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No.:
Date: **27 April 2022**

Before: **Judge Antoine Kesia-Mbe Mindua, President of the Pre-Trial Division**

SITUATION IN COLOMBIA

Public Redacted Version with Public Redacted Version of Annex A

Request for review of the Prosecutor's decision of 28 October 2021 to close the preliminary examination of the situation in Colombia

Source: **International Federation for Human Rights (FIDH)**

CAJAR

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. INTRODUCTION

1. I have the honour to submit to you the present request for review, in representation of Colombian victims of crimes against humanity, including [REDACTED] ("the Applicants"), who are represented by the International Federation for Human Rights ("FIDH") and CAJAR at a national level.[1] The Applicants submit this request for review of the decision of the Prosecutor of the International Criminal Court ("ICC") to close the preliminary examination into crimes under the jurisdiction of the Court committed in Colombia, in accordance with the Rome Statute.

2. The situation in Colombia had been the subject of a preliminary examination since June 2004, initiated *proprio motu* by then Prosecutor Luis Moreno Ocampo. The preliminary examination has focused on alleged crimes against humanity and war crimes committed in the context of the armed conflict between and among government forces, paramilitary armed groups, and rebel armed groups.[2]

3. Over the course of the preliminary examination, which lasted 17 years, the Office of the Prosecutor ("OTP") travelled to Colombia on multiple occasions and received information from various sources, including government and civil society. In its 2012 93-page interim report, the OTP determined that there was a reasonable basis to believe that both crimes against humanity and war crimes had been committed by government and non-State actors. In particular, the OTP found that there was a reasonable basis to believe members of the Colombian army had deliberately killed thousands of civilians, which were reported as guerrillas killed in combat, a practice known as "falsos positivos" (false positives).[3]

[1] A full confidential list of victims represented by CAJAR and FIDH, which submitted information to the OTP during the course of the preliminary examination on Colombia, is available upon request.
[2] ICC, Preliminary examination – Colombia, https://www.icc-cpi.int/colombia (accessed 26 April 2022).
[3] OTP, Situation in Colombia Interim Report (November 2012), paras. 1-10 (hereinafter 'Colombia Interim Report 2012').

4. Under article 15 of the Rome Statute, the Prosecutor may initiate an investigation *proprio motu* on the basis of information about a crime within the jurisdiction of the Court. In this case, the Prosecutor decided, on 28 October 2021, to close the preliminary examination and not to open an investigation into Colombia.

5. The Applicants submitted a request, in the form of a letter, to the President of the Pre-Trial Division to designate a Pre-Trial Chamber in accordance with regulation 46(3) of the Regulations of the Court to review the present request.

6. The Applicants' request to the Pre-Trial Chamber to reverse the Prosecutor's decision to close the Preliminary Examination of the situation in Colombia is based on the following grounds:

    a. Under article 53(3)(b), the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed with an investigation if the decision is based solely on paragraph 1(c) or 2(c) (an investigation would not serve the interests of justice).

    b. In this case, the Prosecutor's decision was based solely on the interests of justice, and therefore the Pre-Trial Chamber may, on its own initiative, review the Prosecutor's decision.

    c. The Pre-Trial Chamber should reverse the Prosecutor's decision, as the opening of an investigation would indeed be in the interests of justice, taking into account in particular the interests of victims.

7. In the alternative, the Applicants request the Pre-Trial Chamber, at a minimum, to order the Prosecutor to justify his decision to close the preliminary examination, to the victims and the international community.

II. The Pre-Trial Chamber should reverse the Prosecutor's decision to close the preliminary examination, under article 53 of the Rome Statute

8. Under article 53(1) of the Statute, "The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute." The Prosecutor shall consider whether "(a) The information available to [him/her] provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed; (b) The case is or would be admissible under Article 17; and (c) 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."[4]

9. Pursuant to article 53(3)(b), the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed with an investigation if that decision is based solely on article 53(1)(c) or (2)(c) (interests of justice). In such a case, the Prosecutor's decision not to proceed with an investigation shall be effective only if confirmed by the Pre-Trial Chamber.

10. The Applicants submit that (1) under article 53, the Pre-Trial Chamber may, on its own initiative, reverse the Prosecutor's decision not to proceed if it is based solely on the interests of justice; (2) the Prosecutor's decision was based solely on the interests of justice; and (3) the Prosecutor's decision does not serve the interests of justice, taking into account in particular the interests of victims, and should therefore be reversed by the Pre-Trial Chamber.

[4] Rome Statute, art. 53(1).

1. The Pre-Trial Chamber may, on its own initiative, reverse the decision of the Prosecutor not to proceed if it is based solely on the interests of justice

11. As provided in article 53(3)(b) of the Rome Statute, where a decision of the Prosecutor not to proceed with an investigation is based solely on the interests of justice, the Pre-Trial Chamber may review the decision:

> b) In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1(c) or 2 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.[5]

12. Article 53(3)(b) clearly gives the Pre-Trial Chamber authority to review a decision by the Prosecutor not to proceed with an investigation following a preliminary examination where the decision is based solely on the interests of justice. In *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya*, the Pre-Trial Chamber confirmed this, stating that the Chamber may review a decision of the Prosecutor not to open an investigation based on the interests of justice, "if the Prosecutor decided not to proceed with such a request on the basis of this sole factor. It is only when the Prosecutor decides that an investigation would not be in the interests of justice that he or she is under the obligation to notify the Chamber of the reasons for such a decision, thereby triggering the review power of the Chamber."[6]

13. The authority of the Pre-Trial Chamber to review a decision of the Prosecutor applies to *all* preliminary examinations conducted by the OTP, i.e., preliminary examinations initiated *proprio motu*, as in the present case, as well as in relation to situations referred by a State or the Security Council. Based on the ordinary meaning of article 53(3)(b) of the Rome Statute, which simply authorises the Pre-Trial Chamber to review a decision of the Prosecutor, "if it is based solely on

[5] Rome Statute, art. 53(3)(b).
[6] Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ICC-01/09 (hereinafter 'Kenya decision'), para. 63.

paragraph 1(c) or paragraph 2(c)", without further details, it can be concluded that the Pre-Trial Chamber has jurisdiction to review a decision of the Prosecutor in all cases where such decision is based solely on paragraph 1(c) or paragraph 2(c) (interests of justice). Article 53(3)(b) explicitly provides that the Pre-Trial Chamber may review "a decision" of the Prosecutor and does not limit such authority to situations referred by a State or the Security Council, and therefore clearly includes decisions taken *proprio motu* by the Prosecutor.[7]

14. Despite the clear and unambiguous language of article 53(1), it is necessary to address the decision of the Appeals Chamber on Afghanistan, in which the Chamber authorised the Prosecutor to initiate a *proprio motu* investigation. In that decision, the Chamber incorrectly stated that, in a hypothetical case where the Prosecutor decided not to open an investigation, "the legal framework does not envisage judicial review of the Prosecutor's conclusion", as article 53(1) of the Rome Statute only applies to situations referred by a State or the Security Council, whereas *proprio motu* investigations are governed only by article 15, and therefore article 53(3)(b) would not apply.[8] Thus, the Appeals Chamber argued that in a hypothetical case in which the Prosecutor decided not to open a *proprio motu* investigation, if the situation was not referred by a State or the Security Council, article 53(1) would not permit a review of that decision.

15. However, as the same Chamber acknowledged, this is "a scenario not arising in this appeal."[9] **Therefore, this part of the Afghanistan decision is *obiter dicta* and should in no way be applied to the Colombian situation, in relation to which, contrary to the situation in Afghanistan, the Prosecutor decided *not* to open an**

[7] *See* Appeals Chamber, Separate opinion of Judge Luz del Carmen Ibáñez Carranza to the Judgment on the appeal against the decision of Pre-Trial Chamber II on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, 5 March 2020, ICC-02/17 OA4 (hereinafter: 'Afghanistan Appeal – separate opinion'), para. 7(i).
[8] Appeals Chamber, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, 5 March 2020, ICC-02/17 OA4 (hereinafter: 'Afghanistan Appeal Judgment'), paras. 29-33.
[9] Afghanistan Appeal Judgment, para. 30.

investigation. This is clearly highlighted in the separate decision of Judge Carmen Ibañez Carranza. With respect to the Chamber's arguments that there is no legal framework providing for the review of a *proprio motu* decision of the Prosecutor not to open an investigation, she states:

> Unless those assertions are *obiter dicta*, my colleagues went *ultra petita* and acted *ultra vires* by indicating what happens when the Prosecutor decides not to initiate a *proprio motu* investigation with regards to matters she has been examining. They would be *ultra petita* because, the question not having being addressed in the Impugned Decision, hardly any appellant or the Appeals Chamber could raise it. They would be *ultra vires* because, even when the Appeals Chamber may dictate the law under the principle *iura novit curia*, it is limited to the Impugned Decision, what the chamber *a quo* said and should have said. For one obvious reason, there was no need nor possibility to address in the Afghanistan situation the question of what happens when the Prosecutor does not request authorisation to initiate an investigation following a preliminary examination: *She has requested such an authorisation*.[10]

