



## **The Office of the Prosecutor**

### **Report on Preliminary Examination activities**

**13 December 2011**

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## A. INTRODUCTION

1. The Office of the Prosecutor (“Office” or “OTP”) of the International Criminal Court (“Court” or “ICC”) is responsible for determining whether a situation meets the legal criteria established by the Rome Statute (“Statute”) to warrant investigation by the Court. For this purpose, the Office conducts a preliminary examination of all situations brought to its attention based on statutory criteria and the information available.<sup>1</sup>
2. The preliminary examination of a situation may be initiated by: (a) a decision of the Prosecutor, taking into consideration any information on crimes under the jurisdiction of the Court, including information sent by individuals or groups, States, intergovernmental or non-governmental organisations; (b) a referral from a State Party or the United Nations (“UN”) Security Council; or (c) a declaration pursuant to article 12(3) of the Statute by a State which is not a Party to the Statute.
3. Once a situation is thus identified, article 53(1) (a)-(c) of the Statute establishes the legal framework for a preliminary examination. It provides that, in order to determine whether there is a reasonable basis to proceed with an investigation into the situation the Prosecutor shall consider: jurisdiction (temporal, either territorial or personal, and material); admissibility (complementarity and gravity); and the interests of justice.
4. *Jurisdiction* relates to whether a crime within the jurisdiction of the Court has been or is being committed. It requires an assessment of (i) temporal jurisdiction (date of entry into force of the Statute, namely 1 July 2002 onwards, date of entry into force for an acceding State, date specified in a Security Council referral, or in a declaration lodged pursuant to article 12(3)); (ii) either territorial or personal jurisdiction, which entails that the crime has been or is being committed on the territory or by a national of a State Party or a State not Party that has lodged a declaration accepting the jurisdiction of the Court, or arises from a situation referred by the Security Council; and (iii) material jurisdiction as defined in article 5 of the Statute (genocide; crimes against humanity; war crimes; and aggression<sup>2</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, taking into consideration the Office’s policy to focus on those who appear to bear the greatest responsibility for the most serious crimes. Where relevant

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<sup>1</sup> See the Draft Policy Paper on Preliminary Examinations of 4 October 2010.

<sup>2</sup> With respect to which the Court shall exercise jurisdiction once the provision adopted by the Assembly of States Parties enters into force. RC/Res.6 (28 June 2010).

domestic investigations or prosecutions exist, the Prosecution will assess their genuineness.

7. *Gravity* includes an assessment of the scale, nature, manner and impact of the alleged crimes committed in 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 criterion 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 a UN Security Council referral.
10. As required by the Statute, the Office’s preliminary examination activities will be 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 of crimes obtained pursuant to article 15. In all circumstances, the Office will analyse the seriousness of the information received and may seek additional information from States, organs of the UN, intergovernmental and non-governmental organisations and other reliable sources that are deemed appropriate. The Office may also receive oral testimony at the seat of the Court.
11. Before making a determination on whether to initiate an investigation, the Office will also seek to ensure that the States and other parties concerned have had the opportunity to provide the information they consider appropriate.
12. 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 assess relevant national proceedings; (iii) to continue to collect information in order to establish sufficient factual and legal basis to render a determination; or (iv) to initiate the investigation, subject to judicial review as appropriate.
13. In order to promote transparency of the preliminary examination process the Office aims to issue regular reports on its activities and provides reasoned responses for its decisions to either proceed or not proceed with investigations.

14. Where the Prosecutor has initiated the preliminary examination process *proprio motu* and determined a reasonable basis to proceed, the Office has adopted a policy of inviting the State(s) concerned to refer the situation to the Court in order to promote cooperation. As in all other situations, such a referral will have no impact on investigative and prosecutorial activities.
15. The Office will also consider, as a matter of policy, the extent to which its preliminary examination activities can serve to stimulate genuine national proceedings against those who appear to bear the greatest responsibility for the most serious crimes. In accordance with its positive approach to complementarity, based on the goals of the preamble and article 93(10) of the Statute, the Office will seek to encourage and cooperate with efforts to conduct genuine national proceedings.

#### Summary of the activities performed during the last year

- a) The Office has received 431 communications relating to article 15 of the Rome Statute during the reporting period, and a total of 9,332 from July 2002.
- b) During the reporting period, the Office completed two preliminary examinations and subsequently opened two new investigations: one in Libya, the other in Côte d'Ivoire.
- c) On 26 February 2011, the UN Security Council unanimously adopted resolution 1970 (2010) and referred the situation in Libya since 15 February 2011 to the Prosecutor of the Court. The Prosecutor subsequently carried out an independent preliminary examination and, on 3 March 2011, determined that the statutory criteria for the opening of an investigation into the situation in Libya since 15 February 2011 had been met.
- d) On 23 June 2011, the Prosecutor requested authorisation from the Pre-Trial Chamber to commence an investigation in Côte d'Ivoire, which had accepted the jurisdiction of the Court under article 12(3) of the Statute, and began investigations on 3 October 2011 on receipt of authorisation from the Chamber.
- e) During the reporting period, the Office continued its preliminary examination activities in the following situations:
  - Analyzing preconditions to jurisdiction in Palestine;
  - Analyzing subject-matter jurisdiction in Afghanistan, Nigeria, Honduras and the Republic of Korea;
  - Analyzing national proceedings in Colombia, Georgia and Guinea.

