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International Criminal Court

Le Bureau du Procureur

The Office of the Prosecutor

Report on Preliminary Examination Activities 2013

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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 that come to its attention based on the statutory criteria and information available.[1]

2. The preliminary examination of a situation by the Office may be initiated on the basis of: a) information sent by individuals or groups, States, intergovernmental or non-governmental organisations; b) a referral from a State Party or the Security Council; or (c) a declaration accepting the exercise of jurisdiction by the Court pursuant to article 12(3) lodged by a State which is not a Party to the Statute.

3. Once a situation is thus identified, the factors set out in article 53(1) (a)-(c) of the Statute establishes the legal framework for a preliminary examination.[2] 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[3]).

5. *Admissibility* comprises both complementarity and gravity.

6. *Complementarity* involves an examination of the existence of relevant national proceedings in relation to the potential cases being considered for investigation by the Office. This will be done bearing in mind its prosecutorial strategy of investigating and prosecuting those most responsible for the most serious crime.[4]

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[1] See the Policy Paper on Preliminary Examinations of November 2013.

[2] See also rule 48, ICC RPE.

[3] 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).

[4] See OTP Strategic Plan – June 2012-2015, para. 22. In appropriate cases the OTP will expand its general prosecutorial strategy to encompass mid- or high-level perpetrators, or even particularly notorious low-

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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 of crimes obtained pursuant to article 15. In all circumstances, the Office analyses the seriousness of the information received and may seek additional information from States, organs of the UN, intergovernmental and non-governmental organisations and other reliable sources that are deemed appropriate. The Office may also receive oral testimony at the seat of the Court.

11. 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.

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 collect information in order to establish sufficient factual and legal basis to render a determination; or (iii) 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 either to proceed or not proceed with investigations.

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level perpetrators, with a view to building cases up to reach those most responsible for the most serious crimes.

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14. 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[5]. 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 seriousness of information received, filter out information on crimes that are outside the jurisdiction of the Court and identify those that appear to fall within the jurisdiction of the Court.

- Phase 2, which represents the formal commencement of a preliminary examination, focuses on whether the preconditions to the exercise of jurisdiction under article 12 are satisfied and whether there is a reasonable basis to believe that the alleged crimes fall within the subject-matter jurisdiction of the Court. Phase 2 analysis entails a thorough factual and legal assessment of the alleged crimes committed in the situation at hand with a view to identifying potential cases falling within the jurisdiction of the Court. The Office may further gather information on relevant national proceedings if such information is available at this stage.

- Phase 3 focuses on the admissibility of potential cases in terms of complementarity and gravity. In this phase, the Office will also continue to collect information on subject-matter jurisdiction, in particular when new or ongoing crimes are alleged to have been committed within the situation.

- Phase 4 examines the interests of justice consideration in order to formulate the final recommendation to the Prosecutor on whether there is a reasonable basis to initiate an investigation.

Summary of activities performed in 2013

15. This report summarizes the preliminary examination activities conducted by the Office between the 1 November 2012 and 31 October 2013.

16. During the reporting period, the Office received 597 communications relating to article 15 of the Rome Statute of which 503 were manifestly outside the Court's jurisdiction; 21 warranted further analysis; 41 were linked to a situation already

[5] For the sake of simplification, the Office has decided to retain four main phases. The article 15 communications that are deemed to warrant further analysis (formerly under phase '2a') will be the subject of closer examination under phase 1 with a view to assessing whether the alleged crimes appear to fall under the jurisdiction of the Court. If such appears to be the case, the situation in question will advance to phase 2.

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under analysis; and 32 were linked to an investigation or prosecution. The Office has received a total of 10,352 article 15 communications since July 2002.

17. During the reporting period, the Office further completed one preliminary examination in relation to Mali and opened one new preliminary examination based on a State Party referral from the Union of the Comoros.

18. In the meantime, the Office has continued the preliminary examination of the situations in Afghanistan, Honduras and Korea (phase 2) and the situations in Colombia, Georgia, Guinea and Nigeria (phase 3). The Office found, in the main, that during the reporting period there was a reasonable basis to believe: 1) war crimes and crimes against humanity were and continue to be committed in Afghanistan; 2) the alleged crimes committed during the post-coup period in Honduras do not reach the threshold of crimes against humanity, although new allegations warrant further analysis; 3) the situation of Nigeria relating to the activities of Boko Haram and the counter-insurgency response by the Nigerian authorities constitutes a non-international armed conflict.

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B. SITUATIONS UNDER PHASE 2 (SUBJECT-MATTER JURISDICTION)

AFGHANISTAN

Procedural History

19. The Office has received 93 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

20. 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

21. 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.

22. The Taliban and other armed groups have rebuilt their influence since 2003, particularly in the south and east of Afghanistan. At least since May 2005, the armed conflict has intensified in the southern provinces of Afghanistan between organised armed groups, most notably the Taliban, and the Afghan and international military forces. The conflict has further spread to the north and west of Afghanistan, including the areas surrounding Kabul. Today ISAF, the US forces and the Government of Afghanistan (GOA) forces combat armed groups which mainly include the Taliban, the Haqqani Network, and Hezb-e-Islami Gulbuddin (HIG).

Alleged Crimes

23. *Killings:* According to the United Nations Assistance Mission in Afghanistan ("UNAMA"), over 14,300 civilians have been killed in the conflict in Afghanistan

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in the period between January 2007 and June 2013. Members of anti-government armed groups were responsible for at least 9,778 civilian deaths, while the pro-government forces were responsible for at least 3,210 civilian deaths. A number of reported killings remain unattributed.

24. According to UNAMA, more civilians were killed by members of anti-government armed groups in the first half of 2013 than in 2012. Members of the Taliban and affiliated armed groups are allegedly responsible for deliberately killing specific categories of civilians perceived to support the Afghan government and/or foreign entities present in Afghanistan. These categories of civilians, identified as such in the Taliban Code of Conduct (*Layha*) and in public statements issued by the Taliban leadership, include former police and military personnel, private security contractors, construction workers, interpreters, truck drivers, UN personnel, NGO employees, journalists, doctors, health workers, teachers, students, tribal and religious elders, as well as high profile individuals such as members of parliament, governors and mullahs, district governors, provincial council members, government employees at all levels, and individuals who joined the Afghanistan Peace and Reintegration Program and their relatives. The UNAMA 2013 mid-year report, in particular, indicated a pattern of targeted killings of mullahs who were mainly attacked while performing funeral ceremonies for members of Afghan government forces.

25. Violence against women has also increased during the reporting period. According to UN Women, Afghan female government officials and public figures have been victims of intimidation, abductions and targeted killings by anti-government elements.

26. These categories of civilians were attacked using three main methods: the first is the beheading, hanging or shooting of civilians throughout the country; the second is suicide attacks by the Taliban targeting civilians not taking direct part in hostilities; and the third is the use of suicide and non-suicide IEDs to assassinate specific individuals, such as high-profile government officials and provincial civilian officials.

27. Afghan government forces and/or international military forces reportedly conducted military operations, including aerial attacks, force protection incidents and night raid operations which resulted in civilian deaths. The number of civilian deaths caused by members of Afghan government forces and/or international military forces has gradually decreased over time reaching an all-time low in the first half of 2013. However, several air strikes conducted in the first half of 2013 resulted in a disproportionate loss of civilian lives according to UNAMA.

28. *Torture and other forms of ill-treatment:* Persons in the custody of Afghan authorities and international forces have reportedly been subject to abusive techniques such as beatings, electric shocks, sleep deprivation, forced nudity and other forms of ill-treatment. In March 2012, the Afghanistan Independent

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Human Rights Commission (AIHRC) documented cases of abuses in nine National Directorate of Security facilities while in January 2013, UNAMA reported on 326 alleged cases of torture and other forms of ill-treatment based on visits to 89 detention facilities under the control of Afghan forces in the period between October 2011 and October 2012.

29. The Afghan government informed the Office of the measures it has taken to address allegations related to torture and other forms of ill-treatment, including granting the international organizations access to detention facilities across the country. The government also informed the Office about an internal investigation carried out by National Directorate for Security into allegations of torture and other forms of ill-treatment towards detainees in various provinces, including Kandahar, Laghman, Kunduz, Faryab, Nangarhar, Takhar, Jowzjan, Paktika and Khwost.

30. *Use of human shields*: Members of the Taliban reportedly used human shields during military operations by forcing villagers to host and feed the Taliban members, and using civilian houses as military bases and checkpoints.

31. *Attacks on protected objects:* Since May 2003, members of anti-government armed groups have been held responsible for numerous attacks on protected objects, including markets, civilian government offices, hospitals, shrines and mosques, and on UN premises and MEDEVAC helicopters. There have also been persistent attacks on girls' schools by means of arson, armed attacks and bombs.

32. *Abductions*: The Taliban claimed responsibility for numerous abductions of civilians targeted on the basis of perceived association with the Afghan government and/or foreign entities present in Afghanistan, including civilian government officials, tribal elders, government workers, contractors, drivers, and translators. Many civilians abducted were later released following negotiations with elders while some abducted civilians were killed. Abductions have been reported mainly in the south, southeast, east and central regions.

33. *Imposition of punishments by parallel judicial structures*: UNAMA reported on the establishment of parallel judicial structures by members of anti-government armed groups. These structures reportedly imposed severe punishments, including executions and mutilations of persons perceived to collaborate with the Afghan government and/or foreign entities present in Afghanistan.

34. *Recruitment of child soldiers:* Members of both anti-government armed groups and Afghan government forces have reportedly conscripted, enlisted and used children to participate actively in hostilities. Armed groups have reportedly used children to carry out suicide attacks, plant explosives and transport military equipment. According to the Afghan government, "no individual under the age of 18 is enlisted in the ranks of the national army or police." The Afghan government also expressed its commitment to protect and promote the rights of

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children and to implement specific measures envisaged in the Afghan national law with the aim of preventing child recruitment.

Legal Assessment

35. Following an examination of information available concerning alleged crimes, the Office has determined that there is a reasonable basis to believe that crimes within the Court's jurisdiction have been committed within the situation of Afghanistan.

Anti-Government Armed Groups

36. Alleged crimes by members of anti-government armed groups (i.e. the Taliban and affiliated armed groups) encompass a broad range of criminal conduct, including both crimes against humanity and war crimes.

Crimes against humanity

37. The information available indicates that the alleged killings and acts of imprisonment attributed to the members of the Taliban were committed as part of a widespread and systematic attack against the civilian population of perceived supporters of the Afghan Government and/or foreign presence in Afghanistan and pursuant to or in furtherance of Taliban policy. The attacks on civilians were planned, directed and organized by the Taliban leadership and executed by Taliban fighters. The policy to attack this group of civilians was explicit in the Taliban's Code of Conduct or Layha and in public statements issued by the Taliban leadership.

38. The information available suggests that since May 2003, at the latest, the following conduct was committed by members of anti-government armed groups, particularly the Taliban, on the territory of Afghanistan:

    a. murder constituting a crime against humanity under article 7(1)(a) of the Statute; and
    b. imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law under article 7(1)(e) of the Statute.

War crimes

39. 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, and non-state armed groups, particularly the Taliban, on the other. 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.

