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PRESSURE POINT: THE ICC'S IMPACT ON NATIONAL JUSTICE

Lessons from Colombia, Georgia, Guinea, and the United Kingdom





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Lessons from Colombia, Georgia, Guinea, and
the United Kingdom

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Findings and Recommendations

A. Positive Complementarity in Preliminary Examinations

The International Criminal Court (ICC) is a court of last resort.

Under the principle of “complementarity,” the ICC can only take up cases where national authorities—which have the primary responsibility under international law to ensure accountability for atrocity crimes—do not.

In the long-term, bolstering national proceedings is crucial in the fight against impunity for the most serious crimes, and is fundamental to hopes for the ICC’s broad impact. Where states have an interest in avoiding the ICC’s intervention, they can do so by conducting genuine national proceedings. As a result, the Office of the Prosecutor (OTP) can have significant leverage with national authorities in countries where it is considering whether to open an investigation in what are known as “preliminary examinations.”

The OTP has recognized this opportunity. In policy and in practice, the OTP is committed, where feasible, to encouraging national proceedings into crimes falling within the ICC’s jurisdiction in preliminary examinations. This makes the OTP potentially an important actor in what has come to be known as “positive complementarity”—the range of efforts by international partners, international organizations, and civil society groups to assist national authorities to carry out effective prosecutions of international crimes. These efforts include legislative assistance, capacity building, and advocacy and political dialogue to counter obstruction.

While early references to positive complementarity were primarily to the role of the court (see Appendix 1), the term has since evolved, particularly leading up to and after the 2010 ICC review conference in Kampala, Uganda. Momentum has been difficult to sustain since Kampala, but the term has garnered increased recognition and has come to encompass initiatives by a range of actors to encourage national prosecutions of international crimes.

These efforts are needed because domestic prosecutions of international crimes typically face several obstacles. Political will of national authorities to support independent

investigations is essential, but is often absent or quixotic given that these prosecutions likely touch on powerful domestic and even international interests that oppose accountability. Prosecutions of mass atrocity crimes also require specialized expertise and support, including witness protection. Countries are often ill-equipped to meet these challenges.

While the OTP's commitment to positive complementarity in preliminary examinations as part of this broader landscape holds significant potential to meet victims' rights to justice for human rights crimes and to amplify the impact of the ICC on national justice efforts, it faces significant and steep challenges in seeking to translate its policy commitment into successful practice.

This report explores the extent to which it is realistic for the OTP to be able to deliver on this commitment, and asks whether domestic challenges are too great for the ICC's commitment to positive complementarity to surmount.

As discussed below, some positive complementarity effects may be triggered simply through the OTP's engagement with national authorities during the course of conducting its preliminary examinations. To go further, however, the OTP, like other complementarity actors, needs to have strategies to bridge the two pillars of "unwillingness" and "inability." These include:

- Focusing public debate through media and within civil society on the need for accountability;
- Serving as a source of sustained pressure on domestic authorities to show results in domestic proceedings;
- Highlighting to international partners the importance of including accountability in political dialogue with domestic authorities;
- Equipping human rights activists with information derived from the OTP's analysis, strengthening advocacy around justice; and
- Identifying weaknesses in domestic proceedings, to prompt increased efforts by government authorities and assistance, where relevant, by international partners.¹

¹ Other authors have also addressed strategies available to the Office of the Prosecutor (OTP) to advance positive complementarity. William Burke-White's article was among the first on positive complementarity, although not specific to the preliminary examination phase. See William Burke-White, "Proactive Complementarity: The ICC and National Courts in the

Many of these are strategies shared with other complementarity actors, but among these actors, the OTP is unique. As indicated above, its leverage with national authorities stems from the fact that, unlike international donors or civil society actors, it has the authority to open an investigation if national authorities fail to act. Under the court's legal framework, however, the OTP's jurisdiction can be blocked even by the appearance of national activity, regardless of whether this ultimately matures into effective domestic proceedings.

This unique leverage, therefore, comes with a unique catch: the OTP needs to strike a balance between opening space to national authorities, while it proceeds and is being seen to proceed with a commitment to act if national authorities do not. Where delay in ICC action does not result in genuine national justice, but provides space to national authorities to obstruct ICC action, it undermines the OTP's influence with national authorities and the OTP risks legitimizing impunity in the view of key partners on complementarity.

Rome System of International Justice," *Harvard International Law Journal*, 2008, vol. 49, pp. 53-108; see also Carsten Stahn, "Complementarity: A Tale of Two Notions," *Criminal Law Forum*, 2008, vol. 19, pp. 87-113; Carsten Stahn, "Taking Complementarity Seriously," in *The International Criminal Court and Complementarity: From Theory to Practice*, ed. Carsten Stahn and Mohamed M. El Zeidy (Cambridge: Cambridge University Press, 2011), pp. 233-282; Justine Tiller, "The ICC Prosecutor and Positive Complementarity: Strengthening the Rule of Law?," *International Criminal Law Review*, 2013, vol. 13, pp. 507-591. Mark Kersten and Thomas Obel Hanson have sought to further theorize the mechanisms through which the OTP can influence national actors in preliminary examinations, whether to bring about proceedings or to deter abuses. Kersten emphasizes, as we do, the importance of strategic alliances and the OTP taking a bolder approach with governments, under certain circumstances. Mark Kersten, "Casting a larger shadow: Pre-meditated madness, the International Criminal Court and preliminary examinations," unpublished, https://www.academia.edu/34379512/Casting_a_Larger_Shadow_Pre-Meditated_Madness_the_International_Criminal_Court_and_Preliminary_Examinations_Introduction_Shadow_Politics_and_the_International_Criminal_Court (accessed November 16, 2017), p. 2. Obel Hanson, while citing some exceptions, notes that, generally, there have been "few existing studies [to] examine the extent to which this goal is being effectively pursued by the OTP at the preliminary examination phase and how ICC preliminary examinations may affect national authorities' commitment to domestic accountability processes and otherwise impact the scope, nature, and conduct of such process." Thomas Obel Hansen, "The Policy Paper on Preliminary Examinations: Ending Impunity Through 'Positive Complementarity'?", Transitional Justice Institute Research Paper No. 17-01, 22 March 2017, <https://ssrn.com/abstract=2939139> (accessed November 16, 2017). One of the exceptions cited by Hansen is Christine Bjork and Juanita Goebertus, "Complementarity in Action: The Role of Civil Society and the ICC Rule of Law Strengthening in Kenya," *Yale Human Rights and Development Journal*, 2014, vol. 14, <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1102&context=yhrdlj> (accessed November 16, 2017), pp. 205-229. Other authors have examined what approach the OTP should take to its legal analysis during the preliminary examination in order to advance complementarity. See Paul Seils, "Putting Complementarity in its Place," in *The Law and Practice of the International Criminal Court*, ed. Carsten Stahn (Oxford: Oxford University Press, 2015), pp. 305-327. Seils has also written a handbook with guidance for national prosecutors seeking to avoid an International Criminal Court (ICC) intervention. See Paul Seils, *Handbook on Complementarity: An Introduction to the Role of National Courts and the ICC in Prosecuting International Crimes* (New York: International Center for Transitional Justice, 2016), https://www.ictj.org/sites/default/files/ICTJ_Handbook_ICC_Complementarity_2016.pdf (accessed November 16, 2017), pp. 77-81.

B. Evolution in OTP Practice

OTP practice has changed significantly since a 2011 Human Rights Watch report, *Course Correction*. The report highlighted inconsistent approaches between situations, the rapid announcement of several new preliminary examinations, and a lack of substantive public reporting regarding progress in these examinations to back up initial publicity.²

Since that time, the OTP has made several important shifts in its approach to positive complementarity and preliminary examinations. These shifts are discussed in Appendix I. They include a more qualified posture on positive complementarity, seeking to engage national authorities only where relevant domestic proceedings are already underway or where national authorities have explicitly stated their commitment to undertaking such proceedings.

They also include its current practice of delaying specific positive complementarity initiatives until after the OTP is certain that potential cases fall within the ICC's jurisdiction, bolstering its ability to engage governments in a more concrete manner. The OTP has also been more cautious in the publicity it seeks for its preliminary examinations, while also putting more substantive information about each examination into the public domain through its annual reports. Lastly, it has boosted, albeit in a still-too-limited manner, the number of staff members assigned to carry out preliminary examinations.

C. Key Findings on Colombia, Georgia, Guinea, and the United Kingdom

This report seeks to build on our 2011 report and evaluate the OTP's impact on national justice through case studies on national proceedings in four countries that are, or were, the subject of OTP preliminary examinations—Colombia, Georgia, Guinea, and the UK.³ The report spans OTP practice both before and after its consolidation in 2013 of a formal policy on preliminary examinations. It seeks to identify areas where further shifts in practice, particularly in the manner of engagement with national authorities, key strategic allies

² See Human Rights Watch, *Course Correction: Recommendations to the Prosecutor for a More Effective Approach to "Situations under Analysis,"* June 2011, <https://www.hrw.org/news/2011/06/16/icc-course-correction>.

³ For an argument about the broader effects produced by the opening of ICC investigations, see Geoff Dancy and Florencia Montal, "Unintended Positive Complementarity: Why International Criminal Court Investigations Increase Domestic Human Rights Prosecutions," January 20, 2015, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2736519 (accessed February 9, 2018). The authors discount the possibility that preliminary examinations on their own could have these effects, given the OTP's limited powers during this phase. *Ibid.*, p. 17.

among international partners and civil society, and media could strengthen OTP impact going forward.

Our research is based on interviews with a range of stakeholders in each country case study including government officials in ministries of foreign affairs, justice, and defense; national investigating and prosecuting authorities; judges; civil society activists; journalists; and representatives of diplomatic missions and United Nations agencies. The four case studies were selected based on Human Rights Watch’s assessment that in each situation, certain prospects for national justice existed or had existed, such that it was reasonable to expect the OTP to have some impact; geographical diversity; existing Human Rights Watch expertise and research in the country; and the feasibility of carrying out research given available resources and staffing.

These four countries fall on a spectrum of OTP engagement with national authorities on domestic justice. Our research suggests that the OTP’s engagement has been most significant in Guinea, followed by Colombia, and far more limited in Georgia. In the UK, the OTP had not deployed a proactive approach to complementarity during the time period covered by our research.⁴

Results to date in national proceedings underscore a key point made above: expectations about the OTP’s influence need to remain realistic. In all four countries, authorities have initiated investigations. Prosecutions, however, have been more limited.

⁴ All four of the case studies in this report stem from article 15 communications concerning ICC states parties, rather than state party or Security Council referrals, or from a non-state party’s acceptance of jurisdiction through an article 12(3) declaration. While the OTP’s analysis of article 53(1) for the purposes of determining whether or not to open an ICC investigation does not depend on the triggering mechanism, there are important differences between these mechanisms when it comes to encouraging national proceedings. The OTP has tended to treat state party referrals largely as confirmation that national authorities will not conduct domestic investigations, while Security Council referrals, particularly of crimes committed in states non-parties, may be most likely to arise out of conditions that are least conducive to national trials. ICC states parties which through their membership in the ICC have a standing commitment to fight impunity may have a stronger incentive to carry out national prosecutions than states non- parties that are the subject of Security Council referrals. States parties may even already have relevant national legislation (including laws embodying the provisions of the Rome Statute through the “implementation” of the treaty) and through the ratification and implementation processes, pro-accountability constituencies within parliament or civil society. While it is worth considering whether these differences are so significant as to preclude positive complementarity activities in such situations, this research has not attempted to address this issue. Our conclusions, therefore, are likely to be most relevant to preliminary examinations initiated following article 15 communications or article 12(3) declarations.

