



**Cour  
Pénale  
Internationale**

**International  
Criminal  
Court**

**Le Bureau du Procureur**

**The Office of the Prosecutor**

# Report on Preliminary Examination Activities (2016)

14 November 2016



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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 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 Rome 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 crime.<sup>4</sup> Where relevant domestic investigations or prosecutions exist, the Office will assess their genuineness.

7. *Gravity* includes an assessment of the scale, nature, manner of commission of the crimes, and their impact, bearing in mind the potential cases that would likely arise from an investigation of the situation.
8. The “*interests of justice*” is a countervailing consideration. The Office must assess whether, taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.
9. There are no other statutory criteria. Factors such as geographical or regional balance are not relevant criteria for a determination that a situation warrants investigation under the Statute. While lack of universal ratification means that crimes may occur in situations outside the territorial and personal jurisdiction of the ICC, this can only be remedied by the relevant State becoming a Party to the Statute or lodging a declaration accepting the exercise of jurisdiction by the Court or through a referral by the Security Council.
10. As required by the Statute, the Office’s preliminary examination activities are conducted in the same manner irrespective of whether the Office receives a referral from a State Party or the Security Council, or acts on the basis of information on crimes obtained pursuant to article 15. In all circumstances, the Office analyses the seriousness of the information received and may seek additional information from States, organs of the United Nations (“UN”), intergovernmental and non-governmental organisations and other reliable sources that are deemed appropriate. The Office may also receive oral testimony at the seat of the Court. All information gathered is subjected to a fully independent, impartial and thorough analysis.
11. It should be recalled that the Office does not enjoy investigative powers at the preliminary examination stage. Its findings are therefore preliminary in nature and may be reconsidered in the light of new facts or evidence. The preliminary examination process is conducted on the basis of the facts and information available. The goal of this process is to reach a fully informed determination of whether there is a reasonable basis to proceed with an investigation. The ‘reasonable basis’ standard has been interpreted by Pre-Trial Chamber II (“PTC II”) to require that “there exists a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court ‘has been or is being

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<sup>4</sup> See OTP Strategic Plan – 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 Rome 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 2016

17. This report summarises the preliminary examination activities conducted by the Office between 1 November 2015 and 30 September 2016.
18. During the reporting period, the Office received 477 communications relating to article 15 of the Rome Statute of which 356 were manifestly outside the Court's jurisdiction; 28 warranted further analysis; 72 were linked to a situation already under analysis; and 21 were linked to an investigation or prosecution. The Office has received a total of 12,022 article 15 communications since July 2002.
19. During the reporting period, the Office opened two new preliminary examinations. On 25 April 2016, following a review of a number of communications and reports documenting alleged crimes, the Prosecutor opened a preliminary examination of the situation in Burundi since April 2015. On 29 September 2016, the Prosecutor announced the opening of a preliminary examination of the situation in Gabon, following the receipt of a referral by the Gabonese Republic pursuant to article 14 of the Statute with respect to alleged crimes committed on its territory since May 2016.
20. The Office also continued its preliminary examinations of the situations in Afghanistan, Colombia, Guinea, Iraq/UK, Nigeria, Palestine, Ukraine and respecting the Registered Vessels of Comoros, Greece and Cambodia
21. Pursuant to the Office's policy on sexual and gender-based crimes, during the reporting period the Office conducted, where appropriate, an analysis of alleged sexual and gender-based crimes 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)

### BURUNDI

#### *Procedural History*

22. The situation in Burundi has been under preliminary examination since 25 April 2016. The Office has received a total of 23 communications pursuant to article 15 in relation to this situation.
23. On 8 May 2015, the Prosecutor issued a statement on the situation in Burundi, expressing concern that violence ahead of the legislative and presidential elections may escalate which could lead to the commission of serious crimes falling under the jurisdiction of the Court.<sup>9</sup> The Prosecutor recalled that Burundi is a State Party to the Rome Statute and reminded that all actors who incite or engage in acts of mass violence could be held responsible before the ICC.
24. On 6 November 2015, the Prosecutor issued a second statement, noting the increasing risk of violence in Burundi as well as the reported use of inflammatory language and reiterating that any person involved in the commission of crimes under the Rome Statute is liable to prosecution before the ICC.<sup>10</sup>
25. On 25 April 2016, following a review of a number of communications and reports documenting alleged crimes, the Prosecutor opened a preliminary examination of the situation in Burundi since April 2015.<sup>11</sup>

#### *Preliminary Jurisdictional Issues*

26. Burundi deposited its instrument of ratification to the Rome Statute on 21 September 2004. The ICC therefore has jurisdiction over Rome Statute crimes committed on the territory of Burundi or by its nationals from 1 December 2004 onwards.
27. On 12 October 2016, the Burundian Parliament voted in favour of Burundi's withdrawal from the Rome Statute and on 18 October, the President of Burundi signed off the bill. The official notification of Burundi's withdrawal was received by the United Nations Secretary General on 27 October 2016.

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<sup>9</sup> [Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding the recent pre-election violence in Burundi](#), 8 May 2015.

<sup>10</sup> [Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding the worsening security situation in Burundi](#), 6 November 2015.

<sup>11</sup> [Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a Preliminary Examination into the situation in Burundi](#), 25 April 2016.

## *Contextual Background*

28. The crisis that has engulfed Burundi began with the controversial announcement of Burundi's ruling party CNDD-FDD, on 25 April 2015, that President Pierre Nkurunziza would run for a third presidential term. Protests against a third mandate were led by the *Halte au troisième mandat* movement comprising opposition politicians, numerous civil society organisations as well as individual citizens.
29. The protests were mostly peaceful, however some protesters reportedly engaged in throwing stones and burning tires and vehicles. Demonstrations continued throughout May, June and up until July 2015. Burundian security forces, predominantly the national police force, reportedly repressed the protests. Several reports reviewed by the Office allege the involvement of elements of the youth wing of Burundi's ruling CNDD-FDD party, called Imbonerakure alongside the police during the repression of protests.
30. On 13 May 2015, during an official visit of President Nkurunziza to Tanzania, General Godefroid Niyombare, a former head of the national intelligence service, announced a *coup d'état*. The *coup d'état* ultimately failed on 15 May 2015. Senior military officials reportedly involved in the coup were arrested or went into hiding.
31. In the face of ongoing protests and violence the parliamentary elections were eventually held on 29 June 2015 and the presidential elections took place on 21 July 2015. On 25 July 2015, Burundi's Electoral Commission announced President Nkurunziza as winner of the presidential elections. The elections were criticized internationally; in a communiqué issued on 17 October 2015, the Peace and Security Council of the African Union qualified them as "non-inclusive and non-consensual".
32. Following the elections, the Government launched different operations against what it termed an "insurgency" or "terrorists" with the declared objective to disarm and arrest those involved in violent protests and the attempted coup. The Government was reported to increasingly target non-state media stations and independent journalists as well as human rights organizations and defenders and other members of the civil society. Reports further allege that the security forces arbitrarily targeted young men in those neighbourhoods in Bujumbura associated with the opposition.
33. On 11 December 2015, unidentified armed men attacked four different army bases in and around Bujumbura. Following these attacks, security forces reportedly carried out cordon and search operations in a number of neighbourhoods in Bujumbura associated with the political opposition, with the declared objective to locate armed fighters and hidden weapons. The security operations reportedly resulted in a high number of civilian casualties.

34. Since the beginning of 2016, open sources report that the number of alleged killings of civilians has significantly dropped, however serious human rights concerns continue to be raised and covert violence, for example, in the form of enforced disappearances and torture, has allegedly increased.

### *Alleged Crimes*

35. The following summary of alleged crimes is preliminary in nature and is based on publicly available reports as well as information received by the Office including from the Government of Burundi. 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.
36. In the reporting period, the preliminary examination has focussed on the alleged crimes against humanity of killing, other inhumane acts, imprisonment, torture, rape and other forms of sexual violence, as well as cases of enforced disappearances and acts of persecution that have been allegedly committed in Burundi since April 2015.
37. On 20 September 2016, the United Nations Independent Investigation on Burundi (“UNIIB”) published its final report, finding that “gross human rights violations have taken and are taking place, committed primarily by State agents and those linked to them. These gross human rights violations are systematic and patterned and impunity is pervasive”. The experts could not exclude the possibility that some instances of these violations amount to crimes against humanity.
38. Most of the alleged crimes reported in communications or by open sources were committed in Burundi’s capital city, Bujumbura Mairie province (“Bujumbura”), and more specifically in different neighbourhoods where the anti-Government protests started in April 2015. The Office has also gathered information of alleged crimes in rural areas of Burundi, committed in particular prior to the elections, but information on the situation outside the capital city remains very limited.
39. *Killings*: The Office identified three phases of violence during which crimes were allegedly committed, namely prior to the 21 July 2015 presidential elections, after the elections leading to and including the 11-12 December 2015 events in Bujumbura, and a third period of covert violence since then and throughout 2016. The OHCHR confirmed a total of 564 cases of execution allegedly committed between 26 April 2015 and 30 August 2016 - a “conservative estimate” according to the UNIIB. The UNIIB found that the large majority of victims have been identified as people who were opposed or perceived to be opposed to the third mandate of President Nkurunziza or as members of opposition parties.

40. During the first phase, from April 2015 to July 2015, many killings attributed to the police forces appear to have occurred as a result of excessive and disproportionate use of force, including lethal force, against protesters. Police officers reportedly also committed extrajudicial killings, including of opposition politicians, outside the context of demonstrations.
41. During the second phase, i.e. from July to December 2015, reports of targeted killings during police raids in retaliation for attacks by unidentified persons suspected to be associated with the opposition, increased.
42. Open sources indicate for example that two attacks by men in police uniform occurred in the zones of Cibitoke and Ngagara in Bujumbura on 3 and 13 October 2015 respectively, apparently in retaliation for attacks on policemen by unknown armed men, resulting in the killing of at least seven and nine residents respectively. In the Cibitoke attack of 3 October 2015, residents claimed that members of the Imbonerakure collaborated with police. In the Ngagara attack of 13 October 2015, police officers reportedly shot and killed a journalist and cameraman from *Radio Télévision Nationale du Burundi* ("RTNB") together with members of his family. An official inquiry launched by the Prosecutor General of Burundi has attributed the murders to unidentified "young people" who killed the victims because the journalist reportedly witnessed and filmed the murder of a police officer by the same "young people".
43. The alleged killings on 11- 12 December 2015 in Bujumbura marked a further escalation of violence in Burundi. During the security operations conducted following the attack on military bases in and around Bujumbura, up to 160 persons were allegedly killed. A Burundian military spokesman reported that 79 "enemies" were killed, 45 were captured and 97 weapons were seized while eight soldiers and policemen had also been killed and 21 wounded. Amnesty International reported that many of the victims described as "enemies" by official sources were merely inhabitants of residential neighbourhoods associated with the political opposition. The alleged killings are attributed to members of the police. Members of the Imbonerakure reportedly also participated in the operations.
44. While the independent experts of the United Nations have attributed the great majority of violations to Government forces, not all killings can be attributed to the security forces. According to information reviewed by the Office, armed gunmen apparently associated with the political opposition have also been involved in several murders, notably targeted assassinations. Open sources reported on a case where, on 7 May 2015, a member of the Imbonerakure was burnt alive. Grenade attacks have also allegedly been carried out by unidentified armed gunmen, causing casualties among the population, including killings of policemen or other members of state security forces. Precise estimates of victims of crimes allegedly committed by anti-Government elements are however lacking at this stage.

45. *Other inhumane acts*: While the precise number of victims is unknown, it appears that at least hundreds of persons would have been injured during the reporting period.
46. The injuries appear to have mainly been inflicted during confrontations with police forces. In that regard, it is reported that the police, in many cases, resorted to excessive and disproportionate force, including the use of live ammunition against protesters. Police forces reportedly injured numerous protesters by gunfire, while others were allegedly severely beaten. Additionally, force was reportedly used in neighbourhoods associated with the opposition outside the context of demonstrations.
47. The Office notes that not all of the reported abuses and injuries may rise to the level of severity required to constitute other inhumane acts under article 7(1)(k) of the Statute. The legal qualification of the alleged conduct requires further analysis in the context of the preliminary examination of this situation.
48. *Imprisonment and torture*: In December 2015, the OHCHR estimated that at least 3,496 people had been arrested in relation to the political crisis. Among them, 704 had been reportedly arbitrarily arrested in the month of September 2015 and 452 in the month of November 2015. The report of the UNIIB more generally reported that “thousands” of people have been tortured since April 2015 and that the use of torture has been a “common feature” of the crisis. A number of allegations point to the involvement of members of the police and the *Service National de Renseignement* (“SNR”) in the commission of the alleged crimes.
49. There is little information available with respect to the duration of the detentions in the context of the situation in Burundi. It appears however that in many cases, people were released after a few days. With respect to the conditions of the deprivations, open sources suggest that many of those arrested were beaten, tortured or otherwise ill-treated. Victims notably reported that they were subjected to humiliating and strenuous exercises, beatings with electric cables, iron bars and police batons, and other ill-treatment to force them to confess false accusations, including participating in an armed rebellion. Other former detainees also described having been threatened with death, denied medical care, and verbally abused.
50. *Rape and other acts of sexual violence*: The OHCHR documented 18 cases of sexual violence against women allegedly committed by the security forces, since mid-December 2015 in the neighbourhoods perceived as supportive of the opposition. The UNIIB reported that many women who fled the country were subject to sexual violence during their flight, by members of the Imbonerakure, unidentified armed men and border guards. The UNIIB further reported that many Burundian women and girls related to males opposed to the third presidential term or perceived as political dissidents, became the targets of physical and sexual violence by elements of the security forces. Cases of sexual

mutilation against women as well as sexual violence against men in detention have also been reported.