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40. The information available suggests that members of anti-government armed groups, particularly the Taliban, have committed the following war crimes within the jurisdiction of the Court:

    a. murder under article 8(2)(c)(i);
    b. cruel treatment under article 8(2)(c)(i) or outrages upon personal dignity under article 8(2)(c)(ii);
    c. the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court under article 8(2)(c)(iv);
    d. intentionally directing attacks against the civilian population or against individual civilians under article 8(2)(e)(i);
    e. intentionally directing attacks against personnel, material, units or vehicles involved in a humanitarian assistance under article 8(2)(e)(iii);
    f. intentionally directing attacks against buildings dedicated to education, cultural objects, places of worship and similar institutions under article 8(2)(e)(iv);
    g. conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities under article 8(2)(e)(vii);
    h. treacherously killing or wounding a combatant adversary under article 8(2)(e)(ix).

Pro-Government Forces

41. Alleged war crimes committed by members of pro-government forces are comparatively more limited in scope, while there is no reasonable basis to believe that these forces have committed crimes against humanity in Afghanistan.

42. The information available suggests that the war crimes of torture, and outrages upon personal dignity, in particular humiliating and degrading treatment, have been committed by members of pro-government forces. Based on the information available at this stage, other types of alleged criminal conduct, such as the killing of civilians through aerial bombardments, escalation-of-force incidents and 'night raids,' do not meet the reasonable basis threshold to qualify as war crimes under the Rome Statute.

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War crimes allegedly committed by Afghan forces

43. The information available suggests that the war crimes of cruel treatment and torture, and outrages upon personal dignity, in particular humiliating and degrading treatment, under articles 8(2)(c)(i) and 8(2)(c)(ii), may have been committed by members of the Afghan government forces against conflict-related detainees in different detention facilities throughout Afghanistan, particularly by members of the National Directorate for Security (NDS – Afghanistan's principal intelligence agency) and by members of the Afghan National Police (ANP).

44. UNAMA and AIHRC reported that detainees captured in the context of the armed conflict and held in prisons under the control of Afghan forces experienced torture in various forms, including suspension (hanging detainees by the wrists with chains or other devices attached to the wall, ceiling, iron bars or other fixtures for lengthy periods) and beatings, especially with rubber hoses, electric cables or wires or wooden sticks and most frequently on the soles of the feet.

45. With respect to the recruitment of children, according to the UN Secretary-General's 11th Annual Report on Children and Armed Conflict, the Afghan National Army and Afghan National Police forces have recruited children, particularly as messengers and tea boys.

46. However, at this stage, the information available is insufficiently detailed and documented to provide a reasonable basis to believe that the war crime of using, conscripting and enlisting children under Article 8(2)(e)(vii) has been committed by the Afghan National Army and Police. The Office will continue to gather information on these allegations.

War crimes allegedly committed by international forces

47. The Office has considered information related to civilian casualties resulting from air strikes. In particular, the United Nations Assistance Mission in Afghanistan (UNAMA) has observed that a high number of air-strikes launched by members of pro-government forces which were directed at military targets have caused incidental loss of civilian life and harm to civilians which appears to be excessive by comparison with the anticipated concrete and direct military advantage. The Office has also considered information relating to alleged civilian deaths and injury arising from escalation-of-force incidents and "night raids". The Office notes that in relation to allegations over proportionality, in the context of a non-international armed conflict, the Rome Statute does not contain a provision for the war crime of intentionally launching a disproportionate attack as set out in article 8(2)(b)(iv). The Office has therefore considered the available information in light of the war crime of intentionally targeting civilians under article 8(2)(e)(i).

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48. The information available does not indicate that civilian deaths or injuries caused by air strikes launched by pro-government forces, as well as escalation-of-force incidents and "night raids", resulted from the intentional directing of attacks against the civilian population. Accordingly, the information available does not provide a reasonable basis to believe that the war crime of intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities pursuant to article 8(2)(e)(i) has been committed by pro-government forces.

49. The Office has examined information alleging in particular that members of the international armed forces have committed the war crimes of torture under article 8(2)(c)(i) and outrages upon personal dignity, in particular humiliating and degrading treatment under article 8(2)(c)(ii).

50. In relation to allegations of torture and ill-treatment, the OTP has focused on cases of those detainees captured in the context of the armed conflict in Afghanistan, and, short of a sufficient nexus to the latter, does not include other alleged conduct related to the treatment of detainees captured outside of Afghanistan.

51. It has been alleged that, between 2002 and 2006, some of the detainees captured in Afghanistan were subjected to interrogation techniques which may constitute torture or inhumane treatment. It is alleged that such interrogation techniques were applied in combination, either simultaneously, or consecutively.

52. The Office continues to seek information to determine whether there is any reasonable basis to believe any such alleged acts, which could amount to torture or humiliating and degrading treatment, may have been committed as part of a policy.

OTP Activities

53. Over the reporting period, the Office has continued to gather and verify information on alleged crimes committed in the situation in Afghanistan, and to refine its legal analysis. The Office has also further engaged with relevant States and cooperation partners with a view to discuss and assess crime allegations, and gather more information.

54. The Office also held a number of meetings with representatives of Afghan civil society and international non-governmental organizations in order to discuss possible solutions to challenges raised by the situation in Afghanistan such as security concerns, limited or reluctant cooperation, and verification of information.

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55. Finally, the Office found that there is a reasonable basis to believe that crimes within the jurisdiction of the Court, namely crimes against humanity and war crimes, have been committed in the situation in Afghanistan since 1 May 2003.

Conclusion and next steps

56. While the Office will continue to analyse allegations of crimes committed in Afghanistan, the Prosecutor has decided that the preliminary examination of this situation should be expanded to include admissibility issues. In this respect, the Office will examine the existence and genuineness of relevant national proceedings, taking into consideration the Office's policy to focus on those most responsible for the most serious crimes. The Office notes that in relation to certain of the alleged crimes mentioned above, there is indication of national activity to address accountability.

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HONDURAS

Procedural History

57. The Office has received 23 communications pursuant to article 15 in relation to the situation in Honduras. The preliminary examination of the situation in Honduras was made public on 18 November 2010.

Preliminary Jurisdictional Issues

58. Honduras ratified the Rome Statute on 1 July 2002. The ICC therefore has jurisdiction over Rome Statute crimes committed on the territory of Honduras or by its nationals from 1 September 2002 onwards.

Contextual Background

59. The preliminary examination of the situation in Honduras focuses on events that occurred since the *coup d'etat* of 28 June 2009. On 28 June 2009, former President José Manuel Zelaya Rosales was arrested by members of the armed forces. He was then placed on board an aircraft and flown to Costa Rica. The National Congress passed a resolution stripping President Zelaya of the presidency and appointing the then President of the Congress, Roberto Micheletti, as President of Honduras. The Executive Branch immediately implemented a curfew, and the police and military were relied upon for its enforcement. On 6 July, a "crisis room" was established on the premises of the presidential palace for the purpose of coordinating police and military operations. Curfews continued to be used through executive decrees restricting freedom of movement, assembly and expression issued on an intermittent basis throughout the summer and into the early autumn. The actions were roundly decried as an illegal *coup d'état* in the international community.

60. Thousands of President Zelaya's supporters marched peacefully in demonstration of their opposition to the *coup d'etat*. Many of these demonstrations were met with resistance and violence by state security forces. Checkpoints and roadblocks were set up in various parts of the country, often preventing the mobilization of larger crowds of demonstrators. President Zelaya attempted, unsuccessfully, to return to the country both in June and at the end of July. He managed to enter Honduras in September where he took refuge in the Brazilian Embassy.

61. In November 2009, presidential elections took place, with Porfirio Lobo winning. He took office in January 2010 and an amnesty decree was adopted providing a pardon to all persons involved in the events of 28 June 2009, excluding those persons responsible for crimes against humanity and human rights violations, and instituted a Truth and Reconciliation Commission (*Comisión de la Verdad y*

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Reconciliación) to cover events between 28 June 2009 and 27 January 2010. In May 2010, Honduran human rights organizations sponsored a Truth Commission (*Comisión de Verdad*), to carry out an alternative inquiry into events following the *coup d'etat* until August 2011. The reports by both commissions were published in July 2011 and October 2012, respectively.

62. Since the coup in 2009, violence in Honduras has increased significantly. Various explanations have been offered for the rise in murders and violent crime but impunity due to the failure of authorities to act has made investigations and prosecutions rare, creating a vicious cycle. Various domestic and international actors have drawn particular attention to alleged targeting of human rights defenders, members of the legal profession, journalists, teachers, union members, resistance members, sexual minorities, indigenous groups, land rights activists and other groups.

Alleged Crimes

63. The majority of the alleged crimes in the period between the coup and President Lobo's inauguration ("post-coup period") arose out of attempts by the security forces to deal with demonstrations. The main categories of these crimes stem from allegations over the treatment of *de facto* regime opponents.. In addition to the allegations dating from this period, the Office has also received allegations extending into the subsequent period ("post-election period"), which is described separately below.

64. <u>*Deaths*</u>: Allegations reviewed describe two kinds of death, the first being resulting from the excessive and disproportionate use of force by security forces during demonstrations or at checkpoints, either from live ammunition or tear gas; and the second resulting from the alleged targeted killing of selected *de facto* regime opponents, including human rights leaders, journalists, and activists. The potential number of victims of the first type ranges between seven and twelve individuals, all attributed to security forces. The latter type ranges from six to over twenty victims, the alleged perpetrators of which remain unknown.

65. <u>*Imprisonment and other severe deprivations of liberty*</u>: Detentions occurred on a large-scale generally on the basis of curfew violations and participation in demonstrations. Estimates range from 3,000 to 4, 500 people affected. The majority of these detentions were for 45 minutes to 24 hours. It is alleged that, in some instances, ill-treatment and injury arose during arrest and detention procedures, though the number of victims and severity of the harm is unclear. In addition, there appear to have been violations of numerous people's due process rights, related to the legality of the curfews justifying the detentions as well as the failure to declare the reasons for the arrests, grant access to counsel and the sporadic use of irregular detention facilities, amongst others.

66. <u>*Torture*</u>: The number of cases of torture is not clear, with possible ranges from four to upwards of dozens occurring during detentions. Injuries, mostly inflicted

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in the context of attempts to suppress demonstrations and following arrest and detention, were reported in the range of anywhere between 288 to fover 400 people.

67. Rape and sexual violence: Information available indicates that approximately two to eight cases of rape and an additional number of acts of sexual violence (approximately ten to fifteen) were committed mostly in the context of demonstrations or detentions.

68. Deportation or Forcible Transfer: President Zelaya and former Foreign Minister Patricia Rodas were allegedly victims of deportation, having been removed from the country against their will and without lawful orders for the removal.

69. Persecution: In various forms, the allegations suggest that the *de facto* regime developed a policy of targeting their opponents through the selective use and enforcement of curfews; shutdown of media outlets; targeting of human rights activists, journalists, and opposition leaders; mass detentions either for participating in demonstrations and/or for violating the curfews; excessive and disproportionate use of force by security forces in demonstrations and at checkpoints and ill-treatment in detention facilities.

70. In addition to allegations concerned with the post-coup period, the Office is also analysing allegations of crimes committed in the post-election period. These allegations focus on vulnerable groups, especially those who resisted the coup, including threats and attacks against human rights defenders, journalists, lawyers, and their enforced disappearances and targeted killing. Another focus has been on the Bajo Aguán region of the country, where it is alleged that over 100 peasants (*campesinos*) have been killed since the coup. Senders of an article 15 communication suggest that these crimes are a continuation of the alleged attack against the regime's opponents. However, there is a paucity of information on attribution of responsibility for many of the allegations which presents challenges for analysis.

