authorities initiated two relevant inquiries during the reporting period, namely the Special Board of Inquiry (“SBI”) instituted by the Nigerian Army and the Presidential Investigation Panel to Review Compliance of the Armed Forces with Human Rights Obligations and Rules of Engagement (“PIP”).
219. The SBI was convened by the Chief of Army Staff of the Nigerian Army on 8 March 2017 and submitted its report on 18 May 2017, a summary of which was published in June 2017. The SBI was mandated to investigate allegations of human rights violations against the Nigerian Security Forces, including in the context of its operations against Boko Haram in north-eastern Nigeria. According to the terms of reference of the SBI, this includes allegations of deaths in military detention, allegations of summary executions in Giwa barracks on 14 March 2014, allegations of torture, enforced disappearances, unlawful killings and illegal detention. The SBI was also tasked to determine the veracity of specific allegations raised by AI against individual senior military officers.
220. The SBI found that the delayed trials of Boko Haram detainees resulting in some cases of deaths in custody constitute a denial of the detainees’ right to a fair trial. However, the SBI found no evidence of arbitrary arrests or extra judicial

executions of detainees in any of the documents reviewed. The SBI was also unable to substantiate any of the allegations by AI against individual senior military officers.

221. The PIP was set up by Acting President Yemi Osinbajo on 11 August 2017, in accordance with one of the SBI's recommendations. The PIP is mandated among others to investigate alleged violations of international humanitarian law and human rights law and matters of conduct and discipline in the Nigerian Armed Forces in local conflicts and insurgencies. Stakeholders, affected persons, institutions and interested members of the public have been invited to submit information to the PIP to assist it in the discharge of its mandate. From 7 September to 6 October 2017, the PIP held a public hearing in Abuja. The last hearing reportedly took place on 8 November 2017, concluding the investigation. A final report of the proceedings is currently being drafted by the panel and will be submitted to the Government with recommendations for further action.

### *OTP Activities*

222. The Office continued its factual and legal assessment of any new information on alleged crimes received during the reporting period and gathered additional information on relevant national proceedings conducted by the Nigerian authorities. It conducted four missions to Nigeria in the reporting period in relation to its admissibility assessment.
223. In November 2016, the Prosecutor met with the Attorney-General of the Federation and Minister of Justice, Mr Abubakar Malami in The Hague, to discuss the status of the preliminary examination of the situation in Nigeria and to recall pending requests and the specific requirements of the Office to conduct its admissibility assessment. On this occasion, the Attorney-General reiterated Nigeria's commitment to the ICC in general and cooperation with the OTP's preliminary examination in particular.
224. In May 2017, the Prosecutor travelled to Abuja to meet with Acting President Yemi Osinbajo and relevant civil and military authorities, including the Minister of Foreign Affairs and the Minister of Defence. The Acting President as well as the Minister of Foreign Affairs ensured the Prosecutor of Nigeria's support and cooperation. In a separate meeting, the Prosecutor discussed the situation in Nigeria with civil society organisations and listened to victims of alleged crimes.
225. In May 2017, the Office held a second technical meeting with Nigerian authorities at the Ministry of Justice in Abuja to gather relevant information with respect to the potential cases identified by the Office for the purpose of its admissibility assessment. The meeting was attended by a wide range of relevant Nigerian institutions and stakeholders from the justice and security sectors. The Office informed the participants on the status of the preliminary examination, recalled the pending requests for additional information, and elaborated on the requirements of the Office to conduct its admissibility assessment. The

participants provided updated information on relevant initiatives, including the setting up of SBI by the Chief of Defence Staff of the Nigerian Army. In the course of the same mission, the Office met with the National Human Rights Commission (“NCHR”) in Abuja and members of the SBI.

226. In December 2016, March 2017, and June 2017, the Office presented the preliminary findings of its ongoing examination to Nigerian prosecuting authorities during capacity building workshops organised by international partners of Nigeria. In these workshops, experts on international crimes exchanged experiences with Nigerian professionals currently investigating and prosecuting crimes that could fall under ICC jurisdiction, such as prosecutors from the office of the Director of Public Prosecutions of the Federation and the Nigerian Army.
227. Throughout the reporting period, the Office maintained close contact with relevant partners and stakeholders on the situation in Nigeria, including international and Nigerian NGOs, communication senders, and diplomatic actors.

#### *Conclusion and Next Steps*

228. The Office will continue its analysis of all new crimes allegedly committed in the situation in Nigeria and its admissibility assessment of the eight potential cases currently identified in order to reach a decision on whether the criteria for opening an investigation are met. The Office will continue to pay special attention to allegations of SGBC and crimes committed against children.
229. While the Office requires further information on relevant domestic proceedings, it will continue to hold consultations with the Nigerian authorities and with intergovernmental and non-governmental organisations to assist relevant stakeholders in identifying pending impunity gaps and the scope for possible remedial measures.

## IV. COMPLETED PRELIMINARY EXAMINATIONS

### AFGHANISTAN

#### *Procedural History*

230. The preliminary examination of the situation in the Islamic Republic of Afghanistan (“Afghanistan”) was announced in 2007. The Office has received a total of 125 communications pursuant to article 15 in relation to the situation in Afghanistan.
231. By memorandum of 30 October 2017, the Prosecutor notified the President of the Court, in accordance with regulation 45 of the Regulations of the Court, of her intention to submit a request for authorisation of an investigation into the situation in the Islamic Republic of Afghanistan pursuant to article 15(3) of the Statute.
232. On 3 November 2017, the Presidency of the Court assigned the Situation in the Islamic Republic of Afghanistan to PTC III.
233. On 20 November 2017, the Office requested authorisation from the PTC to proceed with an investigation of the situation in the Islamic Republic of Afghanistan in the period since 1 July 2002, pursuant to article 15(3) of the Statute.<sup>20</sup> Specifically, the Office has sought authorisation to investigate alleged crimes committed on the territory of Afghanistan in the period since 1 May 2003, as well as other alleged crimes that have a nexus to the armed conflict in Afghanistan and are sufficiently linked to the situation and were committed on the territory of other States Parties in the period since 1 July 2002.

