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The Office of the Prosecutor

# Situation in Colombia

## Benchmarking Consultation

15 June 2021



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## I. Introduction

1. This report explains why the Situation in Colombia remains under preliminary examination and what remains to be done before a final determination on the situation is reached: either to open investigations, or to conclude the preliminary examination subject to its re-opening upon a change in circumstances. In particular, this report examines the role that the Office of the Prosecutor (“Office” or “OTP”) of the International Criminal Court (“ICC” or the “Court”) should play in a preliminary examination that faces a long-term, multi-layered domestic accountability processes and proposes the development of a benchmarking framework moving forward.
2. The present report is not the benchmarking framework itself, but an invitation to consult on how such a framework should look like. In relation to the preliminary examination, the report suggests benchmarking could focus on three key areas: the national legislative framework, domestic proceedings, and the enforcement of sentences. This is because of the impact of all three areas on cases over which the ICC could potentially exercise jurisdiction. Such a focus could provide the means of informing a decision in the context of the Situation in Colombia on whether to move to open an investigation or to close the preliminary examination. To set the context for this process, the document explains briefly how the preliminary examination has unfolded, notes key milestones in the process, and draws potential lessons from the Office’s experience.
3. The Situation in Colombia is the longest running preliminary examination before the ICC. The preliminary examination was initiated in June 2004. In November 2012, at the start of the second ICC Prosecutor’s term, the Office issued a detailed Interim Report setting out its findings on alleged crimes committed by members of the Colombian armed forces, paramilitary groups (sometimes referred to collectively as the *Autodefensas Unidas de Colombia* or “AUC”), the *Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo* (“FARC-EP”), and the *Ejército de Liberación Nacional* (“ELN”).<sup>1</sup> The Interim

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<sup>1</sup> ICC-OTP, [Situation in Colombia: Interim Report](#), November 2012, setting out the Office’s determination that, on the basis of the information available at the time, there was a reasonable basis to believe that members of the FARC- EP, ELN, paramilitary groups and State actors had, since 1 November 2002, committed underlying acts constituting crimes against humanity of murder under article 7(1)(a); forcible transfer of population under article 7(1)(d); imprisonment or other severe deprivation of physical liberty under article 7(1)(e); torture under article 7(1)(f); and rape and other forms of sexual violence under article 7(1)(g) of the Statute; and a reasonable basis to believe that members of the FARC- EP, ELN and State actors had, since 1 November 2009, committed underlying acts constituting the war crimes of murder under article 8(2)(c)(i); attacks against civilians under article 8(2)(e)(i); torture and cruel treatment under article 8(2)(c)(i); outrages upon personal dignity under article 8(2)(c)(ii); taking of hostages under article 8(2)(c)(iii); rape and other

Report observed that the Colombian authorities had carried out and were conducting a large number of proceedings relevant to the preliminary examination against different actors in the conflict for conduct that constituted crimes within the jurisdiction of the Court, including against persons who appeared most responsible. Nonetheless, the Office concluded also that there remained a number of gaps or shortfalls which indicated insufficient or incomplete activity in relation to certain categories of persons and certain categories of crimes. This included, *inter alia*, domestic proceedings relating to the promotion and expansion of paramilitary groups; proceedings relating to forced displacement; proceedings relating to sexual crimes; and, so called 'false positive' cases.<sup>2</sup>

4. In 2012, the Office faced a crossroad. It could either proceed to finalise its admissibility assessment on the basis of the facts as they existed at that time, based on the identified areas of insufficient or incomplete activity; or the Office could keep its admissibility assessment under review, given the ongoing nature of domestic proceedings and the prospects for promoting domestic efforts to prioritise the investigations and prosecutions of relevant and genuine cases concerning the categories of conduct identified by the Office.
5. As noted earlier, the accountability landscape was complex – it neither represented a straightforward assessment of total State inactivity, nor a clear indication of a lack of genuineness in the proceedings undertaken. The competent domestic authorities, grappling with an ongoing armed conflict, and struggling to design an adequate transitional justice response for the multitude of actors who had been involved in the decades-long civil war, appeared to be engaged on multiple fronts, with varying levels of success, in efforts to provide victims with genuine redress. However, the progress made was uneven, with major shortfalls in relation to certain crimes and/or certain levels of responsibility.
6. Thus, while the Office could have proceeded to finalise its admissibility assessment on the basis of the facts as they existed in November 2012, it assessed, in consultation with domestic stakeholders, that the Court's effort to foster accountability for such crimes could best be carried out by channelling