Investigations in Guinea into the September 28, 2009 stadium massacre had yet to lead to trials at time of writing, although in December 2017, following the completion of the investigation, the investigating judges referred the case for trial. Georgian authorities have abandoned their investigations into crimes committed during the 2008 armed conflict with Russia in the South Ossetia region, leading to the opening of an ICC investigation in January 2016. In the UK, where the preliminary examination concerns allegations of abuses committed by the country’s armed forces in Iraq, the creation of a special investigative body to look into allegations, the Iraq Historic Allegations Team (IHAT), now replaced by the Service Police Legacy Investigations (SPLI), has not resulted in any prosecutions. In Colombia, there has been a highly significant number of convictions of individuals accused of “false positive” killings, that is, cases of unlawful killings that military personnel officially reported as lawful killings in combat, but very scarce progress in prosecuting high-ranking officials.⁵

The case studies suggest that it is important not to overstate the prospects for success. Given the many persistent and stubborn obstacles to trying the most serious crimes before national courts, many preliminary examinations will result in the need to open ICC investigations. Objective factors—such as the peace process in Colombia or the cross-border nature of the Georgia-Russia conflict—place significant constraints on what the OTP’s preliminary examinations can achieve when it comes to national justice. Indeed, the OTP has, over time, calibrated its approach to positive complementarity, pursuing this as a strategy only where certain underlying conditions are met.

And yet, in each situation, our research has identified positive steps that are at least partly attributable to the OTP’s engagement.

There has been substantial progress in Guinea, in particular, where the OTP’s engagement has been more intense than in other situations and where over time the OTP as an external point of pressure seems to have contributed to progress by national officials and the engagement of other key international actors on justice.

In Colombia, sources interviewed for this report suggested that the OTP has been one of a number of important actors in keeping the need for accountability in these cases on the

⁵ “False positive” killings are only one dimension of the OTP’s preliminary examination, but the sole focus of our analysis.

agenda. The OTP also worked effectively to counter at least one legislative proposal that might have undermined these prosecutions and was a factor in the development of relevant prosecutorial strategies. The latter was important to addressing a key obstacle to prosecutions. Its engagement has also been a factor in expediting progress in cases against low and mid-level defendants, but has yet to prove effective to address the main obstacle to prosecution of high-level officials: a lack of unequivocal political will to support these prosecutions. Some factors have been beyond the OTP's control, most significantly, the Havana peace process. However, a more assertive approach toward the government by the OTP, including in the media, and more effective alliances with international partners, might have strengthened its influence.

In Georgia, the OTP's approach was less interventionist. It engaged extensively with national authorities as part of its assessment of domestic proceedings and to avoid manipulation of the ICC's mandate, rather than to encourage these proceedings per se. While existence of the preliminary examination and the OTP's regular engagement with authorities in Georgia appears to have spurred a certain amount of investigative activity, ultimately, this was insufficient to support effective national proceedings, which led to the ICC's decision to open an investigation. A number of factors limited the OTP's influence on national accountability efforts, in part because of very limited political will by the government to see national accountability. But strengthened engagement between the OTP and other relevant actors, including media, civil society groups, and international partners may have expedited the OTP's assessment of its own jurisdiction, leading to an earlier decision to seek to open investigations.

In the UK, the OTP reopened its preliminary examination during a dynamic and charged period concerning the broader allegations of abuse by British forces in Iraq. During the period of our research, the OTP had yet to take a proactive approach to complementarity. Not surprisingly then, and against the broader background of developments around accountability, our research indicates that the ICC's involvement so far has not per se instigated or influenced national proceedings in significant ways. Instead, to the extent there has been progress in criminal investigations, it is largely attributable to domestic litigation that predated the ICC examination. At the same time, by subjecting existing domestic efforts to another level of scrutiny, the ICC prosecutor's examination may have discouraged British authorities from discontinuing relevant inquiries into potential abuses by British armed forces in Iraq despite public pressure for them to do so.

Contextual Factors

The case studies make clear that context will influence the likelihood of successful positive complementarity activities by the OTP. Our research suggests four contextual factors are particularly important.

First, and most significantly, the extent of opposition to accountability by powerful interests in the country will constrain the OTP's influence. The lack of full political support for accountability—regardless of stated intention by governments—was a constant across these case studies. In the UK, there seems to be general sentiment to see accountability for politicians for their decision to go to war in Iraq and the ensuing aftermath—an issue not within the ICC's jurisdiction—but not necessarily military officials and rank-and-file soldiers.

But the exact landscape that conditions political will for prosecutions differs.⁶ In all four countries, some or all the alleged perpetrators are or were government agents at certain points during the commission of alleged abuses or during the preliminary examination; where governments have changed, new governments have not necessarily considered prosecutions of former government officials to be in their political interest.

The influence of the armed forces in each of these countries has also been significant. In Colombia, the peace process has been a significant factor shaping government responses in ways that have both contributed to justice and detracted from it, while the relationship between Georgia and Russia in the aftermath of the 2008 conflict and the regional security context has affected decisions regarding prosecution across two successive governments there.

Second, where the underlying crime basis is more limited, as in Guinea where allegations relate to a horrific, but time-bound incident, the OTP has been able to identify specific benchmarks with prosecuting authorities, which, in turn, has helped to push forward incremental progress. In Colombia, the OTP has indicated that it is more challenging to use

⁶ See also Mark Kersten, "Casting a larger shadow: Pre-meditated madness, the International Criminal Court and preliminary examinations," https://www.academia.edu/34379512/Casting_a_Larger_Shadow_Pre-Meditated_Madness_the_International_Criminal_Court_and_Preliminary_Examinations_Introduction_Shadow_Politics_and_the_International_Criminal_Court, p. 19 (suggesting that states will be more sensitive to the OTP's leverage where they are concerned by the reputational costs of being seen to be an ICC situation).

this approach given the broad temporal, geographical, and subject matter scope of the underlying crimes.

Third, where public demand and interest in accountability is high, it opens the possibility for the OTP to amplify the advocacy of key domestic actors, including representatives of civil society, or vice versa, as well as to benefit from the media as a pressure point on governments. In Guinea, victims' associations have participated as civil parties in the domestic investigations, and exchanges between the OTP and these associations assisted the OTP in assessing progress in national investigations. In Colombia, too, domestic civil society organizations have relied on the OTP's reporting on the underlying crimes and the status of national proceedings in their own advocacy, and OTP statements garner widespread media coverage. In the UK, hostility to allegations against service members and the lawyers who brought these allegations has created a difficult terrain for accountability.

Fourth, OTP efforts are likely to have more traction where other international partners are also promoting accountability. In Guinea and Colombia, the OTP has been one of several international actors on justice, while in Georgia, we found little evidence that other potential partners, including diplomatic missions, regional organizations, and UN agencies made it a priority to engage domestic authorities on the importance of accountability for relevant cases.

It is unlikely that the OTP, on its own, can fundamentally alter political dynamics. And while it may have more success in influencing other actors beyond the government—among civil society and in the international community—to join its efforts to press governments to make justice a priority, even this effect is uncertain (see discussion of strategic alliances below). This suggests that the OTP's current approach—to defer to national proceedings where there is at least a stated government intention to proceed, but to carefully calibrate whether and how actively to encourage such proceedings depending on its assessment of the likelihood of genuine proceedings—appropriately recognizes certain inherent limits.

As a result, the OTP's approach has and is likely to continue to differ from one situation to the next. In one situation, the OTP may prolong its deference to national authorities because it considers genuine proceedings may yet materialize, while in another situation, it may not afford national authorities an equivalent space.

To get this balance right, the OTP’s complementarity strategies need to be rooted in a deep appreciation of context. The OTP should be able to understand the domestic and, where relevant, regional political landscape, and build contacts within government, prosecuting authorities, civil society, and the national and international media. In Guinea, our research suggests that the frequency of visits by the OTP to the country helps to explain how, over a number of years during which investigations were at times stalled, they nonetheless managed the situation in a manner that contributed to incremental progress. Building this deep understanding will take resources—staff resources within the OTP, as well as resources for mission travel.

There is also a credibility risk inherent in inconsistent treatment between situations.⁷ Transparency, discussed further below, can help to mitigate these risks.

D. Conclusions and Recommendations

While expectations about the OTP’s influence should be realistic, the four case studies in this report also have lessons for strengthening the OTP’s complementarity specific approaches to increase impact in the future.

1. OTP Should Make More of Its Unique Leverage to Catalyze Political Will

Across the cases studies, the key obstacle to further progress in national prosecutions was an absence of political will by officials to support cases. Where the OTP did engage to address capacity challenges—the development of prosecutorial strategies in Colombia and encouraging assistance from the Team of Experts for Rule of Law/Sexual Violence in Conflict in the UN Office of the Special Representative on Sexual Violence in Conflict in Guinea—it was successful.

This suggests that the OTP can be well-positioned to broker assistance, but that catalyzing political will is likely to be a more significant part of its strategies to encourage national proceedings.

When it comes to catalyzing political will, the OTP’s leverage with national authorities appeared to depend on the level of concern these authorities had regarding the prospect

⁷ See Human Rights Watch, *Course Correction*, part III.A.

of an ICC investigation. The OTP appears to have had its greatest influence in Guinea, where interviewees indicated that the president was concerned that the country be seen as capable of conducting investigations, both as part of its transition from an autocratic to a democratic government and against the backdrop of strong criticism regarding the ICC from some African leaders, particularly in eastern Africa.

In comparison, in Colombia, Georgia, and the UK, interviewees indicated only a limited concern on the part of national authorities regarding the prospect of an ICC investigation. In Colombia, we found little evidence that prosecuting authorities (as compared to the military) believed the ICC would ever open an investigation. In the UK, interviewees described a palpable confidence on the part of British authorities vis-à-vis the unlikelihood of a formal ICC probe. And in Georgia, successive governments simply stopped being concerned about ICC involvement once it became clear that it could not simply be manipulated (either to prosecute alleged Russian abuses or, once the opposition came to power, former Georgian officials).

This suggests that the most productive posture of the OTP vis-à-vis national authorities when it comes to encouraging national proceedings is as a “sword of Damocles,” that is, as a threat and source of strong pressure.⁸ Where authorities simply do not care about ICC intervention, it will be difficult for the OTP to change this perspective. But where a lack of concern stems from the belief that ICC investigations are little more than a remote possibility, this suggests that the OTP should do what it can to counter those perceptions.