#### *Preliminary Jurisdictional issues*

234. Afghanistan deposited its instrument of ratification to the 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.
235. In relation to the crimes in the context of, and that were associated with the armed conflict in Afghanistan that were allegedly committed on the territory of other States Parties, the Statute entered into force for Poland and Romania on 1 July 2002, and for Lithuania on 1 August 2003.

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<sup>20</sup> [Public redacted version of “Request for authorisation of an investigation pursuant to article 15”](#), 20 November 2017, ICC-02/17-7-Conf-Exp. The present chapter summarises the public Request for authorisation, which includes relevant references to sources used.

## *Contextual Background*

236. In response to the attacks of 11 September 2001 on Washington D.C. and New York City, on 7 October 2001 the US launched military operation 'Enduring Freedom' ("OEF") in Afghanistan. The purpose of the operation was to fight Al Qaeda and the Taliban government which harboured Al Qaeda and its leadership. As part of the initial phase of the operation, the US organised and armed Afghan anti-Taliban forces operating under the coalition known as the 'Northern Alliance'. By the end of the year, the Taliban were ousted from power.
237. In order to establish permanent governance institutions, a number of Afghan leaders started talks under the auspices of the UN. The 2-5 December 2001 Bonn Conference resulted in the Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions, otherwise known as the Bonn Agreement. The Bonn Agreement also requested the UN Security Council to establish a UN mandated force to assist in the maintenance of security for Kabul and its surrounding areas until the new Afghan security and armed forces were fully constituted and functioning. On 20 December 2001, the UN Security Council adopted resolution 1386 establishing an International Security Assistance Force ("ISAF"). In parallel to the ISAF mission, US forces continued military operations pursuant to OEF against supporters of the Al Qaeda network.
238. In tandem to the process of establishing Afghan governing institutions, the security situation continued to deteriorate, primarily due to the increasing level of insurgency, largely attributable to the Taliban, which began to rebuild its influence starting in 2002. The three largest anti-government armed groups operating in Afghanistan historically have been the Taliban, the Haqqani Network, and Hezb-e-Islami Gulbuddin ("HIG"). Al Qaeda also remains a focus of military operations by international forces in Afghanistan. Since 2015, groups calling themselves Daesh/Islamic State Khorasan Province ("Daesh/ISKP") have emerged and have been held responsible (or claimed responsibility) for a number of attacks against civilians in Kabul as well in Nangarhar province.
239. The number of international forces deployed to support the Afghan Government peaked at over 100,000 in 2010-2011, the majority of which were US armed forces, but with approximately 50 other countries contributing troops to ISAF, including states that are not members of NATO. The US-led OEF continued in Afghanistan alongside the NATO-led ISAF mission until the end of December 2014, when both combat missions officially concluded, and were replaced by Operation Freedom's Sentinel and Operation Resolute Support, respectively. The new missions are focused primarily on training, advising and assisting the ANSF, although Operation Freedom's Sentinel also conducts counter-terrorism operations against the remnants of Al Qaeda.

### *Subject-Matter Jurisdiction*

240. The armed conflict in Afghanistan during the relevant period has been classified by the Prosecution as of 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.
241. As a result of its examination, the Office has determined that there is a reasonable basis to believe that, at a minimum, the following crimes within the Court's jurisdiction have occurred:
- Crimes against humanity and war crimes by members of the Taliban and their affiliated Haqqani Network;
  - War crimes of torture, outrages upon personal dignity and sexual violence by members of the Afghan National Security Forces ("ANSF"), in particular the National Directorate for Security ("NDS") and the Afghan National Police ("ANP");
  - War crimes of torture, outrages upon personal dignity and rape and other forms of sexual violence, by members of the US armed forces on the territory of Afghanistan and members of the CIA in secret detention facilities both in Afghanistan and on the territory of other States Parties, principally in the 2003-2004 period.
242. The Office has also examined allegations of other crimes committed by international armed forces operating in Afghanistan. In particular, since 2009, when the UN Assistance Mission to Afghanistan ("UNAMA") began to record civilian casualties systematically, it has documented approximately 1,820 civilian deaths.
243. Having reviewed information on a large number of incidents attributed to the international forces, the Office has determined that, although these operations resulted in incidental loss of civilian life and harm to civilians, in most incidents that information does not provide a reasonable basis to believe that the military forces intended the civilian population as such, or individual civilians not taking direct part in hostilities, to be the object of the attack.
244. Nonetheless, if an investigation is authorised into the Situation, these as well as any other alleged crimes that may occur after the start of investigations could nonetheless be subjected to proper investigation.

245. More recently, during the preparation of its Request, the Office received media reports and article 15 communications concerning allegations made against special forces of certain international forces operating in Afghanistan. Should authorisation be granted to open an investigation, these and any other alleged crimes that may occur after the commencement of the investigation, as well as any attendant assessments concerning complementarity and gravity, could be assessed further within the scope of the authorised situation.

*Acts allegedly committed by members of the Taliban and affiliated armed groups*

246. The Office has examined the information available on crimes allegedly committed by anti-government armed groups, in particular the Taliban and their affiliates, in the context of the armed conflict in Afghanistan. According to this information, anti-government armed groups have been responsible for more than 17,000 civilian deaths since 2009, as well as almost 7,000 deliberate and targeted killings of civilians. In the period since 1 May 2003, insurgent groups have allegedly launched numerous attacks on protected objects, including schools, civilian government offices, hospitals, shrines and mosques, and humanitarian organisations.

247. The Taliban leadership has expressly declared its policy of attacking civilians publicly in official documents issued by the Taliban leadership such as the *Layha* and in fatwas; in public statements by Taliban officials or spokespersons who claimed that particular civilians were the primary object of an attack; and in public lists of civilians to be killed or captured.

248. There is a reasonable basis to believe that the Taliban and their affiliates have committed the crimes against humanity of murder (article 7(1)(a)), imprisonment or other severe deprivation of physical liberty (article 7(1)(e)), and persecution against any identifiable group or collectivity on political grounds and on gender grounds (article 7(1)(h)). These crimes were allegedly committed as part of a widespread and/or systematic attack against civilians perceived to support the Afghan government and/or foreign entities, or to oppose Taliban rule and ideology, involving the multiple commission of violent acts in pursuance of the policy of the Taliban leadership to seize power from the Government of Afghanistan and impose its rule and system of beliefs by lethal force. In particular, women and girls have been deliberately attacked by the Taliban and their affiliates to prevent them from studying, teaching, working or participating in public affairs, through intimidation, death threats, abductions and killings.