51. *Enforced disappearances*: Many persons have gone missing since the beginning of the crisis, often following their arbitrary arrest by security forces, notably the police and the SNR. Victims include opposition members, civil society members and demonstrators. In January 2016, the OHCHR denounced the “increasing number of forced disappearances”, referring for example to young men arrested during the operations in Bujumbura on 11-12 December 2015 and taken to “unknown destinations”. It is alleged by different sources that at least 146 persons disappeared after their arrest by police forces during this incident.
52. *Persecution*: In many instances, the acts described above were allegedly targeted at anti-Government protesters and other persons perceived as political opponents or sympathisers of the opposition, including journalists, members of civil society organisations and residents of neighbourhoods of Bujumbura perceived to support the opposition. In some instances, it is also alleged that persons were victimised on the basis of their belonging to a particular ethnic group.

#### *OTP Activities*

53. During the reporting period, the Office has initiated a thorough factual and legal assessment of all available information in order to establish whether there is a reasonable basis to believe that the alleged crimes fall within the subject-matter jurisdiction of the Court. To that end, the Office has systematically analysed information on alleged crimes contained in communications received by the Office under article 15 of the Rome Statute, open source information including relevant human rights reports from Burundian and international non-governmental organisations, statements and reports from regional organisations such as the African Union or the East African Community as well as relevant documentation from intergovernmental organisations such as the United Nations. The Office has furthermore carefully analysed all information received from relevant States, including from the Government of Burundi. The latter includes statements, reports and observations by the Government in response to independent international inquiries into the situation in Burundi, conducted for example by the United Nations Committee against Torture and the UNIIB. It also includes relevant reports of investigative committees set up by Burundi’s Prosecutor General.
54. Based on information gathered from multiple reliable sources, the Office has set up a comprehensive database of incidents that occurred in the context of the situation in Burundi since April 2015. This database is continuously updated as additional or new information becomes available. It will enable the Office to identify and compare the gravest incidents alleged, to conduct preliminary crime pattern analysis and to examine particular features of the situation, such as the

most affected locations, timeframes and types of targets, the different *modus operandi* employed, as well as casualty figures, among others.

55. The review process has included an independent and thorough evaluation of the reliability of sources and the credibility of information received on alleged crimes. During the reporting period, 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 such as by consulting multiple reliable sources for corroboration purposes.
56. Since the beginning of the preliminary examination, the Office has actively engaged the Burundian authorities, international and Burundian NGOs, the UN, communication senders and diplomatic actors on issues pertaining to the preliminary examination.
57. During the reporting period, the Office held meetings with senior officials of the Government of Burundi on two occasions at the seat of the Court. On 26 October 2015, the Prosecutor met with the Justice Minister of Burundi, Mrs Aimée Laurentine Kanyana. On 27 June 2016, the Prosecutor met with a ministerial delegation from the Republic of Burundi led by the Minister of External Relations and International Cooperation, Mr Alain Aimé Nyamitwe, and the Minister of Justice. On both occasions, the Prosecutor discussed with the Burundian authorities the situation in Burundi as well as the activities of the Office, including the purpose and scope of the preliminary examination. The Office is furthermore in regular contact with the Embassy of Burundi in the Netherlands.
58. The Office is giving due consideration to all views and submissions conveyed to it during the course of this process, strictly guided by the requirements of the Rome Statute in the independent and impartial exercise of its mandate.

### ***Conclusion and Next Steps***

59. The Office continues to engage in a thorough factual and legal assessment of the information available, in order to establish whether there is a reasonable basis to believe that crimes within the jurisdiction of the Court have been or are being committed. In accordance with its policy on preliminary examination, the Office may also gather available information on relevant national proceedings at this stage of analysis. Any alleged crimes occurring in the future in the context of the same situation could also be included in the Office's analysis.
60. Despite Burundi's withdrawal from the Rome Statute, the situation in Burundi since April 2015 remains under preliminary examination by the Office of the Prosecutor. The preliminary examination may also include any other crimes within the same situation that could be committed in Burundi until the withdrawal becomes effective, namely one year after the withdrawal's

notification to the UN Secretary General. According to its legal assessment, the Office could also initiate investigations at least during this one-year period. The withdrawal of Burundi would not affect its duty to cooperate with the Court in connection with criminal investigations and proceedings commenced prior the date on which the withdrawal becomes effective.

## GABONESE REPUBLIC

### *Procedural History*

61. The situation in the Gabonese Republic has been under preliminary examination since 29 September 2016. The Office has received a total of 14 communications pursuant to article 15 in relation to the situation in the Gabonese Republic.
62. 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>12</sup> In reference to article 14 of the Rome Statute, Rule 45 of the Rules of Procedure and Evidence and Regulation 25(1)(b) of the Regulations of the Office of the Prosecutor, the Government of the Gabonese Republic requested the Prosecutor "to open an investigation without delay".
63. On 29 September 2016, the Prosecutor issued a statement informing the public of the referral and announcing the opening of a preliminary examination into the situation in the Gabonese Republic.<sup>13</sup>
64. On 4 October 2016, the Presidency of the ICC assigned the situation to Pre-Trial Chamber 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*

65. The Gabonese Republic deposited its instrument of ratification to the Rome 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*

66. On 27 August 2016, presidential elections were 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 spite of growing tensions reported between both candidates' supporters in previous months, elections were generally held in a peaceful climate and with a high voter turnout. A joint AU-ECCAS ("Economic Community of Central

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<sup>12</sup> [Referral under Article 14 of the Rome Statute](#), 20 September 2016.

<sup>13</sup> [Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, concerning referral from the Gabonese Republic](#), 29 September 2016.

African States”) and an EU electoral observation mission were deployed to monitor the process.

67. Prior to the publication of the official results, Jean Ping declared his victory on 28 August 2016, calling upon his supporters to defend their vote. On 31 August 2016, one day later than scheduled, the National Electoral Commission (*Commission nationale électorale autonome et permanente*, CENAP) announced Ali Bongo Ondimba’s victory by a slender margin. According to the official results, the turnout was 59.5% and Ali Bongo Ondimba won 49.8% of the vote against 48.2% for Jean Ping. The opposition contested the results and resigned from the CENAP denouncing widespread irregularities, in particular in Ali Bongo’s home province Haut-Ogooué, results from which came in last. 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.
68. 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 resulting, according to some reports, in hundreds of detentions. A more limited number of deaths and injuries on both sides were also reported, although there are important discrepancies between the number of victims provided by the government and those claimed by the opposition. During violent riots in Libreville, the Gabonese National Parliament and other government buildings were reportedly set ablaze by armed demonstrators, and the Gabonese security forces allegedly bombed the opposition’s headquarters.
69. On 27 September 2016, President Ali Bongo Ondimba was sworn in for his new term, after the Constitutional Court upheld Ali Bongo’s election, rejecting an appeal by Jean Ping who had called for a recount over widespread allegations of fraud.

### *Alleged Crimes*

70. The preliminary examination focuses on alleged crimes committed in the Gabonese Republic, since May 2016 in the context of the presidential elections held on 27 August 2016 onwards. The referral from the Gabonese Government alleges in particular that opposition leaders and/or supporters incited to genocide and resorted to various acts of violence amounting to crimes against humanity.

### *OTP Activities*

71. Over the reporting period, the Office has initiated a thorough factual and legal assessment of all the information available from multiple sources, including

article 15 communications, media reports and the supporting materials and documentation accompanying the referral.

72. The Office also interacted with the legal representatives of the Gabonese Republic, and received a supplementary note from them on 28 September 2016 clarifying the scope of the referral and providing additional details on alleged crimes.

### *Conclusion and Next Steps*

73. The Office will continue to engage with and seek information from the Gabonese authorities, civil society and other relevant stakeholders, in order to reach a determination on whether there is a reasonable basis to believe the alleged crimes fall within the subject-matter jurisdiction of the Court, strictly guided by the requirements of the Rome Statute in the independent and impartial exercise of its mandate.
74. Given the open-ended nature of the situation referred, the Office will also continue to record allegations of crimes committed in the Gabonese Republic to the extent that they may fall within the subject-matter jurisdiction of the Court.

## IRAQ/UK

### *Procedural History*

75. The situation in Iraq/UK has been under preliminary examination since 13 May 2014. The Office has received a total of 27 communications or additional submissions pursuant to article 15 in relation to the situation in Iraq/UK.
76. On 10 January 2014, the European Center for Constitutional and Human Rights (“ECCHR”) together with Public Interest Lawyers (“PIL”) submitted an article 15 communication alleging the responsibility of United Kingdom (“UK”) officials for war crimes involving systematic detainee abuse in Iraq from 2003 until 2008.
77. On 13 May 2014, the Prosecutor announced that the preliminary examination of the situation in Iraq, previously concluded in 2006, was re-opened following submission of further information on alleged crimes within the 10 January 2014 communication.<sup>14</sup>

### *Preliminary Jurisdictional Issues*

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

### *Contextual Background*

80. On 20 March 2003, an armed conflict began between a US and UK-led coalition, and Iraqi armed forces, with two rounds of air strikes followed by a 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, which resulted in the removal of Ba’th leadership from positions of authority within Iraqi society.

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<sup>14</sup> [Prosecutor of the International Criminal Court, Fatou Bensouda, re-opens the preliminary examination of the situation in Iraq](#), 13 May 2014.

81. On 8 May 2003, the US and UK Governments notified the President of the United Nations 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.
82. 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 United Kingdom, remained in Iraq pursuant to United Nations Security Council authorization and the request of the Iraqi government. At the expiry of this mandate on 30 December 2008, foreign forces still present in Iraq remained with the consent of the Iraqi government.
83. 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”).
84. Based on the information available, the alleged crimes were committed in the context of armed conflicts that took place in the territory of Iraq in the period from 20 March 2003 through 28 July 2009. The international armed conflict between the US and UK-led coalition of States and Iraq started on 20 March 2003 with direct military intervention of the coalition forces against targets located in the territory of Iraq. By 16 April 2003, the coalition forces established and consequently exercised authority over the territory of Iraq and its governing institutions as occupying powers.
85. As of 28 June 2004 when the authority was formally transferred from the CPA to the Iraqi Government, the situation in Iraq amounted to a non-international armed conflict between the Iraqi government forces and the MNF-I on one hand, and non-State armed groups on the other. The MNF-I were present and carried out military operations in the territory of Iraq based on the consent of the Iraqi Government. The armed groups engaged in fighting against the Iraqi Government and MNF-I included Al-Qaeda Organization in the Land of the Two Rivers (“Al-Qaeda in Iraq”), Islamic Army in Iraq, Ansar al-Islam and the Mahdi Army.
86. Following the official withdrawal from Iraq of the multi-national forces on 31 December 2008, the non-international armed conflict continued between the Iraqi Government, and the US and UK armed forces on one side, and armed groups on the other side. According to the information available, this armed

conflict ended for the UK as party to the armed conflict on 28 July 2009 when British troops involved in combat operations completed their withdrawal from Iraq.

### *Alleged Crimes*

87. In 27 communications or additional submissions transmitted to the Office under article 15 of the Statute from 10 January 2014 until 16 June 2016, PIL provided a total of 1390 victim accounts, out of which 1071 related to alleged ill-treatment of detainees and 319 to alleged unlawful killings attributed to British personnel in Iraq from 2003-2008.
88. Crimes allegedly occurred in military detention facilities and other locations under the control of UK Services personnel in southern Iraq, including in temporary detention/processing facilities and in longer-term detention and internment facilities.
89. *Torture and other forms of ill-treatment*: PIL and ECCHR alleged that the UK personnel committed systematically and on a large scale war crimes within the jurisdiction of the Court 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. During the reporting period, the Office has focussed its analysis on 831 victim accounts in order to assess the credibility of the allegations and identify any crime patterns.
90. The 831 victim accounts relate to 841 incidents in detention involving 2350 separate allegations of abuse against detainees arrested between March 2003 and June 2009. The alleged victims were typically male, with 70% of them aged between 18 to 34 years and 44 under the age of 18 at the time of the arrest and/or detention.
91. On the basis of the information made available by PIL and ECCHR, the Office has categorised more than 25 of the most frequently reported methods of abuse executed by more than allegedly 140 means. These allegations include beatings and other forms of battery, cuffing and other forms of restraining, sensory deprivation, sensory overstimulation, deprivation of cloths, deprivation of food, deprivation of medical care, deprivation of privacy, deprivation of sleep, deprivation of toilet, deprivation of water, forced exertion, harsh environment, forced immobility and/or silence, prolonged solitary confinement/isolation, stress positions, sexual violence, sexual humiliation/other forms of sexual assaults, electrocution and burning, suspension, water techniques/waterboarding, induced desperation, threats, religious and cultural humiliation, and verbal abuse. Other forms of alleged ill-treatment include forced (unnecessary) medical treatment; collective punishment; forced labour; inadequate bedding; use of pepper spray; and forced feeding.