16. **Moreover, even if this part of the decision of the Appeals Chamber on Afghanistan were not to be considered *obiter dicta*, under the ordinary meaning of article 53 of the Statute the Pre-Trial Chamber has the authority to review the Prosecutor's decision not to initiate a *proprio motu* investigation**. According to the Vienna Convention on the Law of Treaties, the general rule of interpretation is that a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[11] As Judge Ibañez Carranza states, there is nothing in the ordinary meaning of article 53(1)(c) that restricts the application of that article to situations referred by a State or the Security Council. This contrasts sharply with article 53(2)(c), for example, where explicit reference is made to the "State making a referral under Article 14 or the Security Council". It is clear that article 53(1)(c) covers all investigations, while article 53(2)(c) deals with investigations arising

[10] Afghanistan Appeal – separate opinion, para. 4.
[11] Vienna Convention on the Law of Treaties, 1155 UNTS 18232, 23 May 1969 (hereinafter: 'VCLT'), art. 31(1).

from referrals by States or the Security Council, since the latter provision explicitly mentions situations referred by a State or the Security Council. Thus, given that article 53(3)(b) provides that the Pre-Trial Chamber may review a decision of the Prosecutor not to proceed if that decision is based solely on article 53(1)(c) or 53(2)(c) (interests of justice), this authority covers both *proprio motu* decisions and those relating to situations referred by States or the Security Council.[12]

17. This is even clearer if the Rome Statute is interpreted in its context and in the light of its object and purpose, as required by article 31(1) of the Vienna Convention.[13] In the Preamble to the Rome Statute, States affirm "that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation" and, furthermore, that they are "[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes."[14] The fact that the explicit object and purpose of the Rome Statute is to put an end to impunity must be considered when interpreting article 53(3)(c), which allows the Pre-Trial Chamber to review a decision by the Prosecutor not to proceed with an investigation even if a crime within the jurisdiction of the Court has been or is being committed and the case would be admissible under article 17 of the Statute. Limiting the Pre-Trial Chamber's authority to review a decision of the Prosecutor not to proceed with an investigation into crimes under the jurisdiction of the Statute, especially given an absence of explicit language in the Statute requiring it to do so, would run counter to the Statute's objective of ending impunity. As Justice Ibañez Carranza clearly explains:

> If Article 53(1) and accordingly Article 53(3)(b) are interpreted (wrongly, in my view) to say that they only apply to referrals, the

[12] Afghanistan Appeal – separate opinion, para. 7.
[13] VCLT.
[14] Rome Statute, Preamble.

> Statute's object and purpose to put an end to impunity for such atrocious crimes would depend on the political will of States Parties and the Security Council and the supposedly unfettered will of the Prosecutor to request or not to request authorisations to initiate *proprio motu* investigations, without any judicial review when she does not. There would thus be a gap regarding atrocious crimes in regions within the jurisdiction of the Court where neither States Parties nor the Security Council make a referral and the Prosecutor decides not to initiate investigations *proprio motu*.[15]

18. Given the ordinary meaning of article 53, as well as the object and purpose of the Rome Statute to combat impunity, paragraph 3(b) clearly includes *proprio motu* situations, which were not referred to the ICC by a State or the Security Council. Thus, the Pre-Trial Chamber has the authority to review a decision of the Prosecutor not to initiate a *proprio motu* investigation. As stated above, a Pre-Trial Chamber only has this authority under article 53(3)(b) of the Rome Statute when the decision is based solely on the interests of justice. The next question, therefore, is whether in the Colombian case the Prosecutor's decision was based solely on the interests of justice, or whether it was based on article 53(1)(a) (jurisdiction) or article 53(1)(b) (admissibility).

2. *The Prosecutor's decision was based solely on the interests of justice*

19. Given the lack of formal argument or report by the Prosecutor on the closure of the preliminary examination on Colombia, the reasons for not opening an investigation must be inferred from his public statements and the Cooperation Agreement signed between the Colombian government and the Prosecutor.

20. It should be noted that this procedure contrasts with other decisions of the OTP, where reports have been submitted detailing the reasons behind a decision not to open a preliminary examination. For example, in relation to Honduras, where the

[15] Afghanistan Appeal – separate opinion, para. 7(v). *See also* Kenya decision, para. 63 ("such a review [of the interests of justice] may take place in accordance with Article 53(3)(b) of the Statute if the Prosecutor decided not to proceed with such a request on the basis of this sole factor. It is only when the Prosecutor decides that an investigation would not be in the interests of justice that he or she is under the obligation to notify the Chamber of the reasons for such a decision, thereby triggering the review power of the Chamber").

OTP initiated a preliminary examination *proprio motu* in 2010 and, in 2015, decided not to open an investigation, the Prosecutor published a document detailing why it had been concluded that the contextual elements of a crime against humanity did not exist in the Honduran case and therefore that there was no jurisdiction over the crimes.[16] More recently, the current Prosecutor also detailed the reasons for closing the preliminary examination in Bolivia in 2022.[17]

21. While the public statements and the Cooperation Agreement signed between the Colombian government and the Prosecutor use language of complementarity, on a closer look, the Applicants conclude that the Prosecutor's decision was based solely on the interests of justice.

a. The Prosecutor's decision failed to carry out the complementarity analysis required by the ICC's case law

22. In the public statements and the Cooperation Agreement signed between the Colombian government and the Prosecutor, no rigorous complementarity analysis was carried out, despite the fact that the language used by the Prosecutor refers to complementarity under the Rome Statute.

23. After a preliminary examination lasting 17 years, the Prosecutor announced the closure of the preliminary examination in a press release, without presenting a report detailing his decision:[18]

> Following a thorough assessment, the Prosecutor is satisfied that complementarity is working today in Colombia. The Government of Colombia, together with the ordinary courts, the Justice and Peace Law Tribunals, the Special Jurisdiction for Peace, civil society and the people of Colombia are to be commended for their resilience and determination

[16] *See* OTP, Situation in Honduras – Article 5 Report, October 2015. The same occurred in relation to the closure of the preliminary examination in Gabon (*see* OTP, Situation in the Gabonese Republic – Article 5 Report, 21 September 2018); and Irak/UK (*see* OTP, Situation in Iraq/UK – Final Report, 9 December 2020).
[17] *See* Situation in the Plurinational State of Bolivia – Final Report, 14 February 2022.
[18] At least, there is no public report, nor is there a report that has been shared with the victims of the situation in Colombia. *See* "ICC Prosecutor, Mr Karim A. A. Khan QC, concludes the preliminary examination of the Situation in Colombia with a Cooperation Agreement with the Government charting the next stage in support of domestic efforts to advance transitional justice", https://www.icc-cpi.int/news/icc-prosecutor-mr-karim-khan-qc-concludes-preliminary-examination-situation-colombia (accessed 27 April 2022).

> in demanding justice and accountability in their quest for peace. The progress made has led the Office to determine that the national authorities of Colombia are neither inactive, unwilling nor unable to genuinely investigate and prosecute Rome Statute crimes.
>
> In the course of his engagement with stakeholders, the Prosecutor emphasised that an assessment of complementarity should not, and cannot, be postponed indefinitely pending the completion of all possible domestic proceedings. To the contrary, the Statute and the Court's case law are clear that the admissibility assessment must be carried out on the basis of the facts as they exist.

24. In addition, the Prosecutor concluded a Cooperation Agreement with the Colombian government, in which it was recognised that the Colombian justice system has made progress, but, at the same time, "domestic accountability processes are not completed yet, nor all sentences enforced, and proceedings are likely to continue to evolve over a significant period of time." The Agreement also states that the Colombian government commits to continue supporting national processes and to keep the ICC informed of progress in investigations and prosecutions in Colombia. The OTP pledges to continue to support Colombia's accountability efforts and to participate in projects and programmes aimed at Colombian legal professionals. Finally, the Agreement recognises that "the Office of the Prosecutor may reconsider its assessment of complementarity in light of any significant change of circumstances."[19]

25. The Prosecutor's decision is presented in a framework and language of complementarity (article 17), stating that "complementarity is working today in Colombia"; that there is "progress" by national authorities "in demanding justice and accountability in their quest for peace"; and that the Colombian national authorities "are neither inactive, unwilling nor unable to genuinely investigate and prosecute Rome Statute crimes." Yet the decision, in effect, failed to carry out any rigorous complementarity analysis, and the Applicants therefore conclude that

[19] Cooperation agreement between the Office of the Prosecutor of the International Criminal Court and the Government of Colombia, 28 October 2021 (hereinafter 'Cooperation agreement').

there is no option but to find that the decision was based solely on article 53(1)(c) (interests of justice).