## **B. PRECONDITIONS TO JURISDICTION**

### **Palestine**

16. In connection with the declaration lodged by the Palestinian National Authority (“PNA”) under article 12(3) of the Statute on 22 January 2009 accepting jurisdiction of the Court, the Office has been examining whether the declaration meets statutory requirements.
17. The PNA requested the right to be heard on the fulfilment of the statutory requirements for opening an investigation, including on the issue whether Palestine qualifies as a ‘State’ for the purpose of article 12(3). The Office considered that a fair process required that the PNA as well as other interested parties had the opportunity to be heard. The Office therefore ensured due process to all parties involved. Representatives of the PNA presented oral and written arguments. The Office continues to review and consult on those submissions.
18. The Office engaged various stakeholders, including representatives from the PNA, the Arab League Secretariat, and a number of non-governmental organisations (“NGOs”) to discuss the Court’s jurisdiction. The Office has also considered various public reports and organized an interactive discussion among various experts and NGOs that had provided submissions at the seat of the Court during its bi-annual roundtable on 20 October 2010.
19. In July 2011 the Office provided updated information to the UN Office of the High Commissioner for Human Rights pursuant to their request on steps taken by the Office with regard to the Palestinian declaration.

## **C. SUBJECT-MATTER JURISDICTION**

### **Afghanistan**

#### *Procedural History*

20. The OTP has received 56 communications under article 15 of the Rome Statute between 1 June 2006 and 1 June 2011. The preliminary examination of the situation in Afghanistan became public in the course of 2007.

#### *Preliminary Jurisdictional Issues*

21. Afghanistan deposited its instrument of ratification to the Rome Statute on 10 February 2003. The ICC therefore has jurisdiction over Rome Statute crimes

committed on the territory of Afghanistan or by its nationals from 1 May 2003 onwards.

### *Contextual Background*

22. 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 harboring Al Qaeda. The Taliban were ousted from power by the end of the year, and under the auspices of the UN, an interim governing authority in Afghanistan was established in December 2001. In May-June 2002 a new transitional Afghan government regained sovereignty, but hostilities remained 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. Today ISAF, the US forces and the Government of Afghanistan ("GOA") forces combat insurgents, which include the Taliban and several other groups.
23. The Taliban, and their affiliated insurgent groups, have rebuilt their influence since 2003, particularly in the South and East. At least since May 2005, an armed conflict has developed in the southern provinces of Afghanistan between organised armed groups of the insurgent movement, most notably the Taliban themselves, and the Afghan and international military forces. This conflict has spread to the north and west of Afghanistan, including the areas surrounding Kabul.

### *Alleged Crimes*

24. Killings: According to the United Nations Assistance Mission in Afghanistan ("UNAMA"), over 10,000 civilians have been killed in the conflict in Afghanistan from 2007 to 2011. These killings have increased in both frequency and intensity over the years with the majority attributed to the insurgents and occurring in the southern, south-eastern and eastern areas of Afghanistan. Over the last 5 years, most civilian fatalities attributed to insurgent groups reportedly result from suicide and improvised explosive devices attacks. The Taliban and other insurgent groups are allegedly also responsible for deliberately killing selected Afghan and foreign civilians perceived to support the GOA and/or foreign interests. Politically active women are often targeted.
25. There is information of civilian deaths in the course of conducting military operations (including aerial bombardments and search and seizure operations) by "pro-governmental forces". Their number has gradually decreased over time reaching an all time low in 2011.

26. Torture: There have been allegations of acts of torture or other cruel, inhuman or degrading treatment against detainees by various parties to the conflict. The Office has received and will continue seeking further information on steps taken by the Afghan Government and pro-government forces to thoroughly examine such allegations and ensure accountability for those possibly involved in the mistreatment of prisoners.
27. Attacks on Humanitarian Targets and the UN: Each year since 2008, the Afghanistan NGO Security Office (“ANSO”) recorded over 100 security incidents impacting NGOs in Afghanistan. A number of these incidents may have been the result of deliberate attacks. UN staff and installations have also been targeted on several occasions, including two high profile attacks in 2009 and 2011.
28. Attacks on Protected Objects: Since May 2003, insurgents have been held responsible for numerous attacks on protected objects, including mosques, hospitals and MEDEVAC helicopters. There have also been persistent attacks on girls’ schools by means of arson, armed attacks and bombs.
29. Recruitment of Child Soldiers: Both insurgent groups and Afghan forces have been accused of recruiting and using children. Insurgents have reportedly used children to carry out suicide attacks, plant explosives and transport munitions. The Taliban have denied this claim, referring to their policy prohibiting the use of children. The Office has been informed of steps taken by the Afghan Government for the protection of children’s rights, including concluding in January 2011 an action plan for the prevention of underage recruitment with the UN Special Representative for children and armed conflict.