92. According to the information available, Iraqi detainees were abused throughout their interaction with British personnel. This included a number of different phases: initial arrest; transit to a Battlegroup temporary detention facility or to the Brigade Processing Facility (“BPF”); tactical questioning at the Battlegroup level or at the BPF; transit to a Divisional Temporary Detention Facility (“DTDF”) or a Divisional Internment Facility (“DIF”); and detention and interrogation by personnel from the Joint Field Intelligence Teams (“JFIT”). It is alleged that captives were typically subjected to abuses in order to prolong and exploit the shock of capture for tactical questioning and interrogation.
93. *Rape*: According to information received, at least 21 male detainees in 24 instances were raped while in the UK custody, including in the form of anal penetration with a sexual organ or objects such as sticks and digits. Some detainees were allegedly raped repeatedly and for prolonged periods of time by one or more male and female perpetrators. In some cases, rape was reportedly committed in combination with other forms of sexual violence aimed at further degrading the victims.
94. *Other forms of sexual violence*: According to the information available, 135 male conflict-related detainees were subjected to some form of sexual violence in 214 instances. These alleged acts included, *inter alia*, inflicting physical injuries to the genitalia of detainees, enforced masturbation, provocative physical touching of detainees’ genital and anal area, and touching detainees’ body with perpetrators’ sexual organs. In addition, detainees were forcibly maintained in a state of forced nudity, compelled to perform physical exercises naked, repeatedly exposed to genitalia and pornography, and photographed whilst naked.
95. *Killings*: According to PIL, British personnel committed 319 cases of unlawful killings out of which 267 were committed in the course of military operations other than arrest and detention, and 52 were committed against persons in custody of UK authorities. The UK Ministry of Defence reported that up to 381 deaths of Iraqi were allegedly attributed to UK forces. This figure includes alleged deaths in custody, deaths as a result of road accidents and deaths which occurred in and after exchanges of fire.
96. The Office analysed 204 out of 319 witness statements submitted under article 15 of the Statute in relation to unlawful killings of Iraqi nationals in situations outside of custody in order to discern the temporal and geographical scope of alleged crimes, the profiles of alleged victims and any possible pattern of alleged conduct. A total of 133 separate incidents of killings were identified, including 20 incidents resulting in the death of two or more individuals. The majority of reported incidents appear to have occurred in the context of conventional military or counterinsurgency operations by the UK forces. Not every instance of killing necessarily amounts to a crime under the Statute.
97. Five main types of incidents were categorised, namely: 1) air attacks (77 occurrences); 2) crossfire incidents (39 occurrences); 3) search and arrest

operations – house raids (16 occurrences); 4) non-combat vehicle accidents (10 occurrences); 5) escalation of force (27 occurrences). In the remaining 35 cases the typology of victimisation appears unclear owing to an absence or lack of information on the circumstances of the alleged killings.

### *OTP Activities*

98. During the reporting period, the Office received full cooperation from relevant stakeholders, including the senders of the article 15 communications and the UK government, in particular when seeking additional information for the purpose of verifying the seriousness of the information in the Office's possession. In addition, the Office has regularly engaged and exchanged views on issues pertaining to this preliminary examination with other relevant actors, such as local and international NGOs. The Office has given due consideration to all views and submissions conveyed to it during the course of this process, strictly guided by the requirements of the Rome Statute in the independent and impartial exercise of its mandate.
99. As described above, the Office has been conducting a thorough factual and legal assessment of individual claims received and other information available in order to establish whether there is a reasonable basis to believe that the alleged crimes fall within the subject-matter jurisdiction of the Court. In accordance with the Prosecutor's Policy on Sexual and Gender-Based Crimes, the Office also paid particular attention to sexual and gender-based crimes allegedly committed against detainees in the UK custody.
100. In accordance with article 15(2) of the Statute, the Office has undertaken a rigorous independent evaluation of all relevant sources in its possession and in particular a thorough assessment of the seriousness of the information provided under article 15 and the reliability of the senders. For this purpose, the Office researched open sources such as findings and decisions of domestic and regional bodies as well as national public inquiries in order to identify any relevant corroborative or corrective information.
101. The Office closely reviewed relevant official publications issued by the UK military in relation to Operation Telic, in order inter alia to obtain the perspective of the army leadership on the existence of broader or systemic issues linked to detainees' abuses in Iraq. The Office also drew extensively from the findings of two domestic inquiries, respectively into the death of an Iraqi civilian in UK custody ("Baha Mousa inquiry") and allegations of unlawful killings and ill treatment of Iraqi nationals by British troops in Iraq in May 2004 ("Al Sweady inquiry"). The inquiries provided credible and documented information on the context of alleged crimes, the military units involved and the UK military chain of command during the relevant time periods, as well on the factual circumstances of a specific set of alleged incidents of abuse in custody. The Office also considered the findings of the public inquiry into the UK's role in the

Iraq War (“Chilcot report”) to the extent it provided context to allegations of war crimes committed by UK troops in Iraq.

102. Other sources researched by the Office included reports by multiple regional and international organisations, including UN bodies and NGOs such as Redress, Amnesty International, and Human Rights Watch. The Office used in particular the information provided by these latter sources to cross-check allegations of unlawful killings of Iraqi civilians by UK personnel in situations outside of custody, such as in the course of military and counterinsurgency operations conducted by the British army.
103. The Office reviewed the body of relevant jurisprudence drawn up by the European Court of Human Rights (“ECtHR”) for the purposes of corroborating information on two specific incidents of killings of Iraqis in UK custody, filling in information gaps related to the extent of UK control over certain detention facilities, as well as to shed further light on the phases of the conflict for the contextual background information.
104. As part of the examination of available sources, the Office has also developed, and regularly updated, an extensive database which traces all documentary evidence supporting the claims on alleged crimes, including a total of over 900 items screened, received and/or reviewed by the Office in the course of the preliminary examination into the situation in Iraq.
105. The Office is mindful of issues affecting in particular the reliability of the providers of information, including the closing-down of PIL, allegedly as a result of disruption of legal aid funding for breach of contractual requirements with the national competent agency; and allegations of misconduct against the PIL and other groups representing Iraqi’s claimants in the UK, leading *inter alia* to an investigation before the Solicitors Regulation Authority (“SRA”) and the subsequent referral of both PIL and Leigh Day to the Solicitors Disciplinary Tribunal (“SDT”). The Office has closely scrutinized and will continue to keep abreast of relevant developments at the national level in the context of the proceedings before the SDT.
106. While the preliminary examination is focussed on subject-matter jurisdiction issues at this stage, the Office has also received and considered information on the progress of ongoing relevant national proceedings. The Office is in particular mindful that domestic proceedings involving a judicial review of the Iraq Historic Allegations Team (“IHAT”) activities are taking place in the UK.

### ***Conclusion and Next Steps***

107. The Office is currently in the process of concluding its comprehensive factual and legal assessment of information available in order to establish whether there is a reasonable basis to believe that alleged crimes committed by United Kingdom nationals in the context of the armed conflicts in Iraq in the period

from March 2003 to July 2009 fall within the subject-matter jurisdiction of the Court.

108. The Office will continue to be in close contact with relevant stakeholders, including the UK government, in order to exchange views on relevant aspects of the Office's preliminary examination process. In accordance with its policy, the Office will also closely observe the activities and findings of ongoing national proceedings by the UK authorities as well as the periodic developments of judicial review proceedings in the High Court of Justice of England and Wales relevant for the entire preliminary examination process of the situation in Iraq/UK.

## PALESTINE

### *Procedural History*

109. The situation in Palestine has been under preliminary examination since 16 January 2015.<sup>15</sup>
110. The Office has received more than 86 communications pursuant to article 15 in relation to crimes alleged to have been committed since 13 June 2014 in this situation.

### *Preliminary Jurisdictional Issues*

111. On 1 January 2015, the Government of Palestine lodged a declaration under article 12(3) of the Rome 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 Palestine acceded to the Rome Statute by depositing its instrument of accession with the UN Secretary-General. The Rome Statute entered into force for the State of Palestine on 1 April 2015.

### *Contextual Background*

#### *Gaza*

112. As a result of the Six-Day War in 1967, Israel acquired control over the territory of Gaza. In September 2005, Israel completed its unilateral withdrawal from Gaza, including dismantling its settlements and withdrawing its forces. Israel has maintained that following the 2005 disengagement, it is no longer an occupying power in Gaza. By contrast, it may be argued that Israel nonetheless remains an occupying power as a result of the scope and degree of control that Israel has retained over the territory of Gaza – a position that the Office has previously taken in the context of the preliminary examination of the situation referred by the Government of the Union of Comoros.<sup>16</sup>
113. Following Hamas' electoral victory in 2006 and extension of control in 2007, the territory has been the theatre of periodic hostilities between Israel and Hamas as well as other Palestinian armed groups operating in Gaza.

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<sup>15</sup> [The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine, 16 January 2015.](#)

<sup>16</sup> See ICC-OTP, Situation on Registered Vessels of Comoros, Greece and Cambodia Article 53(1) Report, 6 November 2014, paras. 25-29.

114. Most recently, the region was affected by a new wave of hostilities, often referred to as the 2014 Gaza conflict. On 7 July 2014, Israel launched 'Operation Protective Edge', which lasted 51 days. The declared aim 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, followed by a third phase of the operation launched on 5 August characterised by alternating ceasefires and aerial strikes. The hostilities ended on 26 August 2014 with both sides agreeing to an unconditional ceasefire.
115. Since then, different national and international bodies have conducted, or are in the process of conducting, inquiries and/or investigations into incidents that occurred during the 2014 Gaza conflict, such as, for example, the United Nations Independent Commission of Inquiry on the 2014 Gaza Conflict, the UN Headquarters Board of Inquiry into certain incidents that occurred in the Gaza Strip between 8 July 2014 and 26 August 2014, the Israel Defence Forces ("IDF") Military Advocate General (along with the General Staff Mechanism for Fact Finding Assessments), and the Palestinian Independent National Committee (established by a July 2015 presidential decree in order to investigate crimes that occurred during the conflict).

#### *West Bank and East Jerusalem*

116. As a result of the Six-Day War, Israel acquired control over the West Bank and East Jerusalem. Shortly thereafter, Israel adopted laws and orders effectively extending Israeli law, jurisdiction and administration over East Jerusalem. On 30 July 1980, the Knesset, the Israeli parliament, passed a 'Basic Law' by which it established the city of Jerusalem 'complete and united' as the capital of Israel. The UN Security Council and International Court of Justice, among others, have regarded the annexation of East Jerusalem as a violation of the *jus cogens* norm prohibiting the acquisition of territory by military force.
117. Pursuant to the Oslo Accords of 1993-1995, the Palestine Liberation Organization and the State of Israel formally recognised each other, committing to the peace talks and agreeing on a progressive hand over 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 divisions (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).
118. The peace talks between the parties grounded to a halt in 1995 and were followed over the years by a number 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.

### *Alleged Crimes*

119. 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.

#### *Gaza conflict*

120. 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 allegedly over 1,000 civilians, and over 70 Israelis, including six 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 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.
121. It has been reported that the conflict also had a significant impact on children, in particular. For example, reportedly more than 500 children 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.
122. All parties are alleged to have committed crimes during the 51-day conflict.

#### Acts allegedly committed by members of Palestinian armed groups

123. Alleged attacks against civilians: During the 2014 conflict, Palestinian armed groups allegedly fired around 4,881 rockets and 1,753 mortar shells towards Israel, including civilian areas. The majority of these attacks were launched against areas in Israel near Gaza, but further areas, such as Tel Aviv and Dimona were also reportedly targeted. It is reported that some of the attacks resulted in civilian casualties and damage to civilian objects in Israel.

In addition to the injuries and displacement caused by mortar and rocket attacks by Palestinian armed groups, Israeli civilians also reportedly suffered emotional harm and psychological trauma as a result of living under the constant threat and fear of attacks. A certain number of rockets fired by Palestinian armed groups also are alleged to have fallen short and landed within Gaza, causing civilian casualties and damage to civilian objects.

124. Alleged use of protected persons as shields: Palestinian armed groups allegedly launched attacks directly from or nearby areas and buildings where civilians were present at the time. For example, it is alleged that attacks were launched from, or in the immediate vicinity of, residential homes and areas, hospitals, schools (including UNRWA schools), hotels, and buildings dedicated to religion. Similarly, Palestinian armed groups are also alleged to have used such buildings for other military purposes, such as for storing weapons and ammunition, tunnel entrances, and as command and control centres. It has been alleged that Palestinian armed groups engaged in such conduct in order to shield their military operations and assets from attack.
125. Alleged ill-treatment of persons accused of being collaborators: It is alleged that members of the Al Qassam Brigades and the Hamas' Internal Security Forces seriously ill-treated at least 20 Palestinian civilians accused of collaborating with Israel, who were later executed (some publicly) on separate occasions between 5 and 23 August 2014.

#### Acts allegedly committed by members of the IDF

126. Alleged attacks against residential buildings and civilians: It is alleged that the IDF carried out numerous airstrikes on residential buildings, resulting in some cases in injuries and killings of residents and damage to, or destruction of, family homes and other residential buildings. Notable affected areas reportedly included, among others, the Shuja'iya neighbourhood, Khan Yunis, and Khuza'a. It is also alleged that during a ground operation in Khuza'a, in certain reported incidents, civilians came under fire while trying to leave the area, and others were subjected to serious ill-treatment while being detained by IDF forces. Additionally, between 1-4 August 2014, massive bombardment of the Rafah area by the IDF allegedly caused more than one hundred civilian casualties.
127. Alleged attacks against medical facilities and personnel: It is alleged that during the hostilities, medical facilities, ambulances, and medical personnel at times came under attack or fire from IDF forces, either reportedly as a result of being directly targeted or due to their proximity to military targets, in some cases resulting in significant damage as well as casualties to both personnel and patients.

128. Alleged attacks against UNRWA schools: It is reported that six UNRWA schools, serving as designated emergency shelters during the conflict, were hit by projectiles, allegedly fired by the IDF, resulting in damage to the premises as well as in some cases injuries and killings of residents and other persons present at the shelters.
129. Alleged attacks against other civilian objects and infrastructure: During the course of the conflict, various other civilian objects and infrastructure (such as water and sanitation installations, the Gaza power plant, agricultural fields, mosques, and educational institutions) also allegedly sustained significant damage or were destroyed, reportedly due to their proximity to targeted sites or as a result of direct attacks by the IDF.