Current OTP practice places it in a good position to do so. In the past, threats of ICC action may have seemed like empty gestures; now, however, as, discussed in Appendix I, the OTP’s increased public reporting on preliminary examinations and its decision to defer active strategies to encourage national proceedings until it is certain of its own jurisdiction should reinforce the credibility of potential ICC action. The OTP’s identification of potential

⁸ This comes as little surprise given that the four case studies in this report stem from article 15 communications, and concern alleged abuses by former or current government officials. It may not reflect differently situated preliminary examinations. While not specific to the context of preliminary examinations, Carsten Stahn has defined positive complementarity as “a managerial principle which organizes the common responsibility of the Court and domestic jurisdictions by way of a division of labour and burden sharing.” He notes that this should not lead to systematic deference to domestic proceedings, but that it opens space for the court to provide incentives and assistance, rather than assuming that the court has only a threat-based approach as a tool to spur national justice. See Stahn, “Taking Complementarity Seriously,” pp. 263-282.

cases to national authorities and the public through its reports also serves to make clear the OTP's intent to proceed if authorities do not.⁹

To strengthen pressure, however, the OTP will need at times to take a more confrontational approach with authorities. This is especially important given the potential manipulation by national authorities of the court's statutory framework.

When it comes to article 15 *proprio motu* investigations, the OTP needs to satisfy the court's judges that there are no national proceedings that would render potential cases inadmissible.¹⁰ Efforts by the OTP to stimulate national proceedings can produce domestic activity that will make it more difficult for the OTP to meet this burden. Where that activity leads to genuine national proceedings this is positive. But there is an equal risk of domestic authorities producing a certain amount of activity—opening of case files and limited investigative steps—to stave off ICC intervention, but without following through with prosecutions. The judges' remit to look at the admissibility of potential cases means that there is a wide scope of national investigative activity that could be deemed to render ICC action impermissible.¹¹

⁹ Mark Kersten similarly notes that the OTP appeared to be growing bolder in its approach to preliminary examinations, citing the example of Afghanistan, where the OTP's reporting increasingly made clear that it was seriously considering whether an investigation into abuses by US forces in the country was merited. Kersten suggests, in certain contexts, namely where states are likely to be most sensitive to the reputational costs of an ICC investigation, the OTP should amp up its confrontation with states to maximize its leverage. Kersten, "Casting a Larger Shadow: Pre-Meditated Madness, the International Criminal Court, and Preliminary Examinations," https://www.academia.edu/34379512/Casting_a_Larger_Shadow_Pre-Meditated_Madness_the_International_Criminal_Court_and_Preliminary_Examinations_Introduction_Shadow_Politics_and_the_International_Criminal_Court, p. 19.

¹⁰ For state or Security Council referrals, absent proceedings under article 18, which provides a means through which the OTP can defer its investigation at the request of national authorities, the first time the ICC's judges will review admissibility is once the OTP seeks to open a specific case, that is, seeks the issuance of an arrest warrant or a voluntary summons to appear for a specific individual or individuals on specific charges.

¹¹ Judges have defined potential cases as the "(i) 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)." *Situation in the Republic of Kenya*, ICC, Case No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, March 31, 2010, <https://www.legal-tools.org/en/doc/338a6f/> (accessed November 16, 2017), para. 50. Once specific charges are pressed against specific individuals, the court's caselaw invokes a "same person, same conduct" test, requiring a successful challenge to admissibility to show domestic activity with regard to the same incidents and persons against whom the prosecutor seeks to press charges. This narrows the scope for government activity that can render cases inadmissible before the ICC. For an overview of the ICC's caselaw on complementarity, see Paul Seils, *Handbook on Complementarity*, pp. 28-62; see also Carsten Stahn, "Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified Deference?" in *The Law and Practice of the International Criminal Court*, pp. 228-259.

In this scenario, the preliminary examination period may be manipulated by national authorities, leaving it in limbo: too much domestic activity to be certain ICC judges will find OTP action permissible, but too little domestic activity to close out the preliminary examination in deference to genuine national proceedings. The result could be delayed ICC action where it is ultimately needed, increasing the challenges to investigating long after crimes are committed, and deferring the access of victims to justice. The Georgia case study exemplifies this risk.

The OTP needs to carefully determine when deferring to national authorities and deploying positive complementarity strategies is the right choice, and when this will only delay ICC action without any reasonable prospect of national justice. Getting that call right and avoiding instrumentalization is perhaps the OTP's paramount challenge.

OTP Steps to Strengthen Its Hand

The OTP can take certain steps to strengthen its hand with national authorities.

First, it should sharpen up its private and public engagement. In Colombia, former and current government officials indicated that the OTP's manner of engagement failed to convince them of any serious prospect that an investigation would be opened, even without further progress in national proceedings.

Second, the OTP needs to be able to verify information provided to it by government authorities. The OTP, among other steps it takes to verify information directly with authorities, can benefit from alternative sources of information. The OTP can assist civil society efforts to obtain this information by pressing governments on the importance of transparency.

Third, the OTP should also consider publicly identifying benchmarks for national authorities in more situations.¹² Of these four case studies, it has only publicly referenced particular steps that are needed in an investigation in Guinea. While the scope of crimes and relevant national proceedings in other situations may limit its ability to replicate the approach in Guinea, the use of benchmarks stimulated national authorities to take specific

¹² Stahn characterizes the OTP's approach during the preliminary examination in Kenya to have made use of benchmarks, in that the OTP identified a timeline for national authorities to act to conduct domestic prosecutions in order to avoid an ICC intervention. See Stahn, "Taking Complementarity Seriously," pp. 258-260.

steps. It would also allow the OTP to identify where such steps are not being taken, and where, perhaps, the time for deference to national proceedings has ended.

Finally, making these benchmarks public can serve to underscore the seriousness with which the OTP is approaching positive complementarity. More generally, transparency regarding the OTP's analysis of domestic proceedings is key. Where the OTP is, and is seen to be, engaging national authorities in a strong manner to encourage national proceedings, other actors, particularly in civil society and among a country's international donors, as relevant, can complement its efforts to hold the government to account to taking additional steps.

As indicated below, catalyzing these strategic alliances may not always be possible. But in the absence of this transparency, lengthy periods of preliminary examination can appear to local civil society and other key stakeholders as little more than a stalling tactic by the OTP, undermining the willingness of these actors to act as strategic partners.

2. Expedite Analysis to Get to Complementarity Activities Earlier

An important change in OTP practice has been to defer in general active encouragement of national proceedings until Phase 3 of its analysis, that is, until after it has determined that there are potential cases which, absent genuine national proceedings, could be the subject of ICC investigations and prosecutions. Of the case studies in this report, only the UK reflects this new approach, although aspects of the approach—in particular, engaging national authorities around proceedings relevant to the specific, potential cases it has identified—have also been used in the three other case studies.

This is a positive shift, and one that appears to have been driven by clarity in the court's case law that admissibility at the situation phase will be determined with regard to potential cases. It strengthens the credibility of OTP pressure on national authorities given that it can be confident that it could act, should national authorities fail to do so. It avoids the OTP making public statements that go beyond the state of its analysis, which could undermine the credibility of its analysis and lessen its leverage. And it permits the OTP to engage with national authorities around the specific cases it has identified, which, in the

experience of the OTP, as noted in Appendix I, has strengthened the level of engagement it can have with authorities.¹³

Our research suggests that opportunity costs to delaying positive complementarity efforts to Phase 3 may be more limited than expected. This is because the opening of a preliminary examination and the activities that are otherwise necessary to conduct that examination—as distinct from specific strategies to encourage national proceedings—may have their own effect.

In Guinea, the opening of the preliminary examination led within weeks to the initiation of a domestic investigation. In Colombia, Georgia, and the UK, while relevant investigations had already been initiated prior to the opening of the preliminary examination (or, in the case of the UK, the reopening of the preliminary examination; there was no discernable effect of the first preliminary examination on domestic proceedings) observers suggested that the fact that the OTP was monitoring domestic proceedings and requesting information regarding these proceedings contributed to sustaining some pressure on national authorities to act, including, in some countries, by keeping the need for accountability on the radar of the government, civil society, and international partners.

At the same time, however, deferring an active approach to positive complementarity for too long does have costs.

Costs of Deferring Active Approach to Positive Complementarity

The ICC’s legal texts do not prescribe any timeline for taking decisions regarding preliminary examinations. The absence of timelines can provide a helpful flexibility to the OTP, when it comes to carrying out its analysis, as well as implementing its policy commitment to encourage domestic proceedings; the time necessary to catalyze national proceedings is likely to vary greatly depending on context.¹⁴ However, the Colombia case

¹³ To avoid the risk of empty threats, and also to protect the due process rights of potential suspects, Human Rights Watch had recommended in 2011 that the OTP take steps to ensure that its public statements regarding preliminary examinations did not get ahead of its own analysis (on the use of publicity more broadly, see below). See Human Rights Watch, *Course Correction*, part III.D.

¹⁴ The OTP has provided some generic guidance on the length of Phases 1-2 and 4, but when it comes to Phase 3, has stated that the phase “often entails the assessment of national proceedings which inevitably makes it impossible to establish a definite duration of this phase.” See Assembly of States Parties to the Rome Statute (ASP), “Report of the Court on the Basic Size of the Office of the Prosecutor,” ICC-ASP/14/21, September 17, 2015, <https://www.legal-tools.org/en/doc/b27d2a/> (accessed November 16, 2017), p. 37.

study (and, to a certain extent, the Georgia case study) suggest that with the passage of time, and inaction by the OTP, national authorities may grow increasingly less concerned about the prospect of an ICC intervention.

Keeping situations under analysis for several years has also undermined the OTP's credibility in some affected communities; this was apparent in our case studies of Colombia, Guinea, and Georgia. The OTP's ability to influence national authorities can be amplified through alliances with civil society groups, which can be undermined where NGOs lose confidence in the OTP's process.

Given what are otherwise clear benefits to delaying positive complementarity activities until Phase 3, we recommend that the OTP seek to advance through Phase 2 as quickly as possible. This will limit delay in engaging national authorities, while preserving the benefits of the OTP being able to engage with these authorities around specific cases with a clear view toward ICC action if national proceedings do not materialize.

To do so, the OTP should consider its approach to staffing. It may be important to frontload resources on a given preliminary examination in order to analyze and verify communications, while then shifting staff to assess admissibility, and where appropriate, encourage complementarity in Phase 3.

3. Critical Importance of Strategic Alliances

In each of the case studies, we sought to understand the OTP's engagement with other actors who could play a role regarding positive complementarity. These include representatives of a country's international donors and UN agencies, who through political dialogue or capacity building could support justice efforts, and civil society activists engaged in advocacy or capacity building with governments regarding justice.

Unsurprisingly, the OTP had more influence where its efforts were amplified by others, or where it contributed to amplifying the efforts of others. Guinea, again, stands out. The OTP, the UN Office of the Special Representative on Sexual Violence, and victims' associations have served as strategic allies, mutually reinforcing each other's efforts when it comes to justice for the September 2009 stadium massacre. In Georgia, by contrast, the OTP had few such partnerships.

The OTP cannot be expected to single-handedly transform the national accountability landscape. Particularly where there are powerful political interests arranged against justice, the OTP needs to have the backing of other influential partners to catalyze political will.

Our research, however, is inconclusive when it comes to the question of whether the OTP can stimulate others to act. In Guinea, the engagement of some actors happened independently from any OTP efforts, while in other instances, OTP efforts to press for progress on the investigation had limited effect. In particular, donors remained far more focused on security issues despite outreach by the OTP. In Colombia, the OTP has been one of a number of actors on justice, but the engagement of these other actors does not appear to have been catalyzed by the OTP. In Georgia, the OTP did make some limited efforts to interest international partners, but these partners seemed more concerned by regional security in the aftermath of the conflict, and uninterested in prioritizing justice.