26. Under article 53(b)(1), in order to determine whether to initiate an investigation, the OTP must consider whether "[t]he case is or would be admissible under Article 17." As detailed in the OTP's Policy Paper on Preliminary Examinations, "[a]t the preliminary examination stage there is not yet a 'case', as understood to comprise an identified set of incidents, suspects and conduct. Therefore the consideration of admissibility (complementarity and gravity) will take into account **potential cases that could be identified in the course of the preliminary examination** based on the information available and that would likely arise from an investigation into the situation" (emphasis added).[20]

27. The concept of potential cases in a complementarity analysis at the preliminary examination stage was developed by the Pre-Trial Chamber in authorising an investigation into the situation in Kenya. In that decision the Chamber stated that admissibility at the situation phase:

> should be assessed against certain criteria defining a "potential case" such as: (i) the groups of persons involved that are likely to be the focus of an investigation for the purpose of shaping the future case(s); and (ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s). The Prosecutor's selection of the incidents or groups of persons that are likely to shape his future case(s) is preliminary in nature and is not binding for future admissibility assessments. This means that the Prosecutor's selection on the basis of these elements for the purposes of defining a potential "case" for this particular phase may change at a later stage, depending on the development of the investigation.
>
> (…)

[20] OTP, Policy Paper on Preliminary Examinations, November 2013, para. 43. *See also* Pre-Trial Chamber II, Situation in Kenya, Request for authorisation of an investigation pursuant to Article 15, ICC-01/09, 26 November 2009 (hereinafter: 'Kenya Article 15 decision'), para. 51 ("Article 53(1)(b) provides that in determining whether there is a reasonable basis to proceed, the Prosecutor shall consider whether 'the case is or would be admissible under Article 17'. The Prosecutor has considered admissibility at this stage taking into account the potential cases that would likely arise from an investigation into the situation").

> Having said the above, the Chamber considers that, at this stage, the admissibility assessment requires an examination as to whether the relevant State(s) is/are conducting or has/have conducted national proceedings in relation to the groups of persons and the crimes allegedly committed during those incidents, which together would likely form the object of the Court's investigations. If the answer is in the negative, the "case would be admissible", provided that the gravity threshold is also met.[21]

28. The Pre-Trial Chamber clarified with respect to element (i), the groups of persons involved that are likely to be the focus of an investigation, that this involves "a generic assessment of whether such groups of persons that are likely to form the object of investigation capture **those who may bear the greatest responsibility** for the alleged crimes committed. Such assessment should be general in nature and compatible with the pre-investigative stage into a situation" (emphasis added).[22] The concept of potential cases when deciding whether or not to open an investigation has been repeatedly reiterated in decisions of the Court,[23] as well as in documents by the Office of the Prosecutor itself.[24]

29. While the facts in the Kenya case differ from those in the present case, in which the Prosecutor did not request the opening of an investigation, the definition of complementarity at the preliminary examination stage is the same. Thus, a Prosecutor, in deciding whether or not to open an investigation, should identify the "potential cases" in the situation in question, including the groups of persons involved – focusing, in particular, on those who may bear the greatest

[21] Kenya decision, paras. 50-52. *See also* Pre-Trial Chamber III, Situation in the Republic of Côte d'Ivoire, Corrigendum to "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire', ICC-02/11-14-Corr, 3 October 2011 (hereinafter: 'Côte d'Ivoire decision'), paras. 190-191 and 202-204.
[22] Kenya decision, para. 60. *See also* Côte d'Ivoire decision, paras. 190-191 and 202-204.
[23] Pre-Trial Chamber, Public Redacted Version of "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi", ICC-01/17-X-9-US-Exp, 25 October 2017, ICC-01/17-X, 9 November 2017, (hereinafter 'Burundi Article 15 Decision'), para. 143; Kenya decision, para. 59; Pre-Trial Chamber III, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, ICC-02/11, 3 October 2011 (hereinafter: 'Côte d'Ivoire Article 15 Decision'), paras. 190-191. *See also* Afghanistan Appeal Judgment, paras. 40-42, confirming the continuing relevance of the notion of "potential cases".
[24] OTP, Policy Paper on Preliminary Examinations, November 2013, para. 46. *See also* OTP, Situation in Iraq/UK – Final Report, 9 December 2020.

responsibility for the alleged crimes – and the crimes within the jurisdiction of the Court.

30. Indeed, in its 2012 interim report on the preliminary examination on Colombia, the Office of the Prosecutor explained:

> Pursuant to its prosecutorial strategy, the Office will assess complementarity and gravity in relation to the most serious crimes alleged and to those who appear to bear the greatest responsibility for those crimes.
>
> In the preliminary examination stage, Article 53(1)(b) of the Rome Statute requires the Office to consider whether "the case is or would be admissible under Article 17." Prior to the initiation of an investigation, there is not yet a specific 'case,' as understood to comprise an identified set of incidents, individuals and charges. Instead, there is a situation. The Office therefore considers admissibility taking into account potential cases that could arise from a potential investigation into the situation based on the information available.[25]

31. In the same report, the OTP listed ongoing national proceedings against leaders of guerrilla groups, leaders of paramilitary armed groups, congressmen, and commissioned officers of the armed forces, apparently identifying a list of potential cases.[26] The interim report acknowledged that while certain progress in investigations at the national level had been made, at the same time, it warned that there were "certain gaps or shortfalls which indicate insufficient or incomplete activity in relation to certain categories of persons and certain categories of crimes," and therefore opted to keep the preliminary examination open.[27]

32. Noteworthy in this regard is the situation in Iraq/UK, where – as in the situation in Colombia – the OTP decided to open a preliminary examination *proprio motu*, concluding that crimes under the Court's jurisdiction had occurred, and subsequently decided not to open an investigation, citing complementarity grounds. However, in Iraq/UK, unlike the present case, the OTP issued a detailed

[25] Colombia Interim Report 2012, paras. 154-55.
[26] Colombia Interim Report 2012, Annex.
[27] Colombia Interim Report 2012, para. 199.

document explaining the reasons for its conclusion that the UK authorities were willing to conduct relevant investigations and/or prosecutions (article 17(1)(a) of the Rome Statute) or that decisions not to prosecute in specific cases were not due to unwillingness to do so (article 17(1)(b)).[28] Indeed, the 184-page document sets out the reasons that investigations in the UK into the crimes under the jurisdiction of the Court are genuine, in relation to the potential case(s) likely to arise from an investigation of the situation, namely: (i) the forms of conduct set out in the report; and (ii) the category of perpetrators that appear most responsible, including at the level of command/superior responsibility.[29]

33. Both ICC case law and documents of the ICC Office of the Prosecutor itself make it clear that, in deciding whether or not to open an investigation on the basis of complementarity, an analysis of potential cases must be carried out.[30]

34. **In the situation in Colombia, the Prosecutor did not conduct a complementarity analysis taking into account "potential cases", as he did not identify the specific conduct in respect of which investigations or judicial decisions actually existed at the national level, nor did he identify the groups of persons involved who would be the focus of a potential investigation, including whether or not this would include high-level officials**. Indeed, the Prosecutor simply stressed that complementarity "is working" in Colombia and that national authorities are willing and able to investigate crimes under the ICC's jurisdiction. However, these statements were not accompanied by any detailed information about the potential cases in which, in concrete terms, the Colombian State has allegedly been willing and able to investigate and prosecute the crimes in question. At no point in the press release, the public statements on the closure of the preliminary examination,

[28] OTP, Situation in Iraq/UK – Final Report, 9 December 2020.
[29] OTP, Situation in Iraq/UK – Final Report, 9 December 2020, para. 157.
[30] See Burundi Article 15 Decision, para. 143; Kenya decision, para. 59; Côte d'Ivoire Article 15 Decision, paras. 190-191. *See also* Afghanistan Appeal Judgment, paras. 40-42, confirming the continuing relevance of the notion of "potential cases"; OTP, Situation in Iraq/UK – Final Report, 9 December 2020; OTP, Policy Paper on Preliminary Examinations, November 2013; Kenya Article 15 decision.

nor in the Cooperation Agreement, was an analysis of potential cases likely to form part of an investigation of the situation in Colombia presented and, unlike in other cases, no document detailing the complementarity analysis carried out by the OTP was produced.

35. While the Prosecutor stressed that "an assessment of complementarity should not, and cannot, be postponed indefinitely pending the completion of all possible domestic proceedings", he did not explain which groups of persons involved were to be the object of such national proceedings. Thus, the Prosecutor asserted that the Colombian State is willing and able to investigate *crimes* under the ICC's jurisdiction but did not identify whether the Colombian State is prosecuting the *group of persons* who would be part of a potential case. By not defining the group of persons involved, the Prosecutor clearly also failed to specify whether the Colombian State is carrying out or has carried out national proceedings in relation to these groups.[31]

36. As stated above, while in the OTP's 2012 Interim Report on Colombia a list of national proceedings was identified, when closing the preliminary examination, no potential cases were identified. Further, on 15 June 2021, the OTP had invited relevant stakeholders to submit information that would assist in identifying relevant benchmarks and indicators that should guide the assessment of the OTP in reaching a determination on the preliminary examination in Colombia. During this process, FIDH and CAJAR submitted information detailing objective benchmarks regarding the situation in Colombia, that were intended to contribute to the OTP's assessment. The Prosecutor's press release and Cooperation Agreement do not mention any such assessment. These elements further underline the Prosecutor's lack of a reasoned complementarity assessment.