#### *OTP Activities/Engagement*

30. The Office has continued to seek and analyse information from multiple sources on alleged crimes committed by all parties. While a large number of alleged crimes have been and continue to be reported, verifying the seriousness of such allegations and obtaining the detailed information required to conduct a proper legal assessment of each reported incident and attribute responsibility is proving challenging and time-consuming. In the meantime as part of the positive complementarity policy, the OTP has taken steps to encourage key actors to consider and promote accountability mechanisms within areas of their own purview. It maintains contact with experts, civil society organisations, Afghan Government officials, UN officials, and contributing States to ISAF in Afghanistan.

## Honduras

### *Procedural History*

31. The OTP has received 17 communications in relation to the situation in Honduras. The opening of a preliminary examination into the situation in Honduras was announced on 18 November 2010.

### *Preliminary Jurisdictional Issues*

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

### *Contextual Background*

33. On 28 June 2009, President Manuel Zelaya was removed from power by force and arrested for crimes against the model of government, usurpation of duties and abuse of authority. The President of the Congress, Roberto Micheletti, was appointed President of Honduras by the Congress and a State of Emergency was declared. Thousands of persons marched in demonstration of their opposition.
34. Presidential decrees restricting freedom of movement and assembly were issued. Decrees allowed the armed forces to arrest persons found in public places after curfew hours and search houses without warrants. On 27 January 2010, Porfirio Lobo was elected President.

### *Alleged Crimes*

35. The crimes allegedly committed between June 2009 and January 2010 have been investigated by the national Truth and Reconciliation Commission (*Comision de la Verdad y la Reconciliacion, "TRC"*) which published its findings in July 2011. The alleged crimes committed include the following:
36. *Imprisonment*: According to the TRC, approximately 2,000 to 5,000 persons were unlawfully arrested during the relevant period, usually for short durations (from 45 minutes to 24 hours). The TRC also documented acts of physical and verbal abuse against detainees. The Honduran authorities contend that imprisonment may not qualify as a crime.

37. Killings: The TRC documented 20 cases of murder of civilians, of which 8 were victims of deliberate murders (*asesinatos selectivos*) and 12 of alleged disproportionate shootings in the context of demonstrations and checkpoints.
38. Torture: The TRC documented three cases of persons associated to the opposition, two of them journalists, who were arrested and subjected to serious acts of torture.
39. Rape and Sexual Violence: The TRC reported two cases of women raped by the police while in detention after their participation in demonstrations.
40. Deportation: The TRC found that President Manuel Zelaya was arrested and deported to Costa Rica. The matter was later the subject of national investigation and prosecution.
41. Persecution: The TRC concluded that on the basis of its investigation, the acts committed constitute the crime of persecution as a crime against humanity under the Rome Statute in the sense that the then authorities designed and implemented a policy to attack civilians on political grounds.

#### ***OTP Activities/Engagement***

42. The Office has gathered information on the situation in Honduras from multiple sources, including the TRC, the Inter-American Commission of Human Rights, the Office of the High Commissioner for Human Rights as well as international and national NGOs.
43. The Honduran authorities have been forthcoming as soon as the preliminary examination was announced. The Office visited Honduras in 2009 and 2011. In October 2011 in Tegucigalpa, the Office met with the Attorney General, the Human Rights Attorney, the General Prosecutor, the Sub-Secretary of Justice and the Sub-Secretary of Human Rights.

#### **Republic of Korea**

##### ***Procedural History***

44. In November and December 2010, the OTP received several article 15 communications conveying information regarding the shelling of Yeonpyeong Island of the Republic of Korea ("South Korea") by the armed forces of the Democratic People's Republic of Korea ("North Korea") and alleging that the shelling amounts to war crimes under article 8 of the Rome Statute. Subsequent allegations emerged with regard to the *Cheonan*, a South Korean warship. The opening of a preliminary examination was announced on 6 December 2010.

### *Preliminary Jurisdictional issues*

45. South Korea deposited its instrument of ratification to the Rome Statute on 13 November 2002. The ICC therefore has jurisdiction over Rome Statute crimes committed on the territory of South Korea or by its nationals from 1 February 2003 onwards. Both above mentioned alleged crimes were committed on the territory of South Korea.

### *Contextual Background*

46. Since the armistice agreement was signed at the end of the Korean War (1953), both South and North Korea have acknowledged and respected the Northern Limit Line as a practical maritime demarcation in the West Sea and reconfirmed its validity as the maritime demarcation in the Basic Agreement between South and North Korea in 1991 and its Protocol on Non Aggression in 1992. However in 1999 North Korea proclaimed the so called “Chosun Sea Military Declaration Line”, unilaterally modifying the previously agreed Northern Limit Line.

### *Alleged Crimes*

47. The preliminary examination of the situation in South Korea is focused on two incidents: (a) the shelling of Yeonpyeong Island on 23 November 2010, which resulted in the killing of four people (two civilians and two military), the injuring of sixty-six people (fifty civilians and sixteen military) and the destruction of military and civilian facilities on a large scale; (b) the sinking of the *Cheonan*, a South Korean warship, hit by a torpedo allegedly fired from a North Korean submarine on 26 March 2010, which resulted in the death of 46 persons.