Legal Assessment

71. In examining the contextual elements of crimes against humanity, the Office found that opponents of the *de facto* regime could constitute a civilian population. Given the support for former President Zelaya, this would constitute a large number of individuals spread throughout the country. As regards an "attack", taken to be "the multiple commission of acts" in article 7(1), it remains unclear whether the alleged number of deaths due to excessive force, the number of reports of torture, and acts of rape and sexual violence, the detentions of a duration of up to 24 hours and/or under severe conditions, and the number of alleged serious injuries, could be positively linked to the alleged attack or otherwise could cumulatively provide a basis for finding an "attack".

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72. As regards whether this attack could be considered widespread, the Office found that given the large size of the population that was allegedly the target of the attack, the scale of victims of killings, torture, sexual violence, detentions of longer duration and/or in conditions of a severe nature was relatively small, even taken at the highest estimates of ranges. There were indeed many more victims of serious human rights violations, including restrictions on the freedom of movement, expression and association, and the interference with liberty through a large number of generally brief detentions, but these violations, even combined with the smaller number of more serious acts together, cannot be said to constitute a widespread attack directed against the opponents to the *de facto* regime as conceived in the Rome Statute.

73. For assessing whether there was a systematic attack, the Office considered that the vast majority of the acts of violence occurred in demonstration-related contexts. While there were victims of killings, torture, sexual violence, detentions of longer duration and/or in conditions of a severe nature, or serious injuries, the commission of these crimes did not seem to have occurred in an organized and regular pattern. There is no consistent pattern of attacking opponents of the *de facto* regime outside of the context, both factors which could counter claims of an attack of a systematic nature. This creates a difficulty in extricating these acts and characterizing them as part of a systematic attack directed against a population.

74. Although not necessary, given the findings on the lack of either a widespread or systematic attack, the Office also considered whether there was any evidence of a policy to attack opponents of the *de facto* regime. It could be argued that decrees restricting the freedom of movement, assembly and expression served as a framework for the security forces to commit abuses against civilians who opposed the *de facto* regime. Further, the establishment of a "crisis room" designed to plan operations to repress the opposition could also be an indicator of a policy. However, while the decrees themselves expanded the powers of the police and armed forces, they did not as such authorize the commission of acts that could be said to constitute an attack. As regards the "crisis room", it is not clear that emanating from this coordination there was a policy designed to attack, on a widespread and systematic basis, the civilian population constituted by opponents to the *de facto* regime.

75. The Office found that while it appears that the *de facto* regime developed a plan to take over power and assert control over the country, the actions used to implement that plan do not themselves constitute an attack (i.e. the restrictions on freedom, movement and association) that was part of a preconceived policy directed against opponents of the *de facto* regime. This does not diminish the seriousness of the violations of human rights that occurred, but it does create difficulties in substantiating a claim that these acts could be considered as a widespread or systematic attack as understood in the Rome Statute.

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76. In terms of allegations of crimes committed in the post-coup period, the Office has analysed the legal characterization of the allegations of detentions and persecution as underlying conduct. The Office found that despite the large-scale nature of the detentions and the due process violations, their brevity was a significant factor in their legal characterisation. The analysis found that the vast majority of them could not be considered as falling within the ambit of article 7(1)(e) "imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law". For those detained for longer periods of time and/or in severe conditions, it is possible that some of these detentions could rise to meet article 7(1)(e), but on the face of information reviewed, these types of detentions appeared to be the exception.

77. Regarding allegations of persecution, the Office found the restrictions on freedom, movement, and assembly, although widespread and serious human rights violations cannot be said to rise to the level of any of the enumerated acts in article 7(1) with current interpretations of the Rome Statute. Further, the majority of detentions did not appear to rise to the level of conduct captured by article 7(1)(e) and much of the remaining conduct is insufficiently substantiated. The combined effect of this finding together with the findings related to allegations of detentions is that there is not a reasonable basis for establishing persecution during this period.

78. The allegations of targeted killings and other acts against particular segments of the population during the post-coup period was not sufficiently supported by information on attribution that allows it to be connected into a larger pattern of conduct attributable to identifiable actors. Given the current information available and the jurisprudence to date, the analysis found that there was not a reasonable basis to believe that a systematic attack against the opponents of the *de facto* regime occurred in the post-coup period.

79. As regards the claims in the post-election period, the substantiation of an attack against this population is challenging and requires additional research and analysis. Against a backdrop of high levels of violent crime and the prevalence of large numbers of criminal groups, little to no information substantiating the level of independent organization of these criminal groups or possible connection to state agents has been submitted. Thus, key issues outstanding at this stage of the preliminary examination are a lack of factual information on attribution of responsibility for the crimes and a lack of information connecting alleged acts against individuals into a larger pattern that may be characterised as a widespread or systematic attack pursuant to a policy.

80. The Office will continue to gather additional information to analyse whether more recent allegations may be evidence of an escalating pattern of criminal acts that could alter the characterisation of the earlier post-coup period and provide a basis for considering it as a continuous widespread or systematic attack carried out pursuant to a policy.

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OTP Activities

81. Over the reporting period, the Office has sought and analysed information on the situation in Honduras from multiple sources, including from the Truth and Reconciliation Commission (*Comisión de la Verdad y Reconciliación*), the Inter-American Commission on Human Rights, the UN Office of the High Commissioner for Human Rights, various reports from domestic civil society organisations and international non-governmental organisations, the report of the civil society-supported Truth Commission (*Comisión de Verdad*), information from national governments, article 15 communications submitted to the Office, as well as information submitted on behalf of the Honduran government.

82. During the reporting period, the Office has pursued consultations with international and Honduran NGOs to exchange views and verify information on the contextual and characterisation of alleged crimes committed since the June 2009 *coup d'etat*.

Conclusion and next steps

83. There appears to be little doubt that the events surrounding the June 2009 *coup d'etat* and the measures taken in its aftermath constituted human rights violations directly attributable to authorities of the *de facto* regime. As set out in the 2012 report, the Office acknowledges that there are arguments both supporting and opposing a legal characterization of such acts as crimes within the jurisdiction of the Court. However, after careful analysis, the Office has concluded that there is not a reasonable basis to believe that the conduct attributable to the *de facto* regime authorities during that discrete time period constitutes crimes against humanity.

84. The Office will continue its preliminary examination of the situation in the light of more recent allegations of conduct following the presidential election of 2010, to determine whether there is a reasonable basis to believe that crimes against humanity have been or are being committed. The Office will particularly consider whether such allegations may evince an escalating pattern of prohibited acts that might alter the legal characterisation of the earlier post-coup period and provide a basis for considering such acts in the context of an on-going widespread and/or systematic attack carried out pursuant to a State or organisational policy. In this context, the Office will also monitor closely any violence associated with forthcoming presidential elections scheduled for November 2013.

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REGISTERED VESSELS OF COMOROS, GREECE AND CAMBODIA

Procedural History

85. On 14 May 2013, the OTP received a referral from the authorities of the Union of the Comoros "with respect to the 31 May 2010 Israeli raid on the Humanitarian Aid Flotilla bound for Gaza strip."[6] The Office has received four other communications under article 15 of the Statute in relation to this situation.

86. The Office has sought and received clarification on the temporal and territorial scope of the referral from the Comoros. The Comorian authorities have clarified that the territorial scope of the referral is not limited to the Comorian-flagged vessel, but also extends to other flotilla vessels bearing State Party flags. Temporally, the situation forming the subject of the referral began on 31 May 2010 and encompasses all other alleged crimes flowing from the initial incident, including the interception on 06 June 2010.

87. On 05 July 2013, the Presidency of the ICC assigned the situation to Pre-Trial Chamber I.[7] This was a procedural step in accordance with Regulation 46 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

88. The flotilla was comprised of a total of eight ships. In addition to the *MV Mavi Marmara*, registered in the Comoros, the remaining ships were registered in the following countries: Greece, Turkey, Kiribati, Togo, Cambodia and the United States. Of these States of registration, only the Union of the Comoros, Cambodia and Greece are States Parties. As such, pursuant to article 12(2)(a), the jurisdiction of the Court extends to conduct occurring or crimes committed on board a vessel or aircraft for which the Union of the Comoros, Cambodia and Greece are the State of registration.

89. The Union of the Comoros ratified the Rome Statute on 18 August 2006. The ICC therefore has jurisdiction over Rome Statute crimes committed on the territory of Comoros or by its nationals from 1 November 2006 onwards. Cambodia ratified the Rome Statute 11 April 2002. The ICC therefore has jurisdiction over Rome Statute crimes committed on the territory of Cambodia

[6] Referral under Articles 14 and 12(2)(a) of the Rome Statute arising from the 31 May 2010, Gaza Freedom Flotilla situation.
[7] Decision Assigning the Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia to Pre-Trial Chamber I.

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or by its nationals from 1st July 2002 onwards. Greece ratified the Rome Statute on 15 May 2002. The ICC therefore has jurisdiction over Rome Statute crimes committed on the territory of Greece or by its nationals from 1st July 2002 onwards.

Contextual Background

90. On 3 January 2009, Israel imposed a naval blockade off the coastline of the Gaza Strip up to a distance of 20 nautical miles from the coast. The naval blockade was part of a broader effort to impose restrictions on travel and the flow of goods in and out of the Gaza strip following the electoral victory of Hamas in 2006 and their extension of control in 2007.

91. 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.

92. The Israeli Defence Forces (IDF) intercepted the flotilla on 31 May 2010 at a distance of 64 nautical miles from the blockade zone. By that point, two of the eight ships in the flotilla had turned back due to mechanical difficulties. The six remaining ships were boarded by the IDF. The raid resulted in the deaths of nine persons aboard the *Mavi Marmara*, eight of whom were Turkish nationals, and one with Turkish and American dual nationality.

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

Alleged Crimes

94. The following summary of events is preliminary in nature and is based on a review of the reports published by the four aforementioned commissions. On 31 May 2010, six of the boats organized by the "Gaza Freedom Flotilla" were intercepted by the IDF after a series of warnings were issued via radio contact. The boats in the flotilla persisted on their course.

95. According to the report of the United Nations Human Rights Council Fact-Finding Mission ("HRC Report"), just before 04:30, Israeli forces made an attempt to board the *Mavi Marmara* from zodiac boats. Soldiers from the zodiac boats reportedly fired non-lethal weaponry during their attempts to board. They were met with resistance, with passengers throwing various items at them and repelling their attempts to board. A first helicopter appeared, and the Israeli forces used smoke and stun grenades in an attempt to clear an area for

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the landing of soldiers. The soldiers then boarded the ship lowering a rope. There are conflicting accounts of when live ammunition was first used and from where it emanated. The report of the Turkish National Commission of Inquiry ("Turkish Commission") stated that from 04:32 onwards, live ammunition was fired from both the zodiacs and the helicopter. The report of Israel's Public Commission to Examine the Maritime Incident of 31 May 2010 ("Israeli Commission"), indicated that IDF soldiers came under live fire themselves and that they alternated between non-lethal and lethal force as needed to protect themselves and that no firing from helicopters took place. The HRC Report found that live ammunition had been used from at least one of the helicopters and also admitted it was very difficult to establish the exact chain of events due to the conflicting accounts and available evidence. The HRC Report stated that Israeli soldiers continued shooting at passengers who had already been wounded or otherwise constituted no threat to the IDF soldiers.

96. The Israeli Commission reported that upon attempting to take over the *Mavi Marmara*, soldiers had been met with "violent resistance" (including targeting them with shooting water from a hose, shining bright lights down towards the zodiac boats, and throwing objects over the boat) and also upon boarding via the fast-rope down from the helicopters that they were met with "extreme violence," including two soldiers being shot. The Israeli Commission reported that nine IDF soldiers were wounded, some of whom had been beaten, and two from bullet wounds.