37. Indeed, a brief analysis clearly demonstrates that the Colombian State is neither willing nor able to investigate and prosecute many of the high-level officials

[31] Cooperation agreement.

responsible for crimes under the jurisdiction of the ICC. In particular, as detailed in a report written by the FIDH and CAJAR, in the investigation of combatant State agents, several of the individuals who are allegedly responsible for extrajudicial executions have not been called to appear before the *Jurisdicción Especial para la Paz* (Special Jurisdiction for Peace - JEP) and, indeed, have continued to hold positions of command and to be promoted within the structure of the Colombian National Army.[32] Likewise, in the case of third party civilians and non-combatant State agents bearing responsibility, there is a failure to investigate and to exercise due diligence to bring these actors to justice. In particular, there has been a lack of coordination with regard to the investigation and prosecution of third parties and non-combatant State agents within the Colombian Attorney General's Office, as well as opacity about the progress that has been made in these cases. Thus, FIDH and CAJAR have argued that there is a lack of willingness and/or capacity in their assessment of whether to open an investigation involving the responsibility of third parties or non-combatant State agents.[33]

38. In summary, as detailed above, the Prosecutor did not conduct a complementarity analysis that took into account "potential cases". In particular, he failed to identify the groups of persons involved likely to be the focus of a potential investigation, including whether or not this would include high-level officials.

b. <u>The Prosecutor's decision was based solely on the interests of justice, in particular political grounds</u>

[32] FIDH and CAJAR, Colombia at Risk for Impunity: The Blind Spots in Transitional Justice and International Crimes under ICC, p. 11, "Nicacio de Jesús Martínez Espinel, for example, former Commander General of the National Army, when in command allegedly issued instructions that led to the practice of "false positives"31 and was allegedly involved in the illegal wiretapping of politicians, journalists, and human rights defenders.32 These acts were connected to cases involving extrajudicial executions and other human rights violations where victims were represented before the JEP. The lack of protection for victims and their representatives is detrimental to access to justice and to the guarantees of non- recurrence."

[33] FIDH and CAJAR, Colombia at Risk for Impunity: The Blind Spots in Transitional Justice and International Crimes under ICC, pp. 16-18.

and/or considerations about the peace process in Colombia

39. As detailed above, given the lack of analysis of complementarity with respect to the group of persons who would be part of potential cases, there is no option but to conclude that the Prosecutor decided not to open an investigation based solely on the interests of justice.

40. While a Prosecutor could also decide not to initiate an investigation on the grounds of lack of jurisdiction (article 53(1)(a)), this option will not be discussed, as the Prosecutor has repeatedly made it clear that the OTP does consider that there are reasonable grounds to believe that a crime within the jurisdiction of the Court has been or is being committed in Colombia.[34] Therefore, the instant request only analyses the possibility that the closure of the preliminary examination in Colombia was based on admissibility (article 53(1)(b)) or the interests of justice (article 53(1)(c)).

41. Indeed, while the Prosecutor's decision, by way of a press release, uses language of complementarity, a closer analysis suggests that the decision was, in effect, based on political grounds and/or considerations about the peace process in Colombia. This can be inferred from two elements: (1) certain phrases in the press release and/or the Prosecutor's public statements at the time of closing the preliminary examination and (2) the Cooperation Agreement with the Colombian government.

42. With regard to the first point (1), the following sentence from the press release is revealing:

> [T]he Prosecutor has determined that the preliminary examination must be closed. The absence of a preliminary examination does not, however, mean an end to the Office's engagement with Colombia or its support to the accountability processes underway. To the contrary, it marks the

[34] Colombia Interim Report 2012, paras. 152-53.

> beginning of a new chapter of support and engagement – an example of positive complementarity in action.
>
> The closure of the preliminary examination does not detract from the reality that significant work is still required and that the institutions established must continue to be given the space to perform their constitutional responsibilities.

43. The fact that the press release acknowledges that the work still required in Colombia remains "significant" – and, at the same time, states that "complementarity is working today in Colombia", without giving any examples of concrete potential cases – suggests that the Prosecutor's decision was motivated by a desire to give the Colombian government space or time to continue its transitional justice work. This is corroborated by Prosecutor Karim Khan's speech on 28 October 2021 in Colombia, in which the signing of the Cooperation Agreement was announced, and where the Prosecutor stated:

> I want to congratulate all the people of Colombia for their efforts and call on all parties to the peace agreement to be courageous and come to the JEP with their stories. Telling the truth is an essential part of the healing of a people.[35]

44. At the same event, in response to a journalist's question about the long wait of the Colombian people for peace and justice, the Prosecutor stated that "the underlying crimes on all sides of the conflict are very complex and require time"[36]. With these statements, **the Prosecutor's decision appears to be based on considerations of the peace process and Colombia's policy in relation to the JEP – in order to give time and an opportunity for the national system to move forward in terms of truth and reconciliation**. The references to Colombia's Peace Agreement, the search for truth ("an essential part of the healing of a people"), and the time required to move forward in terms of transitional justice in Colombia are considerations that clearly fall outside the legal framework of a complementarity

[35] El Tiempo, "La CPI da cierre al Examen Preliminar sobre la situación en Colombia", 28 October 2021, https://www.youtube.com/watch?v=LxW0-39rz_c.
[36] El Tiempo, "La CPI da cierre al Examen Preliminar sobre la situación en Colombia", 28 October 2021, https://www.youtube.com/watch?v=LxW0-39rz_c.

analysis under the Rome Statute, as the Prosecutor does not refer to specific or potential cases, but speaks in general terms of peace, truth and/or justice. This strongly suggests that the closure of the Colombian preliminary examination was based on the interests of justice – specifically, political and peace process considerations in Colombia – and not on a rigorous complementarity analysis.

45. Like the Prosecutor's public statements and the press release, (2) the Agreement for Cooperation does not analyse potential cases and asserts that complementarity exists without carrying out a clear or rigorous analysis. In this regard, it is worth noting the preamble to the Agreement, which "[takes] into consideration the challenges and obstacles that have arisen throughout the process and [recalls] in particular the recent achievements of the transitional justice in Colombia in pursuing the objectives of retribution, rehabilitation, restoration and deterrence"[37]. Again, this is a subjective and/or personal analysis of the peace process and transitional justice in Colombia by the Prosecutor, who praises Colombia for its progress in terms of retribution, rehabilitation, restoration and deterrence. Without passing judgement on Colombia's progress in the area of transitional justice, these considerations have no place in a legal analysis of complementarity, which should focus solely on potential cases of an investigation and whether or not they meet the requirements of article 17 of the Rome Statute.

46. Finally, it should be noted that the Agreement itself is not something that is foreseen by the Rome Statute in the framework of the closure of a preliminary examination. The existence of an agreement between a State Party to the Rome Statute and the OTP upon closure of a preliminary examination is unprecedented and, again, the fact that there is a plan for future and continued cooperation between the Court and the Colombian government is not a relevant element in a complementarity analysis.

[37] Cooperation agreement.

47. These considerations manifestly show that the closure of the preliminary examination was on the basis of the interests of justice, not a rigorous analysis of potential cases, as required by a complementarity assessment under the ICC's case law interpreting article 17 of the Rome Statute.

3. The Prosecutor's decision does not serve the interests of justice and should therefore be reversed by the Pre-Trial Chamber

48. Having determined that the Prosecutor's decision was based solely on the interests of justice, it is appropriate to analyse whether the Prosecutor's decision not to open an investigation in Colombia would be in the interests of justice. To this end, we will set out the definition of the interests of justice under the Rome Statute, followed by an analysis of the Prosecutor's decision.

a. The exceptional nature of the interests of justice and the presumption in favour of investigation in the Rome Statute

49. Before looking at the definition of the elements of the term "interests of justice", it should be noted that a decision by a Prosecutor not to proceed with an investigation on the basis that it would not serve the interests of justice is exceptional, given the language and structure of article 53(1). As highlighted in a policy paper of the OTP:

> While the other two tests (jurisdiction and admissibility) are positive requirements that must be satisfied, the "interests of justice" is not. *The interests of justice* test is a potential *countervailing* consideration that might produce a reason not to proceed even where the first two are satisfied. This difference is important: the Prosecutor is not required to establish that an investigation or prosecution is in the interests of justice. Rather, he shall proceed with investigation unless there are specific circumstances which provide substantial reasons to believe it is not in the interests of justice to do so at that time.[38]

50. The same paper concludes that "**the exercise of the Prosecutor's discretion under article 53(1)(c) and 53(2)(c) is exceptional in its nature and […] there is a**

[38] OTP, Policy Paper on the Interests of Justice, September 2007, pp. 2-3.

presumption in favour of investigation or prosecution wherever the criteria established in article 53(1) (a) and (b) or article 53(2)(a) and (b) have been met" (emphasis added).[39]

51. This is also supported by the object and purpose of the Rome Statute. As detailed in paragraph 17 above, in the Preamble, States Parties reiterate the importance of putting an end to impunity and ensuring that the most serious crimes of concern to the international community do not go unpunished. In the aforementioned policy paper, the OTP stated that the criteria for the exercise of article 53(1)(c) should naturally be guided by the objects and purposes of the Statute, namely the prevention of serious crimes of concern to the international community by ending impunity.[40] Given the purpose of the Statute, a decision by a Prosecutor *not* to proceed with an investigation on the grounds that it does not serve the interests of justice – in situations where the requirements of jurisdiction and admissibility have been met – should be considered exceptional, because such a decision would run counter to the object and purpose of the Statute.[41]

b. Definition of interests of justice

52. Bearing in mind the object and purpose of the Rome Statute to put an end to impunity, the exceptional nature of the use of article 53(1)(c) and the presumption in favour of investigation or prosecution when the criteria of jurisdiction and admissibility are met, the elements defining the concept of the interests of justice are outlined below.