### *OTP Activities/Engagement*

48. The Office has been seeking additional information from relevant sources, focusing its activities on ascertaining factual issues that are key to determine whether the two incidents could amount to war crimes under the Rome Statute and whether they derive from a policy.
49. In the course of the preliminary examination, the Office has considered in particular the findings of international investigations into the two incidents, including two reports by the UN Command on the sinking of the *Cheonan* and the attack on Yeonpyeong Island.

## Nigeria

### *Procedural History*

50. In the period from 10 November 2005 through 9 November 2011, the Office has received 38 article 15 communications in relation to the situation in Nigeria, out of which 17 were manifestly outside the jurisdiction of the Court; 8 were found to warrant further analysis; and 13 communications were included in the preliminary examination. The preliminary examination of the situation in Nigeria was made public on 18 November 2010.

### *Preliminary Jurisdictional issues*

51. 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*

52. Nigeria's approximately 168 million inhabitants belong to over 250 ethnic groups. Owing to the particular federal character of the country, there are distinctions drawn between "indigenes" of a state (individuals considered to be living in their state of "origin") and those referred to as "non-indigenes" or "settlers" ("newcomers" who might have lived in the state for decades).
53. In the Middle-Belt states, the Plateau State specifically, there have been recurrent clashes since 2001 between "indigene" and "settler" communities. This divide often coincides with divisions along ethnic and/or religious lines. As a result, Muslims and Christians from different ethnic groups have attacked their opponents, using religion as a tool to mobilize followers.
54. The oil-rich Niger Delta region is driven by violence among ethnically-based gangs and military groups and between them and federal forces. The violence primarily relates to a struggle for control over the oil production and access to resources in the region. The region has been also repeatedly affected by the political violence in the period of 2003, 2007 and 2011 elections.

### *Alleged Crimes*

55. *Killings*: Between July 2002 and April 2011, at least thousands of people died in Nigeria as a consequence of inter-communal, sectarian and political violence. These deaths are unevenly distributed over time and place. The vast majority died in the Middle-Belt states in central and northern Nigeria in a series of major assaults along ethnic/sectarian lines by mobs or youth groups. Ongoing examination of these events is determining whether some of these attacks were carried out in a coordinated and organized manner, although the available information is limited. A lesser number of persons died in the Delta region as a consequence of political and other forms of armed violence, including limited armed confrontations between government forces and Delta-based militant groups.
56. *Rape and Sexual Violence*: Rape and other forms of sexual violence have reportedly occurred in the context of ethnic/sectarian violence, allegedly by sponsored gang violence, and in the context of operations by the security forces and during detention, in the northern, central and Delta regions. Sufficient information, however, remains scarce and no precise numbers are available.
57. *Abductions (Delta)*: Abductions by armed groups and gangs appear to have been concentrated in the Delta region, particularly in Rivers State, where kidnappings reportedly became commonplace since the beginning of 2006 and targeted against foreign oil workers. First intended as a political statement, it reportedly also evolved into a profit-seeking activity.

### *OTP Activities/Engagement*

58. Following the public announcement of the preliminary examination in November 2010, the Nigerian authorities have been forthcoming.
59. On 21 April 2011, the OTP expressed public concern about the outbreak of violence in the context of the National Assembly and Presidential elections of April 2011. In response, on 7 June 2011, the Nigerian authorities informed the OTP that a 22-member Panel was set up to investigate pre- and post-election violence in Akwa Ibom State and in other parts of the country within the context of the 2011 general elections.
60. The public announcement of the preliminary examination appears to have raised the interest of Nigerian and international NGOs.

## D. ADMISSIBILITY: COMPLEMENTARITY

### Colombia

#### *Procedural History*

61. The OTP has received 86 communications under article 15 in relation to the situation in Colombia. Of these, 17 were manifestly outside the Court's jurisdiction and 69 are analysed in the context of the preliminary examination. The preliminary examination of the situation in Colombia became public in the course of 2006.

#### *Preliminary Jurisdictional Issues*

62. Colombia deposited its instrument of ratification to the Rome Statute on 5 August 2002. Upon ratifying, Colombia made a declaration according to article 124 of the Rome Statute not accepting the jurisdiction of the ICC with respect to war crimes for a period of seven years. That reservation expired on 1 November 2009. The ICC therefore has jurisdiction over crimes against humanity and genocide committed on the territory of Colombia or by its nationals since 1 November 2002 and for war crimes from 1 November 2009 onwards.