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forms of sexual violence under article 8(2)(e)(vi); and conscripting, enlisting and using children to participate actively in hostilities under article 8(2)(e)(vii) of the Statute. For updates see annual ICC-OTP [Report on Preliminary Examination Activities](#).

<sup>2</sup> ICC-OTP, [Situation in Colombia: Interim Report](#), November 2012. For updates see annual ICC-OTP [Report on Preliminary Examination Activities](#).

the existing will and ability of domestic actors to prioritising the investigation and prosecution of the types of patterns and leadership cases that the Office was considering investigating and prosecuting.

7. In this context, the Office also bore in mind the degree of independence from external interference that the Colombian legal system had established, including measures adopted to foster accountability for conduct constituting Rome Statute crimes, as well as the degree of commitment provided by the Government to ongoing accountability processes, which were being undertaken amidst a highly polarised socio-political context. The Office's assessment at the time was that these steps, while subject to internal challenges and contestation, had not been proven to be disingenuous. The Office also bore in mind that, in the absence of indicators suggesting a lack of genuineness, the setting up of transitional justice mechanisms took time, involving the passing of legislation, constitutional amendments, the testing of laws before the Constitutional Court, and other ancillary processes, as well as a wider national discussion on issues of justice and peace.
8. Accordingly, the Office sought to support such efforts. It did this by undertaking periodic in-country missions, receiving technical visits at the seat of the Court, participating in trainings and seminars, exchanging best practices and lessons learned and identifying to domestic counterparts its expectations in terms of prioritisation. The Office also clarified its positions on a number of domestic legal issues that appeared relevant to its admissibility assessment, which it articulated by means of bilateral meetings and written correspondence with the authorities, public reports and speeches, as well as by responding to an invitation from the Colombian Constitutional Court to submit an *amicus curiae* brief.
9. Such efforts to prioritise domestic accountability were not without challenges, both for the Colombian national system and for the Office. Means had to be devised to allow for operational interaction and dialogue that paid adequate tribute to the twin principles of partnership and vigilance that must guide all of the Office's interactions with a State with respect to complementarity. At various stages, the Office was both aware of the potential for galvanising domestic will and capacity, as well as risk of failure and being misdirected. At the lowest point in this relationship, it appeared at times that the bare minimum was being undertaken at the national level in the effort to keep the ICC 'at bay'. As part of its vigilance function, on a number of occasions the Office identified the need to engage with the Colombian authorities, both in

confidential bilateral interactions as well as sometimes in public statements, to provide frank statements on its admissibility assessment in relation to certain categories of conduct. This included the need to caution against the consequences of disruptions in the proceedings, of ongoing concerns with respect to prioritisation and inactivity, or of developments that might demonstrate any lack of genuineness.