[39] OTP, Policy Paper on the Interests of Justice, September 2007, p. 1.
[40] OTP, Policy Paper on the Interests of Justice, September 2007.
[41] OTP, Policy Paper on the Interests of Justice, September 2007, pp. 2-4. *See also* Judgment on the appeal of the Prosecutor against Pre-Trial Chamber I's 'Decision on the "Application for Judicial Review by the Government of the Union of the Comoros"', Separate and Partly Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza, ICC-01/13-98-AnxI, 1 November 2019, para. 33 ("[a]ny provision in the Rome Statute must be interpreted in a way that aligns with the context, object and purposes of the Rome Statute as set out in its Preamble, that is to put an end to impunity for the most serious crimes that affect the international community as a whole and ensure the investigation and prosecution for those most responsible for the commission of those atrocities. This applies particularly when interpreting the framework for the initiation of an investigation under Article 53.")

53. It should be noted that the term "interests of justice" is not defined by the Rome Statute, nor was there agreement on its definition at the Rome Conference.[42] However, a policy paper of the OTP on the interests of justice established certain factors to be considered: the gravity of the crime, the interests of the victims, and the particular circumstances of the accused. Given that on closing the preliminary examination in Colombia the Prosecutor did not question the gravity of the crimes committed in that country[43] and that, as a result of the lack of consideration of potential cases, we have no information as to who the potential "accused" would be, this section will focus on the interests of victims.

i. Interests of victims

54. Article 53 of the Rome Statute imposes a specific obligation on the Prosecutor to take into account the interests of victims before initiating an investigation: "Taking into account the gravity of the crime and the interests of victims, there are

[42] *See* Human Rights Watch, The Meaning of 'the Interests of Justice' in Article 53 of the Rome Statute, 1 June 2005 ("There has been intense debate about the meaning of the phrase 'in the interests of justice' in Article 53. It is fairly clear that no consensus as to the meaning of the phrase 'interests of justice' was agreed upon at the Rome Conference"). "Philippe Kirsch, the chairman of the Rome Diplomatic Conference, observed in an interview subsequent to the adoption of the Rome Statute that the language of Art. 53, particularly the phrase "the interests of justice," reflects a "creative ambiguity" toward the controversial issue of giving the prosecutor the power to recognize an amnesty exception to the court's jurisdiction." Michael Scharf, "The Amnesty Exception to the Jurisdiction of the International Criminal Court," *Cornell International Law Journal*, vol. 32 (1999), 507, pp. 521-22. This view has also been expressed by Mahnoush Arsanjani, who served as the Secretary of the Committee of the Whole of the Rome Conference: "During the preparatory phase, the question of how to address amnesties and truth commissions was never seriously discussed… The same evasive approach was taken at Rome." Mahnoush H. Arsanjani, "The Rome Statute of the International Criminal Court," *American Journal of International Law*, vol. 22 (1999), p. 38. "As a matter of treaty interpretation, one would not look to 'the preparatory work of the treaty and the circumstances of its conclusion' except to 'confirm' the meaning reached from considering, among other things: (i) the ordinary meaning of the treaty in context and in light of its object and purpose; and (ii) relevant rules of international law, or where the meaning is ambiguous or leads to a result 'which is manifestly absurd or unreasonable.'" Vienna Convention, Article 32.", *id*., footnote 7.

[43] As mentioned above, the closure of the preliminary examination was justified with language of complementarity, but at no time was the seriousness of the crimes committed in Colombia questioned. *See* Cooperation agreement, Preamble "*Highlighting* that over the last 17 years, Colombia and the Office of the Prosecutor have developed a cooperative relationship that has effectively strengthened the country's capacity to administer justice for the most serious crimes of concern to the international community as a whole, which constitutes a valuable experience that may be replicated in other situations around the world"; "ICC Prosecutor, Mr Karim A. A. Khan QC, concludes the preliminary examination of the Situation in Colombia with a Cooperation Agreement with the Government charting the next stage in support of domestic efforts to advance transitional justice", https://www.icc-cpi.int/news/icc-prosecutor-mr-karim-khan-qc-concludes-preliminary-examination-situation-colombia (accessed 27 April 2022).

nonetheless substantial reasons to believe that an investigation would not serve the interests of justice."

55. Since the concept of the "interests of victims" under the Rome Statute has not been developed by the ICC Chambers, our analysis of this concept draws on interpretation by other international courts and mechanisms, notably the right of access to justice for victims, highlighting in particular (i) the right to truth and (ii) the obligation to investigate and sanction. In addition, this section will highlight the consequences and importance of compliance with the obligation to respect and guarantee the right of access to justice (impunity, prevention, and transitional justice), which have been developed, in particular, by the Inter-American Court of Human Rights (IACtHR).

56. The right to access to justice for victims of serious human rights violations is widely recognised by international law, enshrined in numerous international treaties, including the International Covenant on Civil and Political Rights (article 2), the International Convention on the Elimination of All Forms of Racial Discrimination (article 6), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (article 14), and the Convention on the Rights of the Child (article 39) and the American Convention on Human Rights.[44] Indeed, it should be noted that the right to access to justice has been declared by the IACtHR as a peremptory norm of general international law, i.e. as a norm of *jus*

[44] See also Principle VII United Nations 2006 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, which provides for the right to "equal and effective access to justice" following gross violations of International Human Rights Law, 21 March 2006, A/RES/60/147; 13 IHRR 907 (2006), ('Basic Principles'); Article 8 of the Universal Declaration of Human Rights; Article 3 of the Convention for the Protection of all Persons from Enforced Disappearance. The right to a remedy is also found in international humanitarian law treaties, including Article 3 of the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV), Article 91 of the Additional Protocol to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977.

cogens in the terms of article 53 of the 1969 Vienna Convention on the Law of Treaties.[45]

57. The content and scope of this right determines how States should administer justice, including in relation to victims of human rights violations. This obligation takes on greater significance according to the nature of the rights violated and the gravity of the crimes committed,[46] for example, in relation to serious human rights violations which may constitute crimes against humanity or war crimes.

1. Right to the truth

58. Regarding the right to the truth, which is part of the right to access to justice,[47] the Inter-American Court has stated that "everyone, including the next of kin of the victims of serious human rights violations, has the right to know the truth. Consequently, the victims' next of kin and society in general should be informed of everything that happened in relation to such violations."[48] Such information implies "full and complete knowledge of the acts that occurred, the persons involved in them and the specific circumstances, in particular the violations committed and their motive."[49] Fulfilment of the right to access to justice through

[45] IACtHR. Case of Goiburú et al. v. Paraguay, Merits, Reparations and costs, Judgment of 22 September 2006. Series C No. 153, (hereinafter: Goiburú case), para. 131, and IACtHR, Case of Lagos del Campo v. Peru, Preliminary Objections, Merits, Reparations and Costs, Judgment of 31 August 2017, Series C No. 340, (hereinafter: Lagos del Campo case), para. 174.
[46] Goiburú case, para. 128; IACtHR. Case of Garzón Guzmán et al. v. Ecuador, Merits, Reparations and Costs. Judgment of 1 September 2021, Series C No. 434 (hereinafter: Garzón Guzmán case). para. 66, and IACtHR, Case of Maidanik et al. v. Uruguay, Merits and Reparations, Judgment of 15 November 2021, Series C No. 444, (hereinafter: Maidanik case), para. 137.
[47] As has been established by the IACtHR, the right to truth "has autonomy and a broad nature" and, depending on the context and circumstances of the case, its violation can be related to various rights recognised in the American Convention on Human Rights (personal integrity, judicial guarantees and judicial protection, right of access to information). IACtHR, Case of Velásquez Rodríguez v. Honduras, Merits, Judgment of 29 July 1988, (hereinafter: Velásquez Rodríguez case) paras. 181 and 263; IACtHR. Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil, Preliminary Objections, Merits, Reparations and Costs, Judgment of 24 November 2010, Series C No. 219, (hereinafter: Guerrilha do Araguaia case) paras. 201 and 211, and IACtHR. Case of Guachalá Chimbo and others. v. Ecuador, Merits, Reparations and Costs, Judgment of 26 March 2021, Series C No. 423 (hereinafter: Guachalá Chimbo case), para. 213.
[48] IACtHR, Case of Trujillo Oroza v. Bolivia, Reparations and Costs, Judgment of 27 February 2002, Series C No. 92, (hereinafter: Trujillo Oroza case), para. 100; IACtHR, Case of Herzog et al. v. Brazil. Preliminary Objections, Merits, Reparations and Costs, Judgment of 15 March 2018, Series C No. 353, para. 328, Maidanik case, para. 176.
[49] Maidanik case, para. 177.