97. In total, amongst passengers on the *Mavi Marmara,* nine deaths occurred and at least twenty were seriously wounded, including at least fourteen from live ammunition. The majority of gunshot wounds suffered by passengers were to the head, thorax, back and abdomen. The Report of the United Nations Secretary-General's Panel of Inquiry ("Palmer-Uribe Report") found that "despite the investigation and conclusions reached in Israel's report, no satisfactory explanation has been provided to the Panel for how the individual [9] deaths occurred." It further found that "there was no adequate explanation" for "why force was used to the extent that it produced such high levels of injury," noting that some of the injuries included bullet wounds, broken bones, internal injuries requiring multiple surgeries, and one passenger whose injuries caused him to remain in a coma.

98. The Palmer-Uribe Report found that the key differences between the factual accounts given by the Israeli and the Turkish Commissions were around when live fire was first used and the nature of the resistance on board the *Mavi Marmara*.

99. The same report found that there was a "radical difference" between the characterisation of the treatment of passengers after the take-over of the vessels between the Israeli and Turkish Commissions. This extends to the other vessels comprising the flotilla. The Palmer-Uribe Report stated that "there are good

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grounds to believe that there was significant ill-treatment of passengers by Israeli authorities after completion of the takeover" and that in the 93 witness statements reviewed by the panel, there was a general consistency on the matter that was not found in regard to any other set of events.

100. According to the HRC Report, many of the wounded passengers were stripped naked and had to wait several hours before receiving medical treatment and in the process of being detained, IDF soldiers physically abused passengers, including kicking, punching and hitting with the butts of rifles. Passengers were not allowed to speak or move, were verbally abused, denied access to toilet facilities, and were forced to urinate on themselves or to use the facilities in the presence of Israeli soldiers. Some received dog bite wounds from dogs employed by the IDF. Passengers with chronic medical conditions were not provided with access to their medicine. A recurring allegation relates to the tightening of handcuffs causing severe pain and discomfort, and loss of blood circulation allegedly resulting in chronic medical problems for months after the interception.

OTP Activities

101. As noted above, the situation has been examined by four separate commissions. The Office has analysed the supporting documentation accompanying the referral along with the reports published by each commission, and has identified a number of significant discrepancies in the factual and legal characterization of the incidents by these commissions. Accordingly, the Office is seeking additional information from relevant reliable sources in order to resolve these discrepancies.

Conclusion and Next Steps

102. The Office is taking steps to obtain additional information needed to resolve key factual and legal ambiguities in order to determine whether there is a reasonable basis to believe that a crime within the jurisdiction of the Court has been committed.

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REPUBLIC OF KOREA

Procedural History

103. The Office has received eight communications pursuant to article 15 in relation to the situation in Korea. The preliminary examination of the situation relating to two incidents that occurred in 2010 in the Yellow Sea, namely the sinking of a South Korean warship, the *Cheonan*, on 26 March 2010 and the shelling of South Korea's Yeonpyeong Island on 23 November 2010, was made public on 6 December 2010.

104. In accordance with article 15, the Office sought additional information on the two incidents from multiple sources, including from the Government of the Republic of Korea ("ROK" or "South Korea") and the Government of the Democratic People's Republic of Korea ("DPRK" or "North Korea"). On 12 October 2012, the ROK Government responded to Office's request for information of 13 July 2011. Further information was provided by the ROK Government on 11 July 2013.

Preliminary Jurisdictional Issues

105. The ROK is a State Party to the Rome Statute since 13 November 2002. The Court may therefore exercise jurisdiction over Rome Statute crimes occurring on the territory of ROK or by its nationals from 1 February 2003 onwards. Pursuant to article 12(2), the territorial jurisdiction of the Court includes alleged crimes occurring on board a vessel or aircraft registered in a State Party. The attack on Yeonpyeong Island was launched from the DPRK, and it is therefore likely that the perpetrators were DPRK nationals. The DPRK is not a state party. However, because the territorial requirement has been met, the Court may exercise its jurisdiction over the alleged perpetrators. The same applies to the nationals of any non-State Party involved in the alleged attack against the *Cheonan*.

Contextual Background

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

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Alleged Crimes

107. The shelling of Yeonpyeong Island occurred after military exercises by the ROK Marine Corps stationed on the island, including an artillery-firing exercise. The exercises have been conducted annually since 1974. The shelling from the DPRK on 23 November 2010 came in two waves, the first between 14:33 and 14:46 hours, and the second between 15:11 and 15:29 hours. It resulted in the killing of four people (two civilians and two military personnel), the injuring of 66 people (50 civilians and 16 military personnel) and the destruction of military and civilian facilities on a large scale, estimated to cost $4.3 million. In addition to the military base in the south-western part of the island and other marine positions, quite a few civilian installations were hit, including the History Museum, locations close to Yeonpyeong Police Station and the Maritime Police Guard Post, the Town Hall, a hotel, a health centre and other civilian structures in the town of Saemaeul. As to the total number of artillery shells and rockets fired from the DPRK, the report of the UN Command states that a total of 170 rounds were fired, of which 90 landed in the water surrounding Yeonpyeong Island. The ROK Government indicated that 230 rounds were fired. The DPRK publicly acknowledged responsibility for the shelling.

108. In contrast, the DPRK denied responsibility for the sinking of the *Cheonan*, a Patrol Combat Corvette of the ROK Navy's Second Fleet. At 21:22 hours on 26 March 2010, the *Cheonan* was hit by an explosion, broke in half and sank, resulting in the deaths of 46 ROK Navy sailors. A Joint Investigation Group led by the ROK in cooperation with the US, UK, Australia, Canada and Sweden concluded that an underwater explosion from a torpedo manufactured by North Korea caused the sinking. Furthermore, the Multinational Combined Intelligence Task Force (MCITF), composed of South Korea, the US, Australia, Canada and the UK found that the torpedo was launched from a North Korean submarine. The U.N. Command Military Armistice Commission also established a Special Investigation Team which arrived at the same conclusion and found that the evidence was "so overwhelming as to meet the … standard of beyond reasonable doubt."[8]

Legal Assessment

109. The fundamental contextual element needed to establish the commission of a war crime is the existence of an armed conflict. There are two possible bases for the existence of an international armed conflict between the ROK and the DPRK. The first is that the two countries are technically still at war: the Armistice Agreement of 1953 is merely a ceasefire agreement and the parties are yet to negotiate the peace agreement expected to formally conclude the 1950-53 conflict. The second possible basis is that the "resort to armed force

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

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between States" in the form of the alleged launching of a torpedo into the *Cheonan* or the launching of shells into Yeonpyeong, created an international armed conflict.

110. Both the ICC Statute and the Elements of Crimes are silent as to the definition of "armed conflict",[9] leaving this to judicial interpretation. The classic position adopted by many authorities, including the International Committee of the Red Cross (ICRC), is that no element of scale is necessary to the application of the definition of international armed conflict so long as there is a resort to armed force between states. Thus far, the ICC has adopted the definition of armed conflict elaborated by the International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber in the case of *The Prosecutor v. Tadić*.[10]

111. The classical view holds that the contextual requirement of the existence of an international armed conflict is met in the present situation since the alleged launching of a torpedo into the *Cheonan* and the launching of artillery shells into Yeonpyeong created an international armed conflict. Whether or not the technical state of war between the DPRK and ROK is sufficient to establish an international armed conflict may have an impact upon the assessment as to whether the alleged acts by the DPRK actually constitute acts of aggression and breaches of article 2(4) of the UN Charter. However, on the basis that recourse to armed force is sufficient to constitute an international armed conflict, for the present purposes, it is unnecessary to determine this issue.

112. International humanitarian law and the Rome Statute permit belligerents to carry out military operations against military targets, even when it is known that some civilian death or injury will occur. A crime occurs if there is a deliberate targeting of civilians or civilian objects (articles 8(2)(b)(i) or (ii)), or targeting of a military objective in the knowledge that the incidental civilian injury would be clearly excessive in relation to the anticipated military advantage (article 8(2)(b)(iv)).

113. The *Cheonan* was a naval vessel and all those on board who drowned in the sinking were military personnel. In general, it is not a war crime to attack military objectives including naval ships or to kill enemy military personnel including sailors on a naval ship. However, the Office is examining whether the information available provides a reasonable basis to believe that the war crime of killing or wounding treacherously was committed (article 8(2)(b)(xi)).

114. The shells fired onto Yeonpyeong hit both military and civilian objects. The targeting of the military base, the killing of two ROK Marines and the

[9] *Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, 14 March 2012, para. 531.

[10] "[A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State", *Id.*, para. 533 (citing *Tadić*, para. 70).

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wounding of a number of ROK Marines would not constitute war crimes, as such objects and persons are legitimate military targets. However, with respect to the civilian impact, the Office is examining whether there was intentional targeting of civilian persons and objects (articles 8(2)(b)(i) or (ii)), or excessive incidental death, injury or damage to civilian persons and objects (article 8(2)(b)(iv)).

115. According to most sources, including the United Nations Command's report on the incident, of the 170 rounds fired only 80 rounds landed on the island and approximately 90 rounds landed in waters surrounding the island. Approximately 40-50 shells, the majority of those that landed on the island, directly hit military targets. A significant number landed in the area immediately surrounding those targets. However, subsequent communications received by the Office indicated that 230 rounds were fired, of which approximately 180 rounds landed on the island, 150 landed in and around 8 different military areas in various locations on the island, and approximately 30 shells were concentrated in a high-density area of civilian dwellings. The discrepancy appears to be explained by the fact that the United Nations Command report was produced rapidly in the immediate aftermath of the incident: further analysis of the drop zones, recovered rocket components and camera footage confirmed that the total number of rounds fired was 230.

OTP Activities

116. The Office has continued to seek additional information from relevant sources, focusing its activities on ascertaining factual issues that are key to determine, in accordance with article 53(1), whether the available information provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been committed in the course of either incident. In particular, additional information was received from the ROK on 11 July 2013 and is being analysed by the Office.

Conclusion and Next Steps

117. Considering the information provided by the ROK and the lack of information from North Korea, the Office is finalizing its analysis of whether there is a reasonable basis to believe that the alleged attacks constitute crimes within the jurisdiction of the Court, and expects to reach a determination on subject-matter issues in the near future.

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C. SITUATIONS UNDER PHASE 3 (ADMISSIBILITY)

COLOMBIA

Procedural History

118. The OTP has received 146 communications pursuant to article 15 in relation to the situation in Colombia. The Situation in Colombia has been under preliminary examination since June 2004.

119. On 2 March 2005, the Prosecutor informed the Government of Colombia that he had received information on alleged crimes committed in Colombia that could fall within the jurisdiction of the Court. Since then, the Office of the Prosecutor has requested and received additional information on (i) crimes within the jurisdiction of the Court and (ii) the status of national proceedings.

120. In November 2012, the OTP published an Interim Report on the Situation in Colombia, which summarized the analysis undertaken in the course of the preliminary examination including the Office's findings with respect to jurisdiction and admissibility, and identified five areas of continuing focus: (i) follow-up on the Legal Framework for Peace and other relevant legislative developments, as well as jurisdictional aspects relating to the emergence of "new illegal armed groups"; (ii) proceedings relating to the promotion and expansion of paramilitary groups; (iii) proceedings relating to forced displacement; (iv) proceedings relating to sexual crimes; and, (v) false positive cases.