*West Bank and East Jerusalem*

130. Alleged settlement activities: The Israeli government has allegedly led and directly participated in the planning, construction, development, consolidation and/or encouragement of settlements on West Bank territory. This settlement activity is allegedly created and maintained through the implementation of a set of policies, laws, and physical measures. Such activities are alleged to include the planning and authorisation of settlement expansions or new construction at existing settlements, including the regularisation of constructions built without the required authorisation from Israeli authorities (so-called outposts); the confiscation and appropriation of land; demolitions of Palestinian property and eviction of residents; discriminatory use of basic infrastructure and resources, such as water, soil, grazing lands, and market; imposition of other forms of access and movement restrictions upon Palestinians; and a scheme of subsidies and incentives to encourage migration to the settlements and to boost their economic development.
131. According to Israeli official data, in 2015 a total of over 62,000 dunums (or 15,300 acres) of West Bank land were declared as “state land”, namely land belonging to the State of Israel, reportedly the largest total since 2005. Additionally, according to data published by the NGO Peace Now, between January and August 2016, Israeli authorities reportedly advanced plans for a total of 2,623 new units in West-Bank and East Jerusalem, including 756 retroactive approvals of unauthorised constructions. The Israeli Central Bureau of Statistics recorded 591 new construction starts and 760 constructions completed in area C of the West Bank in 2015.
132. In the same year, the Israeli government reportedly destroyed 531 Palestinian-owned structures in the West Bank, including East Jerusalem, allegedly displacing 688 people, according to figures published by the UN Office for the Coordination of Humanitarian Affairs. An additional 889 Palestinians were reportedly displaced between 1 January and 31 July 2016 due to the demolition by Israeli authorities of 684 Palestinian-owned

structures, including 110 in East Jerusalem. In parallel to demolitions, Israeli authorities reportedly advanced plans for the relocation of several Palestinian Bedouin or herder communities located in Area C of the West Bank, including in the Jordan Valley and in the area located immediately east of the Jerusalem municipal boundary, so-called E-1 area.

133. *Alleged ill-treatment*: Allegations concerning ill-treatment of Palestinians arrested, detained and prosecuted in the Israeli military court system have also been reported, including, for example, allegations of systematic and institutionalised ill-treatment of Palestinian children in relation to their arrest, interrogation, and detention for alleged security offences in the West Bank.
134. *Escalation of violence*: Since the beginning of October 2015, there has been an escalation of tensions and violence in Israel and Palestine, including alleged violent attacks by Palestinian assailants against Israelis and others, resulting in killings and serious injuries, as well as alleged unlawful killings and/or excessive use of force by Israeli forces against Palestinians. In reference to the upsurge of violence in the region, allegations have also been made concerning incitement to violence against Israelis by various Palestinian political leaders and groups.

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

135. In the past year, the Office has considered relevant submissions and other available information on issues pertaining to the exercise of territorial and personal jurisdiction by the Court in Palestine.
136. The Office meanwhile also continued to gather and review available information from a range of reliable sources on 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. The OTP also closely monitored relevant developments and events in the region.
137. To date, the Office has reviewed over 320 reports as well as related documentation and supporting material. This includes publicly available information and information from individuals or groups, States, and non-governmental or intergovernmental organisations. The review process has included an independent and thorough evaluation of the reliability of sources and the credibility of information received on alleged crimes. In connection with this process, during the reporting period, 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 such as by consulting multiple reliable sources for corroboration purposes.

138. Based on information collected from multiple reliable sources, the Office has produced a comprehensive database of over 3,000 reported incidents and crimes that allegedly occurred during the 2014 Gaza conflict. This database, updated as additional or new information becomes available, has enabled the Office to identify and compare the gravest incidents alleged, to conduct preliminary crime pattern analysis and to examine particular features of the conflict and of the alleged conduct of the different parties to it, such as for example, the most affected locations, timeframes and types of targets, the different *modus operandi* employed, as well as casualty figures, among others.
139. Considering the number of allegations received which also encompass a broad range of types of alleged conduct and incidents, the Office has sought to be selective in prioritising certain alleged crimes at this stage. The alleged crimes that have been the subject of analysis to date involve complicated factual and legal assessments, such as in relation to conduct of hostilities issues, thereby necessitating careful analysis in reference to the relevant law applicable and information available.
140. 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 as well as specifically to seek additional information to further assess the seriousness of information in its possession and other relevant issues. In this respect, the Office held numerous meetings with a variety of NGOs, including a number of Palestinian NGOs, as well as international organisations.
141. The Office also met with senior officials and representatives of the Palestinian Government on several occasions, including in November 2015 and June and September 2016. During the reporting period, the Government of Palestine also began sending monthly reports to the Office with information on alleged on-going crimes as well as other developments relevant to the preliminary examination.
142. In March 2016, the Office conducted a mission to Amman, Jordan, where it held a round of working-level meetings with representatives of the Palestinian government and Palestinian NGOs on various issues related to the ongoing preliminary examination.
143. From 5 to 10 October 2016, the Office conducted a visit to Israel and Palestine. The visit was facilitated by the Israeli and Palestinian authorities, and conducted with the logistical support of the United Nations Special

Coordinator for the Middle East Peace Process.<sup>17</sup> The purpose of the visit was to undertake outreach and education activities with a view to raising awareness about the ICC and in particular, about the work of the Office, to address any misperceptions about the ICC, and to explain the preliminary examination process. During the visit, the Office travelled to Tel Aviv, Jerusalem, and Ramallah, where meetings were held with Israeli and Palestinian officials at the working levels. Additionally, the Office engaged with the law faculty at Hebrew University and participated in an academic event at Bethlehem University and gave several interviews to the Palestinian, Israeli and international press.

144. As publically reported earlier this year, staff members of certain organisations that have gathered information of relevance to the OTP preliminary examination, such as Al-Haq and Al-Mezan Center for Human Rights, have been subjected to threats and other apparent acts of intimidation and interference. The Office takes this situation very seriously and has consulted with the organisations and persons affected as well as liaised with the Dutch authorities, as the Host State to the Court, in order to ensure that appropriate steps and measures are taken to address the situation.

### *Conclusion and Next Steps*

145. The Office is continuing to engage in a thorough factual and legal assessment of the information available, in order to establish whether there is a reasonable basis to proceed with an investigation. In this context, in accordance with its policy on preliminary examinations, the Office will 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.

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<sup>17</sup> The Government of Israel provided facilitation without prejudice to its objections to Palestine's eligibility to accede to the Rome Statute and to the Court's exercise of jurisdiction over the situation in Palestine.

## UKRAINE

### *Procedural History*

146. The situation in Ukraine has been under preliminary examination since 25 April 2014. The Office has received more than 20 communications under article 15 of the Statute in relation to crimes alleged to have been committed during the period from 21 November 2013 to 22 February 2014. In addition over 48 communications have been received under article 15, concerning crimes allegedly committed after 20 February 2014.
147. 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.
148. On 25 April 2014, in accordance with the Office's policy on preliminary examinations,<sup>18</sup> the Prosecutor opened a preliminary examination of the situation in Ukraine.<sup>19</sup>
149. On 8 September 2015, the Government of Ukraine lodged a second declaration under article 12(3) of the Statute accepting the exercise of jurisdiction by 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.<sup>20</sup>

### *Preliminary Jurisdictional Issues*

150. Ukraine is not a State Party to the Rome 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. Ukraine's acceptance of the exercise of jurisdiction by the ICC was made, in both cases, on the basis of declarations of the Verkhovna Rada of Ukraine (the Parliament of Ukraine), urging acceptance of the exercise of jurisdiction by the Court in respect of crimes allegedly committed during the relevant periods.

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<sup>18</sup> See [ICC-OTP, Policy Paper on Preliminary Examinations, November 2013](#), para. 76.

<sup>19</sup> [The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination in Ukraine, 25 April 2014](#).

<sup>20</sup> [ICC Prosecutor extends preliminary examination of the situation in Ukraine following second article 12\(3\) declaration, 29 September 2015](#).

## *Contextual Background*

### *Maidan events*

151. At the time of the start of the events that are the subject of the Office's preliminary examination, the democratically-elected Government of Ukraine was dominated by the Party of Regions, led by President at the time, Viktor Yanukovich. The Maidan protests were prompted by the decision of the Ukrainian Government on 21 November 2013 not to sign an Association Agreement with the European Union. This decision was resented by pro-Europe Ukrainians, who perceived it as a move closer to the Russian Federation. The same day, mass protests began in Independence Square, Kyiv.
152. Over the following weeks, protesters continued to occupy Independence Square and confrontations between the demonstrators and security forces increased. The protest movement continued to grow in strength and reportedly diversified to include individuals and groups who were generally dissatisfied with the Yanukovich Government and demanded his removal from office. The adoption on 16 January 2014 by the Parliament of laws imposing tighter restrictions on freedom of expression, assembly and association, provoked more protests, including in some other Ukrainian cities.
153. Violent clashes occurred at several points in the context of the Maidan protests, which continued over the following weeks, resulting in injuries both to protesters and members of the security forces, and deaths of some protesters. On the evening of 18 February 2014, the authorities reportedly initiated an operation to attempt to clear the square of protesters. Violence escalated sharply, causing scores of deaths and hundreds of injuries within the following three days. On 21 February 2014, under European Union mediation, President Yanukovich and opposition representatives agreed on a new government and fixed Presidential elections for May 2014. However, on 22 February 2014, the Ukrainian Parliament voted to remove President Yanukovich, and he left the country that day to the Russian Federation.

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

154. In situations involving crimes allegedly committed in the context of armed hostilities, an assessment of the Court's jurisdiction entails analysis of whether the alleged crimes occurred in the context of an international or a non-international armed conflict. With regard to the situation in Ukraine the Office is therefore required to undertake a detailed factual and legal assessment of the relevant events, including analysis of the applicability of the law of armed conflict to the situation in Ukraine from 20 February 2014 onwards in order to determine whether there is a reasonable basis to open an investigation into the situation.

## Crimea

155. Beginning in the last days of February 2014, protests against the new Kyiv Government began to build, notably in eastern regions of the country and in Simferopol, the capital of the Autonomous Republic of Crimea. On 27 February 2014, reportedly armed and mostly uniformed individuals wearing no identifying insignia seized control of government buildings in Simferopol, including the Crimean parliament building. The same day, in the presence of armed men, the Crimean regional parliament reportedly decided to appoint a new prime minister and hold a referendum on the status of Crimea. The Russian Federation later admitted that its military personnel had been involved in taking control of the Crimean peninsula, justifying the intervention *inter alia* on the basis of alleged threats to citizens of the Russian Federation, the alleged decision of residents of Crimea to join the Russian Federation and an alleged request for Russian intervention by (former) President Yanukovich, whom the Russian Federation considered to remain the legitimate leader of Ukraine.
156. 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. Following the signing of the "Treaty on the Adoption of the Republic of Crimea into Russia", between the Crimean *de facto* authorities and the Russian Federation, on 20 March the Russian State Duma passed a law "On the Acceptance of the Republic of Crimea into the Russian Federation and the Creation of New Federal Subjects", paving the way for the application of Russian legislation and policy to Crimea. As a consequence, Crimean residents were automatically declared Russian citizens, while those wishing to retain Ukrainian citizenship were required to notify the authorities within a one-month deadline.
157. The assumption of control over Crimea by the Russian Federation occurred for the most part without exchange of fire. Russian military personnel were used to establish control over the territory, including Ukrainian military installations and government buildings, and in mid-March the Ukrainian Government began withdrawing its troops stationed in bases in Crimea to the mainland.
158. The information available suggests that the situation within the territory of Crimea and Sevastopol amounts to an international armed conflict between Ukraine and the Russian Federation. This international armed conflict began at the latest on 26 February when the Russian Federation deployed members of its armed forces to gain control over parts of the Ukrainian territory without the consent of the Ukrainian Government. 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 on-going state of occupation. A determination of whether or not the initial intervention which led to the occupation is considered lawful or not is not required. For purposes of the Rome Statute an armed conflict may be international in nature if

one or more States partially or totally occupies the territory of another State, whether or not the occupation meets with armed resistance.

### Eastern Ukraine

159. In parallel to events in Crimea, anti-government protests also continued in other regions of Ukraine, but most notably in the east of the country. During April and May 2014 anti-government demonstrators seized government buildings in the eastern Ukrainian provinces of Kharkiv, Donetsk and Luhansk. An anti-government group calling itself the “Donbas People’s Militia”<sup>21</sup> emerged and attempts by law enforcement to regain control were thwarted by reoccupations by the anti-government elements.
160. The situation in the east deteriorated rapidly into violence and on 15 April 2014, the Ukrainian Government announced the start of an “anti-terror operation” and deployed its armed forces to Donetsk and Luhansk. By the end of April, the acting Ukrainian President announced that the Ukrainian Government was no longer in full control of Donetsk and Luhansk. He warned that the country was on “full combat alert”, and reinstated conscription to the armed forces by decree.
161. The events of 2 May 2014, in Odessa, southern Ukraine further exacerbated anti-government feeling in eastern areas. Protests in the city 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.
162. 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” made declarations claiming “independence” from Ukraine. Both the “DPR” and the “LPR” also appealed to be incorporated into the Russian Federation. The “DPR” and “LPR” remain unrecognised by almost all States, including the Russian Federation.
163. The intensity of hostilities in eastern Ukraine increased rapidly in April and May 2014, and included on 2 May the shooting down of two Ukrainian military helicopters over the eastern city of Sloviansk by anti-government armed elements, intense battles for control of Donetsk International Airport at the end of May and on 14 June the shooting down of a Ukrainian military transport plane as it approached Luhansk Airport.
164. In mid-July, the Russian Federation accused Ukraine’s armed forces of shelling the Russian border town of Donetsk. Ukraine itself claimed that rockets fired at Ukrainian military positions over several days in July and August 2014 had been launched from positions in the Russian Federation, and that the Russian Air Force had shot down a Ukrainian military aircraft on 16 July 2014.

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<sup>21</sup> “Donbas” is a historical term referring to the area of Luhansk and Donetsk oblasts in eastern Ukraine.