10. The Office's experience in Colombia has proven to be highly context-specific and while the Office has learned a number of important lessons, these may not be always readily transferable to other situations. On the one hand, the steps that the Office has taken to foster domestic accountability are not unique to Colombia – in many situations, the Office has undertaken similar efforts to prioritise relevant and genuine domestic proceedings. Nonetheless, the accountability landscape in Colombia has also presented certain distinguishing features, including the multiplicity of actors that have had a bearing on accountability, and which have often displayed varying degrees of willingness and/or ability. This includes the Executive, Congress, the Armed Forces, the Constitutional Court, the Attorney General's Office ("AGO"), the Supreme Court of Justice, the Justice and Peace Law ("JPL") tribunals, ordinary courts, the military justice system, the Inspector's General Office, and more recently the Special Jurisdiction for Peace ("SJP"). To this has been coupled the active role of victims and their legal representatives as well as a vibrant civil society. This diversity of actors has meant that no single actor could claim a monopoly on the national discourse in Colombia, or on accountability strategies. Instead, the situation has witnessed a dynamic interplay of checks and balances, which has sometimes advanced the accountability discourse, and sometimes inhibited it.
11. One of the notable results of this has been that when the Office articulated a view on a particular matter affecting its admissibility assessment in Colombia, this was often incorporated by one or other stakeholder into the national accountability discourse, and either championed or scrutinised as a vital domestic issue. This has happened not because of any particular acuity on the part of the Office, but due to the level of receptivity and engagement by domestic constituents with the ICC in Colombia. This experience has not only given expression to the view that the ICC should be seen as an extension of the domestic legal order, but has also reflected the ethos that complementarity, to be meaningful and effective, should be seen as requiring the active engagement of two halves: the ICC and the national system.

12. The sections below do not seek to rehearse the information contained in the Office's prior reports on admissibility, which should be consulted to provide further context to the discussion herein.<sup>3</sup> Nonetheless, it should be emphasised that the Office's ongoing admissibility assessment has not been conducted in the abstract: there are, and remain, *today*, potential cases for which the Office's admissibility assessment remains pending, and which could in principle be the focus of ICC investigations if judicial authorisation was sought. However, the Office also remains convinced that, absent genuineness considerations, the best recourse for accountability in any situation is to prioritise the domestic accountability processes, as far as possible. As is well known, this aligns with the preamble of the ICC Statute to ensure that the Court's intervention in any situation complements (rather than substitutes) the primary responsibility of States to combat impunity for such crimes, and to avoid overburdening the Court's finite resources. But the partnership inherent in the concept of complementarity must also be matched by vigilance. Accordingly, it has proven critical throughout the preliminary examination for the Office to undertake the necessary diligence in assessing whether concrete and progressive national investigations and prosecutorial steps are actually being undertaken and whether these are genuine.
13. Over the course of the preliminary examination, the Office has conducted numerous missions, meetings, exchanges and roundtable discussions with the Colombian authorities, members of the judiciary, as well as with members of civil society, international organisations and academia. The Office has received multiple updates from the judicial authorities on national proceedings addressing ICC crimes. The Office has participated in consultations on a range of issues, including those relating to legislative and other developments relevant to the preliminary examination. The Office has also encouraged and engaged in public discourse on the principle of complementarity in Colombia and has conveyed its views and concerns with respect to aspects of the domestic legislative framework that could impact domestic investigation and prosecution of conduct constituting Rome Statute crimes.
14. In this context, to set the context for possible benchmarks and indicators moving forward, it may be helpful to also recall the positions previously articulated by the Office on legislative and other procedural developments

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<sup>3</sup> See ICC-OTP, [Situation in Colombia: Interim Report](#), November 2012; annual ICC-OTP [Report on Preliminary Examination Activities](#).

during the course of the preliminary examination. Although the Office's terminology may have been different, in the light of the framework being discussed here, these can be thought of as examples of past benchmarks articulated by the Office in response to specific developments that appeared to have impact on the ability and/or willingness of the authorities to bring persons to justice for conduct constituting Rome Statute crimes.