This seems equally true for international partners as it does for civil society groups. Local groups in all four case studies, albeit to varying degrees, have viewed the OTP's approach critically. For the most part, NGOs tended to see the OTP's engagement as delaying justice, which they feel can best be achieved through ICC prosecutions; that is, by giving the authorities space to act, and deferring ICC action, the OTP is prolonging the timeline for justice.

This can dim the willingness of local groups to see the OTP as an ally in advocacy with national authorities. In Guinea, even with some positive progress in investigations, some civil society groups have been quite critical of the OTP, although other groups are more supportive of its work; this has also been the case in Colombia, where there has been a persistent fear that the OTP will simply close the examination and walk away.¹⁵

The OTP should increase its outreach and support to potential partners with a view toward encouraging them to reinforce the OTP's own efforts. The need to respect confidentiality places real limits on what information the OTP can share. But within these limits, civil society

¹⁵ See also Christine Bjork and Juanita Goebertus, "Complementarity in Action: The Role of Civil Society and the ICC Rule of Law Strengthening in Kenya," *Yale Human Rights and Development Journal*, <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1102&context=yhrdlj>, pp. 215-219 (noting that while the OTP can strengthen the legitimacy of civil society actors, these actors may be reluctant to advocate for national justice solutions given their distrust of state institutions).

activists indicated that more information about the OTP's analyses is desirable, and could help contribute to increased advocacy by civil society groups on national justice.

In Georgia, civil society groups had limited access to the details of investigations. There, the OTP could have helped bridge the gap between civil society and the government by pressing government officials to provide more information about investigations, and in doing so, help NGOs become a more strategic partner in evaluating progress—or lack thereof—in investigations. In the UK, the OTP has had limited engagement with civil society, beyond the senders of the article 15 communications that led to the opening of the examination.

In view of the limits to what such outreach to partners may accomplish, and bearing in mind the OTP's limited resources, international donors should also initiate activities to support positive complementarity as warranted in situations under analysis. This would provide the OTP with an immediate complement of potential partners, and does not already appear to be routinely the case.

In Georgia, for example, the European Union created a budget line to support cooperation with the ICC only after the opening of the investigation. We recognize that budgets are often determined far in advance, and it may be difficult to immediately react to the opening of a preliminary examination. But the use of discretionary funds can help to fill gaps until such time as the preliminary examination can be accounted for in budgeting. A general policy by international donors to support credible complementarity initiatives where international crimes have been committed, regardless of whether a preliminary examination has been opened, would also help to ensure the availability of strategic allies where the OTP does act.

It is critical, however, that the OTP maintain strong relationships across a range of stakeholders during preliminary examinations, regardless of the potential benefit to national justice efforts. This is needed to check information provided by government sources when it comes to advancing the OTP's analysis. It is also necessary for the court's transparency as an element of the sound administration of justice, when it comes to victims, civil society representatives, the general public, and ICC states parties. Where it becomes necessary for the ICC to open its own investigation, as was ultimately the case in

Georgia, these relationships, particularly with civil society, are vital to support the work of the court.

4. Increased Transparency Key

Throughout these conclusions, we have highlighted where increased transparency of the OTP's analysis and activities during preliminary examinations—particularly through effective use of relevant media—can further positive complementarity.

This includes:

- publicity aimed at stimulating interest in accountability among the general public, civil society, and international donors to build and sustain conditions favorable to justice and strategic alliances to reinforce OTP efforts;
- publicity as a source of pressure on national authorities, including by publicly benchmarking investigative and prosecutorial steps to more credibly assert the OTP's leverage; and
- publicity that equips strategic allies with information regarding the status of domestic proceedings, which can strengthen their advocacy with the government and lead to the OTP receiving information that verifies or disputes this account.

The latter can be key to the OTP's ability to adapt its strategies, that is, either seeking to increase pressure or determining that national proceedings are unlikely such that it should seek to open its own investigation, thereby avoiding obstruction by national authorities.

In addition, the OTP's efforts on positive complementarity will need to be adapted to context, leading to the perception of inconsistent treatment across different situations, which can undermine the OTP's credibility, its leverage with national authorities, and alliances with strategic partners. As highlighted above, transparency in the OTP's preliminary examinations can help to explain its decision making in a manner that mitigates these risks.

Finally, transparency has an independent value apart from its effect on national justice, in that it is a component of the sound administration of justice, and accountability to the

court's key stakeholders, including victims, civil society groups, national authorities in situations under preliminary examination, and ICC states parties, more broadly.

Despite increased reporting since 2011, including annual reports on preliminary examinations and situation-specific reports as preliminary examinations have moved between phases, the OTP's overall approach to publicity remains cautious. Although Guinea stands out as a clear exception—with the OTP making effective use of local media during its visits and responding to some media requests from The Hague—in the three other case studies, the OTP has limited its engagement with the local media. In Georgia, the OTP also limited contact with international media, which may have provided greater opportunities than the local media.

The OTP should put in place clear communications strategies for each situation under analysis.¹⁶ Two elements will be particularly important to effective strategies.

First, publicity by the OTP should aim to make its analysis as accessible and as straightforward as possible. Constructive ambiguity in the OTP's statements has weakened their effect, and added little to transparency. When it comes to the OTP's annual preliminary examination reports, we found that there was a more limited positive effect of these reports than we had predicted; that is, few actors pointed to the utility of these reports when it came to strengthening their own advocacy. But these reports nonetheless play an important, different role: they provide a check on the OTP's assessment by forcing regular transparency.

The OTP should continue its efforts to enhance reporting, including by developing communications strategies around the release of the annual report in each situation under preliminary examination to ensure findings reach authorities, civil society groups, and media in these countries. While our informal observation indicates that these reports have received increased media attention in recent years, there is still scope for going further. The OTP should also consider formalizing the procedure with which it engages with the senders of the communications. This could include providing them with a sense of

¹⁶ These efforts should be implemented in coordination with the Public Information and Outreach Section of the ICC registry. At the ICC, public information activities in situations under preliminary examination have been considered to be the responsibility of the OTP, while the Outreach Unit's mandate kicks in once situations are under formal investigation.

responses received from relevant government bodies, and identifying to them information that the OTP needs for the next phase of its analysis.

Second, certain situations will present highly complex media landscapes. On these landscapes, the OTP will need to have a deep knowledge, as well as deep contacts within media in order to facilitate a productive use of publicity. In the UK and in Colombia, media coverage of the ICC has not necessarily been productive, when it comes to national justice; this is particularly true in the UK, where coverage of allegations of abuse has been part of a politically charged landscape. In our experience, however, there would be scope for the OTP to more effectively engage with media in both countries.

In addition, governments should consider making available public versions of reports provided to the OTP. If governments are willing to do so, it would remove concerns about confidentiality from decisions on transparency.

* * *

Implementing these recommendations would in our view strengthen the OTP's impact on national justice. But doing so will also depend on the availability of greater resources; the OTP's resources on preliminary examinations are too limited (see Appendix I).

At the same time, our case studies suggest that it is important not to overstate the prospects for success. It is likely to be the case that most preliminary examinations that proceed beyond OTP determinations that there are potential cases over which the court could exercise jurisdiction will result in the need to open ICC investigations, given the many persistent and stubborn obstacles to national justice, particularly when it comes to holding to account high-level perpetrators. This poses a real challenge to the ICC, which faces a significant capacity crisis; demand for ICC action continues to outpace the resources it has available.

Methodology

This report builds on Human Rights Watch’s 2011 report, *Course Correction: Recommendations to the Prosecutor for a More Effective Approach to “Situations under Analysis.”*¹⁷

It is based on research conducted between June and November 2012 and September 2015 and December 2017, primarily interviews with key stakeholders who had knowledge of the OTP’s preliminary examination activities in each of the four country case studies: Colombia, Georgia, Guinea, and the United Kingdom. These stakeholders included government officials in ministries of foreign affairs, justice, and defense; national investigating and prosecuting authorities; judges; members of civil society groups; journalists; and representatives of diplomatic missions and UN agencies. These interviews and other research steps specific to each case study are described below.

Human Rights Watch also conducted 12 interviews in person and by telephone with staff members of the OTP. Human Rights Watch provided the OTP with a draft report for comments and corrections, which are reflected in the published report.

Human Rights Watch also consulted ICC case law, policy statements, news releases, and reports on preliminary examination activities issued by the OTP. We relied on our ongoing monitoring of the ICC’s institutional development and practice across its situations under analysis.

We conducted a limited literature review of existing publications on the Office of the Prosecutor’s positive complementarity activities during preliminary examination. Press reviews of media coverage of the OTP’s preliminary examination activities were conducted for the Colombia, Guinea, and UK chapters, using Factiva and the Google search engine, as well as a search of the websites of specific Guinean media outlets. In Georgia, a number of knowledgeable sources considered media coverage of the OTP’s activities to be very limited, so we did not conduct a press review. Whenever possible, secondary sources,

¹⁷ Human Rights Watch, *Course Correction*.

such as reports by nongovernmental organizations and news articles, were used to corroborate information provided during interviews.

The four case studies were selected from current situations under preliminary examination before the ICC on the basis of a number of criteria. (The Georgia situation moved from preliminary examination to investigation shortly after this project began.) Criteria included Human Rights Watch's assessment that in each situation, certain prospects for national justice existed or had existed, such that it was reasonable to expect the OTP to have some impact; geographical diversity; existing Human Rights Watch expertise and research in the country, either on relevant human rights violations or on the status of national proceedings; and the feasibility of carrying out research given resources and staffing.

We have used generic descriptions of interviewees throughout the report instead of actual names. Some interviewees wished to retain their anonymity given the sensitivity of the issues they discussed while others might have been at increased risk had their names been used. In some instances, the location where the interview was conducted is withheld to protect the identity of the source.

All participants were informed of the purpose of the interview, its voluntary nature, and the ways in which the information would be used. Interviews generally lasted between one and two hours. Interviewees did not receive any compensation for participating in interviews, but some interviewees in Guinea were reimbursed for transportation costs to and from the interview.

Colombia

The Colombia chapter is based primarily on information gathered during research trips to Bogotá and Medellín by Human Rights Watch in June, August, and September 2016. In Bogotá, Human Rights Watch staff interviewed 36 people, including former or current government officials in the ministries of justice and defense and the Attorney General's Office; former or current judges within the Constitutional Court and Supreme Court; and Colombian civil society representatives. Additional interviews were conducted in person or by phone between June and December 2016, including with staff of the OTP in The Hague. Most of the interviews were conducted in Spanish. Human Rights Watch also had access to two confidential memos expressing the views of the Attorney General's Office

regarding cooperation with the OTP and the consistency of Colombian legislation with the Rome Statute.

Georgia

The Georgia chapter of the report is based primarily on information gathered during a research trip to Tbilisi conducted by Human Rights Watch in December 2015. In Tbilisi, Human Rights Watch staff interviewed 18 people, including former and current government officials in the ministries of justice and defense; civil society representatives; diplomats; journalists; and donor officials. Additional interviews were conducted in person, by telephone, or over email between December 2015 and September 2016, including with staff of the OTP. Interviews were conducted in English.

Guinea

This chapter is based on research conducted between June 2012 and June 2016. Research trips were conducted in Conakry, Guinea in June 2012 and March 2016. The first research trip was originally conducted for the December 2012 Human Rights Watch report, *Waiting for Justice: Accountability before Guinea's Courts for the September 8, 2009 Stadium Massacre, Rapes, and Other Abuses*.