#### *Contextual Background*

63. Colombia experienced for almost 50 years a conflict between the government and several illegal armed groups. The most significant illegal armed groups are the Revolutionary Armed Forces of Colombia (*Fuerzas Armadas Revolucionarias Colombianas*, "FARC") and the National Liberation Army (*Ejército de Liberación Nacional*, "ELN"). The activities of the illegal armed groups prompted the formation of right-wing paramilitary organisations, primarily the United Self-Defence Forces of Colombia (*Autodefensas Unidas de Colombia*, "AUC"). There have been allegations of linkages between the paramilitaries and some public servants in waging war against the illegal armed groups.
64. Over the years, the Government of Colombia has held several peace talks and negotiations with illegal armed groups, with different degrees of success. The Justice and Peace Law ("JPL") adopted in 2005 was thus meant to induce paramilitaries to demobilize and confess their crimes in exchange for reduced sentences. Recent years have seen the power of the paramilitaries diminish, including through demobilisation. Some demobilised fighters, however, have allegedly reconstituted themselves into smaller and more autonomous units.

### *Alleged Crimes*

65. Killings: According to the Presidential Human Rights Programme, the number of civilians killed over the period 2003-2010 amounts to 3,166, including killings of indigenous persons, unionists, teachers, local authorities and civilians killed in massacres. Over the years the number of crimes reported, including killings, have decreased significantly from 828 in 2003 to 317 in 2010. Additionally, from 2002 until 2009 between 1,000 and 1,700 cases of “*falsos positivos*” (wherein military members are accused of reporting murders of civilians as members of illegal armed groups killed in combat) were also reported to the UN Special Rapporteur on extrajudicial, summary or arbitrary executions.
66. Enforced Disappearance: According to the National Commission for Missing People more than 16,500 persons were registered as victims of enforced disappearances as of September 2011.
67. Rape and Sexual Violence: Available information from the Inter-Institutional Committee of Justice and Peace indicates that, at a minimum, more than 700 women have been victims of rape and sexual violence up to 2009. There is known to be under-reporting by victims and lack of an appropriate registration of cases.
68. Forcible Transfer of the Population: Information available from non-governmental and international organisations provides that the number of displaced persons ranges from 2,9 million to 5,2 million up to 2010.
69. Severe Deprivation of Liberty: According to official records from the Colombian National Defence Ministry there were 2,800 victims registered as abducted between 1996 and 2007. Officially, the number decreased, from 1,708 abductions in 2002 to about 160 abductions in 2009.
70. Torture: Information collected provides that the number of victims of torture ranges between 930 and 1,300 until 2008.
71. Conscripting, Enlisting or Use of Children in Hostilities: Information available provides that the number of children enlisted, conscripted or used to participate actively in hostilities ranges between 8,000 and 11,000.

### *Legal Assessment*

72. Crimes against Humanity: There is a reasonable basis to believe that the crimes against humanity of murder, enforced disappearance, rape and sexual violence, forcible transfer, severe deprivation of liberty, torture and ill treatment were committed by various parties to the conflict.

73. War Crimes: Preliminary research suggests that various groups may be responsible for committing the war crimes of killing and attacking civilians, enlisting, conscripting or actively using children in hostilities, forcibly transferring and deporting civilians, and rape and sexual violence.

### *Admissibility*

74. Complementarity: Colombian authorities have carried out and are still conducting a large number of proceedings relevant to the preliminary examination against different actors to the conflict in Colombia for crimes that may constitute crimes against humanity and war crimes. Colombia has an institutional apparatus available to investigate and prosecute crimes under the Rome Statute. Proceedings have been initiated against 1) illegal armed group leaders, 2) paramilitary leaders, 3) police and army officials, 4) politicians with alleged links to armed groups, and 5) there are investigations into false positives cases.
75. Illegal Armed Groups: A number of senior leaders from FARC and ELN have been sentenced or charged *in absentia* for crimes, some of which the Court could have jurisdiction over, including murder and severe deprivation of liberty as crimes against humanity and attacks against the civilian population as war crimes.
76. Paramilitary Groups: The JPL provides for specific criminal procedures in the case of demobilized members of paramilitary groups. Information from the Office of the Attorney General indicates that voluntary depositions given by demobilized members of paramilitary groups have reported on 57,131 incidents, which affected approximately 69,373 victims. As of August 2011, 451 indictments have been issued and 4 sentences pronounced. From September 2008 until March 2009, the Colombian authorities extradited 29 members of paramilitary groups, including 10 paramilitary leaders, to the United States for drug-smuggling offences. 7 of these 10 senior paramilitary leaders extradited to the United States have been convicted under ordinary law for crimes that could fall under the ICC's jurisdiction. In addition, at least 11 paramilitary leaders detained in Colombia have been convicted of crimes, some of which could fall under the ICC's jurisdiction, under the ordinary system.
77. Politicians: Proceedings have been initiated against over 150 former and present members of the Congress, the Judiciary and the Administrative Department for Security (*Departamento Administrativo de Seguridad, "DAS"*) for alleged links with paramilitary groups under the ordinary system. Proceedings involve crimes such as criminal association, funding, wiretapping activities and in a few cases, murder.
78. According to information supplied by the Office of the Attorney General, until August 2011, 59 Senators, 48 Members of the House of Representatives, 33

Governors, 252 Mayors and 84 local authorities are the subject of investigations following statements made by paramilitaries during the JPL proceedings. Further, 16 sentences have been issued against politicians after allegations of conspiracy and murder committed in collusion with paramilitaries (in some cases with convictions of 40 years in prison). However, the Office requires further information about the information revealed during the proceedings and whether they involve allegations of crimes that may fall under the jurisdiction of the Court.