165. On 17 July 2014, a civilian Malaysian Airlines aircraft, flight MH17 on route from Amsterdam to Kuala Lumpur carrying 298 passengers and crew, was shot down over eastern Ukraine, killing all on board. An investigation into the incident was subsequently initiated by agreement between Ukraine, Malaysia, the Netherlands (whose nationals represented the majority of victims) and the other States whose nationals had been on board. According to this Joint Investigation Team, the aircraft allegedly was shot down from a location near Pervomaisk, Donetsk, in territory controlled by anti-government armed groups.
166. Fighting of varying degrees of intensity, and involving the use of military weaponry by both sides, has since persisted for more than two years in eastern Ukraine between Ukrainian Government forces and anti-government elements, allegedly supported by the Russian Federation. Two periods of particularly intense battles were reported in Ilovaisk (Donetsk oblast) in late 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.
167. Two attempted ceasefire agreements, the Minsk Protocol, signed on 5 September 2014, and a second agreement within the same framework, known as "Minsk II", in February 2015, have failed to achieve a cessation of hostilities. The second agreement, monitored by the OSCE, appears to have reduced the intensity of fighting to some extent but daily violations of the ceasefire, including use of heavy weapons, and detentions by both sides, have continued.
168. Based on the information available it seems that by 30 April 2014 the level of intensity of hostilities between Ukrainian government forces and anti-government armed elements in eastern Ukraine reached a level that would trigger the application of the law of armed conflict. This preliminary analysis is based on information that both sides used of military weaponry, resources of the armed forces including airplanes and helicopters were deployed by the Ukrainian Government, and there were casualties to military personnel, non-government armed elements and civilians. Furthermore, information available indicates that the level of organisation of armed groups operating in eastern Ukraine, including the "LPR" and "DPR", had by the same time reached a degree sufficient for them to be parties to a non-international armed conflict.
169. Additional information, such as reported shelling by both States of military positions of the other, and the detention of Russian military personnel by Ukraine, and *vice-versa*, points to direct military engagement between Russian armed forces and Ukrainian government forces that would suggest the existence of an international armed conflict in the context of armed hostilities in eastern Ukraine from 14 July 2014 at the latest, in parallel to the non-international armed conflict.

170. For the purpose of determining whether the otherwise non-international armed conflict could be actually international in character, the Office is also examining 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 Rome Statute relevant to armed conflict of an international character for the relevant period. In conducting its analysis, the Office must assess whether the information available indicates that Russian authorities have provided support to the armed groups in the form of equipment, financing and personnel, and also whether they have generally directed or helped in planning actions of the armed groups in a manner that indicates they exercised genuine control over them. The Office is currently undertaking a detailed factual and legal analysis of the information available of relevance to this issue.

### *Alleged crimes*

171. The following summary of alleged crimes is preliminary in nature and is based on publicly available reports and information received by the Office. 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

172. *Harassment of Crimean Tatar population:* Since the assumption of control by the Russian Federation over the territory of Crimea some 19,000 residents of the region have reportedly become internally displaced within mainland Ukraine. A large proportion of this number of internally displaced persons is believed to be of Crimean Tatar ethnicity. Under the application of Russian law throughout the territory, members of the Crimean Tatar population and other Muslims residents in Crimea have also reportedly been subjected to harassment or intimidation, including a variety of measures such as entry bans to the territory, house searches, and restrictions on their freedom of expression, assembly and association.
173. *Killing and abduction:* At least 10 people have been reported missing since March 2014 in the context of the situation in Crimea. In most instances the alleged victims were known to oppose the occupation of Crimea and their abductions were attributed to the “Crimean self-defence” paramilitary group. The Office is also analysing two incidents of alleged abduction and killing of Crimean Tatar activists, in March and September of 2014.
174. *Ill-treatment:* Several incidents of alleged ill-treatment in the context of detention or abduction were also reported, including beatings, choking, and, in at least one instance, threats of sexual violence.

175. Detention and fair trial: A number of civilians who opposed the 16 March referendum have reportedly been arrested and held in detention since March 2014 with information available pointing to the non-respect of a number of due process and fair trial rights. Some 179 persons deprived of their liberty have reportedly been forcibly transferred from prisons in Crimea to prisons in the territory of the Russian Federation.
176. Compelled military service: As a consequence of the imposed change of citizenship, men of conscription age residing in Crimea became subject to mandatory Russian military service requirements. There were reports of a number of young men leaving for mainland Ukraine to escape forced conscription notices from *de facto* authorities.

### Eastern Ukraine

177. The Office has documented more than 800 incidents involving crimes allegedly committed since 20 February 2014 in the context of events in eastern Ukraine.
178. Killing: Since the start of the conflict, according to the UN Office of the High Commissioner for Human Rights, some 9,578 people have been killed and 22,236 injured, including, members of the armed forces and armed groups and civilians. Between April 2014 and June 2016, up to 2,000 civilians were killed in armed hostilities, mostly (85-90%) as a result of shelling of populated areas in both government-controlled territory and areas controlled by armed groups. Other incidents reported include several civilians allegedly killed or injured by firearms, attributed to both pro-government forces and armed groups. A smaller number of summary executions of persons who were *hors de combat* including members of armed groups and of Ukrainian forces were also alleged.
179. 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 in areas controlled by armed groups. In some cases it is alleged that shelling of such objects was deliberate or indiscriminate or that civilian buildings including schools have been improperly used for military purposes.
180. Detention: All sides have also 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 civilians suspected of being pro-Ukrainian and members of Ukrainian armed forces and in many cases ill-treated them. 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.

181. *Disappearance*: More than 400 people were registered as “missing” in the context of the conflict in eastern Ukraine, though it remained unclear how many of these individuals had been forcibly disappeared. Some were believed to be alive and in detention while others may be among the large number of bodies that remained so far unidentified by the relevant authorities. Some documented instances of alleged forced disappearance have however been reported and were attributed mainly to pro-government forces.
182. *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, use of electric shocks and other physical abuse were widely documented in both government-controlled territory and in areas outside the Government’s control and allegedly targeted civilians and members of both Ukrainian armed forces and armed groups. In the majority of incidents reported the torture or ill-treatment occurred in the context of detention, frequently in “irregular” detention facilities and often during interrogation.
183. *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 OTP acknowledges that 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 or armed groups. These alleged crimes were attributed to both state and non-state forces. In several documented cases sexual violence, including rape, threats of rape, beating of genitals and forced nudity were perpetrated in the context of interrogations.

### *OTP Activities*

184. The Office has continued to conduct a thorough factual and legal analysis of information received in relation to the conflict in order to establish whether there is a reasonable basis to believe that the alleged crimes fall within the subject-matter jurisdiction of the Court. As described above, analysis of the situation in Ukraine in this phase has required extensive research focussed both on the examination and evaluation of information relevant for determining the existence (or not) of international and/or non-international armed conflict in eastern Ukraine, and on analysing the more specific alleged acts that may constitute crimes under article 5 of the Statute.
185. Since Ukraine’s lodged its second declaration under article 12(3) of the Statute, the Office has received a large volume of information pursuant to article 15 of the Statute, from the Ukrainian Government, from NGOs working in Ukraine and from other organisations and individuals. The information provided to the Office includes, in many instances, first-hand accounts and other documented information obtained from witnesses or victims of alleged crimes. In particular

the Office is currently reviewing more than 7,000 pages of material consisting of several hundred documented accounts of interviews and other information from witnesses and victims, collected by NGOs working in Ukraine.

186. Based on information collected from multiple reliable sources, the Office has compiled a comprehensive database of over 800 incidents alleged to have occurred in the context of the situation in Ukraine since 20 February 2014. This database is updated as additional or new information becomes available, and provides a basis for the next steps in the preliminary examination which include preliminary crime pattern analysis and further examination of particular features of the conflict and of the alleged conduct of the different parties to it, such as the most affected locations, timeframes and types of targets, and the different *modus operandi* employed, as well as casualty figures, among others.
187. The review process has included an independent and thorough evaluation of the reliability of sources and the credibility of information received on alleged crimes. During the reporting period, 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 such as by consulting multiple reliable sources for corroboration purposes.
188. In this context, the Office has also interacted with relevant stakeholders including senders of article 15 communications, the Government of Ukraine, international and national organisations. 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 October 2016. During the mission, the Office held talks with Ukrainian authorities, such as the Office of the General Prosecutor of Ukraine and the ministries of Justice and Foreign Affairs, and 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.
189. In its Report on Preliminary Examination Activities in 2015, the Office provided its preliminary analysis of the crimes allegedly committed during the Maidan protest events. The Office found that while the acts of violence allegedly committed by the Ukrainian authorities between 30 November 2013 and 20 February 2014 could constitute an “attack directed against a civilian population” under article 7(2)(a) of the Statute, the information available did not provide a reasonable basis to believe that the attack was systematic or widespread under the terms of article 7 of the Statute. The Office however noted that serious human rights abuses had occurred in the context of the Maidan events, and expressed its willingness to reassess its preliminary analysis in the light of any new information. In October 2016, the Office received further information that will be subject to close examination.

### *Conclusion and Next Steps*

190. The Office will continue to engage with the Ukrainian authorities, civil society and other relevant stakeholders, such as the Russian Federation, on all matters relevant to the preliminary examination of the situation in Ukraine.
  
191. The Office continues its detailed factual analysis of the alleged crimes on the basis of its preliminary assessment of the existence of armed conflicts in both regions with a view to identifying potential cases within the jurisdiction of the Court. 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)

#### AFGHANISTAN

##### *Procedural History*

192. The Office has received 112 communications pursuant to article 15 in relation to the situation in Afghanistan. The preliminary examination of the situation in Afghanistan was made public in 2007.

##### *Preliminary Jurisdictional issues*

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

194. 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.

##### *Contextual Background*

195. After the attacks of 11 September 2001, in Washington D.C. and New York City, a United States-led coalition launched air strikes and ground operations in Afghanistan against the Taliban, suspected of harbouring Osama Bin Laden. The Taliban were ousted from power by the end of the year and in December 2001, under the auspices of the UN, an interim governing authority was established in Afghanistan. In May-June 2002, a new transitional Afghan government regained sovereignty, but hostilities continued in certain areas of the country, mainly in the south. Subsequently, the UN Security Council in Resolution 1386 established an International Security Assistance Force ("ISAF"), which later came under NATO command.

196. The Taliban and other armed groups have rebuilt their influence since 2003, particularly in the south and east of Afghanistan. At least since May 2005, the armed conflict has intensified in the southern and eastern provinces of Afghanistan between organised armed groups, most notably the Taliban, and the Afghan and international military forces. The conflict has further spread to the north and west of Afghanistan, including the areas surrounding Kabul. The armed conflict has opposed the Government of Afghanistan forces and armed groups which mainly include the Taliban, the Haqqani Network, and

Hezb-e-Islami Gulbuddin (“HIG”). International forces deployed in support of the Government of Afghanistan ended their combat missions in December 2014, although such forces remain in reduced numbers, primarily in a training, advisory and assistance role.

### *Subject-Matter Jurisdiction*

197. The situation in Afghanistan is usually considered as an armed conflict of a non-international character between the Afghan Government, supported by the ISAF and US forces on the one hand (pro-government forces), and non-state armed groups, particularly the Taliban, on the other (anti-government groups). The participation of international forces does not change the non-international character of the conflict since these forces became involved in support of the Afghan Transitional Administration established on 19 June 2002.
198. 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:
- a. Crimes against humanity and war crimes by the Taliban and their affiliated Haqqani Network;
  - b. War crimes of torture and related ill-treatment by Afghan government forces, in particular the intelligence agency (National Directorate for Security), and the Afghan National Police;
  - c. War crimes of torture and related ill-treatment, by US military forces deployed to Afghanistan and in secret detention facilities operated by the Central Intelligence Agency, principally in the 2003-2004 period, although allegedly continuing in some cases until 2014.
199. The above crimes are alleged to have been committed on the territory of Afghanistan, in all 34 of Afghanistan’s provinces. Kandahar and Helmand appear to be the most affected provinces, with a high degree of conflict-related violence throughout the relevant time period. In addition, a limited number of alleged crimes associated with the Afghan armed conflict are alleged to have been committed on the territories of Poland, Lithuania and Romania, which are parties to the Statute. This is because individuals captured in the context of the armed conflict in Afghanistan, such as presumed members of the Taliban or Al Qaeda, were allegedly transferred to detention centres located in those countries.
200. Crimes are alleged to have been committed throughout the entire time period during which the Court may exercise its jurisdiction, i.e., since 1 May 2003 and continuing to the present day. Since the information available provides a reasonable basis to believe that at least some crimes within the Court’s jurisdiction were committed on the territory of Poland prior to 1 May 2003, the situation for which the Prosecutor could potentially seek authorisation to

investigate would accordingly encompass not only alleged crimes committed in Afghanistan since 1 May 2003, but also other alleged crimes that are sufficiently linked to the situation in Afghanistan and that were committed outside of Afghanistan since 1 July 2002.

201. The Office has also examined allegations regarding civilian casualties caused by international military forces operating in Afghanistan. Since 2009, when UNAMA began to record such casualties systematically, UNAMA has documented approximately 1,600 civilian deaths.
202. 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 the information available 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.
203. The Office also identified a few other incidents attributed to international forces where owing to paucity of the information available at this stage, it was unable to reach a determination whether there is a reasonable basis to believe crimes within the jurisdiction of the Court have occurred. In particular, an in-depth assessment would require evidence on the context of the attacks to determine whether civilian deaths or injuries amounted to war crimes within the jurisdiction of the Court.
204. These and similar allegations would fall within the scope of the situation and could be investigated further, should the Pre-Trial Chamber in due course authorise an investigation and depending on the results of the application of the case selection and prioritization policy of the Office.

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

205. 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 in the period between January 2007 and December 2015. Since May 2003, insurgent groups have allegedly launched numerous attacks on protected objects, including schools, civilian government offices, hospitals, shrines and mosques, and humanitarian organisations.
206. 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,<sup>22</sup> or to oppose Taliban rule and ideology, including women and girls who worked, took part in public affairs, or attended school past the age of puberty, and involved 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.

207. Based on the information available at this stage, the Office has found that there is a reasonable basis to believe that since 1 May 2003, the Taliban and their affiliates have also committed at a minimum 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 fifteen 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 authorities*

208. 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. This conduct reflects a pattern of alleged criminality dating back to the beginning of the conflict in 1978, for which a state of total impunity persists. At present, an estimated 35-50% of conflict-related detainees may be subjected to torture in Afghan detention facilities.
209. There is a reasonable basis to believe that Afghan authorities 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 National Directorate of Security (“NDS”), the Afghan National Police (“ANP”), the Afghan National Army (“ANA”), the Afghan National Border Police (“ANBP”) and the Afghan Local Police (“ALP”).
210. The information available does not indicate that the alleged crimes by Afghan forces against conflict-related detainees were committed as part of any plans or policies at the national level. However, the information available indicates that in some cases, the alleged crimes may have been committed as part of one or more plans or policies at the facility, district or provincial level. The information available also indicates that the alleged crimes were committed on a large scale.