investigation thus constitutes "a form of reparation."[50] The right to truth has also been repeatedly recognised by UN mechanisms and the European Court of Human Rights.[51]

59. It should also be noted that the IACtHR has stressed that when the facts of a case take place within a non-international armed conflict, the clarification of the truth of what happened acquires particular relevance.[52] In the same vein, the IACtHR has highlighted the United Nations' recognition of "the importance of determining the truth about gross violations of human rights for the consolidation of peace and reconciliation processes."[53]

2. Obligation to investigate and sanction

60. In its case law, the IACtHR has established that State authorities who have knowledge of a serious human rights violation have the obligation to open ex officio, a serious, impartial and effective investigation,[54] carried out by all available legal means and aimed at determining the truth[55] and at the pursuit, capture, prosecution and punishment of those responsible.[56] This has been reiterated by the

[50] IACtHR, Case of Gómez Palomino v. Peru, Merits, Reparations and Costs, Judgment of 22 November 2005, Series C No. 136 (hereinafter: Gómez Palomino case) para. 78; IACtHR, Case of Uzcátegui et al. v. Venezuela, Merits and reparations, Judgment of 3 September 2012, Series C No. 249 (hereinafter: Uzcátegui case) para. 240, and IACtHR. Case of Rodríguez Vera et al. (Disappeared from the Palace of Justice) v. Colombia, Preliminary Objections, Merits, Reparations and Costs, Judgment of 14 November 2014, Series C No. 287 (hereinafter: Rodríguez Vera case), para. 511.
[51] See International Commission of Jurists, "The Right to a Remedy and Reparation for Gross Human Rights Violations", pp. 121-130.
[52] IACtHR, Case of García and Family Members v. Guatemala, Merits, Reparations and Costs, Judgment of 29 November 2012 Series C No. 258 (hereinafter: García and Family case), para. 176.
[53] IACtHR, Case of Gudiel Álvarez (Diario Militar) v. Guatemala, Merits, Reparations and Costs, Judgment of 20 November 2012, Series C No. 253 (hereinafter: Diario Militar case), para. 299.
[54] Velásquez Rodríguez case, para. 177; IACtHR, Case of the Pueblo Bello Massacre v. Colombia, Merits, Reparations and Costs, Judgment of 31 January 2006, Series C No. 140 (hereinafter: Pueblo Bello Massacre case) para. 143, and Maidanik case, para. 138.
[55] IACtHR. Case of Juan Humberto Sánchez v. Honduras, Preliminary Objection, Merits, Reparations and Costs. Judgment of 7 June 2003. Series C No. 99, para. 127; IACtHR. Case of Barbosa de Souza et al. v. Brazil, Preliminary Objections, Merits, Reparations and Costs, Judgment of 7 September 2021, Series C No. 435, para. 128, and Maidanik case, para. 138.
[56] Velásquez Rodríguez case, para. 174; Pueblo Bello Massacre case, para. 143, and IACtHR, Case of Velásquez Paiz et al. v. Guatemala, Preliminary Objections, Merits, Reparations and Costs, Judgment of 19 November 2015, Series C No. 307, (hereinafter: Velásquez Paiz case), para. 143.

case law of the European Court of Human Rights[57] and the African Commission on Human and Peoples' Rights.[58] Similarly, the UN Human Rights Council and its predecessor, the Commission on Human Rights, have repeatedly affirmed the duty of States to conduct investigations into allegations of serious human rights violations, in particular in cases of extrajudicial killings, enforced disappearances and torture.[59]

61. In relation to the determination of responsibilities, the IACtHR has indicated that States must establish "the corresponding criminal (intellectual and material), administrative and/or disciplinary responsibilities, and effectively apply the sanctions and consequences provided for by law."[60] In this regard, the Court has emphasised that the passage of time due to the lack of diligence in the investigation unduly affects the possibility of obtaining and presenting relevant evidence to clarify the facts and determine the corresponding responsibilities.[61]

62. Therefore, compliance with the duty of States to investigate and sanction serious human rights violations is "not only an international obligation, but also provides essential elements to consolidate a comprehensive policy on the right to truth, access to justice, effective measures of reparation and guarantees of non-

[57] McCann v. the United Kingdom, ECtHR, Judgment of 27 September 1995, Series A No. 324, para. 161; Opuz v. Turkey, ECtHR, Judgment of 9 June 2009, para. 150; Kalender v. Turkey, ECtHR, Judgment of 15 December 2009, para. 53; Weber and Others v. Poland, ECtHR, Judgment of 27 April 2007, para. 68; Öneryıldız v Turkey, ECtHR, Judgment of 30 November 2004, para. 93; Budayeva and Others v. Russia, ECtHR, Judgment of 20 March 2008, para. 142; Assenov v. Bulgaria, ECtHR, Judgment of 28 October 1998, Reports 1998-VIII, para. 102.

[58] *Malawi African Association et al. v. Mauritania*, AfrComHPR Communications 54/91 et al. (2000), recommendations, lit. 1; *Mouvement Burkinabé des Droits de l'Homme et des Peuples v. Burkina Faso*, AfrComHPR Communication 204/97 (2001), recommendations, lit 1.

[59] See, for example, Human Rights Council resolutions: 17/5 (2011), para. 4 (extra-judicial, arbitrary or summary executions); 10/24 (2009), para. 6-7 and 11 (torture); 21/4 (2012), para. 18(b)-(f) (enforced disappearance). See also Commission on Human Rights resolutions: 2003/32 (torture), para. 8; 2003/53, para. 4-5 (extrajudicial, summary and arbitrary executions); 2003/72, para. 8 (impunity); 2003/38, para. 5(c) (enforced or involuntary disappearances).

[60] Velásquez Rodríguez case, para. 174; Pueblo Bello Massacre case, para. 143, and IACtHR, Case of Tenorio Roca et al. v. Peru, Preliminary Objections, Merits, Reparations and Costs, Judgment of 22 June 2016, Series C No. 314, para. 176.

[61] IACtHR, 12 Guatemalan Cases v. Guatemala, Monitoring Compliance with Judgment, Judgment of the Inter-American Court of Human Rights of 24 November 2015 (hereinafter: 12 Guatemalan cases), recital 131; IACtHR. Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia, Merits, Reparations and Costs. Judgment of 1 September 2010, Series C No. 217, para. 172, and Velásquez Paiz case, para. 169.

repetition."[62] Certainly, "judicial processes aimed at clarifying what happened in contexts of systematic human rights violations can provide a space for public denunciation and accountability for the arbitrary acts committed; they foster society's confidence in the rule of law and in the work of its authorities, legitimising their actions; they allow processes of social reconciliation based on knowledge of the truth of what happened and the dignity of the victims, and, ultimately, they strengthen collective cohesion and the rule of law."[63]

3. Consequences of compliance with the obligation to respect and ensure the right of access to justice for victims of human rights violations: impunity, prevention, and international justice

63. As the OTP stated in its policy paper on the interests of justice, respecting and guaranteeing the right of access to justice for victims of human rights violations contributes to combating impunity, preventing the commission of serious human rights violations and ensuring lasting respect for international justice.[64]

64. The obligation to investigate as part of the right of access to justice becomes more pressing in cases where there is a situation of structural impunity.[65] The IACtHR has defined impunity as "the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of the rights protected by the American Convention."[66] According to the IACtHR, impunity "fosters chronic recidivism of human rights violations[67] and total defenselessness of victims and

[62] IACtHR, Case of the Massacre of the Village Los Josefinos v. Guatemala, Preliminary Objection, Merits, Reparations and Costs, Judgment of 3 November 2021, Series C No. 442, para. 102, and IACtHR, Case of Julien Grisonas Family v. Argentina, Preliminary Objections, Merits, Reparations and Costs. Judgment of 23 September 2021, Series C No. 437, para. 165.
[63] *Idem*.
[64] OTP, Policy Paper on the Interests of Justice, September 2007, p. 4.
[65] 12 Guatemalan cases, recitals 122, 173 and 174.
[66] IACtHR, Case of the "White Van" (Paniagua Morales et al.) v. Guatemala, Merits, Judgment of 8 March 1998. Series C No. 37 (hereinafter: White van case), para. 173, and IACtHR, Case of Gutiérrez and family v. Argentina, Merits, Reparations and Costs, Judgment of 25 November 2013, Series C No. 271, para. 119.
[67] White van case, para. 173, and IACtHR, Case of the Landaeta Mejías Brothers and others v. Venezuela, Preliminary Objections, Merits, Reparations and Costs, Judgment of 27 August 2014, Series C No. 281, para. 216.

their relatives."[68] For this reason, it must be eradicated by all available legal means, through the determination of both general responsibilities – of the State – and individual responsibilities – criminal and other – of its agents or of individuals[69] – "and, consequently, by removing all de facto and de jure obstacles that maintain impunity[70] and by ensuring that the rules of due process of law are respected."[71]

65. Precisely for this reason, if the State complies with its obligation to investigate, prosecute and, where appropriate, punish those responsible for serious human rights violations, it guarantees the prevention of further violations. Thus, as the IACtHR has reiterated, the duty to investigate and to protect the right to the truth benefits the victims' relatives and society as a whole, "because, by knowing the truth about [the] crimes [committed], it can prevent them in the future."[72] Without investigation and fulfilment of the corresponding right to the truth, serious human rights violations may continue to be tolerated in the State concerned.