79. There are also proceedings against members of the intelligence service for their alleged direction and sustained promotion of crimes against human rights organisations, judges and journalists. Further information and analysis is required.
80. Police and Army Officials: The OTP has gathered information on several proceedings against members of the police and military forces. Some of the proceedings analysed by the Office include sentences exceeding 50 years of imprisonment handed down to active and retired officials from the Police and Army, for their alleged links with paramilitaries. According to the latest information received from the Colombian Attorney General, the number of proceedings deriving from the JPL framework relate to 191 Army Officers and 57 low-level officers; 121 police officers and 128 low-level police officers and 6 Navy officials. The Office is requesting more information to analyse if all the proceedings are related to conduct committed within the temporal and subject-matter jurisdiction of the Court.
81. On 30 August 2011, the Colombian Attorney-General publicly announced that her office was investigating more than 3,400 members of the armed forces for allegations of extrajudicial killings. The Attorney General added that from this number, about 1,400 agents were in detention.
82. The Office continues to gather information about proceedings on allegations for “*falsos positivos*”, killings of indigenous persons and sexual crimes, the level of responsibility of the persons under investigation and whether there exists any kind of interference in the conduct of investigations.

#### *OTP Activities/Engagement*

83. The Office maintains a constant dialogue with the Colombian Government, and has received updated information on relevant national proceedings from the Colombian judicial authorities. Most recently, on 21 September 2011, the Prosecutor met with the new Attorney-General of Colombia, Vivian Morales. The Colombian authorities have subsequently provided updated information on the JPL proceedings.
84. The Office has engaged in public discussions about the application of the complementarity principle in Colombia. At the bi-annual NGO roundtable of 20

October 2010, the Office held a session concerning complementarity within the preliminary examination in Colombia, with panellists commenting on the response of Colombian authorities to fighting impunity. The session generated a focused debate on the JPL proceedings specifically. In May 2011 in London, the OTP participated in a high level conference, gathering a number of experts, Colombian officials, magistrates and NGO representatives, which generated a healthy discussion on the Office's role in fostering complementarity in Colombia.

85. The Office will continue to examine the situation and national proceedings in Colombia. In this context, in accordance with its positive approach to complementarity, the Office has welcomed the current efforts of the Colombian Government at seeking further international support for the national proceedings and at promoting cooperation, as explained by the Colombian President, Mr. Juan Manuel Santos, during the ninth session of Assembly of States Parties in December 2010.
86. The appointment of Spanish Judge Baltasar Garzón, who has worked as a consultant for the Office, as advisor to the Mission to Support the Peace Process in Colombia of the Organisation of American States ("OAS") is an example of cooperation between States Parties, international organisations and the Office.
87. During the reporting period, the Office has continued to analyse information available on national investigations and prosecutions in Colombia, in particular proceedings against illegal armed groups, paramilitary leaders as well as State actors. In each case, the Office seeks to determine whether the said proceedings focus on or include persons bearing the greatest responsibility for the crimes committed. There is no basis at this stage to conclude that the existing proceedings are not genuine. The Office will continue to monitor the commission of new crimes and the judicial developments.

## **Georgia**

### ***Procedural History***

88. The OTP has received 3,830 communications in relation to the Georgian situation. The preliminary examination of the situation in Georgia was announced on 14 August 2008.

### *Preliminary Jurisdictional issues*

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

### *Contextual Background*

90. The armed conflict that occurred in Georgia in August 2008 has its roots in the dismantling of the Soviet Union. A first conflict over South Ossetia, Georgia's northern autonomous entity, took place between 1990 and 1992. The conflict ended with the peace agreement signed on 24 June 1992 in Sochi by Russian and Georgian Presidents, Boris Yeltsin and Eduard Shevardnadze, providing for the deployment of a joint peace-keeping force. At the time, South Ossetia became a semi-autonomous area with two separate administrations.
91. For 12 years there was no serious military confrontation, until skirmishes between South Ossetian forces and the Georgian army degenerated, on 7 August 2008, into an armed conflict, which the Russian involvement rendered international. A cease-fire agreement between Georgia and the Russian Federation, mediated by the French President Nicolas Sarkozy, was reached on 12 August 2008 but alleged crimes continued to be committed thereafter.

### *Alleged Crimes*

92. Forcible Displacement of Georgian Population: Through systematic and widespread destruction and pillaging of houses and property, South Ossetian forces allegedly forced 30,000 ethnic Georgians to flee from villages within and outside South Ossetia.
93. Attack against Peacekeepers: According to available information, Georgian forces allegedly attacked Russian peacekeepers' positions in Tskhinvali.
94. Unlawful Attacks: There are allegations that both Georgian and Russian forces might have used indiscriminate or disproportionate force and/or failed to take the required precautions to spare civilian losses.
95. Pillaging and Destruction of Property: Allegedly South Ossetian forces, not prevented by Russian forces, looted, burned and systematically destroyed ethnic Georgian villages in South Ossetia and the "buffer zone" for the purpose of forcing their residents to leave.