249. There is also a reasonable basis to believe that since 1 May 2003, the Taliban and their affiliates have committed the following war crimes in the context of a non-international armed conflict: murder (article 8(2)(c)(i)), intentionally directing attacks against the civilian population (article 8(2)(e)(i)), intentionally directing attacks against humanitarian personnel (article 8(2)(e)(iii)), intentionally directing attacks against protected objects (article 8(2)(e)(iv)), conscripting or

enlisting children under the age of 15 years or using them to participate actively in hostilities (article 8(2)(e)(vii)), and killing or wounding treacherously a combatant adversary (article 8(2)(e)(ix)). These war crimes were committed on a large scale and as part of a plan or policy.

*Acts allegedly committed by members of the Afghan National Security Forces*

250. Multiple sources have reported on the prevalence of torture in Afghan Government detention facilities, including the Afghanistan Independent Human Rights Commission, UNAMA, and a fact-finding commission appointed by the President of Afghanistan in 2013.
251. The information available provides a reasonable basis to believe that members of the ANSF have committed the war crimes of torture and cruel treatment under article 8(2)(c)(i), outrages upon personal dignity pursuant to article 8(2)(c)(ii), and sexual violence under article 8(2)(e)(vi). Governmental authorities alleged to have tortured conflict-related detainees include the NDS, the ANP as well as the Afghan National Army (“ANA”), the Afghan National Border Police (“ANBP”) and the Afghan Local Police (“ALP”).
252. The information available does not clearly indicate that the alleged crimes by members of the ANSF against conflict-related detainees have been committed as part of one or more plans or policies at the facility, district or provincial level. However, the information available indicates that the alleged crimes were committed on a large scale.

*Acts allegedly committed by members of the US armed forces and of the CIA*

253. The information available provides a reasonable basis to believe that in the period since 1 May 2003, members of the US armed forces have committed the war crimes of torture and cruel treatment (article 8(2)(c)(i)), outrages upon personal dignity (article 8(2)(c)(ii)) and rape and other forms of sexual violence (article 8(2)(e)(vi)). These crimes were committed in the context of a non-international armed conflict. Moreover, the information available provides a reasonable basis to believe that in the period since 1 July 2002, members of the CIA have committed the war crimes of torture and cruel treatment (article 8(2)(c)(i)), outrages upon personal dignity (article 8(2)(c)(ii)), and rape and other forms of sexual violence (article 8(2)(e)(vi)). These crimes were committed in the context of a non-international armed conflict, both on the territory of Afghanistan as well as on the territory of other States Parties to the Statute.
254. In particular, the information available provides a reasonable basis to believe that at least 54 detained persons (selected from a wider range of reported victims) were subjected to torture, cruel treatment, outrages upon personal dignity, rape and/or sexual violence by members of the US armed forces on the territory of Afghanistan, primarily in the period 2003-2004. The information available further provides a reasonable basis to believe that at least 24 detained



persons (selected from a wider range of reported victims) were subjected to torture, cruel treatment, outrages upon personal dignity, rape and/or sexual violence by members of the CIA on the territory of Afghanistan and other States Parties to the Statute (namely Poland, Romania and Lithuania), primarily in the period 2003-2004.

255. The information available indicates that these alleged crimes took place in the context of, and were associated with the armed conflict in Afghanistan. In particular, those crimes were allegedly committed against conflict-related detainees suspected of being members of the Taliban and/or Al Qaeda or otherwise suspected of cooperating with them. Interrogation techniques were designed and implemented as part of a policy to obtain actionable intelligence, and appear to have been discussed, reviewed, and authorised within the US armed forces, the US Department of Defence (“DoD”), the CIA, and other branches of the US Government.

#### *Admissibility Assessment*

256. At the article 15 stage, admissibility is assessed in relation to ‘potential cases’ which may be brought. Having identified potential cases arising from the conduct of three separate groups of alleged perpetrators - members of the Taliban and their affiliates (anti-government groups); members of the ANSF; and members of the US armed forces or the CIA - the Office has found that these potential cases that would likely arise from an investigation of the situation in Afghanistan would be currently admissible. The Office will continue to assess the existence of national proceedings for as long as the situation remains under investigation, should the Chamber authorise the investigation, including in relation to any additional information that may be provided by relevant States with jurisdiction at the article 18 stage.

#### *Members of the Taliban and affiliated armed groups*

#### Complementarity

257. The information available indicates that at this stage no national investigations or prosecutions have been conducted or are ongoing against those who appear most responsible for the crimes allegedly committed by members of the Taliban and affiliated armed groups.
258. The Government of Afghanistan adopted a national action plan on transitional justice in 2005, which stated that no amnesty should be provided for war crimes, crimes against humanity and other gross violations of human rights, and set out other activities geared towards truth-seeking and documentation, and the promotion of reconciliation and national unity. The action plan remains unimplemented and appears to have become obsolete.

259. Instead, the Afghan Parliament passed a general amnesty in 2007, which entered into force in 2009. The “Law on Public Amnesty and National Stability” provides legal immunity to all belligerent parties including “those individuals and groups who are still in opposition to the Islamic State of Afghanistan”, without any temporal limitation or any exception for international crimes.
260. More recently, efforts have been taken by the Government of Afghanistan to build its capacity to meet its obligations under the Statute and to facilitate national investigations and prosecutions of ICC crimes. In particular, in 2014 the Government of Afghanistan updated the country’s Criminal Procedure Code in order, *inter alia*, to exempt Rome Statute crimes from the ordinary statutes of limitations. The Government of Afghanistan has also promulgated a new Penal Code which now explicitly incorporates Rome Statute crimes and specifies superior responsibility as an available mode of liability. The Penal Code Bill was adopted by Afghanistan’s parliament in May 2017.
261. Upon review of this and other information, the Office has concluded that the potential case(s) it has identified concerning crimes allegedly committed by members of the Taliban and affiliated armed groups would currently be admissible, meaning that there is no conflict of jurisdiction between Afghanistan and the Court.