15. These views and concerns, as expressed by the Office, are contained in its 2012 Interim Report, the annual reports on preliminary examination activities, bilateral correspondence with the authorities, public statements, presentations in academic conferences, media interviews, and in an *amicus curiae* brief submitted upon invitation to the Constitutional Court of Colombia. The topics on which the Office has expressed its views on, in this regard, have focussed on initiatives to adopt measures that might significantly hamper the genuineness of relevant proceedings; initiatives resulting in major obstructions to the mandate and/or proper functioning of jurisdictions dealing with crimes within the areas of focus of the preliminary examination; and the suspension or revision of the judicial scheme set forth in the peace agreement in a manner that could delay or obstruct the conduct of genuine criminal proceedings.
16. For example, the Office communicated its views on the compatibility with the Rome Statute of any potential decision to grant a total suspension of sentences against leaders of the former FARC-EP convicted *in absentia* for conduct amounting to ICC crimes by the ordinary justice system.<sup>4</sup> On the topic of prioritisation, the Office expressed its concerns on proposals from domestic authorities to adopt the Office's own selection criteria, which were based on the ICC's highly limited mandate, and stated that this should not be interpreted in a manner that might restrict the obligation of States under domestic and international law more generally. The Office has also expressed its views on several occasions on issues related to sentences, including the manner in which they are executed, to the extent this may reflect on the genuineness of domestic efforts to bring persons concerned to justice.<sup>5</sup> On

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<sup>4</sup> ICC-OTP, [Report on Preliminary Examination Activities \(2013\)](#), para. 149. In the 2012 Interim Report, the Office concluded that eight former leaders of the FARC-EP had been convicted *in absentia* under the ordinary jurisdiction for conduct amounting to ICC crimes. The Office stated that subject to the appropriate execution of sentences of those convicted *in absentia*, the Office had no reason at that stage to doubt the genuineness of such proceedings. See ICC-OTP, [Situation in Colombia: Interim Report](#), November 2012, paras. 160 and 161.

<sup>5</sup> See e.g. ICC-OTP, [Transitional Justice in Colombia and the Role of the International Criminal Court](#), Remarks delivered by the Deputy Prosecutor, Mr. James Stewart, 13 May 2015, pp. 10-13. See also, ICC-OTP, [Escrito de Amicus Curiae de la Fiscal de la Corte Penal Internacional Sobre la Jurisdicción Especial Para La Paz, Ante la Corte Constitucional de la República de Colombia](#), 18 October 2017, RPZ-0000001 y



command responsibility, the Office made submissions on the definition of command responsibility applicable to members of the armed forces, as included in the peace agreement and implementing legislation, to highlight five potential aspects of the domestic law definition that had the potential to run counter to international customary law and the Rome Statute.<sup>6</sup> On modes of liability, the Office also submitted that the lack of clarity with respect to proceedings before the SJP on the notion of “active or determinative” participation might result in a waiver of criminal prosecution for individuals responsible for serious contributions to grave crimes, even if indirectly or by culpable omission.<sup>7</sup> The Office has also several times expressed its view on the compatibility of amnesties, pardons and other measures with similar effects with the Rome Statute.<sup>8</sup> With respect to the armed forces, the Office expressed its concerns with regard to a proposal to create special chambers for the military forces within the existing structure of the SJP, which would have included a separate process for selecting magistrates, the removal for the requirement of confessions or recognition of responsibility for granting SJP benefits, and would have allowed for the possibility of release after a sixth of the sentence had been served.<sup>9</sup> Relatedly, the Office set out a number of overarching concerns on the thoroughness and delays in investigations concerning the members of the armed forces.<sup>10</sup>

17. Some of the issues noted above have since been addressed or taken up by relevant legislative developments or otherwise have been considered by the Constitutional Court of Colombia. Others topic remain relevant to ongoing consideration of the preliminary examination and may warrant revisiting as part of a benchmarking process.

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RPZ-003, paras. 49-52; and ICC-OTP, [The Role of the ICC in the Transitional Justice Process in Colombia](#), 30-31 May 2018, paras. 132-155.

<sup>6</sup> ICC-OTP, [Escrito de Amicus Curiae de la Fiscal de la Corte Penal Internacional Sobre la Jurisdicción Especial Para La Paz, Ante la Corte Constitucional de la República de Colombia](#), 18 October 2017, RPZ-0000001 y RPZ-003, paras. 4-28. See also, ICC-OTP, [Report on Preliminary Examination Activities \(2017\)](#), 4 December 2017, para. 145; and ICC-OTP, [The Role of the ICC in the Transitional Justice Process in Colombia](#), 30-31 May 2018, paras. 96-122.