96. Torture and Other Forms of Ill-treatment: Georgian prisoners of war, as well as ethnic Georgian and South Ossetian civilians, were reportedly victims of torture, degrading treatment or other forms of ill-treatment.

### *Legal Assessment*

97. There is a reasonable basis to believe that the war crimes of pillaging, destroying civilian property and inflicting acts of torture were committed in the context of the August 2008 armed conflict. There also is a reasonable basis to believe that the crime against humanity of forcible transfer or deportation of population was committed. Further evaluation of alleged unlawful attacks by all parties, including the alleged attack against Russian peacekeepers, is required.

### *Admissibility*

98. Complementarity: The Investigative Committee of the Russian Federation and the Chief Prosecutor of Georgia have been conducting separate investigations into incidents that could constitute crimes under the jurisdiction of the ICC. The proceedings have been the subject of regular consultations between the Office and the competent national authorities with a view to assessing whether they are actually willing and able to bring the perpetrators of crimes to justice.

### *OTP Activities/Engagement*

99. During the reporting period, the Office has continued to follow up on investigations into alleged crimes committed during the August 2008 conflict in Georgia.
100. In February 2011, The Office conducted a second visit to the Russian Federation and received a comprehensive update on the progress of national investigations. The Office has maintained regular contacts with the Georgian authorities. In September 2011, both Governments have been requested to provide a written update on the progress (or lack thereof) of their respective investigations.
101. On 18 October 2011, the Russian Embassy replied to the OTP that "factors create an obstacle to genuine advancements in the national investigation of the criminal case, preventing the possibility to properly bring to justice alleged perpetrators of crimes with the jurisdiction of the Russian Federation". According to the Russian authorities, further investigative efforts are impeded by the fact that "the Georgian side has refused to provide legal assistance in relation to the criminal case" and "senior officials of foreign states including those of Georgia enjoy immunity from the criminal jurisdiction of the Russian Federation".

102. On 12 December 2011, the Georgian Government provided the OTP with an updated report concerning the national criminal proceedings related to the August 2008 armed conflict. The report details the latest steps taken and findings of the investigation carried out by the Office of the Chief Prosecutor of Georgia with respect to the allegations over the attacks against Russian peacekeepers, allegations against Georgian servicemen, and issues concerning the “ethnic cleansing case”. The Georgian Government stated that, as a State Party to the Rome Statute, it is “mindful of its international obligation to investigate and prosecute grave crimes that concern the international community as a whole and resorts to its best efforts to comply with those commitments”.
103. The Office maintains close contacts with NGOs in the region, receiving reports from and participating in meetings with these organisations, some of which are also carrying out an assessment of relevant national proceedings pertaining to the alleged crimes committed during the August 2008 conflict.

## **Guinea**

### ***Procedural History***

104. The OTP has received 19 communications under article 15, of which eight were received between October and November 2009. The preliminary examination of the situation in Guinea was announced on 14 October 2009.

### ***Preliminary Jurisdictional issues***

105. 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 its nationals from 1 October 2003 onwards.

### ***Contextual Background***

106. In December 2008, after the death of President Lansana Conte, who had ruled Guinea since 1984, Captain Moussa Dadis Camara led a group of army officers who seized power in a military coup. 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 transfer power after holding presidential and parliamentary elections. However, subsequent statements suggested that he might run, which led to protests by opposition and civil society groups. On 28 September 2009, 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”.

### *Alleged Crimes*

107. The UN established an International Commission of Inquiry which issued its final report on 13 January 2010. The Commission confirmed that at least 156 persons were killed or disappeared, and at least 109 women were victims of rape and other forms of sexual violence. Cases of torture or cruel, inhumane or degrading treatment were also confirmed. The Commission considered that there is a strong presumption that crimes against humanity were committed.
108. The *Commission Nationale d’Enquête Indépendante* (“CNEI”), set up by the Guinean authorities, confirmed that killings, rapes and enforced disappearances took place although in slightly lower numbers than documented by the UN Commission.
109. Killings and Disappearances: Over 150 persons were allegedly killed by State security forces and militia loyal to former President Moussa Dadis Camara in the main stadium in Conakry on 28 September. A number of persons also disappeared after their arrest inside or outside the stadium. Others were allegedly abducted at hospitals and never seen again.
110. Rape and Sexual Violence: On 28 September 2009, over 100 women and young girls were allegedly raped or suffered from other forms of sexual violence including mutilations. Most of these acts allegedly took place in the stadium. Several women were also reportedly abducted, detained and used as sexual slaves for a period of several days.
111. Arbitrary Detention and Torture: On 28 September 2009 and in its immediate aftermath, scores of civilians were allegedly arrested and detained. While in detention, they allegedly suffered from regular beatings and other acts amounting to torture.
112. Persecution: On 28 September 2009 and in its immediate aftermath, pro-governmental security forces allegedly attacked civilians based on their perceived ethnic affiliation and/or their support for opposition candidates.