#### Gravity

262. Over the period 2009-2016, 50,802 civilian casualties (17,770 deaths and 33,032 injuries) were attributed to anti-government armed groups, mostly from their use of improvised explosive devices as well as suicide and complex attacks. The information available suggests that much of the alleged conduct was committed with particular cruelty or in order to instil terror and fear among the local civilian population. Victims were deliberately targeted on a discriminatory basis based on their actual or perceived political allegiance or on gender grounds, with attacks particularly directed at civic and community leaders. The campaign of targeted killings of politicians, government workers, tribal and community leaders, teachers, and religious scholars has also deprived local Afghan communities of functioning institutions. In many parts of the country, the Afghan population has been denied access to humanitarian assistance and basic government services, including health care, as a direct consequence of the insurgent strategy of targeting government workers and aid workers, including medical staff and de-miners.
263. Other crimes were committed in a manner calculated to inflict maximum harm and injury on the largest number of victims, such as through suicide bombings in crowded public gatherings, including in mosques during Friday prayers. The widespread use of perfidious tactics has also placed the civilian population at increased risk of attack from governmental and international forces, contributing to increased civilian casualties. The alleged crimes have had a particularly broad

and severe impact on women and girls. Girls' education has come under sustained attack, thereby depriving thousands of girls of their right to access education.

*Members of the Afghan National Security Forces*

Complementarity

264. Despite the particularly high prevalence of prohibited acts against conflict-related detainees in certain detention facilities run by the NDS or ANP, the information available does not indicate that relevant national proceedings have been carried out against those most responsible for such alleged crimes. Accordingly, the Office has assessed that the potential case(s) it has identified concerning crimes allegedly committed by members of the ANSF would currently be admissible, meaning that there is no conflict of jurisdiction between Afghanistan and the Court.

Gravity

265. The alleged crimes have been committed on a large scale, with reports that torture has been practised institutionally in certain facilities. High percentages of detainees have reported having experienced torture or cruel treatment. Facilities in which torture was found to be prevalent or systematic are located in multiple provinces across the country and are not limited to any one particular geographical region.
266. The manner in which these crimes are alleged to have been committed also appears to have been particularly cruel, prolonged and severe, calculated to inflict maximum pain and has included acts of sexual violence. The alleged crimes had severe short-term and long-term impacts on detainees' physical and mental health, including permanent physical injuries.

*Members of the US armed forces and the CIA*

Complementarity

267. The information available indicates that at this stage no national investigations or prosecutions have been conducted or are ongoing against those who appear most responsible for the crimes allegedly committed by members of the US armed forces.
268. Although the US has asserted that it has conducted thousands of investigations into detainee abuse, to the extent discernible, such investigations and/or prosecutions appear to have focused on alleged acts committed by direct

physical perpetrators and/or their immediate superiors. None of the investigations appear to have examined the criminal responsibility of those who developed, authorised or bore oversight responsibility for the implementation by members of the US armed forces of the interrogation techniques that resulted in the alleged commission of crimes within the jurisdiction of the Court. Despite a number of efforts it has undertaken, the Office has been unable to obtain specific information or evidence with a sufficient degree of specificity and probative value that demonstrates that proceedings were undertaken with respect to cases of alleged detainee abuse by members of the US armed forces in Afghanistan within the temporal jurisdiction of the Court, of which it has identified at least 54 victims.

269. The information available indicates that at this stage no national investigations or prosecutions have been conducted or are ongoing against those who appear most responsible for the crimes allegedly committed by members of the CIA. The limited inquiries and/or criminal proceedings that were initiated appear to have been focussed on the conduct of direct perpetrators and persons who did not act in good faith or within the scope of the legal guidance given by the Office of Legal Counsel regarding the interrogation of detainees. No proceedings appear to have been conducted to examine the criminal responsibility of those who developed, authorised or bore oversight responsibility for the implementation by members of the CIA of the interrogation techniques that resulted in the alleged commission of crimes within the jurisdiction of the Court.
270. In relation to proceedings conducted in other States, criminal investigations are reportedly ongoing in Poland, Romania and Lithuania regarding alleged crimes committed in relation to the CIA detention facilities on their respective territories. If the Chamber authorises the investigation, the Office will continue to assess the progress of any relevant national proceedings in order to determine whether they encompass the same persons and substantially the same conduct as identified in the course of any investigations by the Office, and if so, whether they are genuine.
271. Moreover, no national investigations or prosecutions have been conducted or are ongoing in Afghanistan with respect to crimes allegedly committed by members of international forces, in line with status of forces agreements in place between Afghanistan and the US as well as between Afghanistan and ISAF troop-contributing countries, which provide for the exclusive exercise of criminal jurisdiction by the authorities of the sending State.

### Gravity

272. The groups of persons likely to be the focus of future investigations include persons who devised, authorised or bore oversight responsibility for the implementation by members of the US armed forces and members of the CIA of

the interrogation techniques that resulted in the alleged commission of crimes within the jurisdiction of the Court.

273. With respect to the US armed forces, the alleged crimes appear to have been inflicted on a relatively small percentage of all persons detained by US armed forces, and to have occurred during a limited time period. Nonetheless, the acts allegedly committed were serious both in their number and in their effect, and although implemented pursuant to authorised interrogation policies adopted locally rather than at headquarters level, implicated personal responsibility within the command structure.
274. The treatment of CIA detainees appears to have been particularly grave on a qualitative assessment. The alleged crimes appear to have been committed with particular cruelty, involving the infliction of serious physical and psychological injury, over prolonged periods, and including acts committed in a manner calculated to offend cultural and religious values, and leaving victims deeply traumatised. Detainees who were subjected to “enhanced interrogation techniques” and extended isolation exhibited psychological and behavioural issues, including hallucinations, paranoia, insomnia, and attempts at self-harm and self-mutilation.