Human Rights Watch researchers conducted interviews with approximately 25 individuals during the 2012 research trip and 35 during the 2016 research trip. Both individual and group interviews were conducted. Interviewees during both research trips included officials and staff in the Justice Ministry; justice practitioners, including judges, prosecutors, private lawyers, and legal support staff; representatives of international partners, including government and intergovernmental donor and United Nations officials; Guinean and international NGO members; local journalists; and victims of abuses.

Between July and November 2012 and November 2015 and June 2016, Human Rights Watch staff conducted additional interviews in French and English with UN officials, Western and African diplomats, ICC officials, and Guinean government officials in New York and The Hague, and by telephone. Most of the interviews were conducted in French, and a small number in English.

United Kingdom

This chapter is based primarily on information gathered during Human Rights Watch research in London, Berlin and The Hague between November 2015 and July 2017. Human Rights Watch staff spoke to 23 individuals either in-person or by telephone, including journalists, barristers, solicitors, international criminal law experts, former and current government officials, parliamentarians, civil society representatives, and staff at the OTP. Interviews were conducted in English.

Human Rights Watch also reviewed a range of publicly available documents, including ICC reports and policy papers, European Court of Human Rights judgments, domestic judicial decisions, public and judicial inquiry reports, relevant NGO reports, government statements and reports, and British press articles.

I. Colombia

A. Overview

Colombia has endured over 50 years of armed conflict between government forces and non-state armed groups. During the conflict, military personnel and other state agents, paramilitary groups, and guerrillas—notably the Revolutionary Armed Forces of Colombia (FARC) and the National Liberation Army (ELN)—have committed thousands of grave international crimes.¹⁸

Colombia ratified the Rome Statute on August 5, 2002, and the Office of the Prosecutor (OTP) of the International Criminal Court (ICC) opened its preliminary examination in Colombia—its longest running preliminary examination at time of writing— in June 2004, although its work was not made public until 2006.¹⁹

This chapter assesses whether the OTP has catalyzed domestic prosecutions in Colombia regarding the systematic extrajudicial executions of civilians committed by army brigades between 2002 and 2008 in cases known as “false positive” killings.

“False positive” killings are only one of the OTP’s five areas of focus.²⁰ However, given the breadth of alleged crimes committed in Colombia that could fall within the ICC’s jurisdiction, the scope of relevant domestic proceedings, the long-lasting nature of the OTP’s preliminary examination in Colombia, and the fact that justice for these killings has

¹⁸ Paramilitary groups were officially demobilized beginning in 2006, although many commanders reconfigured their forces into smaller and more autonomous groups. Peace talks with FARC guerrillas, which began in 2012, were finalized in November 2016, and included an agreement on the rights of victims. Formal peace talks with the ELN guerrillas started in February 2017.

¹⁹ The International Criminal Court (ICC) can exercise its jurisdiction over crimes against humanity committed on the territory or by nationals of Colombia since November 1, 2002. However, the court only has jurisdiction over war crimes committed since November 1, 2009, given that the administration of then-President Andrés Pastrana issued in 2002 a declaration pursuant to article 124 of the Rome Statute, deferring the court’s jurisdiction over war crimes for seven years. See “Colombia’s ICC Declaration a ‘Prelude to Impunity,’” Human Rights Watch news release, September 5, 2002, <https://www.hrw.org/news/2002/09/05/colombias-icc-declaration-prelude-impunity>; OTP, “Situation in Colombia: Interim Report,” November 2012, <https://www.legal-tools.org/doc/7029e5/pdf/> (accessed November 28, 2017).

²⁰ In this chapter, the term “false positive” refers to cases of unlawful killings that military personnel staged to look like—and officially reported as—lawful killings in combat of guerrillas, paramilitaries, or criminals. The majority of victims were civilians, though in some rare cases, there is evidence that the victims were guerrillas killed outside of combat (hors de combat), after they had surrendered.

been a specific focus of Human Rights Watch’s work since 2011, we have chosen to limit our analysis to the issue of “false positive” killings.

The chapter does not include an assessment of the OTP’s engagement around the Agreement on the Victims of the Conflict, reached by the Colombian government and the Revolutionary Armed Forces of Colombia (FARC) guerrillas in December 2015 as part of their peace talks.²¹ The agreement has bearing on “false positive” cases, given that many such cases likely will be transferred to the “Special Jurisdiction for Peace” established by the agreement. The tribunal, however, was not operational at time of writing this report. Human Rights Watch has expressed concerns that problems in the agreement and in proposed implementing legislation could undermine meaningful prosecution of “false positive” killings before the tribunal.²²

Our research indicates that the OTP’s engagement on “false positive” killings has had mixed results. Authorities have carried out investigations and prosecutions of hundreds of low-level soldiers in “false positive” cases, and sources interviewed for this report suggested the OTP has been one of several important actors in keeping the need for accountability in these cases on the agenda. The OTP worked effectively to counter at least one legislative proposal that might have undermined these prosecutions and its engagement positively affected the development of relevant prosecutorial strategies.

But its engagement has had a limited influence in the face of the main obstacle to prosecution of high-level officials: lack of unequivocal political will to support these prosecutions. This is perhaps unsurprising. The prosecution of senior level officials by a state in the absence of regime change presents one of the most significant tests of the complementarity principle.

²¹ See “Final Peace Agreement” (“Acuerdo final para la terminación del conflicto y la construcción de una paz estable y duradera”), Alto Comisionado para la Paz, November 24, 2016 <https://www.mesadeconversaciones.com.co/sites/default/files/24-1480106030.11-1480106030.2016nuevoacuerdofinal-1480106030.pdf> (accessed November 28, 2017). The December 15 Agreement on the Victims’ of the Conflict was modified after the peace deal was narrowly defeated in an October 2, 2016 national plebiscite. For an analysis of key modifications of the new peace deal, see Letter from Human Rights Watch to President Juan Manuel Santos, “Letter to Santos on the new peace agreement with the FARC,” November 23, 2016, <https://www.hrw.org/news/2016/11/23/letter-president-santos-new-peace-agreement-farc>. For an analysis of the ICC’s influence on peace processes in Colombia, see René Ureña, “Prosecutorial Politics: The ICC’s Influence in Colombian Peace Processes, 2003–2017,” *American Journal of International Law*, vol. 111 (1), January 2017, <https://doi.org/10.1017/ajil.2016.3> (accessed November 28, 2017), pp. 104-125.

²² See, for example, “Colombia: Chance to Fix Flawed Transitional Justice Law,” Human Rights Watch press release, July 6, 2017, <https://www.hrw.org/news/2017/07/06/colombia-chance-fix-flawed-transitional-justice-law>

In addition, as discussed below, the Havana peace process between the Colombian government and FARC guerrillas significantly limited the OTP's influence with regard to advancing national prosecutions of "false positive" killings. Windows of opportunity for a more confrontational approach by the OTP closed as the peace process advanced, lest the OTP be perceived as a spoiler of the peace.

Below, we first describe progress in domestic prosecutions of "false positive" killings and analyze the main obstacles to further progress. We then summarize the OTP's engagement regarding "false positives" since 2008 and assess whether and to what extent the OTP has catalyzed justice in "false positive" killings, regarding three specific areas: legislation, prosecutorial policies, and individual prosecutions. Finally, we assess whether the OTP has strengthened its leverage with the Colombian government by building strategic alliances with key partners, including local civil society and international partners, and through effective engagement with media.

B. National Prosecutions of "False Positive" Killings

Between 2002 and 2008, army brigades across Colombia routinely executed civilians. Under pressure from superiors to show "positive" results and boost body counts in their war against guerrillas, military units abducted primarily young men or lured them to remote locations under false pretenses—such as promises of work—killed them, placed weapons on their bodies, and then reported them as enemy combatants killed in action.²³

Committed on a large scale for more than half a decade, these "false positive" killings constitute one of the worst episodes of mass atrocity in the Western Hemisphere in recent decades. They were war crimes and might amount to crimes against humanity under the Rome Statute.²⁴

²³ See Human Rights Watch, *On Their Watch: Evidence of Senior Army Officers' Responsibility for False Positive Killings in Colombia*, June 24, 2015, <https://www.hrw.org/report/2015/06/24/their-watch/evidence-senior-army-officers-responsibility-false-positive-killings>; OTP, "Situation in Colombia: Interim Report," <https://www.legal-tools.org/doc/7029e5/pdf/>; UN Commission on Human Rights, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, Visit to Colombia, A/HRC/14/24/Add.2, March 31, 2010, http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add.2_en.pdf (accessed November 28, 2017), para. 11.

²⁴ See Human Rights Watch, *On Their Watch*, p. 15.

According to Human Rights Watch’s research, significant evidence indicates that numerous senior army officers, including officers who subsequently rose to the top of the military command, bear responsibility for “false positive” killings. Our research suggests that some of them may at least be criminally liable as a matter of command responsibility in that they knew, or should have known, “false positive” killings were taking place and yet failed to prevent or punish the conduct.²⁵

1. Status of National Prosecutions

In September 2008, a scandal broke out over the disappearance of at least 16 young men and teenage boys from Soacha, a low-income Bogotá suburb. Their bodies were found in the distant northeastern province of Norte de Santander. The military—initially backed by then-President Alvaro Uribe—claimed they were combat deaths, but it soon came to light that they were victims of “false positive” killings.²⁶ The Soacha scandal helped force the

²⁵ Under international law, command responsibility arises when a superior knew or should have known that subordinates under their effective control were committing a crime, but failed to take the necessary and reasonable steps to prevent or punish the acts. See, for example, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted June 8, 1977, 1125 U.N.T.S. 3, entered into force December 7, 1978., arts. 86-87; Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993), art. 7(3); Statute of the International Tribunal for Rwanda, adopted by S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 3, U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598, 1600 (1994), art. 6(3); Statute of the Special Court for Sierra Leone, January 16, 2002, <http://www.rscsl.org/Documents/scsl-statute.pdf> (accessed January 25, 2018); Rome Statute of the International Criminal Court (Rome Statute), A/CONF.183/9, July 17, 1998, entered into force July 1, 2002, art. 28. Colombia’s highest courts have issued rulings that essentially equate this international doctrine with criminal responsibility by omission, which is codified in the country’s penal code. Colombian Criminal Code (Código Penal), *Secretaría Senado*, Law 599/2000, signed into law on July 24, 2000, http://www.secretariasenado.gov.co/senado/basedoc/ley_0599_2000.html (accessed November 28, 2017), art. 25. In its June 2014 decision concerning retired army Gen. Jaime Humberto Uscátegui, the Supreme Court found: “In cases of grave human rights violations, in the international order and in the domestic sphere, criminal responsibility extends to the military superior with respect to the acts of his subordinates, as long as the requirements in transnational norms are met, which are verified in our legal system through the figure of the position of guarantor and the dogma of the crimes of commission by omission.” Criminal Cassation Chamber of the Supreme Court of Colombia, case number 35113, Decision of June 5, 2014, pp. 156-157. In its ruling upholding Colombia’s ratification of the Rome Statute, the Constitutional Court found: “In Colombia, there is a place for command responsibility with respect to the military leader, whether official or de facto.” Constitutional Court of Colombia, Sentence C578, July 30, 2002. In 2001, the Constitutional Court also ruled that “in relations of hierarchy, the superior with authority or command has the duty to take special measures...to avoid that people under his effective control commit acts that violate fundamental rights. E.g. If the superior does not avoid – and could [avoid] – that a soldier that immediately depends on him commits torture, or an extrajudicial execution, or in general a crime against humanity, the harmful result by the subordinate is imputed to him because he is a guarantor.” Constitutional Court of Colombia, Sentence SU-1184, November 13, 2001.