<sup>7</sup> ICC-OTP, [Escrito de Amicus Curiae de la Fiscal de la Corte Penal Internacional Sobre la Jurisdicción Especial Para La Paz, Ante la Corte Constitucional de la República de Colombia](#), 18 October 2017, RPZ-0000001 y RPZ-003, paras. 40-48. See also, ICC-OTP, [Report on Preliminary Examination Activities \(2017\)](#), 4 December 2017, para. 147.

<sup>8</sup> ICC-OTP, [Escrito de Amicus Curiae de la Fiscal de la Corte Penal Internacional Sobre la Jurisdicción Especial Para La Paz, Ante la Corte Constitucional de la República de Colombia](#), 18 October 2017, RPZ-0000001 y RPZ-003, paras. 29-39. See also, ICC-OTP, [Report on Preliminary Examination Activities \(2017\)](#), 4 December 2017, para. 146; and ICC-OTP, [The Role of the ICC in the Transitional Justice Process in Colombia](#), 30-31 May 2018, paras. 123-131.

<sup>9</sup> ICC-OTP, [Presentación del Fiscal Adjunto, James Stewart, sobre complementariedad](#), 1 November 2018, paras. 52-65.

<sup>10</sup> *Ibid.*

18. It is hoped that the proposed benchmarking framework introduced in skeletal form at the end of this report will enable the Office, on the basis of consultations with affected stakeholders, to develop a roadmap that will enable it to reach a determination on whether the time has come to proceed with investigations or close the preliminary examination, by articulating the indicators that might guide such an assessment as well as the factors that might trigger a re-assessment based on a change in circumstances.
19. Given the complexity of the situation, while the Office has recalled its past positions, it does not at this stage propose to predetermine what the specific benchmarks or indicators should be. Instead, the Office seeks an open and inclusive consultative process that invites the participation of all relevant stakeholders in a learning process that the Office has embarked upon, as it seeks to identify relevant benchmarks and indicators that should guide the assessment in reaching a determination on the preliminary examination. The Office is deeply aware that, given the enormity of the challenges facing transitional justice and accountability in Colombia, an inclusive process that seeks meaningful participation of affected stakeholders in the formulation of relevant benchmarks is more likely to generate the legitimacy necessary to achieve appropriate outcomes.

## **II. Towards a Decision**

20. The approach that Colombia has taken to ensure accountability for crimes committed in the context of the armed conflict within a transitional justice system is innovative, complex and ambitious. While significant progress has been obtained over the years, the process of accountability has also experienced numerous challenges and at times setbacks. It is also clear that the trajectory of accountability on which Colombia has set itself, involving a complex array of actors and accusations, will continue to evolve over a significant period of time and take many years to complete.
21. Such a long-term accountability process, involving the ordinary jurisdiction, the JPL system and the SJP, has several implications for the Office's preliminary examination. Under the current circumstances, the Office's ultimate assessment of whether domestic proceedings have genuinely addressed the potential cases that are likely to arise from an investigation by the ICC may take years to answer. This in turn invites reflection on the goals and duration of the Office's preliminary examination activities when faced with long-term, multi-layered domestic accountability processes.