Preliminary Jurisdictional Issues

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

Contextual Background

122. Colombia has experienced approximately 50 years of violent conflict between government forces and rebel armed groups, as well as amongst those armed groups. The most significant actors include the *Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo* ("FARC") and the *Ejército de Liberación Nacional* ("ELN"); paramilitary armed groups; and the national armed forces and the police. Over the years, the Government of Colombia has held several peace talks and negotiations with various armed groups, with differing degrees of success. The Justice and Peace Law ("JPL") adopted in 2005 was designed to

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encourage paramilitaries to demobilize and confess their crimes in exchange for reduced sentences. Recent years have seen the power of the paramilitaries diminish, including through demobilization. Some demobilized fighters, however, have allegedly reconfigured into smaller and more autonomous units.

123. On 18 October 2012, peace talks between the Government of Colombia and the FARC began in Oslo, and then moved to Havana where they remain on-going. The six agenda items, as agreed to in the framework for the peace talks, are: (1) rural development and agrarian reform; (2) political participation; (3) disarmament and demobilization; (4) drug trafficking; (5) victims (human rights of victims and truth-telling); (6) implementation and verification mechanisms. An agreement was reached on the first and second agenda items in May and November 2013, respectively.

Subject-Matter Jurisdiction

124. As reported in the November 2012 Interim Report on the Situation in Colombia, the Office has determined that there is a reasonable basis to believe that the FARC, ELN and paramilitary armed groups have each committed crimes against humanity under article 7 of the Rome Statute, in the form of murder; forcible transfer of population; imprisonment or other severe deprivation of physical liberty; torture; rape and other forms of sexual violence, since 1 November 2002.

125. There is also a reasonable basis to believe that the FARC and ELN have committed war crimes under article 8 of the Statute in the form of murder; attacks against civilians; torture and cruel treatment and outrages upon personal dignity; taking of hostages; rape and other forms of sexual violence; and conscripting, enlisting and using children to participate actively in hostilities, since 1 November 2009. Because they are paramilitary armed groups which started demobilizing in 2006, they are not considered a party to the armed conflict for the period covered by the ICC's jurisdiction over war crimes.

126. State actors, in particular members of the Colombian army, have also allegedly deliberately killed thousands of civilians to bolster success rates in the context of the internal armed conflict and to obtain monetary profit from the State's funds. The available information indicates that these killings, also known as "*falsos positivos*" (false positives), were carried out by members of the armed forces, at times operating jointly with paramilitaries and civilians, as a part of an attack directed against civilians in different parts of Colombia, pursuant to a policy adopted at least at the level of certain brigades within the armed forces. Accordingly, the Office determined that there is a reasonable basis to believe that organs of the State have committed crimes against humanity in the form of murder and enforced disappearance. The Office has been and continues

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analysing information on whether such a policy may have extended to higher levels within the State apparatus.

127. Furthermore, the Office concluded that there is a reasonable basis to believe that members of the State's forces have committed war crimes in the form of murder and attacking civilians; torture and cruel treatment; outrages upon personal dignity; rape and other forms of sexual violence from 1 November 2009 to date.

128. During the reporting period, the Office has continued to receive and gather further information on a number of alleged crimes within the jurisdiction of the Court. The Office has also analysed whether three "new illegal armed groups"—the Urabeños, the Rastrojos and the Aguilas Negras – can be considered parties to the existing non-international armed conflict or alternatively, if there exists a separate non-international armed conflict either between any of these groups and the Government or between the groups exclusively.

129. Based on the information available, there is not a reasonable basis to believe the Rastrojos or the Aguilas Negras are sufficiently organised to constitute a party to an non-international armed conflict. There is a reasonable basis to believe the Urabeños group is sufficiently organized because, *inter alia*, its members are well-disciplined; there is a hierarchical structure; effective control is exercised over its members; it exercises control over territory; it has the capacity to recruit and acquire weapons; and it has a significant number of personnel. However, the available information about the intensity of violence between the Urabeños and any of the parties to the existing armed conflict (the Government, FARC and the ELN) indicates that such confrontations are not sufficiently intense for the Urabeños to qualify as a party to the conflict. Conversely, while the available information indicates that the level and intensity of violence between the Urabeños and Rastrojos may be sufficient to constitute a non-international armed conflict, as noted above, the Rastrojos do not appear to meet the criteria to be classified as an organized armed group. The Office will continue to monitor and gather information on the degree of organization of "new illegal armed groups" and the intensity of the violence and may review its conclusions in the light of new facts or evidence.

Admissibility Assessment

130. Since the publication of its November 2012 Interim Report, the Office has received a large amount of information concerning national proceedings for conduct which constitutes a crime within the jurisdiction of the Court. Over the reporting period, the Office received 354 judgments from the Government of Colombia related to members of the FARC and ELN armed groups, members of paramilitary armed groups, army officials and members of successor paramilitary armed groups (new illegal armed groups). The Office is analysing the relevance of these decisions for the preliminary examination,

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including whether they focus on those most responsible for the most serious crimes within the jurisdiction of the Court and, whether they are genuine.

Legal Framework for Peace

131. The Office has been monitoring developments related to the implementation of the Legal Framework for Peace (*Marco Legal para la Paz*, "LFP"), including those related to on-going peace talks in Havana. As explained in the Interim Report, it is likely that the implementation of the LFP will have an impact on the national proceedings relating to crimes under the Court's jurisdiction and the admissibility of cases before the ICC, and thus, is directly relevantto the preliminary examination. In this context, and pursuant to its positive approach to complementarity, the Office has continued to consult with the Government of Colombia in an effort to ensure that any eventual peace agreement is compatible with the Rome Statute.

132. The Office has continued its exchange of communications with the Government of Colombia on a range of issues relevant to the preliminary examination, including those related to the LFP's implementation and the peace talks. The Office has also communicated to the authorities its position on the compatibility with the Rome Statute on granting suspended sentences for those most responsible for the most serious crimes.

133. On 05 September 2013, the Constitutional Court published an official communiqué announcing its decision to reject a challenge to the constitutionality of the LFP. In addition to declaring the LFP to be constitutional, the Constitutional Court set forth nine parameters of interpretation that the Colombian Congress must observe when adopting LFP implementing legislation. One of the parameters included in the communiqué states that "[t]he mechanism of total suspension of the execution of a sentence cannot be applied to those convicted as most responsible for crimes against humanity, genocide and war crimes committed in a systematic manner." Subject to the review of the full text of the decision, the parameters outlined by the Constitutional Court appear to highlight its commitment to ensure the compatibility of national laws with Colombia's international obligations. The Office will continue to follow closely the drafting of statutory bills relating to the LFP, and their ultimate implementation.

Military Justice Reform

134. The Office has also continued to monitor and analyse national proceedings relating to false positive cases. In December 2012, the Colombian Congress passed a bill amending articles 116, 152 and 221 of the Colombian Constitution. The amendments, also known as the "Military Justice Reform" (*Reforma del Fuero Penal Militar*, "MJR") bestowed jurisdiction upon the military courts to investigate and prosecute active duty military and police personnel for crimes "related to acts of military service." The reform further delineated the

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jurisdiction of military and civilian courts by listing seven crimes that must be tried exclusively in civilian courts: torture, extrajudicial killings, forced displacement, sexual violence, crimes against humanity, genocide, and enforced disappearance. All other alleged violations of humanitarian law are to be tried in military courts. The MJR was further implemented through a statutory law approved by the Colombian Congress in June 2013. On 23 October 2013, however, the Constitutional Court declared the MJR unconstitutional on procedural grounds.

135. The law provided legal definitions and rules of interpretation relevant for the qualification of conduct, investigation and prosecution of alleged crimes attributed to members of the armed forces. Amongst the definitions, the Office notes that the definition of "direct participation in hostilities," which determines when civilians can be considered a "legitimate target", would broaden the interpretation given by the ICRC in its Interpretive Guidance on the Notion of Direct Participation in Hostilities under IHL and could therefore result in the exoneration of members of the Colombian army that are alleged to have committed war crimes under the Rome Statute.

136. The statutory law further required that allegations of crimes be treated in a specific and independent manner. In addition, it referred to the definition of crimes against humanity provided in article 7 of the Rome Statute without guidelines or criteria to distinguish crimes that could be part of a systematic and widespread attack against the population from isolated events. For cases where the same conduct can constitute both a war crime and a crime against humanity, such an approach could potentially inhibit an effective investigation of the context and circumstances in which these crimes were committed, links to other possible cases, and any potential involvement of high-ranking officers.

137. The Office will seek clarification from the Government of Colombia on these issues, particularly on the application of definitions and rules of interpretation relevant for the initial qualification of conduct, which will ultimately determine the jurisdiction (military or civilian) in which investigations and prosecutions are conducted.

138. The Office will therefore continue to monitor the implementation of the MJR in relation to persons and conduct that would form the focus of potential cases before the ICC. The Office is aware of concerns voiced by Colombian civil society, international NGOs and international organizations regarding the alleged lack of independence and impartiality of the Colombian military justice system and the consequences this could have for the investigation and prosecution of false positive cases. Under article 17 of the Statute, the Office's analysis of national proceedings is case specific, and there is no assumed preference for national proceedings to be conducted in civilian as opposed to military jurisdictions *per se*. The Office will evaluate whether specific national proceedings have been or are being carried out genuinely.

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139. The Attorney General's Unit of Analysis and Context (*Unidad Nacional de Analisis y Contexto*, "UNAC") has been analysing allegations of at least 1,360 false positive cases committed across Colombia with a view to establish criminal structures within the military and whether certain brigades or divisions had a policy to commit these alleged crimes. Pursuant to the prioritization criteria set forth by the Attorney General's Directive 00001 of October 2012 (see below), the working group has identified regions where false positives killings were of particular gravity with a view to establishing the truth and prosecuting those most responsible. The information available also indicates that investigations against several high-ranking officers for false positive killings were initiated during the reporting period.

140. The Office will continue to monitor the progress of these investigations, with a view to analysing whether they bring to light the context and circumstances of the crimes and whether they ultimately seek to ascertain the alleged responsibility of those at senior levels for the commission of the gravest crimes, either as perpetrators or in respect of their liability as commanders.

141. The Office also notes that the Attorney General, in coordination with the military justice system, is reviewing pending cases against military and police personnel to decide on the jurisdiction that will deal with the cases. In that regard, the Attorney General's Directive 00001 of May 2013 specifically directed that conduct known as false positives must remain within the jurisdiction of the ordinary courts, irrespective of the original legal qualification of the conduct. The analysis carried out by UNAC could assist in the identification of conduct that could potentially amount to crimes against humanity, in order that such cases remain in the jurisdiction of ordinary courts.

New Investigative Approach and Prioritization Strategy

142. In the Interim Report of November 2012, the Office identified gaps or shortfalls that indicated insufficient judicial activity in relation to the promotion and expansion of paramilitary groups, sexual crimes and the crime of forced displacement. In this context, the Office has noted with interest the new investigation policy and prioritization of cases set up by the Attorney General's Directive 00001 of October 2012. This Directive orders all units under the Attorney General's Office to prioritize investigations of crimes committed by large criminal organizations, considering their gravity, social impact and representativeness. Over the reporting period, the Office has gathered information about the implementation of the new investigation policy conducted by two units within the Attorney General's Office; the UNAC and the JPL Unit.

143. The UNAC directs its investigative efforts to crimes committed by large criminal structures, including paramilitary and the so-called guerrilla groups as well as civilians, public officials and state agents that promoted the consolidation and expansion of these criminal groups. At the time of writing,

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the Office had gathered information about the work of seven thematic working groups under this unit, two of which could ultimately contribute to shedding light on the commission of crimes that are of direct relevance to the preliminary examination, namely, forced displacement and sexual crimes.