²⁶ See Human Rights Watch, *World Report 2009* (New York: Human Rights Watch, 2009), Colombia chapter, <https://www.hrw.org/world-report/2009/country-chapters/colombia>.

government to take serious measures to stop the crimes and to publicly admit allegations of “false positive” killings that human rights monitors had raised for several years.²⁷

The Attorney General’s Office had carried out some investigations on “false positive” killings before the Soacha scandal, despite the government’s reluctance to admit crimes were taking place in a widespread manner.²⁸ Investigations began in 2007, and resulted in first convictions around 2009.²⁹ Since then, Colombian authorities have made significant progress in prosecuting members of the army responsible for “false positive” killings.³⁰

²⁷ See Christian Salazar Volkman, “Evaluating the Impact of Human Rights Work: The Office of the United Nations High Commissioner for Human Rights and the Reduction of Extrajudicial Executions in Colombia,” *Journal of Human Rights Practice*, vol. 4, no. 3 (2012), <https://doi.org/10.1093/jhuman/huso27> (accessed November 28, 2017), p. 398; Human Rights Watch, *On Their Watch*, page. 1; OTP, “Situation in Colombia: Interim Report,” <https://www.legal-tools.org/doc/7029e5/pdf/>, para. 100.

²⁸ Human Rights Watch interview with former attorney general, September 1, 2016; See, for example, “Remarks by President Alvaro Uribe Vélez at the promotion ceremony of 250 lieutenants of the National Army” (“Palabras del Presidente Álvaro Uribe Vélez en la ceremoniade ascensos de 250 alféreces a subtenientes del Ejército Nacional”), June 3, 2009, http://historico.presidencia.gov.co/discursos/discursos2009/junio/ejercito_03062009.html (accessed November 28, 2017).

²⁹ Human Rights Watch interview with former attorney general, September 1, 2016.

³⁰ Crimes in Colombia are investigated and prosecuted by the Attorney General’s Office, which belongs to the judicial branch, and has administrative and budgetary autonomy. Extrajudicial killings are investigated by the Human Rights Unit within the Attorney General’s Office and by local prosecutors throughout the country. In addition, many cases are likely being handled by military judges. Other relevant actors regarding prosecutions include delegate prosecutors before the Supreme Court, who are in charge of prosecuting active or retired generals. Colombian Constitution, art. 235 (4). Colombia applies two codes of criminal procedure to prosecute “false positive” cases, depending on the time of events. Crimes committed before January 1, 2005, are prosecuted under Law 600, whereas crimes committed after that date are frequently prosecuted under Law 906, which was passed in 2004. Law 906, art. 533. However, Law 906 was progressively applied in different provinces of Colombia, so Law 600 has been applied to multiple cases occurring after January 1, 2005. Law 600 followed an inquisitorial model of prosecution during the pre-trial stage. Its procedure was mostly written and gave wide powers to prosecutors, including the power to detain individuals without the need of a judicial order. Under Law 600, defendants are charged (*vinculados*) immediately after they are first questioned by prosecutors (*indagatoria*), although they have the right to require a “spontaneous declaration” (*version libre*) before a prosecutor during the early stages of investigation. Law 600, art. 325. Judges can order pre-trial detention to ensure the defendant’s cooperation once they have been charged. Law 600, art. 341. Prosecutors may later indict the defendant if they have “proved the occurrence of the crime” and have “serious motives to believe” that the defendant is responsible for it. Law 600, art. 397. After being indicted, defendants are brought to a public and oral trial. Under Law 600, defendants are also entitled to reach an agreement with prosecutors through which they can receive reduced sentences in exchange for accepting their criminal responsibility in the crimes for which they are investigated. Law 600, art. 40. Law 906 provides a procedure that is predominantly oral and gravitated towards an Anglo-American adversarial model. Under Law 906, the prosecutorial steps are the following. Prosecutors question defendants (*interrogatorio*) when they have “grounded reasons” to believe they had engaged in a crime. Law 906, art. 282. Then prosecutors can charge (*imputar*) defendants when their criminal responsibility can be “reasonably inferred,” and indict them (*acusación*) when there is “likelihood” of their criminal responsibility. Law 906, arts. 286, 336. Defendants can face pre-trial detention or other measures to ensure their cooperation once they have been charged. After being indicted, defendants are brought to a public and oral trial. Law 906, art. 287. In addition, defendants are entitled to reach an agreement (*preacuerdo*) with prosecutors through which they can receive reduced sentences in exchange for admitting their criminal responsibility. Law 906, arts. 348-54. See Law establishing the Code of Criminal Procedure (Ley por la cual se expide el Código de Procedimiento Penal), *Secretaría Senado*, Law 600 of 2000, signed into law on July 24, 2000, http://www.secretariassenado.gov.co/senado/basedoc/ley_0600_2000.html (accessed November 28, 2018); Law

As of March 2018, the Colombian Attorney General’s Office was investigating 2,198 cases of extrajudicial executions committed between 2002 and 2008 and had convicted over 1,600 state agents in 268 cases.³¹

While in recent years there have been some meaningful steps forward in prosecuting top commanders, progress has been slow. Out of all of these cases, at least 11 army colonels have been convicted and one retired army general has been charged.

Until June 2015—almost seven years after the Soacha scandal—no prosecutorial steps had been taken against active or retired generals implicated in “false positive” killings. In that month, four active or retired generals were summoned for questioning (*interrogatorio*) and a “spontaneous declaration” before a prosecutor (*version libre*)—both steps being the very first in criminal investigations under the two relevant codes of criminal procedure.³²

The generals included former army top commander Mario Montoya Uribe. As of March 2018, 11 had been called into questioning.³³ At time of writing, other prosecutorial steps had been taken regarding three of the 11: the investigation against one retired general was closed due to lack of evidence, one retired general has been charged and indicted, and one investigation against an active general was closed due to lack of evidence, although he remains under investigation for another case.³⁴ In March 2016, prosecutors announced

establishing the Code of Criminal Procedure (Ley por la cual se expide el Código de Procedimiento Penal), *Secretaría Senado*, Law 906 of 2004, signed into law on September 1, 2004, http://www.secretariasenado.gov.co/senado/basedoc/ley_0906_2004.html (accessed November 28, 2017).

³¹ Human Rights Watch interview with senior officials in the Attorney General’s Office, Bogotá, March 14, 2018. This figure does not correspond to the number of individuals convicted as it includes convictions against the same individual in different cases. Senior officials in the Attorney General’s Office told Human Rights Watch that they did not have a record of how many victims were involved in the 2,198 cases under investigation.

³² See Human Rights Watch, *World Report 2016* (New York: Human Rights Watch, 20016), Colombia chapter, <https://www.hrw.org/world-report/2016/country-chapters/colombia>; UN High Commissioner for Human Rights, Annual report of the UN High Commissioner for Human Rights: Situation of human rights in Colombia, http://www.hchr.org.co/documentoseinformes/informes/altocomisionado/informe_anual_2015.pdf, para. 58. See above for a description of the prosecutorial steps under the two codes of criminal procedures and an explanation on when each of the codes is applied.

³³ Human Rights Watch email correspondence with human rights lawyer, July 21, 2016; and interview with prosecutor, Bogotá, July 22, 2016.

³⁴ Human Rights Watch interview with prosecutor, Bogotá, August 25, 2016.

that they would summon Montoya Uribe for a hearing where he would be charged, but such hearing had not taken place at time of writing.³⁵

2. *Obstacles to Accountability at Senior Levels for “False Positive” Killings*

Human Rights Watch has previously identified several obstacles to accountability for “false positive” killings. These include (a) use of an incident-based approach instead of prosecutorial strategies aimed at uncovering patterns that could lead to establishing accountability at more senior levels; (b) limited resources allocated to these cases; (c) lack of military cooperation with civilian investigations, with many “false positive” killings pending before military instead of civilian courts; and (d) reprisals against witnesses.³⁶

This section focuses on what appear to be the two key obstacles for accountability at senior levels for “false positive” killings: inconstant political will to move forward with these prosecutions, and use of an incident-based approach—as opposed to strategies aimed at uncovering patterns that might be indicative of the responsibility of more senior officials.

Political Will: Mixed Signals

Authorities in the Colombian government have sent mixed signals regarding the political will necessary to support prosecuting those most responsible for “false positive” killings.

During the Uribe administration (2002-2010), the government repeatedly denied that “false positives” were a systemic problem and accused the human rights defenders who were reporting these killings of colluding with guerrillas to discredit the military.³⁷ The

³⁵ “General Mario Montoya will attend the hearing” (“General Mario Montoya asistirá a la audiencia de imputación de cargos”), *El Tiempo*, March 31, 2016, <http://www.eltiempo.com/archivo/documento/CMS-16550821> (accessed January 26, 2018); Human Rights Watch interview with prosecutor, August 25, 2016. See Human Rights Watch, *On Their Watch* for evidence against 12 of the 16 generals under investigation. See “Colombia: New Evidence Against Ex-Army Chief,” Human Rights Watch news release, December 20, 2016, <https://www.hrw.org/news/2016/12/20/colombia-new-evidence-against-ex-army-chief>.

³⁶ This section draws largely on Human Rights Watch, *On Their Watch*, chapter III (“Obstacles to Accountability”).

³⁷ See Human Rights Watch, *World Report 2009*, Colombia chapter, <https://www.hrw.org/world-report/2009/country-chapters/colombia>. See, for example, “Remarks by President Álvaro Uribe Vélez at the promotion ceremony of 250 lieutenants of the National Army,” http://historico.presidencia.gov.co/discursos/discursos2009/junio/ejercito_03062009.html; “Remarks by President Álvaro Uribe Vélez during his meeting with students from Jorge Tadeo Lozano University” (“Palabras del Presidente Álvaro Uribe Vélez durante el encuentro con estudiantes de la Universidad Jorge Tadeo Lozano”), *Presidencia*, February 3, 2010, http://historico.presidencia.gov.co/discursos/discursos2010/febrero/utadeo_03022010.html (accessed November 28, 2017); “Remarks by President Álvaro Uribe Vélez in the Centennial Celebration of the Escuela Superior de Guerra” (“Palabras

government took the position that those responsible for allegedly isolated events would be held accountable,³⁸ although in fact criticized prosecutions.³⁹ In 2008, the government dismissed 27 army officials, including three generals, following the Soacha scandal.⁴⁰

In 2010, Juan Manuel Santos, President Uribe's defense minister between 2006 and 2009, won the national elections. His administration has committed publicly to hold to account those responsible for "false positives."⁴¹ At the same time, it has promoted several pieces of legislation that would open the door to impunity for these crimes, including the Legal Framework for Peace and numerous bills that would transfer extrajudicial killings, including "false positive" killings, to military jurisdiction. These legislative developments and the OTP's influence with regard to them are discussed further in Part D.

del Presidente Álvaro Uribe Vélez en la conmemoración del centenario de la Escuela Superior de Guerra"), *Presidencia*, May 8, 2009, http://historico.presidencia.gov.co/discursos/discursos2009/mayo/escuela_o8052009.html (accessed November 28, 2017).