### *Interests of Justice*

275. The seriousness and extent of war crimes and crimes against humanity allegedly committed in Afghanistan, highlighted by the extended period of time over which crimes have been and continue to be committed, the wide range of perpetrators among all parties to the conflict, the recurring patterns of criminality, and the limited prospects for accountability at the national level, all weigh heavily in favour of an investigation. In light of the mandate of the Prosecutor and the object and purpose of the Statute, and based on the information available, the Office has identified no substantial reasons to believe that the opening of an investigation would not serve the interests of justice.

### *OTP Activities*

276. During the reporting period, the Office has completed its comprehensive assessment of statutory criteria for a determination whether there is a reasonable basis to proceed with an investigation into the situation in Afghanistan pursuant to article 53(1) of the Statute.
277. Following the publication of the *OTP Report on Preliminary Examination Activities 2016*, various stakeholders, including appropriate State authorities engaged with the Office. In particular, the announcement by the Prosecutor in November 2016 that she would imminently decide on whether to open investigations prompted the submission of additional information, which required careful analysis. The Office took note of the efforts undertaken by the Afghan authorities over the

course of the past year to build its capacity to meet its obligations under the Statute, such as efforts to amend the penal code and the criminal procedural code to facilitate national investigations and prosecutions of ICC crimes.

278. The Office further engaged with competent stakeholders to discuss matters relevant for the issue of the “interests of justice”, including the gravity of crimes and the interests of victims of alleged crimes committed in Afghanistan.
279. The Office also seized a number of opportunities to reinforce its cooperation activities with relevant States and other external partners, emphasising that the effective cooperation is of the utmost importance for the work of the Office in this situation.

### *Conclusion*

280. For the reasons set out above and on the basis of the information presented and the supporting material, on 20 November 2017 the Prosecutor has requested the PTC III to authorise the commencement of an investigation into the situation in Afghanistan in the period since 1 July 2002.<sup>21</sup>
281. In compliance with rule 50, on filing of the Request, the Prosecutor provided notice to victims or their legal representatives of her intention to request authorisation to commence an investigation and informed them that pursuant to regulation 50(1) of the Regulations of the Court, they have until 31 January 2018 to make representations to the Chamber.

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<sup>21</sup> [The Prosecutor of the International Criminal Court, Fatou Bensouda, requests judicial authorisation to commence an investigation into the Situation in the Islamic Republic of Afghanistan](#), 20 November 2017.

## BURUNDI

### *Procedural History*

282. The situation in the Republic of Burundi (“Burundi”) has been under preliminary examination since 25 April 2016. The Office has received a total of 34 communications pursuant to article 15 in relation to this situation.
283. On 17 August 2017, the Prosecutor notified the President of the Court, in accordance with regulation 45 of the Regulations of the Court, of her intention to submit a request for authorisation of an investigation into the situation in Burundi, pursuant to article 15(3) of the Statute.
284. On 23 August 2017, the Presidency of the Court assigned the situation in Burundi to PTC III.
285. On 5 September 2017, the Office requested authorisation from PTC III to proceed with an investigation into the situation in Burundi from 26 April 2015 onwards, pursuant to article 15(3) of the Statute. This request was made under seal on 5 September 2017 to protect the integrity of the investigation and the life or well-being of victims and potential witnesses in the situation. The Chamber agreed with the Office’s assessment that this exceptional measure, which was fully consistent with the Court’s legal framework, was necessary given the circumstances of this situation.
286. On 25 October 2017, PTC III issued its decision authorising the commencement of an investigation under seal, and ordered the Registry of the ICC to reclassify as public its decision on 9 November 2017.<sup>22</sup>
287. On 25 October 2017, following the PTC’s authorisation, the Prosecutor opened an investigation into the situation in Burundi since 26 April 2017 and notified States Parties and those States which would normally exercise jurisdiction over the crimes concerned on 9 November 2017 in accordance with article 18(1) of the Statute.<sup>23</sup>

### *Preliminary Jurisdictional Issues*

288. Burundi deposited its instrument of ratification to the Statute on 21 September 2004. The ICC therefore has jurisdiction over Rome Statute crimes committed on

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<sup>22</sup> [Public Redacted Version of “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi”](#), ICC-01/17-X-9-US-Exp, 25 October 2017 (ICC-01/17-9-Red), 09 November 2017. The present chapter summarises the public Request for Authorisation, which includes relevant references to sources used.

<sup>23</sup> [Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, following judicial authorisation to commence an investigation into the Situation in Burundi](#), 9 November 2017.

the territory of Burundi or by its nationals from 1 December 2004 until 26 October 2017.

289. On 27 October 2016, the Government of Burundi lodged a notification of withdrawal with the UN Secretary-General. In accordance with article 127(2), Burundi's withdrawal from the Statute came into effect on 27 October 2017. The Court retains jurisdiction with respect to alleged crimes that occurred on the territory of Burundi during the time period when it was a State Party to the Statute.

### *Contextual Background*

290. Burundi's history, both before and after independence in 1962, has been marked by repeated cycles of violence, including between ethnic communities, namely the majority Hutu and the minority Tutsi communities. Starting in 1993, a violent ethnic conflict that lasted over a decade reportedly cost the lives of more than 300,000 Burundians, and left hundreds of thousands displaced. The civil war, sparked by the assassination of the country's first Hutu President, Melchior Ndadaye, in October 1993, pitted a variety of mostly Hutu rebel movements against Burundi's Tutsi-dominated armed forces, the *Forces Armées Burundaises* ("FAB"). The *Conseil National pour la Défense de la Démocratie-Forces de Défense de la Démocratie* ("CNDD-FDD") was the main Hutu rebel group during this war.
291. In August 2000, the Arusha Peace and Reconciliation Agreement for Burundi ("Arusha peace agreement") set up a power-sharing system between the Hutu and the Tutsi which led to the creation of a transitional government on 1 November 2001.
292. Transformed into a political party, the CNDD-FDD participated in the general elections of 2005, which marked the end of the transition period. It won a majority in the National Assembly in July 2005 and on 19 August 2005, CNDD-FDD leader, Pierre Nkurunziza, was elected President by a Joint Parliamentary Congress comprising members of the National Assembly and the Senate. President Nkurunziza was re-elected for a further term in the 2010 presidential election, which was boycotted by the opposition.
293. The political and security situation in Burundi from April 2015 onwards evolved along three broad phases.
294. In the first phase, the announcement on 25 April 2015 by Burundi's ruling CNDD-FDD party that President Nkurunziza would run for a third term sparked several public protests, claiming that this was barred by the Arusha peace agreement and by the Constitution. By contrast, supporters of the President argued that the first term did not count. On 13 May 2015, while the President was abroad on an official visit to Tanzania, a group of senior military and police officers led by the former head of the intelligence service, the *Service National de Renseignement* ("SNR"), Major General Godefroid Niyombare,



announced a coup d'état on private radio stations and stated that the President had been dismissed. After two days of fighting in the capital, Bujumbura, the coup eventually failed and some senior leaders of the coup attempt were arrested, while others, including Major General Godefroid Niyombare, went into hiding.