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<sup>22</sup> Foreign entities present in Afghanistan include international military forces, private military companies, international governmental and non-governmental organizations, international companies, and international media.

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

211. The information available provides a reasonable basis to believe that, in the course of interrogating these detainees, and in conduct supporting those interrogations, members of the US armed forces and the US Central Intelligence Agency (“CIA”) resorted to techniques amounting to the commission of the war crimes of torture, cruel treatment, outrages upon personal dignity, and rape. These acts are punishable under articles 8(2)(c)(i) and (ii) and 8(2)(e)(vi) of the Statute. Specifically:

- Members of US armed forces appear to have subjected at least 61 detained persons to torture, cruel treatment, outrages upon personal dignity on the territory of Afghanistan between 1 May 2003 and 31 December 2014. The majority of the abuses are alleged to have occurred in 2003-2004.
- Members of the CIA appear to have subjected at least 27 detained persons to torture, cruel treatment, outrages upon personal dignity and/or rape on the territory of Afghanistan and other States Parties to the Statute (namely Poland, Romania and Lithuania) between December 2002 and March 2008. The majority of the abuses are alleged to have occurred in 2003-2004.

212. These alleged crimes were not the abuses of a few isolated individuals. Rather, they appear to have been committed as part of approved interrogation techniques in an attempt to extract ‘actionable intelligence’ from detainees. According to information available, the resort to such interrogation techniques was ultimately put to an end by the authorities concerned, hence the limited time-period during which the crimes allegedly occurred.

213. The Office considers that there is a reasonable basis to believe these alleged crimes were committed in furtherance of a policy or policies aimed at eliciting information through the use of interrogation techniques involving cruel or violent methods which would support US objectives in the conflict in Afghanistan. Likewise, there is a reasonable basis to believe that all the crimes identified herein have a nexus to the Afghanistan conflict.

*Admissibility Assessment*

214. 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 Afghan authorities; or members of the US armed forces or the CIA - the Office has found that these potential cases that would arise from an investigation of the situation would be admissible pursuant to article 53(1)(b), subject to further information that could be provided by the

relevant national authorities in the course of the preliminary examination or any subsequent investigation.

*Members of the Anti-Government Groups*

215. *Complementarity*: 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 to the law’s application or any exception for international crimes. Prior to the passage of the amnesty law, only one high-ranking member of an armed group (Abdullah Shah, a commander of Ittehad-e Islami), had been tried, for crimes committed in 1992-93. In addition, reportedly two senior members of the Haqqani Network were prosecuted and convicted by a national primary court in August 2016 for an unknown alleged conduct. The Government of Afghanistan is yet to provide information on these proceedings in order for the Prosecution to fully assess the admissibility of these two cases. According to the information available, apart from the two individuals, no leaders of the principal anti-government armed groups, or other members situated at the highest echelons of responsibility, such as those who ordered, financed or otherwise organized the alleged crimes, have been reportedly investigated or prosecuted.
216. *Gravity*: Between January 2007 and June 2015, approximately 45,000 civilian casualties (17,000 deaths and 28,000 injuries) have been attributed to anti-government armed groups, primarily from their use of improvised explosive devices. The information available suggests that many of the alleged crimes were committed with particular cruelty, such as through beheadings and hangings. Those bodies were then displayed in public places, sometimes with a letter attached as a warning to others, with the aim to terrorize and spread fear among the local civilian population, as a means of control.

*Members of the Afghan authorities*

217. *Complementarity*: The Government has instituted only a limited number of proceedings against alleged perpetrators. Despite the scale of alleged ill-treatment in NDS and ANP detention facilities (an estimated 35-51% of conflict-related detainees according to the findings of UNAMA’s detention monitoring program), information provided by the Government of Afghanistan to UNAMA indicates that to date the Government has prosecuted only two NDS officials (in relation to one incident), and no ANP officials, for this conduct. The Government has not provided any information on national proceedings to the Office, despite multiple requests for such information from the Office since 2008, including two requests submitted during the reporting period.
218. *Gravity*: There are an estimated 5,000 conflict-related detainees in Afghan government custody. The manner in which the crimes are alleged to have been

committed appears particularly gruesome and was seemingly calculated to inflict maximum pain. 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 CIA*

219. Complementarity: US civilian and military courts can exercise their jurisdiction over conduct that would constitute a crime within ICC subject-matter jurisdiction (i.e. war crimes, crimes against humanity, and genocide), when committed abroad by US nationals.
220. In its most recent response to the Committee Against Torture (November 2015), the US indicated that "more than 70 investigations concerning allegations of detainee abuse by military personnel in Afghanistan conducted by the Department [of Defence] resulted in trial by courts-martial, close to 200 investigations of detainee abuse resulted in either non-judicial punishment or adverse administrative action, and many more were investigated and resulted in action at a lower level." Specific public information on the incidents and persons forming the subject of those proceedings is, however, limited. According to the information available, the Prosecution was unable to identify any individual in the armed services prosecuted by courts martial for the ill-treatment of detainees within the Court's temporal and territorial jurisdiction. The vast majority of investigations and prosecutions relating to detainee ill-treatment were for conduct in Iraq. A small number of court martial proceedings (7) were for ill-treatment in Afghanistan that took place in 2002.
221. The Department of Justice conducted a two-year preliminary review (from August 2009 to June 2011) of allegations related to the abuse of detainees in the custody of the Central Intelligence Agency ("CIA"), which reviewed allegations regarding the ill-treatment of 101 detainees. According to the information available, the scope of this review appears to have been limited to investigating whether any unauthorised interrogation techniques were used by CIA interrogators, and if so, whether such conduct could constitute violations of any applicable criminal statutes. In his public statements about those proceedings, the US Attorney General further emphasized that "the Department of Justice (DOJ) will not prosecute anyone who acted in good faith and within the scope of the legal guidance given by the Office of Legal Counsel regarding the interrogation of detainees." As a result of the review, the Attorney-General conducted full criminal investigations only into the cases of two detainees who had died in CIA custody. Both investigations were completed in August 2012 and did not result in any indictments or prosecutions because, according to the Attorney-General, "the admissible evidence would not be sufficient to obtain and sustain a conviction beyond a reasonable doubt."
222. While proceedings appear to have been limited to the conduct of interrogators and to incidents where interrogation methods were not authorised at the time,

the Office is seeking to obtain further clarifications on the scope of relevant preliminary reviews and investigations before finalising its determination on the admissibility of the related potential cases.

223. Criminal investigations are reportedly on-going in Poland, Romania and Lithuania regarding alleged crimes committed in relation to the CIA detention facilities on their respective territories. The information available has not allowed the Office to discern the actual contours of such national cases, such that their scope could be said to cover the potential cases under the analysis.
224. *Gravity*: There is specific information indicating that at least 88 persons in US custody were allegedly tortured. The information available suggests that victims were deliberately subjected to physical and psychological violence, and that crimes were allegedly committed with particular cruelty and in a manner that debased the basic human dignity of the victims. The infliction of “enhanced interrogation techniques,” applied cumulatively and in combination with each other over a prolonged period of time, would have caused serious physical and psychological injury to the victims. Some victims reportedly exhibited psychological and behavioural issues, including hallucinations, paranoia, insomnia, and attempts at self-harm and self-mutilation. The gravity of the alleged crimes is increased by the fact that they were reportedly committed pursuant to plans or policies approved at senior levels of the US government, following careful and extensive deliberations.

### *Interests of Justice*

225. In light of the mandate of the Office, as well as the object and purpose of the Statute, and taking into account the gravity of the crimes and the interests of victims, based on the information available the Office would have no substantial reasons to believe that the opening of an investigation would not be in the interests of justice.

### *OTP Activities*

226. During the reporting period, the Office has focussed its activities on concluding a 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. In the course of this process, the Office engaged with a number of stakeholders, including appropriate State authorities for the purpose of gathering additional information relevant for the assessment of admissibility and the interests of justice. The Government of Afghanistan is yet to provide information in response to the Office’s continuous requests for further information on relevant national proceedings.
227. In the context of assessing whether the potential cases have been of sufficient gravity to justify further action by the Court, pursuant to the Prosecutor’s Policy on Sexual and Gender-Based Crimes, the Office took into account the impact that

sexual and gender-based crimes had on victims and their communities. It found that the alleged violent acts amounting to the crime against humanity of persecution on gender grounds have had a particularly broad and severe impact on the lives of women and girls. Girls' education has come under sustained attack, thereby depriving thousands of girls of their right of access to education. Women who were left as sole income-providers for their households after the death or injury of their husbands experienced long-lasting social and economic consequences, with poverty forcing many women to give their daughters in marriage in exchange for debts or to take their children out of school often to work. Widowed women were often particularly vulnerable to other forms of violence and abuse from family and community members.

228. 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. These discussions assisted the Office in assessing whether there are substantial reasons to believe that an investigation would not serve the interests of justice prior to making a decision on whether to seek authorisation from the Pre-Trial Chamber to open such an investigation into the situation in Afghanistan.

229. The Office also took a number of opportunities to reinforce its cooperation activities with relevant States and other external partners, emphasizing that the effective cooperation is of the utmost importance for the work of the Office in this situation.

### *Conclusion*

230. The Office is concluding its assessment of factors set out in article 53(1)(a)-(c), and will make a final decision on whether to request the Pre-Trial Chamber authorisation to commence an investigation into the situation in the Islamic Republic of Afghanistan since 1 May 2003, imminently.

## COLOMBIA

### *Procedural History*

231. The situation in Colombia has been under preliminary examination since June 2004. The OTP has received 181 communications pursuant to article 15 of the Rome Statute in relation to the situation in Colombia.
232. In November 2012, the OTP published an Interim Report on the Situation in Colombia, which summarised the Office's findings with respect to jurisdiction and admissibility. The report outlined key areas of continuing focus where further efforts to address insufficient judicial activity were required: (i) proceedings relating to killings and enforced disappearances, commonly known as "false positives" cases; (ii) proceedings relating to forced displacement; (iii) proceedings relating to sexual crimes; and, (iv) national proceedings relating to the promotion and expansion of paramilitary groups. The report further identified as an additional area of focus (v) legislative developments that could impact the conduct of national proceedings, including the Legal Framework for Peace and others, as well as jurisdictional aspects relating to the emergence of "new illegal armed groups".

### *Preliminary Jurisdictional Issues*

233. Colombia deposited its instrument of ratification to the Rome 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 Rome Statute.

### *Contextual Background*

234. Colombia has 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 *Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo* ("FARC-EP"); the *Ejército de Liberación Nacional* ("ELN"); paramilitary armed groups; and the Colombian national armed forces.
235. On 18 October 2012, peace talks between the Government of Colombia and the FARC-EP began in Oslo, and then moved to Havana. On 26 September 2016, after nearly four years of negotiations, the negotiating parties signed the Final Agreement for Ending Conflict and Building a Stable and Long-Lasting Peace ("*Acuerdo Final Para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera*"). The text of the agreement incorporates accords on the six items of the initial agenda, including agreements relating to rural development and

agrarian reform, political participation, drug trafficking, disarmament and demobilization, implementation and verification mechanisms, and the agreement on victims, which envisions the creation of a Special Jurisdiction for Peace (“SJP”). A national plebiscite held on 2 October 2016 however resulted in the peace agreement being rejected by 50,2 percent of the voters (37 percent of the Colombian electorate).

236. On 30 March 2016, the Government of Colombia announced the beginning of peace negotiations with the ELN. The six-point negotiating agenda, as agreed as the framework for the peace talks, includes: (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*

237. As detailed in previous reporting,<sup>23</sup> the Office has determined that the information available provides a reasonable basis to believe that crimes against humanity under article 7 of the Rome 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.
238. There is also a reasonable basis to believe that war crimes under article 8 of the Statute have been committed in the context of the non-international armed conflict in Colombia, including, since 1 November 2009, 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 Rome Statute.
239. During the reporting period, the Office continued to receive and gather information on alleged crimes, including killings and enforced disappearances known as *false positives* cases. This information together with relevant open sources information has been analysed to inform the identification of potential cases that would likely arise from an investigation of the situation, on the basis of which the Office is analysing the admissibility of cases relating to this area of focus of the preliminary examination.

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<sup>23</sup> See ICC-OTP, [Situation in Colombia: Interim Report](#), November 2012.

### *Admissibility Assessment*

240. During the reporting period, the Office received from the Colombian authorities approximately 80 judgments rendered by Colombian courts against members of the armed forces, FARC-EP and ELN armed groups, and members of paramilitary armed groups. These judgments include convictions against perpetrators of false positives killings and against paramilitary and rebel commanders for forced displacement and sexual and gender based crimes. In addition, on 28 July 2016 the Office received information in response to a request submitted to the Colombian authorities on 8 December 2014. All material received has been thoroughly reviewed by the Office, including for the purpose of assessing its relevance for the preliminary examination and to inform the on-going admissibility analysis.

#### *Proceedings relating to "false positives" cases*

241. Following a thorough factual and legal assessment of the information available, the Office has identified potential cases likely to arise from an investigation by the Office if the criteria for opening such investigation were met, and bearing in mind the Office's prosecutorial strategy of investigating and prosecuting those most responsible for the most serious crimes. The identification of potential cases is without prejudice to any further findings on subject-matter jurisdiction to be made pursuant to additional information that the Office could receive in the future. Furthermore, the legal characterisation of these cases and any alleged crimes may be revisited at a later stage. The identification of potential cases also serves the purpose of assessing the level of judicial activity by the competent national authorities.