144. In relation to sexual crimes, the Office notes that draft legislation on access to justice for victims of sexual violence in the context of the armed conflict is pending approval before Congress.[11] The draft bill would amend Colombia's Criminal Code to codify certain forms of conflict-related sexual violence, such as forced nudity, abortion and pregnancy, as specific criminal offences, and would facilitate access to justice by specifying that certain types of forensic evidence are not required to prove crimes of sexual violence. At the time of writing, the draft bill had been approved by the House of Representatives and was under debate in the Senate.

145. In parallel to the UNAC, the Attorney General's JPL Unit has implemented the new investigative approach established by Directive 00001 of October 2012 by prioritizing sixteen "macro-investigations" against demobilized armed groups participating in the JPL process.. On the basis of information collected during "free-version" hearings ("*versión libre*"), on 30 July 2013 the JPL Unit requested the JPL Chambers to attribute charges ("*imputación de cargos*") against thirteen paramilitary commanders and two mid-level FARC commanders considered to be amongst those "most responsible". Each leader was charged with several counts of sexual crimes, forced displacement, enforced disappearances and child recruitment committed against a total of over 30, 000 victims. By prosecuting the leaders of the main demobilized groups, the JPL Unit seeks to produce judgments that cover the context and circumstances in which demobilized armed groups committed serious and representative crimes. According to the Attorney General's Office, the crimes amount to crimes against humanity because they were committed systematically by each group as part of a policy to attack the civilian population. As of September 2013, no judgment for these cases had been issued yet.

OTP Activities

146. Over the reporting period, the Office has maintained consultations with the Government of Colombia on a variety of issues related to the preliminary examination. The Office conducted two missions to Bogotá, gathered additional information on a variety of issues related to the jurisdiction and admissibility assessment of the situation, analysed information submitted through article 15 communications and held numerous meetings with

[11] Proyecto de Ley 037/2012 (Cámara de Representantes) 244/2013 (Senado), "por el cual se modifican algunos artículos de las leyes 599 de 2000, 906 de 2004 y se adoptan medidas para garantizar el acceso a la justicia de las víctimas de violencia sexual, en especial la violencia sexual con ocasión al conflicto armado, y se dictan otras disposiciones".

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international organizations, international NGOs and Colombian civil society in Bogotá, The Hague, New York and Geneva.

147. The Office sent two missions to Bogotá in April and June 2013 respectively. Between 15 April and 23 April the OTP sent a mission to Bogotá to gather information on national proceedings taken to address the areas of focus identified in the November 2012 Interim Report on the Situation in Colombia. The OTP met with senior officials from all three branches of government, national civil society, international NGOs and international organizations. Further, the Office participated in a public event on international criminal law organised by the University El Rosario. The Government of Colombia facilitated the visit and provided its full support in organizing and implementing the mission.

148. From 19 until 21 June, the Office conducted a second mission to follow-up with the Colombian authorities on issues related to the admissibility assessment of false positives cases and the peace process, and to participate in an international conference about international humanitarian law and international criminal law, sponsored by the Ministry of Justice, at the University Javeriana.

149. With regard to the LFP's implementation, on 26 July 2013, the OTP sent a letter to the Colombian authorities, including the Constitutional Court, sharing the Office's views in relation to the compatibility of suspended sentences with the Rome Statute. On 07 August 2013, the Office sent a letter to the Constitutional Court, clarifying its Prosecutorial Policy to focus on those most responsible while supporting national investigations for lower-ranking perpetrators to ensure that offenders are brought to justice by some other means. This letter was sent after the intervention of various parties citing the Office's strategy as a prosecutorial model for national jurisdictions.

150. Lastly, on 24 September, Prosecutor Fatou Bensouda and the President of the Colombian Republic, Juan Manuel Santos met in New York and discussed the prospect of establishing peace in Colombia and the highest standards of justice.

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Conclusion and Next Steps

151. During the reporting period, the Colombian authorities took steps to prioritize investigations and prosecutions of those most responsible for ICC crimes, under both the JPL and ordinary systems. Under the JPL, charges against such persons were broadened to include conduct amounting to sexual violence and forced displacement within ICC jurisdiction, while investigations initiated by the Attorney General's Office against other alleged perpetrators appear to have expanded to include such conduct.

152. During the coming year, the Office will continue to analyse the progress of these national proceedings – as well as those relating to the other areas of focus identified in the Interim Report – and will continue to analyse their relevance and genuineness in order to reach determinations on admissibility. The Office will also continue to analyse the implementation of the LFP and the MJR in order to assess their impact on the conduct of national proceedings relating to crimes under ICC jurisdiction. The Office will continue to consult closely with the Colombian authorities with a view to ensuring that genuine national proceedings are carried out against those most responsible for the most serious crimes.

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GEORGIA

Procedural History

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

Preliminary Jurisdictional issues

154. 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

155. 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.

156. For 12 years there was no serious military confrontation, until skirmishes between South Ossetian forces and the Georgian army degenerated, on 7 August 2008, into an armed conflict, which was rendered international by Russia's involvement. A cease-fire agreement between Georgia and the Russian Federation, mediated by the then French President Nicolas Sarkozy, was reached on 12 August 2008 but alleged crimes continued to be committed thereafter.

Alleged Crimes

157. *Forcible displacement of Georgian population*: South Ossetian armed forces allegedly forced up to 30,000 ethnic Georgians to flee from villages within and outside South Ossetia by systematically destroying and pillaging their houses and other property. In some cases, ethnic Georgians were killed and/or subjected to abuses.

158. *Attack against peacekeepers*: The Georgian armed forces allegedly carried out attacks on the Joint Peacekeeping Force Headquarters (JPKF HQ) and the base of the Russian Peacekeeping Forces Battalion (RUPKFB) during the nights of 7 and 8 August 2008. According to the Russian authorities, 10 peacekeepers

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belonging to the Russian peacekeeping battalion were killed and 30 of them were wounded as a result of the alleged attack.

159. *Unlawful attacks directed against the civilian population and civilian objects*: Both Georgian and Russian armed forces allegedly launched indiscriminate and disproportionate attacks against civilian targets, and/or failed to take the required precautions to minimize civilian losses.

160. *Destruction of property*: Extensive destruction of civilian property allegedly resulted from heavy shelling and bombing of towns and villages during the active hostilities phase, and later as a result of acts of violence carried out by South Ossetian forces in ethnic Georgian villages in South Ossetia and to a lesser extent in the "buffer zone".

161. *Pillaging*: In the aftermath of the active hostilities, the ethnic Georgian villages in South Ossetia and in the "buffer zone" were allegedly systematically pillaged by South Ossetian armed forces.

162. *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 and other forms of ill-treatment.

Subject-Matter Jurisdiction

163. Following a legal analysis of the information on alleged crimes received and collected at this stage, the Office reached the conclusion that there is a reasonable basis to believe that, at a minimum, the following war crimes falling under the jurisdiction of the Court have been committed by South Ossetian forces: (i) torture under article 8(2)(a)(ii) and/or article 8(2)(c)((i); (ii) destruction of property under article 8(2)(a)(iv) and/or article 8(2)(e)(xii); (iii) pillaging under article 8(2)(b)(xvi) and/or article 8(2)(e)(v).

164. There is also a reasonable basis to believe that at minimum South Ossetian forces committed the crime against humanity of deportation or forcible transfer of population under article 7(1)(d).

165. Further evaluation of other alleged conduct by parties to the conflict, including the intentional directing of attacks against Russian peacekeepers, remains inconclusive. This assessment may be revisited in the light of new facts or evidence.

Admissibility Assessment

166. According to the information available at this stage, both Georgia and Russia are still conducting national investigations into the crimes allegedly committed during the armed conflict of August 2008.

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167. Following changes in the Government of Georgia as a result of parliamentary elections of October 2012 and the appointment of the new Chief Prosecutor, the Georgian authorities took the decision to pursue the investigation into the alleged crimes committed during the August 2008 conflict on the territory of Georgia.

168. On 10 May 2013, the Office of the Chief Prosecutor of Georgia informed the Office that "the alleged criminal actions committed during the hostilities of August 2008 and its aftermath are being investigated". On 15 May 2013, the Chief Prosecutor officially confirmed that the investigation would focus on allegations of war crimes, including "attacks against Russian peacekeepers by the Georgian troops, attacks against civilians by both the Georgian and Russian troops, destruction of civilian properties, forcible displacement of civilian population, torture and other ill-treatment, and pillage of ethnic Georgian villages".[12]

169. In order to fully review the evidence collected so far and continue to efficiently investigate these complex criminal cases, the Georgian Chief Prosecutor set up an eight-member investigative team responsible for coordinating and guiding the investigation on the ground. During a meeting with the investigative team on 25 September 2013, the Office was informed about the functions, procedures and investigative steps implemented so far, as well as the measures available to overcome the lack of access to the incident sites and the alleged lack of cooperation from Russia and South Ossetia.

170. With respect to the national investigation conducted by the Investigative Committee of the Russian Federation, the Office expects to receive updated information on the status of national proceedings or further clarification on the reported obstacles encountered by the Russian authorities in the course of their investigation, including the alleged lack of cooperation by the Georgian government and the diplomatic immunity enjoyed by foreign (i.e. Georgian) officials who might be subject to prosecutions.

OTP Activities

171. The Office has actively pursued dialogue with national authorities and other relevant stakeholders with the aim to assess and encourage genuine national proceedings conducted by Georgia and Russia in relation to alleged crimes committed in the context of the August 2008 armed conflict.

172. During the reporting period, the Office visited Georgia on two occasions as part of the on-going admissibility assessment of the situation in Georgia. The first visit took place on 25-28 March 2013 and its purpose was to seek an update on the status of national proceedings and further develop cooperation with

[12] Global Times, "Georgia to investigate war crime allegations", 15 May 2013.

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Georgian authorities. The Office met with the Chief Prosecutor of Georgia and government officials from respective ministries, including the Ministry of Foreign Affairs, Ministry of Justice, Ministry for Reintegration, and the Ministry for Internally Displaced Persons from the occupied Territories, Accommodation and Refugees. The Georgian authorities stressed their willingness to fulfil their obligations to investigate and prosecute those responsible for committing crimes within the jurisdiction of the Court, regardless of nationality or status.

173. In the course of the visit, the Office also took the opportunity to continue consultations with other relevant stakeholders, including Georgian civil society and foreign diplomats.

174. A follow-up visit was conducted on 22-26 September 2013. In particular, the Office met with members of the investigative team of the Office of the Chief Prosecutor of Georgia, and received information on the investigative steps taken to date, and updates on the progress made in the review of 150 volumes of investigative material collected in the past five years.

175. In accordance with its positive approach to complementarity, on 6-7 June 2013, the Office also accepted the invitation of the Georgian Chief Prosecutor to give a presentation to national investigators and prosecutors on crimes falling under the jurisdiction of the ICC.

176. In the process of verifying the seriousness of the information, the Office further interacted with relevant international partners on several occasions, including the Organisation for Security and Co-operation in Europe (OSCE), which resulted in defining and implementing effective modalities for mutual cooperation.

Conclusion and next steps

177. The Office will continue to actively engage with relevant stakeholders and request updated information on national proceedings in order to conduct a comprehensive and accurate assessment of the admissibility of potential cases identified at this stage of the analysis.

178. In particular, the Office will follow up closely on the Georgian authorities' renewed commitment to investigate and prosecute alleged crimes committed by all parties during the August 2008 conflict

179. Furthermore, the Office is planning a mission to Moscow to follow-up on the investigation into alleged crimes committed during the August 2008 conflict conducted by the authorities of the Russian Federation, including the Investigative Committee of the Russian Federation.