22. In such a situation, the Office could either keep a preliminary examination open indefinitely pending completion of all relevant proceedings before reaching a determination on admissibility; or it could seek to reach a decision at an earlier stage, while domestic accountability processes remain ongoing, which the Office could revisit upon a change of circumstance.
23. The Government of Colombia, a number of different constituents among members of civil society and other stakeholders have conveyed to the Office their view that the approach of giving priority to domestic proceedings has been beneficial for both Colombia's accountability efforts and the operation of the Rome Statute system. While the Office appreciates the benefits of continuing its long-term engagement in Colombia, there must arguably be a limit on the duration and scope of a preliminary examination – meaning that the Office should be able to reach a determination in a situation without waiting for all relevant proceedings to conclude. This possibility makes acute sense for a permanent Court whose jurisdiction is not subject to any statute of limitation and whose decisions therefore may be revisited upon a change of circumstance. The Office believes that in principle it could, and indeed should, be able to reach decisions on preliminary examinations even in the midst of ongoing domestic accountability processes, which it could revisit as needed, rather than postponing decision-making indefinitely pending the completion of all domestic processes.
24. Several questions immediately arise from this consideration: what kind of decision does the Office foresee taking? Could it be revisited? And most importantly, when would the circumstances be ripe to reach such a decision?
25. ***What kind of decision:*** Reaching a decision while domestic proceedings are ongoing could mean one of two things: to 'open' or 'close'. The Office could proceed to request authorisation from a Pre-Trial Chamber to open ICC investigations: if it considers that domestic proceedings, though ongoing, are not in fact addressing the potential cases that the ICC would likely investigate, or not doing so genuinely. Alternatively, if the Office concludes that relevant domestic cases are being addressed genuinely, it could decide not to proceed with an investigation and thereby close the preliminary examination.
26. ***Could it be revisited:*** In either scenario, the Office's decision would not prejudice, nor be prejudiced by, any subsequent steps taken by the domestic authorities, since it could be revisited. For example, in a situation where the Office has opened an investigation, a change in circumstances due to a State's

genuine willingness and ability to investigate/prosecute cases under investigation by the OTP could lead to a re-assessment, based on the Office's case selection and prioritisation policy.<sup>11</sup> Conversely, where the ICC has not proceeded and has instead closed its preliminary examination, a change in circumstances that evinces domestic inaction or a lack of genuineness might warrant the Office revisiting its prior assessment, as envisaged under article 15(6) of the Statute.

27. *When would a decision be ripe:* The most difficult question is when the circumstances would be ripe for a determination. Under what conditions would the OTP seek to take such a decision – in other words, what concrete benchmarks or indicators would the Office use to reach a decision?
28. When in late 2019 the Office called for a conversation on how a benchmarking framework might be applied in Colombia in the context of its annual preliminary examination report,<sup>12</sup> it became clear both at the launch event for the report and in consultations held with different stakeholders during the Office's mission to Colombia in early 2020 and in virtual remote exchanges throughout the past year, that there is considerable concern over the prospect a premature determination by the OTP (whether to open investigations or close the preliminary examination) – in terms of the impact this would have on ongoing transitional justice processes in Colombia, which currently remain at a crucial, formative stage.
29. More specifically on timing, the Office has sought to re-assure stakeholders during the course of the last year that it does not anticipate any decision being reached imminently. What the Office seeks to do, rather, is to broaden the scope of consultations on what a final determination might look like, and on the benchmarks and indicators that might guide the process towards a decision: *i.e.* the articulation of a suitable road map to guide future decision-making.
30. In terms of impact, the Office has long championed the positive effects that its involvement with a situation (whether during preliminary examination or investigation/trial) may have in encouraging the activation of relevant and genuine domestic proceedings.<sup>13</sup> Indeed, this aspiration forms a cornerstone

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<sup>11</sup> ICC-OTP, [Policy paper on case selection and prioritisation](#), 15 September 2016.

<sup>12</sup> [Remarks of ICC Prosecutor Fatou Bensouda at the Presentation of the 2019 Annual Report on Preliminary Examination Activities](#), 6 December 2019, pp.3-4; see also ICC-OTP, [Report on Preliminary Examination Activities \(2019\)](#), 5 December 2019.

<sup>13</sup> See e.g. ICC-OTP, [Paper on some policy issues before the Office of the Prosecutor](#), 1 September 2003.

of the preamble to the Rome Statute. A decision by the OTP, whether to proceed or not to proceed, would not alter the Office's commitment to the principles of partnership and vigilance in this regard.