242. The OTP identified at least five potential cases relating to false positives killings allegedly committed by members of eleven brigades acting under five divisions of the Colombian armed forces between 2002 and 2010. For the purpose of assessing whether relevant national proceedings are on-going, the OTP has identified a number of commanding officers in charge of relevant divisions and brigades under whose command the greatest number of false positives killings was allegedly committed. The OTP's findings have also been informed by judgments rendered by different district courts of Colombia against mid and low-level perpetrators; information relating to operational irregularities within military units implicated in the alleged crimes; and information suggesting the involvement by action or omission of the persons concerned. The scale, manner and impact of the crimes attributed to each division have also been considered.

243. The Colombian authorities have carried out a significant number of investigations and prosecutions against mid and low-level members of the Colombian army. Information available to the Office indicates that until February 2016, Colombian courts had rendered 817 convicting sentences against 961 members of the armed forces for false positives cases. By July 2016, the Attorney General's Office ("AGO") was investigating 2,241 cases of extrajudicial

killings by members of the armed forces, amounting to a total number of 4,190 victims. According to judgments submitted to the OTP by the Colombian authorities, since 2012, two colonels, two lieutenant colonels, 12 majors, eight captains and 29 lieutenants have been convicted for such conduct.

244. The information available to the Office further indicates that the Colombian authorities have initiated investigation against at least 14 commanding officers for conduct related to the potential cases identified by the Office. Information about the exact investigative steps taken is, however, limited. Public reports indicate that during the reporting period the case against one general has moved to the trial phase and that others have been called for questioning; however, the OTP has yet to receive detailed information from the Colombian authorities on the cases being reportedly investigated.

*Proceedings relating to forced displacement*

245. Over the reporting period, Justice and Peace Law (“JPL”) Tribunals rendered 10 judgements of first instance relating to cases of forced displacement against 43 members of paramilitary groups, including against Ramón María Isaza Arango, former general commander of the *Autodefensas Campesinas del Magdalena Medio*. Pursuant to the AGO’s strategy of prioritisation of cases against those most responsible within paramilitary structures, Ramón María Isaza Arango was convicted for 91 counts of forced displacement as indirect and co-perpetrator. The “macro-judgement”, rendered by the Bogota JPL tribunal in February 2016, is currently under appeal before the Criminal Appellate Chamber of the Supreme Court of Justice.
246. In addition, convictions rendered in previous years against Ramón María Isaza Arango, Arnubio Triana Mahecha, former commander of the *Puerto Boyacá* bloc, Ramiro Vanoy Murillo, former commander of the *Mineros* bloc, and Salvatore Mancuso, former commander of the *Catatumbo* bloc, as well as against 42 low and mid-level paramilitaries, were confirmed on appeal. The Office further received from the Government of Colombia information on six mid-level paramilitary commanders and one FARC-EP front commander convicted of forced displacement under the ordinary justice system.
247. On the basis of the information available, including relevant judicial decisions submitted by the Colombian authorities, proceedings conducted against paramilitary groups for forced displacement continue to make progress under the JPL framework. According to the AGO’s strategy for consolidation and completion of JPL proceedings, ongoing national proceedings concerning additional paramilitary leaders are expected to be completed in the course of 2016 and 2017.
248. Information available also suggests that the National Directorate for Analysis and Context (*Dirección Nacional de Análisis y Contexto*, DINAC) is

conducting investigations on forced displacement and other serious crimes allegedly committed by FARC-EP and ELN members, including against their respective leadership. The Office however requires further details on the scope and type of investigative activities carried out by the Colombian authorities in that regard.

*Proceedings relating to sexual and gender based crimes*

249. As in previous years, the main developments relating to national proceedings for sexual and gender based crimes (“SGBC”) concern paramilitary leaders under the JPL framework. In February 2016, Ramón María Isaza Arango was convicted of twelve counts of rape (*acceso carnal violento en persona protegida*), four counts of sexual violent acts (*acto sexual violento en persona protegida*), two counts of enforced prostitution or sexual slavery and one count of forced abortion. Given his position of senior paramilitary leader, Ramón María Isaza was convicted as indirect perpetrator for all these charges. Furthermore, previous convictions issued against Arnubio Triana Mahecha and Ramón María Isaza were also confirmed on appeal during the reporting period.
250. Although some steps had been adopted to prioritise SGBC cases attributed to all parties to the conflict, proceedings on conflict-related sexual crimes concerning both the FARC-EP and the ELN’s leadership remain at the investigation stage. In preparation for a post-conflict setting after the adoption of a peace agreement between the Government of Colombia and the FARC-EP, the AGO indicated that the investigations concerning the FARC-EP’s command would be transferred to the SJP once this jurisdiction becomes operative.
251. Information on ongoing criminal proceedings relating to alleged sexual crimes by state forces is scant. During the reporting period, the Colombian authorities submitted information on only one conviction (in first instance and in appeal) rendered against a low-level member of the army. In this context, in spite of the comprehensive reform of the AGO’s investigative model aiming at focusing on those most responsible for SGBC, relevant national proceedings for these crimes against members of the FARC-EP, the ELN and state forces, appear limited.

*The Special Jurisdiction for Peace*

252. During the reporting period, the Office closely reviewed the provisions of the Agreement Regarding the Victims of the Conflict concluded between the Government of Colombia and the FARC-EP in December 2015, concerning the creation of the Special Jurisdiction for Peace to the extent relevant for its on-going admissibility assessment.
253. Once established, the SJP would have jurisdiction to investigate and prosecute those most responsible for the most serious conflict-related

crimes, including cases against members of the FARC-EP, members of the armed forces and those who, directly or indirectly participated in the internal armed conflict. Under the SJP only political crimes, such as rebellion and sedition, would be subject to amnesty. Amnesties and pardons for crimes against humanity and war crimes under the Rome Statute are excluded from the SJP system.

254. The agreement on the SJP foresees two different types of judicial procedures: one for those who commit to tell the truth and accept responsibility; and one for those who do not. All persons subject to the SJP would first appear before a Chamber responsible for deciding on the accuracy and completeness of confessions and to make provisional determinations regarding the most serious crimes and the alleged most responsible individuals. Persons appearing before the Chamber may be requested to supplement their confessions if they are found to be incomplete.
255. Members of the FARC-EP who would acknowledge responsibility for their crimes and commit to non-repetition would be sentenced to five to eight years of “effective restriction of liberties and rights, such as freedom of residence and movement”, along with participation in restorative projects for victims. Those who accept responsibility for crimes belatedly would serve the same term under ordinary conditions, while those who fail to acknowledge their responsibility could be convicted to prison sentences of up to twenty years. Any special treatment within the SJP is conditional upon the provision of the full truth, redress to the victims and guarantees of non-repetition.
256. A Chamber for the Definition of Legal Situations would resolve jurisdictional conflicts and other legal issues that may arise, such as the applicability of sentences previously rendered by other courts. A Review Section would also be set up to review decisions and sentences rendered by the other Chambers of the SJP.
257. At this stage of the preliminary examination, the OTP has not formed a specific or final position regarding the Special Jurisdiction for Peace, which is yet to be established. The SJP seems designed to establish individual criminal responsibility, bring perpetrators to account and to fully uncover the truth, while also seeking to fulfil sentencing objectives of deterrence, retribution, rehabilitation and restoration. Fulfilment of these objectives will not only depend on the procedures and conditions set forth in the Agreement, but also on the effectiveness of restrictions on liberty imposed on individuals, the nature of which have yet to be clearly laid out. The OTP would also have to consider whether any substantive lacunae in the laws applied by the competent SJP authorities, including in relation to command responsibility, could hinder their ability to genuinely proceed in relation to the potential cases which are likely to arise from an investigation into the situation.

### *OTP Activities*

258. During the reporting period, the Office conducted several analytical activities relating to the areas of focus of the preliminary examination. As set out above, on the basis of new information received, the Office updated its analysis of the allegations of false positives killings for the purpose of identifying potential cases. The OTP also continued the assessment of relevant national proceedings relating to sexual and gender-based crimes and forced displacement. The analysis of information required researching, reviewing and analysing a variety of open sources including NGO reports, findings and decisions rendered by different Colombian courts as well as government reports in order to identify relevant corroborative or corrective information.
259. Further, the OTP analysed the provisions set forth in the final peace agreement between the government of Colombia and the FARC-EP in relation to the establishment of the SJP, to the extent the envisaged system is likely to inform the Office's admissibility assessment of relevant cases.
260. In this context, on 1 September 2016, the Prosecutor issued a statement welcoming the conclusion of the peace negotiations between the Government of Colombia and the FARC-EP.<sup>24</sup> The Prosecutor praised the historic achievement, noting that this opportunity for peace marks the beginning of a long-term process which requires genuine accountability – which by definition includes effective punishment – to nurture a sustainable peace.
261. In addition to the reported analytical activities, the Office has been in contact with Colombian authorities, including with the former Minister of Justice, Mr Yesid Reyes. In the course of these meetings, the Prosecutor exchanged views with the Colombian authorities on several aspects relevant to the preliminary examination, including on matters relating to the Agreement Regarding the Victims of the Conflict and the envisaged creation of a Special Jurisdiction for Peace. The Office also held numerous meetings with representatives of international organisations, international NGOs and Colombian civil society in The Hague and abroad.

### *Conclusion and Next Steps*

262. In the context of its on-going 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

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<sup>24</sup> [Statement of the ICC Prosecutor, Fatou Bensouda, on the conclusion of the peace negotiations between the Government of Colombia and the Revolutionary Armed Forces of Colombia – People's Army](#), 1 September 2016.

prosecutorial activities undertaken with respect to the potential cases it has identified.

263. The Office will continue to examine developments relating to the peace negotiations between the Government of Colombia and the FARC-EP as well as the ELN. In this context, the OTP will carefully review any possible change to the text of the agreement signed on 26 September 2016 following the result of the national plebiscite, to the extent relevant to the preliminary examination, as well as any subsequent draft legislation pertaining to the establishment of accountability mechanisms for those most responsible for the most serious crimes.

## GUINEA

### *Procedural History*

264. The situation in Guinea has been under preliminary examination since 14 October 2009. The Office has received 34 communications pursuant to article 15 in relation to the situation in Guinea.

### *Preliminary Jurisdictional Issues*

265. Guinea deposited its instrument of ratification to the Rome 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*

266. 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*

267. In October 2009, the UN established an international commission of inquiry (“UN Commission”) to, *inter alia*, investigate the alleged gross human rights violations that took place on 28 September 2009 and, where possible, identify those responsible. In its 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.

268. 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.
269. 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.
270. 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 Rome Statute.

#### *Admissibility Assessment*

271. On 8 February 2010, in accordance with the recommendations of the reports of the UN Commission and of the CNEI, the Conakry Appeals Court General Prosecutor 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 is 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 delay.
272. Following the presidential election of October 2015, the reform of the judicial system and the fight against impunity appear to remain a priority of the Guinean authorities. In this context, the reappointment of Me Cheick Sako in the position of Minister of Justice signals the continued support of the authorities for the investigation carried out by the Guinean panel of judges. Furthermore, progress made in criminal proceedings relating to other incidents of human rights violations in Guinea and the adoption of relevant legislative reforms, such as the incorporation of Rome Statute provisions into the new penal code, are further signs of the authorities' apparent commitment to do justice to victims of serious human rights abuses, including crimes falling under the jurisdiction of the ICC.
273. Over the reporting period, the panel of Guinean judges focussed on taking the investigative steps requested by legal representatives of victims as "*parties civiles*". Since November 2015, the panel of judges has interviewed

at least five high-ranking officials of the Guinean army as witnesses, and additional victims in Conakry and abroad. To date, 14 individuals have been indicted, including the former Head of State Moussa Dadis Camara and other former and current high-level officials. Over 400 victims, of which approximately 50 are victims of sexual crimes, have been heard by the panel of judges.

274. Considering the advanced stage of the investigation, during the reporting period, the Guinean authorities have publicly committed on several occasions their wish for a trial to take place in the near future, possibly early 2017.
275. In this context, bearing in mind the resources and technical capacity required to organise such an important and unprecedented trial in Guinea, national authorities have made regular contact with international partners, such as the United Nations, the EU, France, and the US Government to secure the support for the holding of a trial in accordance with international standards of justice and due process.
276. Notwithstanding the concrete and progressive investigative steps adopted by the panel of judges during the reporting period, the Office notes that the appointment in March 2016 of General Mathurin Bangoura, former member of the CNDD indicted in 2015, as Governor of Conakry was perceived by victims and civil society organisations as a troubling signal in the context of Guinean authorities' stated intention to bring to justice the persons allegedly involved in the 28 September case.

#### *OTP Activities*

277. During the reporting period, the Office continued to actively follow-up on the progress of national proceedings relating to the events of the 28 September 2009, and to encourage the Guinean authorities to hold to their commitment to complete the investigation in 2016 and to set the stage for a trial within the time-period provided by Guinean law.
278. In February and June 2016, respectively, the Office conducted its twelfth and thirteenth missions to Conakry since the beginning of the preliminary examination to take stock of the investigative steps adopted by the panel of judges and gauge, in consultation with the Guinean authorities, the prospect of organising a trial within a reasonable time frame. During both missions, the OTP delegation held meetings with the Minister of Justice, the panel of judges, the diplomatic community in Conakry, Guinean NGOs and victims' legal representatives. As in previous visits, the OTP delegation also responded to media queries on the purpose of the visit and the nature of the meetings held with the national authorities.
279. The Office also kept abreast of legislative developments that may have an impact on the conduct of proceedings. In this regard, the Office followed-up

on the adoption of a new code of criminal procedure in July 2016, which introduced substantial changes in the conduct of criminal proceedings, including the establishment of courts of first instance on criminal matters. By the same token, civil society organisations welcomed the absence of the death penalty and the criminalisation of torture in the new penal code.