³⁸ See, for example, "Remarks by President Alvaro Uribe Velez at the National Congress of Potato Producers" ("Palabras del Presidente Álvaro Uribe Vélez en el Congreso Nacional de Productores de Papa"), *Presidencia*, March 25, 2010, http://historico.presidencia.gov.co/discursos/discursos2010/marzo/prductores_papa_25032010_i.html (accessed November 28, 2017); "For the dignity of our country, for the future of the new generations, let us face terrorism! So as to not suffer from its eternal slavery!" (¡Por la dignidad de la patria, por el futuro de las nuevas generaciones, enfrentemos el terrorismo! ¡Para no padecer su eterna esclavitud!), *Presidencia*, October 20, 2006, http://historico.presidencia.gov.co/discursos/discursos2006/octubre/universidad_militar.htm (accessed October 19, 2017); "Remarks by President Alvaro Uribe Velez at the Communal Council of the Government in Yopal" ("Palabras del Presidente Álvaro Uribe Vélez en el Consejo Comunal de Gobierno en Yopal"), *Presidencia*, November 28, 2009, http://historico.presidencia.gov.co/discursos/discursos2009/noviembre/ccg258_28112009.html (accessed November 28, 2017).

³⁹ Human Rights Watch interview with former attorney general, September 1, 2016.

⁴⁰ The government dismissed the officers following an internal investigation into "false positive" allegations by a high-level military commission, which found "serious indications of command negligence on different levels in terms of the observance and verification of the procedures that govern the cycle of intelligence and planning, conduction, execution, and evaluation of the military operations and missions, as well as an inexcusable lack of diligence on the part of officers in the rigorous investigation of alleged irregular cases in their jurisdiction." See "Press Release from the President's Office about the Dismissal of 25 Military Members for Cases of Disappearances," ("Comunicado de la Presidencia sobre el retiro de 25 militares por casos de desapariciones"), *El Tiempo*, October 29, 2008, <http://www.eltiempo.com/archivo/documento/CMS-4632012> (accessed November 28, 2017).

⁴¹ See, for example, "Remarks by Counselor Guillermo Rivera at the hearing 'Complaints on setbacks regarding the legislation on military criminal justice in Colombia,' at the 154th session of the IACHR" ("Palabras del Consejero Guillermo Rivera en la audiencia 'Denuncias sobre retrocesos en la legislación sobre justicia penal militar en Colombia', en el 154 periodo de sesiones de la CIDH"), *Consejería de derechos humanos*, March 19, 2015, <http://www.derechoshumanos.gov.co/Prensa/2015/Paginas/Palabras-del-Consejero-Guillermo-Rivera-en-la-audiencia-Denuncias-sobre-retrocesos-en-la-legislacion-sobre-justicia-penal.aspx> (accessed November 28, 2017); "In Colombia we can say that there is not a single complaint of false positives: President Santos" ("En Colombia podemos decir que hoy no hay ni una sola acusación de falsos positivos: Presidente Santos"), *Presidencia*, December 13, 2012, http://wsp.presidencia.gov.co/Prensa/2012/Diciembre/Paginas/20121213_01.aspx (accessed November 28, 2017).

A key reason behind these mixed signals on accountability during the Santos' administration is the peace process with the FARC guerrillas, which formally began in October 2012, and the government's attempts to obtain military support for the process.⁴² For example, a former official from the Attorney General's Office told Human Rights Watch that authorities thought that progress in prosecuting top army commanders would undermine the army's support for the peace process when a final accord was reached.⁴³ Similarly, a former Defense Ministry official noted that some legislative proposals the ministry submitted, including one on military jurisdiction, were meant to convey that military personnel would not be subject to harsher prosecutions than the guerrillas negotiating peace.⁴⁴

However, the peace process at times apparently created the opposite incentive by actually helping prosecutions move forward. Some interviewees noted that at times the Attorney General's Office may have advanced "false positive" cases to send a message to the international community—such as the US government and the Inter-American human rights system—that peace negotiations would not reinforce impunity for army members and, perhaps more critically, to avoid an ICC intervention that could risk the peace talks.⁴⁵

In fact, an ICC investigation would mean that Colombian authorities would lose control of their prosecutions of army officers and, thus, key leverage to gain the army's support for the peace deal. This also suggests that, independently of any specific strategies pressed by the OTP on positive complementarity, Colombia's membership in the ICC has been a positive point of pressure, avoiding worse outcomes on justice.

⁴² See, for example, "I will not allow for soldiers to go to jail while guerilla fighters remain free" ("No permitiré que los soldados acaben en la cárcel y los guerrilleros libres"), *Semana*, December 19, 2015, <http://www.semana.com/nacion/articulo/santos-presenta-la-justicia-transicional-para-los-militares/454183-3> (accessed November 28, 2017); Law n. 01 of 31 July 2012 regarding legal instruments of transitional justice established within the framework of article 22 of the constitution and other provisions are dictated (Acto Legislativo No. 01 por medio del cual se establecen instrumentos jurídicos de justicia transicional en el marco del artículo 22 de la constitución política y se dictan otras disposiciones), *Congreso de Colombia*, July 31, 2012, <http://wsp.presidencia.gov.co/Normativa/actos-legislativos/Documents/2012/ACTO%20LEGISLATIVO%20N%C2%B0%2001%20DEL%2031%20DE%20JULIO%20DE%202012.pdf> (accessed November 28, 2017); Human Rights Watch interview with senior prosecutor, Bogotá, June 22, 2016.

⁴³ Human Rights Watch telephone interviews with former senior official in the Attorney General's Office, Bogotá, June 18, 2016; and member of international human rights group, Bogotá, June 20, 2016.

⁴⁴ Human Rights Watch interview with former Defense Ministry official, Bogotá, June 17, 2016.

⁴⁵ Human Rights Watch separate interviews with human rights lawyer, Bogotá, June 21, 2016; and prosecutor, Bogotá, June 22, 2016.

Incident-Based Prosecutions

Another key obstacle to holding more senior officials accountable has been the fact that prosecutions in Colombia have long been incident-based, while failing to investigate broader patterns of abuses—which is necessary to determine responsibility beyond military personnel directly involved in carrying out “false positive” killings.

Between 2012 and 2015, then-Attorney General Eduardo Montealegre adopted prosecutorial policies that helped address this shortcoming, including by designing a prioritization scheme and creating a unit to carry out a context-based analysis of crimes, the Unit of Analysis and Context (UNAC, later called Direction of Analysis and Context, DINAC).⁴⁶ However, implementation of these strategies to prosecute “false positives” has been limited or slow, as discussed in Section D.

C. OTP Approach to Positive Complementarity and Cooperation Challenges

Domestic proceedings on a range of crimes that could amount to war crimes or crimes against humanity—even though they have often been prosecuted as ordinary crimes and did not include “false positive” killings—pre-dated the beginning of OTP involvement in Colombia in 2004.

Therefore, the OTP’s strategy was to encourage Colombian authorities to address crimes it believed were relevant to the ICC’s jurisdiction, while monitoring implementation of the 2005 Justice and Peace Law, which allowed demobilized members of paramilitary death squads to receive reduced sentences of up to eight years in exchange for confessions.⁴⁷

⁴⁶ Directive 01/2012 to adopt criteria for prioritization of situations and cases, and to create a new system of criminal investigation and management in the Attorney General’s Office (Directiva 01/2012 por medio de la cual adoptan unos criterios de priorización de situaciones y casos, y se crea un nuevo sistema de investigación penal y de gestión de aquellos en la Fiscalía General de la Nación), *Fiscalía General de la Nación*, Bogotá, October 4, 2012, <http://www.fiscalia.gov.co/colombia/wp-content/uploads/Directiva-N%C2%Bo-0001-del-4-de-octubre-de-2012.pdf> (accessed November 28, 2017); Resolution 1810/2012 to create the national unit of analysis and context (Resolution 1810/2012 por medio de la cual se crea la Unidad nacional de análisis y contextos), *Fiscalía General de la Nación*, October 4, 2012, <http://www.fiscalia.gov.co/colombia/wp-content/uploads/2013/02/0-1810-12-1.pdf> (accessed November 28, 2017); The application of the prioritization strategy was subject to some criticism. See, for example, Inter-American Commission on Human Rights, “Truth, Justice and Reparation: Fourth Report on Human Rights Situation in Colombia,” December 31, 2013, <http://www.oas.org/en/iachr/reports/pdfs/colombia-truth-justice-reparation.pdf> (accessed November 28, 2017).

⁴⁷ See Human Rights Watch, *Smoke and Mirrors: Colombia’s demobilization of paramilitary groups*, August 2005, <https://www.hrw.org/reports/2005/colombiao805/colombiao805.pdf>; Human Rights Watch, *Selling Justice Short: Why Accountability Matters for Peace*, July 2009, https://www.hrw.org/sites/default/files/reports/ijo709webwcover_1.pdf; Alejandro Chehtman, “The Impact of the ICC in Colombia: Positive Complementarity on Trial,” *Domac* 17, October 2011,

The OTP's work on "false positives" started in 2008, shortly after the Soacha scandal.⁴⁸ However, until 2012, the OTP's engagement with Colombian authorities regarding the issue had been limited. Although the OTP closely monitored the developing Soacha scandal in 2008, and continued to analyze information obtained through open sources, including with regard to national proceedings, it had limited and informal engagement with national authorities.

The OTP first referred to "false positives" in its public statements only in 2010 (its practice of issuing what are now annual reports on its preliminary examinations began in 2011).⁴⁹ In addition, resources within the OTP—already severely limited when it came to preliminary examinations—were diverted to other situations under analysis after 2008. There was no analyst officially in charge of the Colombia work between November 2010 and August 2011.

Human Rights Watch was unable to identify interviewees who could speak with first-hand knowledge about the engagement between the OTP and Colombian authorities in the earliest phases of the prosecution's preliminary examination. As a result, this chapter primarily concerns the period from 2012. This means that we have been unable to comprehensively assess the possible effect of OTP monitoring and limited engagement with national authorities on national prosecutions for "false positive" cases between 2008-2012. This period may have had important opportunities for influence, given our conclusion (see below) that the start of the peace process in 2012 was a significant limitation.

In 2012, the OTP gave renewed attention to the international crimes committed in Colombia and the national efforts to bring those responsible to justice.⁵⁰ An OTP official told Human Rights Watch that prosecutor Moreno Ocampo considered making a final determination regarding the preliminary examination near the end of his mandate, in 2012.⁵¹

<https://en.ru.is/media/domac/Domac-17-AC.pdf> (accessed November 28, 2017); Jennifer S. Easterday, "Deciding the Fate of Complementarity: A Colombian case study," *Arizona Journal of International and Comparative Law*, vol. 26(1) (2009), pp. 49-111.

⁴⁸ Human Rights Watch interview with human rights lawyer, Buenos Aires, June 14, 2017.

⁴⁹ "International Criminal Court investigates the freedom of soldiers responsible for 'false positives'" ("Corte Penal Internacional indaga por la libertad de militares de los 'falsos positivos'"), *El Tiempo*, May 20, 2010, <http://www.eltiempo.com/archivo/documento/CMS-7691492> (accessed November 28, 2017).