295. In the second phase, the presidential election on 21 July 2015, which had been twice postponed, were followed by a number of targeted attacks and search operations by the security forces in neighbourhoods perceived as 'anti-government' or where attacks on the security forces had taken place. Following the election, the Government reportedly further targeted non-state media stations and independent journalists as well as human rights defenders and other members of civil society.
296. In the third phase, attacks by armed men against four military bases in and around Bujumbura on 11 December 2015 led to counter-insurgency operations by the security forces, including house-to-house searches in neighbourhoods associated with the opposition. This reportedly resulted in the killing of a number of civilians, including by summary and extrajudicial executions. These events were allegedly followed by a wave of repression by the security forces, supported by members of the ruling party's youth wing, the *Imbonerakure*, against perceived and actual opponents of the Government. During this third phase of varying levels of intensity, more covert strategies involving abductions, enforced disappearances, and unexplained deaths were also reported.

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

297. The information available provides a reasonable basis to believe that from 26 April 2015 onwards, members of the Burundian security forces - the *Forces de Défense Nationale* ("FDN"), the police (*Police Nationale du Burundi*, or "PNB") and the intelligence service (*Service National de Renseignement* or "SNR") – and members of the *Imbonerakure* carried out an attack against the civilian population in the province of Bujumbura Mairie in particular. The attack targeted specific categories of civilians based on their actual or perceived political affiliation. This included protesters opposing President Nkurunziza's third presidential term, suspected protesters, members of the political opposition, and persons perceived as opposition members or sympathisers, including journalists, members of civil society organisations as well as residents of neighbourhoods associated with the opposition. The information available furthermore provides a reasonable basis to believe that the attack directed against the civilian population was both widespread and systematic.
298. On the basis of the available information, and without prejudice to other possible crimes within the jurisdiction of the Court which may be identified during the course of an investigation, the Office has determined that there is a reasonable basis to believe that in the context of the situation in Burundi, from 26 April 2015 onwards, members of the Government, the Burundian security forces

and the *Imbonerakure* committed at a minimum the following acts constituting crimes against humanity: murder under article 7(1)(a); imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law under article 7(1)(e); torture under article 7(1)(f); rape and other forms of sexual violence of comparable gravity under article 7(1)(g); enforced disappearance under article 7(1)(i); and persecution against any identifiable group or collectivity on political grounds under article 7(1)(h).

299. A number of acts of violence, including murder, are alleged to have been committed by armed anti-government entities and other unidentified perpetrators. However, at this stage, such underlying acts cannot be linked to the contextual elements of crimes within the jurisdiction of the Court. This is because the degree of intensity of the armed confrontation and the level of organisation of armed anti-government entities is insufficient to characterise the situation as a non-international armed conflict. Nor are these underlying acts constitutive of crimes against humanity. These findings are without prejudice to the possible future identification of crimes within the jurisdiction of the Court which may arise from the examination of any new information or evidence.

#### *Admissibility*

300. At the article 15 stage, admissibility is assessed in relation to ‘potential cases’ which may be brought.

#### Complementarity

301. In light of the information available, including information provided by the Government of Burundi, the potential case(s) that would likely arise from an investigation of the situation, related to those who appear most responsible for the most serious crimes, would be admissible pursuant to article 17(1)(a)-(b) of the Statute.
302. The Burundian authorities have established three commissions of inquiry in response to the violent events since April 2015. However, these commissions’ findings have examined only a limited number of incidents and focussed on the criminal responsibility of actual or perceived members of the opposition as ‘insurgents’ for the violence. They have also generally discounted the alleged responsibility of members of the Government, the security forces or the *Imbonerakure* for the commission of crimes. The limited number of cases that the authorities have initiated into the death or abduction of civilians appears to have focussed on isolated acts and generally lack specificity. As such, the Office has been unable to identify at this stage the actual contours of the relevant person(s) or conduct under investigation.
303. More specifically, none of the domestic proceedings examined by the Office reveal any past or ongoing criminal process that seeks to establish the criminal responsibility of members of the Burundian authorities, the security forces

and/or the *Imbonerakure* who appear to bear the greatest responsibility for the alleged crimes. No leaders of the units allegedly involved in the commission of crimes, nor other relevant members of the political, defence and security leadership have been investigated or prosecuted for the crimes alleged.

304. As such, the information available indicates inactivity by the Burundian authorities in relation to the crimes identified. Additionally, to the extent that the Burundian authorities have cleared members of the security forces as alleged physical perpetrators of any wrongdoing, the Office believes that the inquiries conducted into these allegations were not conducted genuinely, but were undertaken for the purpose of shielding the persons concerned from criminal responsibility.

#### Gravity

305. The crimes were allegedly committed on a large scale, with an estimated 593 killings, 651 cases of torture, 3,477 arbitrary arrests or detentions, and 36 enforced disappearances, and widespread rape and sexual violence. Moreover, the information indicates that the alleged conduct was committed with discriminatory intent, based on actual or perceived political affiliation of the victim(s), and, in the case of torture, rape and sexual violence, with particular cruelty.
306. The alleged crimes committed have had a particularly severe impact on children and victims of SGBC. Victims of rape in particular experienced long-lasting physical and psychological consequences. The crimes identified had a severe impact not only on direct victims - who lost their lives, suffered severe physical and psychological injuries - but also on indirect victims. According to the Office of the UN High Commissioner for Refugees ("UNHCR"), 413,490 people had sought refuge in neighbouring countries between April 2015 and 31 May 2017. This had a severe impact in particular on child refugees, who constitute a significant part of the total refugee population. The situation has also had a negative impact on the socio-economic and humanitarian needs within Burundi, with a dramatic increase in the number of people needing humanitarian assistance from 1.1 million to at least 3 million in 2016 (26 percent of the total population of Burundi).