- If a decision was made to proceed with an ICC investigation, the Office would continue to seek collaboration with the competent domestic authorities to share the burden of investigating and prosecuting those most responsible and combining international and national efforts to combat impunity.
  - If a decision was made to close the preliminary examination without an ICC investigation, the Office would maintain its due diligence obligations to revisit any prior assessment based on a change of circumstance. Indeed, it is hoped that the publication of factors that could trigger reconsideration by the Office would serve to guard against regressive developments.
31. In this regard, it is important to recall that in either of the above scenarios, the Office would continue to be able to receive and consider information received from any source. Given its long historical engagement, and as part of its due diligence obligations, the Office would also maintain its readiness to engage bilaterally or in public *fora* with different stakeholders, and so continue to participate in national discourses around accountability as well as engage in operational and technical exchanges with its domestic counterparts.

### **III. Benchmarking**

32. It is the Office's assessment that developments in domestic accountability in Colombia, across the spectrum of potential cases identified by the Office that could warrant investigation by the ICC, have progressed to a point where a determination could conceivably be within sight: either to open investigations, or to close the preliminary examination, subject to revisiting that assessment upon a change in circumstances.
33. The Office recognises that the meaning of the term 'benchmark' varies according to the context in which it is applied.<sup>14</sup> In broad terms, the UN, for example, has described benchmarks as a point of reference against which change and progress can be measured,<sup>15</sup> while an indicator measures progress

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<sup>14</sup> UN, [Monitoring Peace Consolidation: United Nations Practitioners' Guide to Benchmarking](#), 2010, p. 17.

<sup>15</sup> UN, [Monitoring Peace Consolidation: United Nations Practitioners' Guide to Benchmarking](#), 2010, p. 17, 23; OHCHR, [Human Rights Indicators: A Guide to Measurement and Implementation](#), 2012, pp. 20, 171.

towards or regression away from a benchmark, such as by indicating a trend or singular event.<sup>16</sup>

34. In the context of the Rome Statute, benchmarks relevant to the Office's admissibility assessment must be focussed on wherever relevant national proceedings are active or inactive, in the sense of making concrete and tangible progress towards determining the individual criminal responsibility of persons under investigation and/or prosecution, and, if so, where such investigations and/or prosecutions are vitiated by a lack willingness or ability to carry them out genuinely. The standard for making such a genuineness assessment is set out in articles 17(2) and 17(3) of the Rome Statute, supplemented by the accompanying jurisprudence of the Court, relevant international standards of due process,<sup>17</sup> and the Office's articulation of guiding factors as set out in its policy papers.<sup>18</sup>
35. Indicators relevant to the admissibly assessment, in this context, could examine the factors set out in articles 17(2) and 17(3), across a number of different categories. Drawing on UN best practice,<sup>19</sup> these might include:
  - *Structural indicators*: focussing on the nature of domestic law in relation to criminal accountability for conduct constituting Rome Statute crimes, whether it incorporates the required international standards, as well as the institutional mechanisms competent to investigate, prosecute and adjudicate those crimes.
  - *Process indicators*: measuring ongoing efforts by competent institutional mechanisms to promote and protect accountability for these crimes,

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<sup>16</sup> UN, [Monitoring Peace Consolidation: United Nations Practitioners' Guide to Benchmarking](#), 2010, pp. 8-9, 39; OHCHR, [Human Rights Indicators: A Guide to Measurement and Implementation](#), 2012, p. 172.

<sup>17</sup> See e.g. article 17(2), requiring the unwillingness assessment to consider "the principles of due process recognized by international law". See also ICC Appeals Chamber in [Al-Senussi Admissibility AJ](#), para. 220: "It is clear that regard has to be had to 'principles of due process recognized by international law' for all three limbs of article 17 (2), and it is also noted that whether proceedings were or are 'conducted independently or impartially' is one of the considerations under article 17(2)(c). The concept of independence and impartiality is one familiar in the area of human rights law. Rule 51 of the Rules of Procedure and Evidence specifically permits States to bring to the attention of the Court, in considering article 17(2), information 'showing that its courts meet internationally recognized norms and standards for the independent and impartial prosecution of similar conduct'. As such, human rights standards may assist the Court in its assessment of whether the proceedings are or were conducted 'independently or impartially' within the meaning of article 17(2)(c)". At the same time, the Appeals Chamber stressed that in doing so the ICC is not acting as a human rights court nor directly applying human rights standards, but is examining the relevance and utility of human rights standards and accompanying jurisprudence as an aid to interpreting the various terms used in article 17, given the chapeau requirement in article 17(2); *ibid.*, paras. 190, 219.