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GUINEA

Procedural History

180. The Office has received 20 communications under article 15 in relation to the situation in Guinea. The preliminary examination of the situation in Guinea was made public on 14 October 2009.

Preliminary Jurisdictional Issues

181. 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

182. 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. 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 transfer power upon the holding presidential and parliamentary elections. However, subsequent statements that appeared to suggest that Dadis Camara might run for president led to protests by opposition and civil society groups. On 28 September 2009, the Independence Day of Guinea, an opposition gathering at the national stadium in Conakry was violently suppressed by the security forces, leading to what became known as the "28 September massacre".

Alleged Crimes

183. The United Nations 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.

184. 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.

185. *Killings and Disappearances:* Over 150 persons were allegedly killed by State security forces and militia loyal to former President Moussa Dadis Camara in

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the national stadium in Conakry on 28 September. A number of persons also disappeared after their arrests inside or outside the stadium. Others were allegedly abducted from hospitals and never seen again.

186. *Rape and Sexual Violence:* Over 100 women and young girls were allegedly raped or suffered from other forms of sexual violence including mutilations, most allegedly taking place in the stadium. Several women were also allegedly abducted, detained and used as sexual slaves for a period of several days.

187. *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.

188. *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.

Subject-Matter Jurisdiction

189. The 28 September 2009 events in the Conakry stadium can be characterised as a widespread and systematic attack against the civilian population in furtherance of the CNDD's policy to prevent opponents from, and punish them for, challenging Dadis' intention to keep his group and himself in power.[13]

190. According to the information available, the Office has determined that there is a reasonable basis to believe that the following acts, constituting crimes against humanity, were committed in the national stadium in Conakry on 28 September 2009 and in the days immediately thereafter: 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 form of sexual violence under article 7(1)(g); persecution under article 7(1)(h); and enforced disappearance of persons under article 7(1)(i).

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

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Admissibility Assessment

191. A national investigation into the 28 September 2009 events has been on-going since 8 February 2010. According to the information available, the national authorities appear to be investigating the same persons and the same conduct that would form the basis of the potential case that the Office would seek to bring before the ICC. Accordingly, the Office has focused its admissibility assessment on whether the national authorities are unwilling or unable genuinely to carry out the proceedings.

192. During the reporting period, the panel of judges assigned to the case continued to take a number of investigative steps, such as interviewing victims (over 370 victims have been heard since the commencement of the investigation); seeking to locate alleged mass graves; and calling political leaders and military officers for interview, including, in June 2013, the Chief of Staff of the gendarmerie, General Balde, as well as the Head of Presidential Security, Claude Pivi. Over the reporting period, the panel of judges also indicted two additional persons, including Pivi, bringing the total number indicted to eight.

193. Several of the eight indictees were previously listed by the UN International Commission of Inquiry into the 28 September 2009 events among the alleged most responsible perpetrators whose role warranted further investigation, namely: Aboubakar Diakité, alias "Toumba", the former aide-de-camp of Moussa Dadis Camara; Lt. Col. Moussa Tiegeboro Camara, head of the national agency for the fight against drug-trafficking, organized crime and terrorism; Col Abdoulaye Chérif Diaby, former Health Minister at the time of the events, and Claude Pivi, Head of Presidential Security.

194. The national investigation appears to have been hampered, nonetheless, by several factors including the holding of weekly demonstrations in the streets of Conakry during the first half of the year; a tense political climate ahead of the parliamentary elections; security concerns relating to the profile of potential suspects; as well as administrative hurdles causing delays in the transmission of national and international requests for judicial assistance. The panel of judges has, however, benefitted from advice and logistical support from the United Nations.

195. Despite the fact that two of those indicted by the panel have retained their posts in government, an issue that continues to be a source of deep frustration for the victims, the Office has no basis at this stage to consider the proceedings as being inconsistent with the intent to bring the persons concerned to justice. Their indictment constitutes a serious indication that the cases should and will be brought to court. The Office expects that a trial will take place without delay.

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OTP Activities

196. Since the 28 September 2009 events, the Office has paid eight successive visits to Conakry to follow up on the investigation conducted by the Guinean authorities.

197. During the reporting period, the Office sent two missions to Guinea in January and June 2013. The purpose of these missions was to follow-up on the investigative steps undertaken by the national authorities; to assess whether the proceedings are vitiated by any indication of unwillingness or inability to carry out the proceedings genuinely; and to assess the prospects for a domestic trial in the near future. During both missions, the Office had extensive consultations with the panel of investigative judges in charge of the case, the Guinean judicial and political authorities, victims' representatives, as well as international actors.

198. The Office has liaised with a number of UN bodies, including the Peacebuilding Commission, the Office of the High Commissioner for Human Rights, the Office of the UN Special Representative on Sexual Violence in Conflict and the Team of Experts on the Rule of Law and Sexual Violence in Conflict. A senior United Nations consultant has subsequently been assigned to assist the Guinean panel of judges. The Office has also maintained close contact with international NGOs monitoring or assisting the victims in the proceeding, including the *Féderation internationale des droits de l'homme* (FIDH).

199. On 27 September 2013, ICC Prosecutor Fatou Bensouda issued a statement encouraging the Guinean authorities to continue their efforts and to ensure that justice is done for the victims as swiftly as possible. On the eve of long awaited parliamentary election, the Prosecutor also recalled that anyone seeking to incite violence, to order, request, encourage or to contribute in any other way to the commission of crimes falling within the scope of the Rome Statute, is liable to be prosecuted before the Court.

Conclusion and Next Steps

200. Over the reporting period, the national investigation into the 28 September 2009 events has continued to generate significant results. This investigation has yet to be completed, however, and several critical steps remain pending with a view to demonstrating the genuineness of national efforts to hold perpetrators accountable. In accordance with its policy to encourage genuine national proceedings, the Office will continue to actively follow-up on the proceedings and to mobilize relevant stakeholders, including States Parties and international organizations, to support the efforts of the Guinean authorities to ensure that justice is served. Should such efforts fail, the Office may revisit its findings. The situation remains under preliminary examination.

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NIGERIA

Procedural History

201. The Office has received 67 communications pursuant to article 15 in relation to the situation in Nigeria. The preliminary examination of the situation in Nigeria was made public on 18 November 2010.

Preliminary Jurisdictional Issues

202. 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

203. During the course of its preliminary examination, the Office has analysed information relating to a wide and disparate series of allegations against different groups and forces at different times throughout the various regions of the country. This includes inter-communal, political and sectarian violence in central and northern parts of Nigeria; violence among ethnically-based gangs and militias and/or between such groups and the national armed forces in the Niger Delta; as well as alleged crimes arising from the activities of Boko Haram, a Salafi-jihadi Muslim group that operates mainly in north-eastern Nigeria, and the counter-insurgency operations by the Nigerian security forces against Boko Haram.

204. Central and northern Nigeria have been affected by large upswings of violence since at least the return to democratic rule in 1999, reportedly costing the lives of thousands of civilians. The main causes of the violence appear to include a struggle for political power and access to resources, particularly between perceived indigenous groups and "settlers".

205. In the oil-rich Niger Delta, the struggle for control and impact of the oil production in the region, as well as access to resources, have been among the primary root causes of the violence. One of the most prominent armed groups in the region is the Movement for the Emancipation of the Niger Delta (MEND), whose activities reportedly include the kidnapping of both foreign and Nigerian oil workers and the attacking of oil infrastructure in the region.

206. Boko Haram is a Salafi-jihadi Muslim group that operates mainly in north-eastern Nigeria, but it has also launched attacks in other parts of the country

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including Abuja, Plateau and Adamawa States.[14] Since 2010, Boko Haram has shown signs of transitioning into a globalized Salafi-jihadi group and has attracted international attention in particular by carrying out suicide attacks. The group has allegedly attacked religious clerics, Christians, political leaders, Muslims opposing the group, members of the police and security forces, "westerners", journalists, as well as UN personnel. The group has also been accused of committing several large-scale bombing attacks against civilian objects, including deliberate attacks against Christian churches and primary schools. More recent Nigerian security operations against the group and disputes within its leadership may have contributed to the reported creation of splinter groups.

207. In June 2011, President Jonathan sent a Joint Task Force (JTF) comprised of military, police, immigration and intelligence personnel to address the security threat posed by Boko Haram. In December 2011, the President declared a state of emergency in selected local government areas in Borno, Plateau, Yobe and Niger states. In May 2013, the President declared a second state of emergency, this time for the three States of Borno, Yobe and Adamawa. This last declaration led to a surge of security forces in these states and the deployment of special forces. Since their first deployment, security forces are alleged to have committed crimes, including extrajudicial killings, torture and other forms of ill treatment as well as pillage and destruction of property.

Subject-Matter Jurisdiction

208. In its article 5 report on the situation in Nigeria, published on 5 August 2013 and which was based on information gathered as of December 2012,[15] the Office concluded that there does not appear to be a reasonable basis to believe that the alleged crimes committed in the central and northern States in connection with the inter-communal violence constituted crimes against humanity. The Office also concluded that there does not appear to be a reasonable basis to believe that alleged crimes committed in the Delta Region constituted war crimes. Both conclusions may be revisited in the light of new facts or evidence.

209. With respect to alleged crimes committed by Boko Haram the article 5 report concluded that there is a reasonable basis to believe that, since July 2009, Boko Haram has committed the crimes of (i) murder constituting a crime against humanity under article 7(1)(a) of the Statute, and (ii) persecution constituting a crime against humanity under article 7(1)(h) of the Statute.

[14] The group is known officially as *Jama'at Ahl as-Sunna lid-Da'wa wal-Jihad*, Arabic for "the Sunni group for Islamic preaching and jihad."
[15] Office of the Prosecutor, Situation in Nigeria – Article 5 Report, 5 August 2013.

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210. In particular, the report noted that the information available provides a reasonable basis to believe that since July 2009 Boko Haram has launched a widespread and systematic attack that has resulted in the killing of more than 1,200 Christian and Muslim civilians in different locations throughout Nigeria. The targeting of an identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or on any other grounds is a constitutive element of the crime of persecution under article 7(1). The Office's report observed that the consistent pattern of such incidents indicates that the group possesses the means to carry out a widespread and/or systematic attack, and displays internal coordination and organizational control required to that end. In particular, the information available indicates that the attacks have been committed pursuant to the policy defined at the leadership level of Boko Haram, which aims at imposing an exclusive Islamic system of government in Nigeria.

211. Accordingly, the Prosecutor decided to move the situation in Nigeria to phase 3 of the preliminary examination with a view to assessing whether the Nigerian authorities are conducting genuine proceedings in relation to the crimes allegedly committed by Boko Haram.

212. Since the publication of the article 5 report, the Office has continued to document information on alleged crimes committed by Boko Haram. This includes the 17 September 2013 attack on the town of Benisheik and surrounding areas in Borno State during which up to 161 persons, in the vast majority civilians, were reportedly killed and over 150 civilian residences destroyed. Alleged Boko Haram leader Abubakar Shekau claimed responsibility for the attack in a video message released on 25 September 2013. On 29 September 2013, Boko Haram reportedly attacked the College of Agriculture in Gujba, Yobe State, killing up to 50 students, in apparent execution of Boko Haram's declared policy of specifically targeting students, teachers and education facilities that do not follow its interpretation of Islam.