#### *OTP Activities*

307. During the reporting period, the Office focussed its activities on consolidating its analysis and drafting the Request for authorisation to proceed with an investigation into the situation in Burundi.
308. On 4 November 2016, the Prosecutor gave an interview to *Infos Grands Lacs*, providing an update on the status of the preliminary examination to the public and explaining the Office's position on the Burundian withdrawal.

309. On 5 December 2016, in a letter to the Burundian Ambassador to the Netherlands, the Prosecutor presented the Office's position on the withdrawal and requested the Burundian authorities' assistance to enable a mission of the Office to Burundi.
310. On 18 April 2017, the Office sent a request for information to the Burundian Government for additional information on relevant proceedings in relation to the crimes allegedly committed in Burundi. In response, on 1 June, the Government of Burundi provided information and documents which were duly taken into consideration.
311. To examine the seriousness of the information received and discuss matters relevant for the assessment of admissibility and the interests of justice, the Office further engaged with competent stakeholders, including article 15 communication senders, victims' representatives and members of international human rights organisations.

### *Conclusion and Next Steps*

312. The preliminary examination of the situation in Burundi is now completed. For the reasons set out above and on the basis of the information presented and the supporting material, on 25 August 2017, the PTC authorised the commencement of an investigation into the situation in the Republic of Burundi since April 2015. In accordance with the Chamber's decision, the time period of the investigations will focus on crimes allegedly committed from 26 April 2015 to 26 October 2017, but may also extend to related or continuous crimes that occur outside of those parameters.
313. PTC III has further confirmed that Burundi's withdrawal from the Statute has no effect on the jurisdiction of the Court over crimes allegedly committed during the time period it was a State Party. Nor does it affect the continuing obligation of Burundi to cooperate with the Court in relation to the investigation, given that it was authorised and initiated before the withdrawal of Burundi from the Statute came into effect.

## REGISTERED VESSELS OF COMOROS, GREECE AND CAMBODIA

### *Procedural History*

314. On 14 May 2013, the OTP received a referral on behalf of the Government 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 she had opened a preliminary examination on the basis of the referral. On 5 July 2013, the Presidency of the ICC assigned the situation to PTC I.
315. 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 certain registered vessels of Comoros, Greece, and Cambodia that arose in relation to the 31 May 2010 incident. This conclusion was based on a thorough legal and factual analysis of the information available and pursuant to the requirement in article 17(1)(d) that cases shall be of sufficient gravity to justify further action by the Court. The Office issued a detailed report presenting its findings on jurisdictional and admissibility issues.<sup>24</sup>
316. On 29 January 2015 the Representatives of the Comoros filed an application for review of the Prosecutor’s decision not to proceed, pursuant to article 53(3)(a) of the Statute.
317. On 16 July 2015, PTC I, by majority, requested the Prosecutor to reconsider her decision pursuant to article 53(3) of the Statute, having considered that the Prosecutor had erred in concluding that the potential case(s) arising from the situation would not be of sufficient gravity to be admissible at the Court.
318. On 6 November 2015, the Appeals Chamber, by majority, dismissed *in limine* the Prosecutor’s appeal against the PTC I’s request on the basis that it was not a decision “with respect to [...] admissibility” within the meaning of article 82(1)(a) of the Statute. In particular, the majority concluded that it was not “a determination of admissibility that would have the effect of obliging the Prosecutor to initiate an investigation”; to the contrary, “the final decision in this regard” was “reserved for the Prosecutor.”
319. Dismissing the Prosecutor’s appeal terminated the suspensive effect of PTC I’s request, which had been ordered by the Appeals Chamber. This triggered the Prosecutor’s duty, under rule 108(2), to review her decision “as soon as possible.”

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<sup>24</sup> ICC-OTP, [Situation on Registered Vessels of Comoros, Greece and Cambodia: Article 53\(1\) Report](#), 6 November 2014.

320. On 29 November 2017, the Prosecutor notified PTC I of her “final decision”, as required by rule 108(3).<sup>25</sup> Having carried out a thorough review of all the submissions made and all the information available, including information newly made available in 2015-2017, the Prosecutor remained of the view that the information available did not provide a reasonable basis to proceed with an investigation. The final decision filed with the Court provided extensive reasoning in support of this conclusion.

### *Preliminary Jurisdictional Issues*

321. Of the eight vessels in the flotilla, only three were registered in States Parties. Pursuant to article 12(2)(a) of the Statute, 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 to the Statute, according to article 12(2)(a) of the Statute, the ICC can exercise its jurisdiction in relation to the conduct of non-State Party nationals alleged to have committed Rome Statute crimes on the territory of, or on vessels and aircraft registered in, an ICC State Party.

322. The Court has jurisdiction over Rome Statute crimes committed on the territory of Comoros or by its national 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 the interception of the flotilla by the Israeli forces, including the 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.

323. Litigation before PTC I saw an increased emphasis by the Comoros, and participating victims, on allegations of misconduct by Israeli nationals on Israeli territory against flotilla passengers awaiting lawful deportation. As confirmed by PTC I, the Court does not have jurisdiction over these crimes. However, these allegations may be taken into account to the extent necessary in assessing whether there is a reasonable basis to proceed with an investigation into crimes committed during the flotilla incident itself (*i.e.*, aboard the vessels), over which the Court does have jurisdiction.