66. Consequently, "the failure to investigate [...] gross human rights violations that occurred in the context of systematic patterns is especially serious, because it may reveal non-compliance with the State's international obligations established by non-derogable norms."[73] In this sense, judges, as those governing the process, must direct and guide judicial proceedings so as not to sacrifice justice and due process in favour of formalism and impunity.[74]

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[68] White van case, para. 173, and IACtHR, Case of the Barrios Family v. Venezuela, Merits, Reparations and Costs. Judgment of 24 November 2011, Series C No. 237, paras. 175 and 292.
[69] Goiburú case, para. 131, and IACtHR, Case of the Peasant Community of Santa Bárbara v. Peru, Preliminary Objections, Merits, Reparations and Costs, Judgment of 1 September 2015, Series C No. 299, (hereinafter: Santa Bárbara case) para. 222.
[70] IACtHR, Case of Myrna Mack Chang v. Guatemala, Merits, Reparations and Costs, Judgment of 25 November 2003, Series C No. 101, para. 277, and Santa Bárbara case, para. 222.
[71] IACtHR, Case of Anzualdo Castro v. Peru, Preliminary Objection, Merits, Reparations and Costs, Judgment of 22 September 2009, Series C No. 202, para. 125.
[72] IACtHR, Case of Bámaca Velásquez v. Guatemala, Reparations and Costs. Judgment of 22 February 2002, Series C No. 91, para. 77, and IACtHR, Case of the 19 Merchants v. Colombia, Merits, Reparations and Costs, Judgment of 5 July 2004, Serie C No. 109, para. 259.
[73] IACtHR, Case of García Lucero et al. v. Chile, Preliminary Objection, Merits and Reparations, Judgment of 28 August 2013, Serie C No. 267, para. 123, and Maidanik case, para. 147.
[74] IACtHR, Case of Gelman v. Uruguay, Monitoring Compliance with Judgment, Order of the Inter-American Court of Human Rights of 19 November 2020, recital 10, Maidanik case, para. 210.

67. According to the IACtHR, "Justice, to be such, must be opportune, and reach the desired or awaited *effet utile* with the action, and particularly dealing with cases of serious human rights violations, the principle of effectiveness of the investigation of the facts and the determination of the punishment of those responsible must prevail."[75]

68. In any event, the IACtHR has affirmed that "Access to international justice is also envisaged as a guarantee that ensures effective judicial protection of the rights and freedoms recognized in the American Convention against any violations, and which supports and complements the national jurisdictions."[76] Moreover, according to the IACtHR access to international justice "is a tool that promotes the empowerment and inclusion of historically or traditionally disadvantaged groups, thereby strengthening democratic institutions, even in countries with a strong tradition of observance of human rights."[77]

c. The Prosecutor's decision does not serve the interests of justice

69. Taking into account the elements flowing from victims' right of access to justice, highlighting in particular (i) the right to the truth and (ii) the obligation to investigate and sanction, as well as the consequences relating to impunity, crime prevention and international justice resulting from the implementation of this right, the Applicants conclude that the Prosecutor's decision is not in the interests of justice within the meaning of article 53(1) of the Rome Statute.

70. First, with regard to the right to the truth, the closure of the preliminary examination on Colombia may mean that hundreds or thousands of victims of crimes under the ICC's jurisdiction will be deprived of knowing the truth,

[75] IACtHR, Case of Gelman v. Uruguay, Merits and Reparations, Judgment of 24 February 2011, Serie C No. 221, para. 194.
[76] IACtHR, Obligations in matters of human rights of a State that has denounced the American Convention on Human Rights, and attempts to withdraw from the OAS (interpretation and scope of Articles 1, 2, 27, 29, 30, 31, 32, 33 to 65 and 78 of the American Convention, Advisory Opinion OC-26/20, 9 November 2020. Series A No. 26, para. 54.
[77] *Idem*.

including full knowledge of the acts that occurred and the persons involved in them. In particular, as mentioned above, while certain investigations have made progress in Colombia, there is a systematic lack of investigation with respect to a large number of high-level officials, in particular third parties and non-combatant State agents involved in crimes under the ICC's jurisdiction, which means that many victims will not be able to access the truth about the criminal responsibility of these individuals.

71. In relation to the obligation to investigate and sanction, the Prosecutor's decision not to open an investigation of the situation in Colombia clearly constitutes a violation of the victims' rights in terms of investigation and sanction. As the IACtHR has emphasised, the passage of time in cases of human rights violations unduly affects the possibility of obtaining and presenting evidence that would allow for the identification of the perpetrators responsible. The closure of the preliminary examination on Colombia will further prolong the long wait for victims there, who have not yet been able to access justice through investigation or sanction of perpetrators. As mentioned above, the closure of the preliminary examination of Colombia will effectively leave certain groups of perpetrators free from criminal investigation and/or sanction, which in itself constitutes a violation of the rights of victims, who are entitled to a serious, impartial and effective *ex officio* investigation, conducted by all available legal means and aimed at determining the truth, and, where appropriate, the prosecution, capture, trial and possible punishment of those responsible.

72. As detailed above, guaranteeing the right of access to justice is essential to fighting impunity, preventing the commission of serious human rights violations, and ensuring lasting respect for international justice. Taking into account these elements, as well as the purpose and object of the Rome Statute, the Prosecutor's decision is clearly not in the interests of justice in the Colombian case.

73. It is worth mentioning in this regard the justifications of the Prosecutor in his public statements and the Cooperation Agreement with the Colombian government, in particular the arguments that refer to the Colombian peace process and that justify the closure of the preliminary examination in order to give time and an opportunity for the Colombian transitional justice system to move forward in terms of truth, peace and reconciliation.

74. First, as stated above, the closure of the preliminary examination in effect goes against the victims' right to the truth, as many cases will evade any investigation, thus denying the possibility of access to the truth about the facts and the perpetrators involved, in particular high-level officials. Moreover, as the Office of the Prosecutor itself has emphasised in its policy paper on the interests of justice, there is a difference between the concepts of the interests of justice and the interests of peace, and indeed "the broader matter of international peace and security is not the responsibility of the Prosecutor; it falls within the mandate of other institutions."[78] Thus, while considerations of the peace process, the transitional justice system and reconciliation are relevant in other public policy areas, given the dire consequences of the closure of the ICC's preliminary examination for the right of access to justice of Colombian victims, it is clear that the Prosecutor's decision not to open an investigation in the situation of Colombia is not in the interests of justice.

III. At the very least, the Prosecutor should justify his decision to close the preliminary examination to victims and the international community

75. Should the Pre-Trial Chamber decide not to reverse the Prosecutor's decision, the Prosecutor should, at the very least, be required to provide a public and reasoned

[78] OTP, Policy Paper on the Interests of Justice, September 2007, p. 9. "[T]here is a difference between the concepts of the interests of justice and the interests of peace and that the latter falls within the mandate of institutions other than the Office of the Prosecutor", id., p. 1.

explanation of the grounds for the closure of the preliminary examination of the situation in Colombia.

76. The Prosecutor's duty to provide a public and reasoned explanation of the grounds for the closure of the preliminary examination in Colombia stems from the Rome Statute and the Regulations of the Court. Based on article 53(1)(c) of the Rome Statute, the Prosecutor is required to inform the Pre-Trial Chamber of any decision not to investigate or not to prosecute based solely on articles 53(1)(c) or 53(2)(c)(2). Furthermore, article 15(6) of the Statute requires that, if after receiving information during a preliminary examination, the Prosecutor decides not to open an investigation "he or she shall inform those who provided the information." While we do not know whether or not the Prosecutor informed the Pre-Trial Chamber, in any event, in any event he did not inform victims or the organisations that represent them, including the present Applicants, of the justification of his decision not to open an investigation.