<sup>18</sup> See e.g. ICC-OTP, [Policy Paper on Preliminary Examinations](#), 1 November 2013, paras. 50-58.

<sup>19</sup> See OHCHR, [Human Rights Indicators: A Guide to Measurement and Implementation](#), 2012, pp. 35-37.

including policies, budgetary resources and measures taken to ensure implementation.

- *Outcome indicators*: capturing specific individual and collective accountability outcomes in specific proceedings.

36. As to their form, UN best practice indicates that benchmarks must be concrete, measureable<sup>20</sup> and realistic.<sup>21</sup> Similarly, indicators should also be simple to understand and apply, timely and few in number, reliable, based on transparent and verifiable methodology, and conform with relevant international standards.<sup>22</sup>

37. Within the framework outlined above, the Office proposes to focus on three different categories that have had a bearing on the investigation and/or prosecution of relevant cases domestically: the legislative framework for the conduct of domestic proceedings, including any limitation on their scope or focus; the domestic proceedings before the ordinary jurisdiction, the JPL and the SJP; and the enforcement of sentences.

- **Legislative Framework**

38. Benchmarks and indicators applied to the legislative framework could articulate any indicators that have the potential to impact on the ability and/or willingness of the authorities to bring persons to justice.

39. This might include identification of measures that might significantly hamper the genuineness of relevant proceedings; initiatives resulting in major obstructions to the mandate and/or proper functioning of different competent jurisdictions; or revision of the judicial scheme set forth in the peace agreement.

- **Domestic Proceedings**

40. Benchmarks and indicators applied to the complex and multi-layered jurisdictions with competence over different alleged crimes and actors could assist the Office in assessing the relevance and genuineness of domestic proceedings before the ordinary criminal justice system, the JPL, or the SJP, namely: to consider whether there are manifest gaps in the prosecutorial programme in relation to the promotion and expansion of paramilitary groups; proceedings relating to forced displacement; proceedings relating to

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<sup>20</sup> UN, [Monitoring Peace Consolidation: United Nations Practitioners' Guide to Benchmarking](#), 2010, p. 17.

<sup>21</sup> UN, [Monitoring Peace Consolidation: United Nations Practitioners' Guide to Benchmarking](#), 2010, p. 7.

<sup>22</sup> OHCHR, [Human Rights Indicators: A Guide to Measurement and Implementation](#), 2012, pp. 50-51.

sexual crimes; and 'false positive' cases, and/or whether those who appear most responsible have been or are being genuinely investigated and/or prosecuted for such crimes.

41. Where specific proceedings have been initiated and are ongoing, benchmarks and indicators might help determine the appropriate procedural stage or milestone (whether progressive or regressive) that could allow the Office to reach an admissibility assessment with respect to a particular potential case or cases.

- **Enforcement of Sentences**

42. Benchmarks and indicators relevant to enforcement of sentences could seek to assess whether penal sanctions awarded were effective, including in terms of verification and monitoring, and/or proportionate in serving appropriate sentencing objectives, whether in terms of retribution, rehabilitation, restoration and/or deterrence.

#### **IV. Consultation**

43. It is the Office's hope that developing a benchmarking framework could help chart the way forward for the OTP and affected stakeholders in Colombia. While this exercise is being undertaken primarily to inform its own admissibility assessment, the Office is also keenly aware that public articulation of relevant benchmarks and indicators might more concretely contribute to galvanising the competent domestic authorities to prioritise meeting certain objectives while, conversely, clarifying the conditions under which the ICC might proceed to undertake investigations.
44. The Office would welcome receiving comments and observations for consideration by end of September 2021. Comments can be sent to: [Office.OftheProsecutor@icc-cpi.int](mailto:Office.OftheProsecutor@icc-cpi.int).