213. Since the increase of security operations after the declaration of a state of emergency in Borno, Yobe and Adamawa States on 14 May 2013, reports of crimes allegedly committed by Nigerian security forces have also increased. Nonetheless, the information available at this stage does not provide a reasonable basis to believe that killings and other abuses attributed to the Nigerian security forces in their response to Boko Haram constitute crimes against humanity. In particular, the information available is insufficient to establish that the alleged acts were committed as part of an attack against the civilian population and pursuant to a State policy to launch such an attack. The Office may revisit this assessment in light of new facts or evidence.

214. During the reporting period, the preliminary examination has focused in particular on the question whether the contextual elements for war crimes have been met, including the existence of a non-international armed conflict. In this context, the Office has examined the level of organisation of Boko Haram as an

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armed group and the intensity of the armed confrontations between Boko Haram and the Nigerian security forces (JTF, police forces and military forces not deployed under the JTF).

215. In terms of organisation, the Office has considered the hierarchical structure of Boko Haram; its command rules and ability to impose discipline among its members; the weapons used by the group; its ability to plan and carry out coordinated attacks; and the number of Boko Haram forces under command. The Office has concluded that Boko Haram fulfils a sufficient number of relevant criteria to be considered an organised armed group capable of planning and carrying out military activities.

216. With respect to the level of intensity of the armed confrontations between Boko Haram and Nigerian security forces, the Office has analysed over 200 incidents occurring between July 2009 and May 2013. In particular, the Office has assessed the extent and sustained nature of such incidents, as well as their seriousness; the frequency and intensity of armed confrontations; their geographical and temporal spread; the number and composition of personnel involved on both sides; the mobilization and the distribution of weapons; and the extent to which the situation has attracted the attention of the UN Security Council.

217. The Office observes that there appears to be some correlation between the deployment of the Nigerian Government Joint Task Force in June 2011 and an increase in frequency and intensity of the incidents between Boko Haram and security forces. Two declarations of a state of emergency in the north-eastern parts of Nigeria in December 2011 and May 2013 were followed by a surge of troops, increased security operations and renewed armed confrontations. The Offices notes that the latter declaration defined Boko Haram's activities as an "insurgency".[16]

218. In view of the above, the required level of intensity and the level of organization of parties to the conflict necessary for the violence to be qualified as an armed conflict of non-international character appear to have been met. The Office has therefore determined that since at least May 2013 allegations of crimes occurring in the context of the armed violence between Boko Haram and Nigerian security forces should be considered within the scope of article 8(2)(c) and (e) of the Statute.

219. For example, one incident requiring further examination is the military operation of 16 and 17 April 2013 in the town of Baga, Borno State. Based on local sources and satellite images, Human Rights Watch reported that up to 183 persons were killed in the incident, including a large number of civilians, and

[16] President Jonathan's address on the Declaration of a State of Emergency in Borno, Yobe and Adamawa states, 14 May 2013, http://www.statehouse.gov.ng/index.php/news/speeches/83-president-jonathan-s-address-on-the-declaration-of-a-state-of-emergency-in-borno-yobe-and-adamawa-states.

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that 2,275 buildings destroyed. The Office has received information from the Nigerian Government on the incident providing a lower number of civilian casualties and destroyed buildings. Similarly, the 29 September 2013 attack reportedly launched by Boko Haram against the College of Agriculture in Gujba, Yobe State will also be analysed in the light of article 8(2)(c) and (e).

Admissibility Assessment

220. The information available indicates that the Nigerian authorities have been and currently are conducting proceedings against members of Boko Haram for conduct which could constitute crimes under the Rome Statute. In response to the Office's requests for information, the Nigerian authorities have also provided a significant body of information on national proceedings which the Office is analysing as part of its admissibility assessment.

221. On 20 February 2013 new legislation was passed in the parliament, including the Terrorism (Prevention) (Amendment) 2013 and new directives issued by the judicial organs to facilitate the prosecution of Boko Haram suspects and to clarify competency issues between the state and federal levels, since proceedings against Boko Haram members may take place both before the Federal High Court and before the State High Courts and Magistrate Courts. The Office requested the Government in October 2013 to provide additional information in this regard, in view of the apparent discrepancy between the high number of Boko Haram suspects detained and the number of national proceedings.

222. On 24 April 2013, President Jonathan inaugurated the Committee on Dialogue and Peaceful Resolution of Security Challenges in the North which is mandated to develop a framework for the granting of amnesties for Boko Haram members; the setting up of a framework for disarmament; the development of a comprehensive victims' support program; and the development of mechanisms to address the underlying causes of insurgencies that will help to prevent future occurrences. In this regard, the Government has assured the Office that the committee is fully aware of Nigeria's international legal obligations, including under the Rome Statute.

OTP Activities

223. During the reporting period, the Office has been in close contact with Nigerian authorities, maintained and developed contacts with senders of article 15 communications, Nigerian NGOs as well as international NGOs.

224. Between 29 July and 1 August 2013, the Office conducted a mission to Abuja to undertake consultations with Nigerian officials concerning the investigations and prosecutions of alleged Boko Haram crimes. The Office also sought information on the security operations against Boko Haram as part of its

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analysis regarding the possible existence of a non-international armed conflict. The Office also sought to gain clarity, *inter alia*, on competency issues between State and Federal courts for crimes that might fall within the jurisdiction of the Court and discussed information gaps regarding its ongoing admissibility assessment.

225. In particular, the Office was able to meet with representatives of the Federal High Court of Nigeria, the Director of Public Prosecutions of the Federation, the Office of the National Security Adviser, the Nigerian Human Rights Commission, senior officers of the Police and the State Security Services, among other relevant officials.

226. The Government subsequently provided the Office with a range of additional documents, potentially relevant for its ongoing jurisdictional and admissibility assessment. The Office continues its dialogue with the Nigerian Government regarding the relevant information needed to perform its admissibility assessment.

227. On 5 August 2013, the Office published its article 5 Report on the situation in Nigeria based on information gathered by the Office as of December 2012.

Conclusion and next steps

228. The Office has received and analysed information submitted by the Nigerian authorities relevant to the admissibility assessment of alleged crimes committed by Boko Haram. It has identified gaps of information and requested additional information to substantiate its assessment whether the national authorities are conducting genuine proceedings in relation to those most responsible for such crimes, and the gravity of such crimes. A determination on admissibility remains pending.

229. At the same time, the Office will continue its jurisdictional assessment with respect to alleged crimes committed by Boko Haram and by the Nigerian security forces in the light of the Office's determination as to the existence of a non-international armed conflict.

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D. COMPLETED PRELIMINARY EXAMINATIONS

MALI

230. On 16 January 2013, the Prosecutor formally opened an investigation into alleged crimes committed on the territory of Mali since January 2012. This decision was the result of the preliminary examination of the Situation in Mali that the Office had been conducting since July 2012, following the referral of the "situation in Mali since January 2012" by the Malian Government.

231. In the course of the preliminary examination, the Office determined that there was a reasonable basis to believe that war crimes within the jurisdiction of the Court had been committed in the context of the Situation in Mali since January 2012, namely: (1) murder constituting a war crime under article 8(2)(c)(i); (2) mutilation, cruel treatment and torture constituting war crimes under article 8(2)(c)(i) (3); the passing of sentences and the carrying out of executions without due process constituting war crimes under article 8(2)(c)(iv); (4) intentionally directing attacks against protected objects constituting war crimes under article 8(2)(e)(iv); (5) pillaging constituting a war crime under article 8(2)(e)(v); and (6) rape constituting a war crime under article 8(2)(e)(vi). This assessment was preliminary in nature for the purpose of satisfying the threshold determination under article 53(1) and is therefore not binding for the purpose of the investigation or any future selection of charges.[17]

232. Since no national proceedings were pending in Mali or any other State against those most responsible for the most serious crimes committed in Mali, the Office also determined that potential cases, likely to arise from an investigation into the situation, would be admissible. Such cases, moreover, appear to be grave enough to warrant further action by the Court.

233. Lastly, based on its assessment of the situation, including through its missions to Mali in August and October 2012, the Office identified no substantial reasons to believe that the opening of an investigation would not serve the interests of justice. The preliminary examination was terminated on 16 January 2013 when the Prosecutor decided to open an investigation into the Situation in Mali since January 2012.[18]

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[17] *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. 50.

[18] ICC Office of the Prosecutor, Situation in Mali, Article 53(1) Report, 16 January 2013.

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PALESTINE

234. During the reporting period, the Office has received a number of inquiries as to the consequences of the United Nations General Assembly (UNGA) Resolution 67/19, and whether the Office has opened or intends to open a preliminary examination as a result. In the interests of promoting predictability and transparency in relation to its work, the Office offers the following clarifications.

235. On 3 April 2012, the Office issued a decision to close the preliminary examination of the situation in Palestine. The preliminary examination had been initiated following the lodging, on 22 January 2009, by Ali Khashan, acting as Minister of Justice of the Government of Palestine, of a declaration pursuant to article 12(3) of the Rome Statute accepting the International Criminal Court's jurisdiction for "acts committed on the territory of Palestine since 1 July 2002."

236. In its decision, the OTP stated that "it is for the relevant bodies at the United Nations or the Assembly of States Parties to make the legal determination whether Palestine qualifies as a State for the purpose of acceding to the Rome Statute and thereby enabling the exercise of jurisdiction by the Court under article 12(1)." The Office added that "the current status granted to Palestine by the United Nations General Assembly is that of 'observer,' not as a 'Non-member State.' The Prosecutor has therefore determined that there was no basis on which to pursue the preliminary examination further." The OTP concluded by stating that "the Office could in the future consider allegations of crimes committed in Palestine, should competent organs of the United Nations or eventually the Assembly of States Parties resolve the legal issue relevant to an assessment of article 12."[19] The Office's determination, thus, was that the 2009 declaration was not validly lodged.

237. On 29 November 2012, the UNGA adopted Resolution 67/19, by which it decided "to accord to Palestine non-member observer State status in the United Nations, without prejudice to the acquired rights, privileges and role of the Palestine Liberation Organization in the United Nations as the representative of the Palestinian people, in accordance with the relevant resolutions and practice."[20] The Office has subsequently examined the implications of the UNGA Resolution.

238. It should be noted firstly that the UNGA Resolution does not cure the legal invalidity of the 2009 declaration. Second, the Office's consideration of jurisdiction does not involve any determination on Palestinian statehood *per se*. The test consistently applied by the Office is whether Palestine has the ability to accede to the Rome Statute thereby providing jurisdiction pursuant to article

[19] "Situation in Palestine," ICC-OTP, 3 April 2012.
[20] UN General Assembly Resolution 67/19, "Status of Palestine in the United Nations," 4 December 2012, U.N. Doc. A/RES/67/19.

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12(1)-(2) or, in the alternative, lodge a declaration accepting the jurisdiction of the Court pursuant article 12(3). As explained in the Office's decision of 3 April 2012, in accordance with article 125, the Rome Statute is open to accession by "all States", and any State seeking to become a Party to the Statute must deposit an instrument of accession with the Secretary-General of the United Nations.[21] Since it is the practice of the Secretary-General to follow or seek the General Assembly's directives on whether an applicant constitutes a "State" for the purpose of treaty accession, the Office considers that Palestine's status at the UNGA is of direct relevance to the issue of the Court's jurisdiction. Nonetheless, at this stage, the Office has no legal basis to open a new preliminary examination.

[21] This position is set out in the understandings adopted by the General Assembly at its 2202nd plenary meeting on 14 December 1973; see *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, ST/LEG/7/Rev. 1, paras 81-83; http://untreaty.un.org/ola-internet/Assistance/Summary.htm

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