77. This is further confirmed by rule 49 of the Rules of Procedure and Evidence, which states that the Prosecutor, when deciding not to open an investigation as per article 15(6) of the Statute, "*shall* promptly ensure that notice is provided, including reasons for his or her decision" (emphasis added). Further, the Prosecutor's notice must also advise of the possibility of submitting further information in light of new facts and evidence. Thus, taking articles 53(1)(c) and 15(6) of the Statute, as well as rule 49 of the Rules of Procedure and Evidence, it is clear that the Prosecutor must both inform and provide reasons for his decision to not open an investigation after a preliminary examination.

78. The Prosecutor's duty to give a reasoned explanation to the victims of the Colombian situation and the international community is also required by international human rights standards, which must be considered in accordance with article 21(3) of the Rome Statute.

79. In this regard, it is important to note the obligation to justify decisions, which stems from the right of access to justice. The IACtHR has indicated that "[t]he principle of a reasonable time established in the American Convention and [its] consistent case law is applicable not only to the domestic proceedings in each State Party, but also to the international organs or courts whose function it is to decide petitions concerning presumed human rights violations."[79] This statement is also relevant to the obligation of international tribunals and bodies to justify their decisions. Article 8 of the American Convention "establishes the guidelines for due process of law, which consists of a series of requirements that must be observed in the procedural instances in order to allow the individual to defend his or her rights adequately against any decision of the State that may affect them."[80] The duty to state grounds is one of the "due guarantees" linked to the proper administration of justice to safeguard the right to due process[81] of, among others, the victims of human rights violations and their relatives, "in relation to their rights to access justice and to know the truth."[82]

80. The Inter-American Court has established that the statement of reasons "[is] the externalisation of the reasoned justification that allows a conclusion to be reached,"[83] in a way that "protects the right of citizens to be tried for the reasons that the law provides, and grants credibility to the legal decisions within the

[79] IACtHR, Annual Report 2020, p. 52.
[80] IACtHR, Case of the Constitutional Court v. Peru, Merits, Reparations and Costs. Judgment of 31 January 2001. Serie C No. 71, para. 69; IACtHR, Case of Girón et al. v. Guatemala, Preliminary Objection, Merits, Reparations and Costs, Judgment of 15 October 2019. Serie C No. 390, para. 95, and IACtHR, Case of Martínez Esquivia v. Colombia, Preliminary Objections, Merits and Reparations. Judgment of 6 October 2020. Serie C No. 412 (hereinafter: Martínez Esquivia case), para. 105.
[81] IACtHR, Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela, Preliminary Objection, Merits, Reparations and Costs. Judgment of 5 August 2008. Serie C No. 182 (hereinafter: Aptiz Barbera case), para. 77; IACtHR, Case of Chinchilla Sandoval v. Guatemala, Preliminary Objection, Merits, Reparations and Costs, Judgment of 29 February 2016. Serie C No. 312 (hereinafter: Chinchilla case), para. 248, and IACtHR, Case of García Ibarra et al. v. Ecuador, Preliminary Objection, Merits, Reparations and Costs, Judgment of 17 November 2015, Serie C No. 306 (hereinafter: García Ibarra case), para. 151.
[82] García Ibarra case, para. 151.
[83] IACtHR, Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador, Preliminary Objections, Merits, Reparations and Costs. Judgment of 21 November 2007, Serie C No. 170, para. 107; IACtHR, Case of Palma Mendoza et al. v. Ecuador, Preliminary Objection and Merits. Judgment of 3 September 2012, Serie C No. 247, para. 100, and Chinchilla case, para. 248.

framework of a democratic society."[84] Thus, "a clear explanation of a decision is an essential part of a proper statement of reasons for a judicial decision"[85] and thus of the right of access to justice.

81. Also noteworthy is the right to judicial review, which is part of victims' access to justice.

82. The European Parliament Directive on "minimum standards on the rights, support and protection of victims of crime" states that "Member States shall ensure that victims, in accordance with their role in the relevant criminal justice system, have the right to a review of a decision not to prosecute."[86] This has been reiterated by the European Court of Human Rights, which ruled in the case of *Ramos Nunes de Carvalho e SÁ v. Portugal* that the right to a fair trial (article 6) was violated, in part, by the insufficiency of judicial review.[87]

83. Indeed, the IACtHR, the European Court of Human Rights and UN committees have all established that the right to judicial review is essential and exists even in the case of administrative decisions of state organs, which further reinforces the importance of access to judicial review.[88]

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[84] Apitz Barbera case, para. 77; IACtHR, Case of López Mendoza v. Venezuela, Merits, Reparations and Costs. Judgment of 1 September 2011, Series C No. 233, para. 141, and Martínez Esquivia case, para. 106.
[85] García Ibarra case, para. 151.
[86] European Parliament, Directive 012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, 25 October 2012, 2012/29/EU, Article 11(1). *See also* Judgment on the appeal of the Prosecutor against Pre-Trial Chamber I's 'Decision on the "Application for Judicial Review by the Government of the Union of the Comoros"', Separate and Partly Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza, ICC-01/13-98-AnxI, 1 November 2019, paras. 36-39.
[87] European Court of Human Rights, Grand Chamber, Ramos Nunes de Carvalho e SA v. Portugal, Judgment, 6 November 2018, Application Nos. 55391/13, 57728/13 and 74041/13, para 214. *See also* ECtHR, Ramos Nunes de Carvalho e SA v. Portugal, Joint Concurring Opinion of Judges Raimondi, Nussberger, Jaderblom, Mose, Polačková, and Koskelo, Applications nos. 55391/13, 57728/13 and 74041/13, para. 13; Judgment on the appeal of the Prosecutor against Pre-Trial Chamber I's 'Decision on the "Application for Judicial Review by the Government of the Union of the Comoros"', Separate and Partly Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza, ICC-01/13-98-AnxI, 1 November 2019, paras. 36-39.
[88] IACtHR, 'Access to justice as a guarantee of economic, social, and cultural rights', 7 September 2007, OEA/Ser.L/V/II.129, para. 178 and footnote138 ("The European Court of Human Rights has developed abundant case law in this connection. Thus, the ECHR requires that states parties guarantee the right to appeal administrative decisions to a court that offers the guarantees outlined in Article 6 of the ECHR. As regards the scope of review by the court of justice, the decisions of the ECtHR all indicate that a court reviewing administrative decisions should have broad jurisdiction, i.e., over both the law and the facts. This ensures the individual the opportunity to

84. Taking into account articles 53(1)(c) and 15(6) of the Statute, rule 49 of the Rules of Procedure and Evidence, as well as the obligation to provide reasons for a decision arising from the right of access to justice, the Prosecutor should, at the very least, justify his decision to close the preliminary examination to the victims and the international community. It is worth reiterating, as detailed above, that in situations similar to the Colombian case this has been the practice of the OTP, which has published documents explaining why investigations have not been opened in Honduras (2015), Gabon (2018), Iraq/UK (2020) and Bolivia (2022).[89]

IV. Relief sought

85. For the aforementioned reasons, the Applicants respectfully request the Pre-Trial Chamber to reverse the Prosecutor's decision to close the preliminary examination of the situation in Colombia. In the alternative, we request that, at the very least, the Prosecutor present to victims and the international community a rigorous and reasoned analysis, 53(1)(c) and 15(6) of the Statute, rule 49 of the Rules of Procedure and Evidence, and international human rights law standards, of the decision not to open an investigation into the situation in Colombia.

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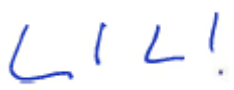
have a judge rule definitively on the merits of his or her claims, with the proper guarantees of independence and impartiality. Thus, for instance, in *Albert and Le Compte v. Belgium*, the applicants were medical practitioners who alleged the unavailability under domestic law of a suitable legal remedy to challenge decisions imposing disciplinary measures on them adopted by a professional association. The decisions of this administrative body could only be appealed before an organ of the same nature as the association, whose decisions, in turn, had to be appealed before the Belgian Court of Cassation. The European Court held that, under the Convention, administrative bodies that impose disciplinary sanctions must either comply with the requirements of Article 6 or, if not, be subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6(1) of the European Convention. The European Court considered that there had been a breach of Article 6(1) in this case because the professional association, which exercised disciplinary powers and could decide the merits of the case, did not hear the case publicly, and because the Court of Cassation, which met the procedural requirements of Article 6(1), could only examine points of law within the limited scope of this appeal. (ECtHR, *Albert and Le Compte v. Belgium*, A 58, para. 29 (1983). v. Harris, D. J., O´Boyle, M. O. and Warbrick, C., *Law of the European Convention of Human Rights*, London, (1995), p. 192).”). *See also* Committee on the Rights of the Child, *General Comment No. 16, State obligations regarding the impact of the business sector on children's rights*, UN Doc CRC/C/GC/16 (2013), para. 71.

[89] OTP, Situation in Honduras – Article 5 Report, October 2015; OTP, Situation in the Gabonese Republic – Article 5 Report, 21 September 2018; OTP, Situation in Iraq/UK – Final Report, 9 December 2020; Situation in the Plurinational State of Bolivia – Final Report, 14 February 2022.

Respectfully submitted on behalf of the Applicants by Counsel,



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At Paris, France