### *Legal Assessment*

113. The 28 September 2009 events in the Conakry stadium can be characterised as a widespread and systematic attack against the civilian population. The significant volume of information available on these events enables the Office to establish the existence of a reasonable basis to believe that crimes against humanity were

committed in Conakry on that day and the following days, including murder, enslavement, imprisonment, torture, rape and other form of sexual violence, enforced disappearances of persons, and other inhuman acts.

### *Admissibility*

114. **Complementarity:** Following the OTP's announcement of the opening of a preliminary examination on 14 October 2009, the Guinean Foreign Minister visited the Office and indicated that the Guinean authorities were willing and able to proceed with a criminal investigation, which was formally opened on 8 February 2010, prior to the Deputy Prosecutor's first visit to Conakry. The Guinean Chief Prosecutor then appointed three judges to investigate the 28 September 2009 case on the basis of the two reports – the Guinean commission of inquiry and the UN International Commission of Inquiry. The investigation has been carried out at a fairly slow but steady pace. The lack of suitable security and logistical conditions has impacted on the proceeding but these issues seem to have been addressed.

### *OTP Activities/Engagement*

115. During the reporting period, the Office conducted three missions to Guinea in November 2010, March 2011 and October 2011 respectively to follow up on the national investigation being carried out by Guinean judges into the 2009 events, and to deter the commission of new crimes during the election period, as part of the Office's preventive mandate. Deputy Prosecutor Fatou Bensouda, as well as senior officials of the Office, met with Government officials, representatives from the judiciary and civil society, as well as victims and victims' associations.
116. The OTP has further engaged with multiple Guinean, West African and international partners to maintain and develop the general consensus to bring to account those bearing the greatest responsibility for the alleged crimes committed on 28 September 2009.

## **E. COMPLETED PRELIMINARY EXAMINATIONS**

### **Libya**

117. On 26 February 2011, the UN Security Council unanimously adopted resolution 1970 (2010) and referred the situation in Libya since 15 February 2011 to the Prosecutor of the ICC. It further invited the Prosecutor to address the Security Council within two months of the adoption of the resolution and every six months thereafter on actions taken pursuant to the resolution.

118. On the basis of the information evaluated and analysed, on 3 March 2011, the Prosecutor determined that the statutory criteria for the opening of an investigation into the situation in Libya since 15 February 2011 had been met. At that time, the information showed that Muammar Gaddafi's security forces shot at civilians demonstrating against the regime. From 15 until 20 February, scores of former political prisoners, political opponents and journalists also had allegedly been arrested by the Internal Security Service. The available information provided a reasonable basis to believe that crimes against humanity had been committed and continued being committed in Libya where additionally an armed conflict started. Further, in accordance with the information collected, the Office had not found any genuine national investigation or prosecution of the persons or conduct that would form the subject matter of the cases it would investigate, which clearly appeared to meet the threshold of gravity required. Lastly, there were no substantial reasons to believe that the investigation would not serve the interests of justice.
119. On the same day, the Prosecutor informed the President of the Court, the UN Secretary-General, and through the Secretary-General, the members of the UN Security Council and issued a public statement informing the opening of the investigation and noting that the Office will act with impartiality.

#### **Côte d'Ivoire**

120. In October 2003, the Government of Côte d'Ivoire, pursuant to article 12(3), accepted the jurisdiction of the Court for crimes committed on the country's territory from 19 September 2002. This was reconfirmed on 18 December 2010, in a declaration signed by President Ouattara. Further, the OTP received a letter from President Ouattara dated 3 May 2011, in which he noted his assessment that "the Ivorian judiciary is not at this stage in the best position to address the most serious of the crimes" committed since 28 November 2010, and "any attempt at trying the most responsible individuals may face multiple obstacles".
121. The Office thus continued to analyse the situation in Côte d'Ivoire, particularly the violence following the presidential runoff held on 28 November 2010. In the course of the crisis, the Prosecutor and the Deputy Prosecutor issued several statements warning individuals committing crimes under the Rome Statute that they could be brought to account before the ICC.
122. Pursuant to the preliminary examination of the situation in Côte d'Ivoire, the Prosecutor concluded that the statutory criteria established by the Rome Statute for the opening of an investigation were met. On 23 June 2011, the Prosecutor requested authorisation from the Pre-Trial Chamber to open an investigation into the alleged crimes committed on the territory of Côte d'Ivoire since 28 November 2010 and invited victims to send their representations to the Court on 17 June 2011, based on

article 15 of the Statute. Such authorisation was subsequently granted on 3 October 2011.

123. In its 23 June Request, the OTP stated that upon review of the supporting material, the Chamber may broaden the temporal scope of the investigation to events that occurred since 19 September 2002 (the date from which the Republic of Côte d'Ivoire accepted the exercise of jurisdiction by the Court). Such also appeared to be the expectations of the Ivorian civil society and the political opposition, as confirmed during the visit that the Office paid to Côte d'Ivoire in July 2011. In its Decision of 3 October 2011 authorizing the commencement of the investigation, the majority of the Pre-Trial Chamber ordered the Office to revert with any available information on potentially relevant crimes committed between 2002 and 2010. The Office provided the requested additional information on 3 November 2011.