324. In its final decision, the Office noted that, on the facts of this situation, it could not identify a sufficient factual basis to make it “necessary”, in the PTC’s words, to take into account events on Israeli territory in order to assess the gravity of the

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<sup>25</sup> [Notice of Prosecutor's Final Decision under Rule 108\(3\)](#), ICC-01/13-57, 29 November 2017. [Statement of ICC Prosecutor, Fatou Bensouda, on the Situation on registered vessels of the Union of the Comoros et al.](#), 30 November 2017.

potential case within the Court's jurisdiction. In particular, while there is a continuum between the victims of the alleged conduct, there appears to be no sufficient link between the perpetrators of the alleged misconduct on Israeli territory and the alleged perpetrators of the identified crimes within the Court's jurisdiction, nor reason to believe that flotilla passengers were abused systematically or on a planned basis aboard the *Mavi Marmara* and on land. These conclusions are unaffected by the additional information made available in 2015-2017.

### ***Contextual background***

325. 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. Israel stated that the primary purpose of the blockade was military-security, namely to prevent the flow of arms and ammunition to Hamas by sea. The blockade, however, has been controversial due to its impact on the civilian population of Gaza.
326. 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.
327. The 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.
328. The situation was the subject of a UN Human Rights Council Fact-Finding Mission, which delivered its report in September 2010, and a separate Panel of Inquiry appointed by the UN Secretary-General, which published its report in September 2011. The Governments of Turkey and Israel have also conducted national inquiries.

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

329. In its report of 6 November 2014, and for the reasons set out therein, the Office determined that there was 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: wilful killing pursuant to article 8(2)(a)(i), wilfully causing serious injury to body and health pursuant to article 8(2)(a)(iii), and committing outrages upon personal dignity pursuant to article 8(2)(b)(xxi) of the Statute. The Office noted, in this

context, that the protected civilian status of the passengers aboard the *Mavi Marmara* did not preclude, in certain circumstances, the possibility for the lawful use of force. However, since the question of excuses or justifications for the use of force relate to the criminal responsibility of particular individuals, it was determined that this was a matter to be properly addressed at the investigation stage, if any, and not in the course of preliminary examination.

330. The Prosecutor's determination of subject-matter jurisdiction over the events aboard the *Mavi Marmara* was not in issue before PTC I, and therefore is unaffected by the Prosecutor's subsequent review under article 53(3) and rule 108(3). This determination is re-affirmed in the Prosecutor's final decision filed with the Court.

### *Admissibility Assessment*

331. In its report of 6 November 2014, the Office determined 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.
332. 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, aboard the *Mavi Marmara*. As such, the 6 November 2014 report reasoned, the potential case(s) that could be pursued by this Court were inherently limited to an event encompassing a relatively small number of victims of the alleged ICC crimes, with limited countervailing qualitative considerations.
333. Likewise, although the interception of the flotilla took place in the context of the Israel-Hamas conflict, as noted in the 6 November 2014 report, 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 had to be distinguished from the Office's assessment, which was limited to evaluating the gravity of the alleged crimes committed by Israeli forces on board the vessels over which the Court has jurisdiction.
334. Given the Office's conclusion in the 6 November 2014 report concerning the lack of sufficient gravity, it was unnecessary to reach a further conclusion on the question of complementarity.
335. In the course of the review requested by PTC I, the Office considered afresh whether any potential case(s) arising from the flotilla incident would be sufficiently grave so as to be admissible for the purpose of articles 17(1)(d) and 53(1)(b) of the Statute.



336. In concluding the review, the Prosecutor reaffirmed her previous determination in the 6 November 2014 report. She concluded that, in the absence of a potential case of sufficient gravity arising from the situation, there is no reasonable basis to proceed with an investigation. This was for three reasons.
337. First, PTC I's request did not lend itself to justifiable grounds to reverse the Prosecutor's previous decision. More specifically, the Office's further assessment and scrutiny following the Pre-Trial Chamber I's request have led the Prosecutor to reaffirm the Office's legal reasoning concerning the standard of proof for preliminary examinations under article 53(1); the standard of review to be applied by a Pre-Trial Chamber under article 53(3); and the substantive analysis actually carried out.
338. Second, and in any event, the arguments presented by the Comoros and the legal representatives of victims do not demonstrate that the Office's assessment of the information made available in 2014 was unreasonable, unfair, or legally incorrect. In particular, on the basis of the information available, there was no reasonable basis to believe that the identified crimes were committed on a large-scale or as part of a plan or policy. Nor did the Office err in assessing the nature or impact of the identified crimes, or in its approach to allegations of other misconduct on Israeli territory, beyond the jurisdiction of this Court.
339. Third, in the interests of completeness and transparency—even though not strictly required in the context of rule 108(3)—the Office considered whether the new materials made available after the November 2014 report (in 2015-2017) required it to depart from its prior conclusions. However, submissions by the Comoros and legal representatives of victims made on the basis of these new materials either were consistent with its original findings or were not reasonably supported by any of the available information.
340. As a consequence of this analysis, the outcome of the preliminary examination remains the same. 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. Consequently, it remains unnecessary to consider the question of complementarity. The Prosecutor fully recognises the impact of the alleged crimes on the victims and their families and her conclusion does not excuse any crimes which may have been perpetrated in connection with the *Mavi Marmara* incident.

### *OTP Activities*

341. Over the reporting period, the Office concluded a *de novo* review of all the information available to it both prior and since the 6 November 2014 report was issued.

342. This entailed a thorough review of PTC I's reasoning in its request, but also the submissions of the representatives of the authorities of the Comoros, independent counsel for certain participating victims, and the Office of Public Counsel for Victims for the remainder of the participating victims, and a fresh reconsideration of all the information available at the time of the November 2014 determination.
343. Additionally, under the discretion vested in the Prosecutor by article 53(4) of the Statute, this review entailed a de novo examination of all submissions and information made available in the period 2015-2017 by representatives of the Comoros and participating victims. In total, the OTP has subjected to renewed analysis more than 5,000 pages of documents, including the personal accounts of more than 300 passengers aboard the *Mavi Marmara*, as well as other materials.

#### *Conclusion and next steps*

344. The Prosecutor notified PTC I of her final decision on 29 November 2017, providing extensive reasoning in support of her conclusion. The Office has completed its review and issued its final decision under rule 108(3). This closes the preliminary examination, subject to the Prosecutor's ongoing and residual discretion under article 53(4) of the Statute.