280. As the 28 September case enters a decisive stage, the Office continued to encourage a coordinated approach between all the relevant actors supporting the Guinean authorities' efforts to fulfil their primary responsibility to prosecute those responsible for Rome Statute crimes. In this context, the Office understands that the Guinean authorities, civil society and other relevant partners aspire to draw lessons from the auspicious precedent set by the trial of Chad's former president Hissène Habré, convicted in May 2016 by the Extraordinary African Chambers in Dakar.
281. In addition, the Office remained engaged in continued dialogue with civil society organisations, victims' legal representatives, UN representatives, including with the UN Team of Experts on the Rule of Law and Sexual Violence in Conflict, the EU, and other relevant States. As part of its efforts to mobilise international support for the 28 September case, the Office held a number of consultations with relevant partners, such as during a roundtable held between the ICC and the EU in July 2016 in Brussels. Furthermore, the Minister of Justice's participation in July 2016 in the High-level conference on "International Criminal Justice against Sexual and Gender-Based Crimes", organised jointly by Senegal and the Assembly of State Parties to the Rome Statute (ASP) in Dakar, enabled valuable exchanges of best practices in investigating SGBC at the national level with other countries of the region.

### *Conclusion and Next Steps*

282. The adoption of additional key investigative steps during the reporting period and the Minister of Justice's stated determination to set the stage for a trial in 2017 are encouraging signs of the Guinean authorities' commitment to bring justice to the victims of the 28 September events within a reasonable delay.
283. The Office will continue to assess the conduct of the investigation and to encourage Guinean authorities to hold to their commitment to complete this phase of proceedings within the best possible deadline. Furthermore, the Office will continue engaging with the international community and relevant partners to facilitate international assistance for the organisation of the trial phase.

## NIGERIA

### *Procedural History*

284. The preliminary examination of the situation in Nigeria was made public on 18 November 2010. The Office has received a total of 116 communications pursuant to article 15 in relation to the situation in Nigeria.
285. On 5 August 2013, the Office published an Article 5 report on the Situation in Nigeria, presenting its preliminary findings on jurisdictional issues.<sup>25</sup>
286. On 12 November 2015, the Office published its updated conclusions of the subject-matter assessment with respect to alleged crimes committed in the context of the conflict between Boko Haram and the Nigerian security forces. The Office identified eight potential cases involving the commission of crimes against humanity and war crimes under articles 7 and 8 of the Statute: six for conduct by Boko Haram and two for conduct by the Nigerian security forces.<sup>26</sup>

### *Preliminary Jurisdictional Issues*

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

### *Contextual Background*

288. The armed conflict between Boko Haram and Nigerian security forces continued unabated during the reporting period. With the support of armed forces of neighbouring States, including Chad, Niger, Cameroon and Benin, the Nigerian army regained control over most of the territory previously held by Boko Haram in Nigeria proper. Military operations led by the 7<sup>th</sup> Infantry Division as part of operation *Lafiya Dole* have pushed Boko Haram into remote territory in Nigeria's north-eastern region but also across its national borders into Cameroon, Chad and Niger, leading to a regionalisation of the conflict.
289. During the reporting period, Boko Haram reportedly suffered from internal power struggles and split into different factions. After its purported leader Abubakar Shekau pledged allegiance to the so-called Islamic State of Iraq and al-Sham/Greater Syria ("ISIS" aka "ISIL", "Daesh" or "IS") in March 2015, in August 2016 ISIS reportedly appointed Abu Musab al-Barnawi, former Boko Haram's spokesperson, as the new leader of the group. In a public message, Shekau

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<sup>25</sup> See ICC-OTP, Situation in Nigeria: Article 5 Report, 5 August 2013.

<sup>26</sup> See ICC-OTP, Report on Preliminary Examination Activities 2015, paras. 195-214.

rejected the appointment. The exact links between Boko Haram and/or its factions and ISIS remain unclear.

290. Apart from the conflict with Boko Haram, Nigerian security forces were reportedly involved in other security operations, including clashes with pro-Biafra protesters in December 2015 in Onitsha, Anambra State and with members of the Islamic Movement of Nigeria in Zaria, Kaduna State the same month. Furthermore, violent incidents between militants linked to Fulani herdsmen and farmers throughout the reporting period in Nigeria's north-central zone have led to the death of civilians. In Nigeria's Niger Delta, militant groups such as the Niger Delta Avengers have resumed attacks on oil installations, triggering a security response by the Nigerian security forces.

### *Subject-Matter Jurisdiction*

291. In November 2015, the Office had identified eight potential cases involving the commission of crimes against humanity and war crimes under articles 7 and 8 of the Statute. During the reporting period, the Office continued to receive and examine information related to the conflict and the eight potential cases, including specifically with respect to gender aspects of the alleged crimes.
292. In line with its policy on sexual and gender-based crimes, the Office conducted further analysis into Boko Haram's attacks against women and girls, including (a) abductions, (b) forced marriages, rapes, sexual slavery and sexual violence, (c) use of women and girls for operational tasks such as suicide attacks and (d) murders, with a view to assessing whether such conduct was targeted at females because of their sex and/or socially constructed gender roles, and therefore could qualify as gender-based crimes.
293. The Office also conducted a specific analysis on the crime against humanity of persecution on gender grounds under article 7(1)(h) of the Statute. The information available indicates that the elements of this crime could be met to the extent that females in northeast Nigeria were intentionally and severely deprived of fundamental rights by reason of their belonging to a group identifiable on gender grounds. The targeting of student girls for attending public schools or the use of girls as suicide bombers may also constitute acts of persecution on gender grounds.
294. Similarly, the Office has conducted analysis on the question whether the crimes allegedly committed by the Nigerian security forces against military aged males suspected of being Boko Haram members or supporters, may be considered an intentional and severe deprivation of fundamental rights by reason of the victims' belonging to a group identifiable on gender grounds.
295. The Office further paid specific attention to crimes committed against children, particularly by Boko Haram, including conscripting and enlisting children under the age of fifteen years into armed groups and using them to participate actively

in hostilities under article 8(2)(e)(vii) of the Statute. The Office furthermore identified incidents where the victims of other alleged crimes committed by Boko Haram included children, such as murder, sexual and gender-based crimes and abductions.

296. During the reporting period, the Office has also examined allegations of crimes committed in the situation in Nigeria unrelated to the armed conflict between Boko Haram and the Nigerian security forces. This includes allegations of crimes committed by the Nigerian security forces against pro-Biafra protesters in December 2015 and against civilians in the course of military offensives conducted against the Niger Delta Avengers since mid-2016. In addition, the Office assessed communications related to alleged crimes committed by militants linked to the Fulani herdsmen since 2014. The Office has furthermore examined communications relating to the Presidential and National Assembly elections in March 2015 and the State elections in April 2015.
297. Following a thorough factual and legal analysis of the available information, the Office did not find a reasonable basis to believe that the crimes alleged in the previous paragraph would fall within the jurisdiction of the Court. This finding is without prejudice to any further findings on subject-matter jurisdiction to be made pursuant to additional information that the Office may receive at a later stage of analysis. The Office's analysis on the events occurred in Zaria, Kaduna State in December 2015 is still on-going.

### *Admissibility Assessment*

298. During the reporting period, the Office further sought to assess the admissibility of the eight potential cases it has identified, in particular, whether the State of Nigeria is conducting investigations or prosecutions of the same cases and if so, whether the State is unwilling or unable genuinely to carry out such investigations or prosecutions.
299. The Office understands that in absence of any implementing legislation of the Rome Statute, the crimes allegedly committed by Boko Haram that could fall under the Court's jurisdiction may be prosecuted under the 2011 and 2013 Terrorism Acts by the Attorney-General of the Federation. While terrorism suspects can be arrested by the Police, the Department of State Services ("DSS") and the armed forces, criminal investigations related to terrorism would be conducted by the Police and the DSS. Once an investigation is concluded, relevant case files of terrorist suspects would be forwarded to the Director of Public Prosecutions of the Federation ("DPPF") and ultimately brought before the Federal High Court ("FHC") of Abuja. The Office understands that the FHC is already seized of a number of terrorism cases relating to Boko Haram's conduct, a few of which have led to convictions.
300. Crimes allegedly committed by the Nigerian security forces that could fall under the Court's jurisdiction would be exclusively investigated and prosecuted by the

military and would not fall under the jurisdiction of the Attorney-General of the Federation.

301. Both, the DPPF and the military authorities provided supporting material including investigative reports and case files regarding potentially relevant individual cases, which are subject to further examination by the Office.

### *OTP Activities*

302. As reflected above, the Office conducted a thorough factual and legal assessment of information available pertaining to the alleged commission of sexual and gender-based crimes in the context of the armed conflict, as well other information and communications received on a variety of alleged crimes committed in different contexts. Meanwhile, the Office also gathered information on relevant national proceedings conducted by the Nigerian authorities.
303. In March 2016, the Prosecutor sent an updated request to the newly-established Government of Nigeria to receive information on any investigations and/or prosecutions that have been undertaken by the relevant national authorities with regard to the potential cases identified by the Office. In April 2016, the Office sent a delegation to Abuja to meet with the newly-appointed Attorney-General of the Federation and Minister of Justice, Mr Abubakar Malami, and to discuss cooperation matters in the context of the Office's preliminary examination of the situation in Nigeria.
304. In September 2016, the Office took part in a technical meeting convened by the Attorney General in Abuja for the purpose of receiving updated information and supporting documentation on relevant proceedings carried out by the Nigerian authorities. The meeting was attended by a wide range of relevant Nigerian institutions and stakeholders, including the Office of the Attorney-General of the Federation, the International and Comparative Law Department in the Ministry of Justice, the Director of Public Prosecutions of the Federation, representatives of the Inspector General of the Police, the National Security Adviser, the Department of State Services, the Chief of Defence Staff of the Nigerian Armed Forces and other representatives of the Nigerian Armed Forces including military investigators, as well as officials of the Federal High Court Abuja and the National Human Rights Commission. All participants to the meeting provided both oral and written submissions and supporting material, including investigation reports and copies of relevant case files. The Office acknowledges the renewed commitment of the Nigeria authorities to cooperate with the Office in the context of the preliminary examination.
305. The Office maintained close contact with relevant partners and stakeholders on the situation in Nigeria, including international and Nigerian NGOs, communication senders, the UN, and diplomatic actors.

### *Conclusion and Next Steps*

306. The Office will continue its analysis of any new allegations of crimes committed in the situation of Nigeria and its assessment of admissibility of the eight potential cases identified, in addition to any possible new potential case, in order to reach a decision on whether the criteria for opening an investigation are met.
307. The Office will further build on the cooperation received from Nigerian authorities to date and request additional information and clarifications of information already received regarding national proceedings as required. The Office may hold further consultations with national authorities as well as with intergovernmental and non-governmental organisations to assist relevant stakeholders to identify pending impunity gaps and the scope for possible remedial measures.

#### IV. SITUATION UNDER RECONSIDERATION

##### REGISTERED VESSELS OF COMOROS, GREECE AND CAMBODIA

###### *Procedural History*

308. On 14 May 2013, the Office of the Prosecutor received a referral on behalf of the authorities 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 Pre-Trial Chamber I.
309. 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. A detailed report was issued by the Prosecutor presenting the findings of the Office on jurisdictional and admissibility issues.
310. 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.
311. On 16 July 2015, Pre-Trial Chamber 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.
312. On 6 November 2015, the Appeals Chamber, by majority, dismissed *in limine* the Prosecutor’s appeal against the Pre-Trial Chamber 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 Pre-Trial Chamber I’s request could not be appealed on this basis because 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” is “reserved for the Prosecutor.”

313. Dismissing the Prosecutor's appeal terminated the suspensive effect of Pre-Trial Chamber 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."

#### *Preliminary Jurisdictional Issues*

314. 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 Rome 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.
315. 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.
316. Litigation before Pre-Trial Chamber 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 Pre-Trial Chamber 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.

#### *Contextual background*

317. 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.

318. 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.
319. 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.
320. The situation was the subject of a United Nations Human Rights Council Fact-Finding Mission, which delivered its report in September 2010, and a separate Panel of Inquiry appointed by the United Nations Secretary-General, which published its report in September 2011. The Governments of Turkey and Israel have also conducted national inquiries.

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

321. In the Office’s report of 6 November 2014, and for the reasons set out therein, the Prosecutor 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: (1) wilful killing pursuant to article 8(2)(a)(i); (2) wilfully causing serious injury to body and health pursuant to article 8(2)(a)(iii); and (3) committing outrages upon personal dignity pursuant to article 8(2)(b)(xxi) of the Statute. The Prosecutor 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.
322. The Prosecutor’s determination of subject-matter jurisdiction over the events aboard the *Mavi Marmara* was not in issue before Pre-Trial Chamber I, and therefore is not subject to the Prosecutor’s current review under article 53(3) and rule 108(3).

### ***Original Admissibility Assessment***

323. In the Office's report of 6 November 2014, the Prosecutor 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.
324. 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.
325. 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 Prosecutor'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.
326. Given the Prosecutor's conclusion in the 6 November 2014 report concerning the lack of sufficient gravity, it was unnecessary for her to reach a further conclusion on the question of complementarity.
327. The Prosecutor's determination that the potential case(s) that would likely arise from an investigation of the flotilla incident were of insufficient gravity is now the focus of the review requested by Pre-Trial Chamber I.

### ***OTP Activities***

328. Over the reporting period, the Office conducted a *de novo* review of all the information available to it prior to 6 November 2014, upon which the 6 November 2014 report was based. This included analysis of information from multiple sources, including, *inter alia*, the reports of the four commissions that previously examined the flotilla incident and the supporting materials and documentation accompanying the referral by the Comoros as well as additional materials provided by it later in the course of the preliminary examination.

329. This review was conducted in light of the reasoning of Pre-Trial Chamber I in its request to the Prosecutor to review her prior decision, as well as the arguments presented by the Comoros and the participating victims.

330. In addition, the Prosecutor exercised her independent discretion under article 53(4) to consider the significance, if any, of information newly made available to the Office since 6 November 2014. The volume of this new information was significant, encompassing further information from the legal representatives of the Comoros and the participating victims, and such submissions as they chose to make.

*Conclusion and next steps*

331. The Office is nearing completion of its review of all information gathered prior to and since its initial report of 6 November 2014 and is preparing to issue the Prosecutor's final decision under rule 108(3) in the near future.