⁵⁰ Human Rights Watch interview with ICC staff, Buenos Aires, July 21, 2016.

⁵¹ *Ibid.*; and email correspondence with ICC staff, The Hague, May 3, 2017.

At the time, and since 2008, the OTP was working on an “interim report” on the situation. The report, published in November 2012, was, according to one interlocutor, originally aimed at easing complaints from local civil society groups that the OTP was not doing enough in Colombia.⁵² It resulted in an important new form of engagement.

The report is seen by the OTP as an important tool in its strategy to encourage national proceedings. That strategy is rooted in the OTP’s assessment that while Colombia has the national capacity to prosecute those most responsible for international crimes, including “false positive” killings, conflicting political interests and an inadequate prosecutorial strategy have at times undermined efforts to carry out these prosecutions.⁵³ (These are, broadly speaking, the same key obstacles identified by Human Rights Watch’s research, as indicated above.) The interim report accordingly identifies priority areas as an effort to overcome a lack of adequate prosecutorial strategy domestically; one of these is “false positive” cases.⁵⁴

Since the interim report and as of the end of 2017, the OTP has carried out six trips to Colombia: three in 2013 (in April, June, and November), two in 2015 (in June and May), and a high-level mission, led by the prosecutor, Fatou Bensouda, in 2017. During these trips, OTP officials met with officials from the three branches of government, and representatives of national civil society groups, international NGOs, and international organizations.⁵⁵ In addition, OTP officials, on occasion, held meetings with Colombian diplomats in The Hague and with other officials visiting the OTP.⁵⁶

One relevant challenge for the OTP in implementing this approach, however, has been the somewhat limited cooperation from Colombian authorities.

⁵² Human Rights Watch interview with human rights lawyer, June 14, 2017.

⁵³ Human Rights Watch group interview with ICC staff, The Hague, August 2, 2016.

⁵⁴ OTP, “Situation in Colombia: Interim Report,” <https://www.legal-tools.org/doc/7029e5/pdf/>, para. 22.

⁵⁵ OTP, “Report on Preliminary Examination Activities 2013,” November 25, 2013, <https://www.legal-tools.org/en/doc/dbf75e/> (accessed October 12, 2017), para. 147; OTP, “Report on Preliminary Examination Activities 2014,” December 2, 2014, <https://www.legal-tools.org/en/doc/3594b3/> (accessed November 28, 2017), para. 128; OTP, “Report on Preliminary Examination Activities 2015,” November 12, 2015, <http://www.legal-tools.org/doc/acoed2/> (accessed November 28, 2017), para. 60.

⁵⁶ Human Rights Watch group interview with ICC staff, August 2, 2016.

During the administration of President Alvaro Uribe (2002-2010), the Colombian government targeted local NGOs, accusing them of politically motivated lies, and took a challenging stance with international human rights bodies.⁵⁷

During the administration of President Juan Manuel Santos (since 2010), the Colombian government adopted the view that it should engage with international bodies, including the OTP.⁵⁸ As part of this approach, the government has shared a significant amount of information with the OTP, including statistics, hundreds of rulings, spreadsheets on ongoing prosecutions, and a mapping of “false positive” cases.⁵⁹

Despite this, since 2014, Colombian authorities have at times failed to provide material information about the suspects, scope of the investigations, nature of charges, or the investigative steps taken against current or retired generals implicated in “false positive” killings.⁶⁰ An official within the Attorney General’s Office told Human Rights Watch that during a 2015 OTP trip the office instructed officials that while they could explain cases, they could not hand over any documents.⁶¹

Colombian officials have argued that material information about ongoing investigations is confidential under Colombian law and that strictly speaking, ICC states parties do not have a duty to share any information with the OTP during a preliminary examination.⁶² One government official said that the government “may voluntarily” share such information “provided domestic law is respected.”⁶³

⁵⁷ See, for example, Colectivo de Abogados “José Alvear Restrepo,” “President Uribe Vélez’s Declaration on the ruling of the Inter-American Court on the Manuel Cepeda case, a new grievance for victims” (“Declaración del presidente Uribe Vélez sobre sentencia de la Corte Interamericana sobre el caso Manuel Cepeda, es un nuevo agravio para las víctimas”), July 2, 2010, <http://www.colectivodeabogados.org/?Declaracion-del-presidente-Uribe> (accessed November 28, 2017); “Uribe calls on UN rapporteur to do his research before speaking to the media” (“Uribe pide a relator de ONU informarse antes hablar a los medios), *La Nación*, September 6, 2008, http://www.nacion.com/mundo/Uribe-relator-ONU-informarse-medios_o_999300144.html (accessed November 28, 2017).

⁵⁸ Human Rights Watch telephone interview with former vice minister of justice, July 11, 2016.

⁵⁹ Human Rights Watch telephone interview with former senior official in the Attorney General’s Office, June 18, 2016.

⁶⁰ OTP, “Report on Preliminary Examination Activities 2015,” <http://www.legal-tools.org/doc/acoed2/>, para. 158; Human Rights Watch group interview with OTP staff, The Hague, August 2, 2016.

⁶¹ Human Rights Watch interview with former senior prosecutor, Bogotá, June 22, 2016.

⁶² Human Rights Watch telephone interview with former senior official in the Attorney General’s Office, June 18, 2016; interview with government official; and group interview with senior officials in the Attorney General’s Office, Bogotá, June 22, 2016.

⁶³ Human Rights Watch interview with government official.

However, the reluctance to share information appears to stem from a belief among some officials that the OTP would use that information as evidence during an ICC proceeding against members of the Colombian military.⁶⁴ In addition, the limited cooperation may be due to the peace negotiations with FARC guerrillas. According to an OTP official, “[t]he relationship [with the government] became harder with the peace process.... Our missions created less enthusiasm [in the government], that was clear.”⁶⁵

The OTP publicly noted the government’s lack of cooperation in its November 2015 report. OTP officials told Human Rights Watch that they decided to do so to remind the Colombian government that the ICC case law requires that progress be supported with evidence with a “sufficient degree of specificity and probative value.”⁶⁶

The OTP noted that there was no immediate change in cooperation in response. By August 2016, however, it had ultimately received the requested information from the authorities.⁶⁷

During her September 2017 mission, Bensouda said in a press conference that the Attorney General’s Office had not provided information she had requested regarding “false positives” investigations.⁶⁸

D. Impact of OTP Engagement

Although beyond the scope of this report, as discussed briefly above, it is clear that Colombia’s status as an ICC member country has profoundly shaped the government’s approach to the current peace negotiations, where it has sought to position its proposals as

⁶⁴ Human Rights Watch telephone interview with former senior official in the Attorney General’s Office, June 18, 2016; and interview with senior official in the Attorney General’s Office, Bogotá, June 20, 2016.

⁶⁵ Human Rights Watch interview with ICC staff, July 21, 2016.

⁶⁶ Human Rights Watch group interview with ICC staff, August 2, 2016; OTP, “Report on Preliminary Examination Activities 2015,” <http://www.legal-tools.org/doc/acoed2/>, para. 164.

⁶⁷ Human Rights Watch group interview with ICC staff, August 2, 2016.

⁶⁸ “We asked the attorney general for very precise information and we did not receive it”: ICC prosecutor” (“Le hemos pedido al fiscal información muy precisa y no la hemos recibido”: fiscal de la CPI), *El Espectador*, September 13, 2017, <https://www.elespectador.com/noticias/judicial/le-hemos-pedido-al-fiscal-informacion-muy-precisa-y-no-la-hemos-recibido-fiscal-de-la-cpi-articulo-713009> (accessed November 28, 2017).

sufficient to avoid ICC intervention. This, in part, repeats the previous government’s approach to the implementation of the Justice and Peace Law for demobilizing paramilitaries.⁶⁹

When it comes to “false positive” killings, the OTP has had an impact on certain Colombian legislation and prosecutorial policies, but, in the period of research covered by this report—that is, mainly after the publication of the OTP’s 2012 interim report and through September 2016— it has had less success in fostering individual prosecutions of senior army officials. There has been significant progress in cases against lower and mid-level perpetrators—including the at least 11 colonels cited above—since 2012, and our interlocutors thought the OTP was one of several factors advancing these cases. There is little indication, however, that this progress will translate into cases against higher-level defendants; while proceedings have been initiated against 19 generals, the cases have been marked by undue delay. (The OTP’s impact on legislation, prosecution policies, and prosecutions is evaluated below.)

1. Legal Framework for Peace and Constitutional Court Ruling

In 2012, lawmakers passed the Legal Framework for Peace, a constitutional amendment that sought to lay the groundwork for the peace negotiations with FARC guerrillas. The amendment included a range of benefits for those responsible for human rights abuses committed in the context of the armed conflict, including members of the armed forces. While its applicability was overtaken by the justice agreement that the government and FARC reached in December 2015, the amendment would have benefited members of the armed forces responsible for “false positive” killings, since Colombian courts have considered that many of these killings are connected to the armed conflict.⁷⁰

⁶⁹ For discussions about the ICC’s role in the demobilization of paramilitaries, see Alejandro Chehtman, “Developing Local Capacity for War Crimes Trials: Insights from BIH, Sierra Leone, and Colombia,” *Domac/9*, June 2011, <https://en.ru.is/media/domac/Domac-9-AC-Final-Paper.pdf> (accessed November 28, 2017); Alejandro Chehtman, “The ICC and its Normative Impact on Colombia’s Legal System,” *Domac/16*, October 2011, <https://en.ru.is/media/domac/Domac-16-AC-Colombia.pdf> (accessed November 28, 2017); Jennifer S. Easterday, “Deciding the Fate of Complementarity: A Colombian case study,” *Arizona Journal of International and Comparative Law*; Amanda Lyons and Michael Reed-Hurtado, “Colombia: Impact of the Rome statute and the International Criminal Court,” The International Center for Transitional Justice, May 2010 (paper presented at the Rome Statute Review Conference, Kampala, June 2010), <https://www.legal-tools.org/doc/17ec15/pdf/> (accessed November 28, 2017).

⁷⁰ See Constitutional Amendment establishing legal instruments of transitional justice (Acto legislativo por medio del cual se establecen instrumentos jurídicos de justicia transicional en el marco del artículo 22 de la Constitución Política y se dictan otras disposiciones), *Congreso de Colombia*, Constitutional Amendment 01 of July 31, 2012, <http://www.altocomisionadoparalapaz.gov.co/desarrollos-legislativos-paz/marco-juridico-para-la-paz/Documentos%20compartidos/Acto-Legislativo-N-01-del-31-de-julio-de-2012-4.pdf> (accessed November 29, 2017). See

The amendment empowered Congress to limit prosecutorial efforts to those deemed “most responsible” for international crimes committed in a systematic manner, in an attempt to emulate the OTP’s prosecutorial strategy.⁷¹ In fact, the OTP’s prosecutorial strategy is cited in the official explanation of the bill.⁷²

According to the vice minister of justice at the time, this provision was not meant to limit the prosecutions to those strictly required by the ICC, but was rather a “policy transfer” premised on the argument that limiting the prosecutions to those “most responsible” would make prosecutions most effective.⁷³

While some prioritization is to be expected in situations of mass atrocities committed by thousands of perpetrators, a selective policy limited to those “most responsible”—meaning that all others will not be prosecuted for their crimes—fails to meet the state’s responsibility to hold those responsible for abuses accountable.⁷⁴

In addition, the Legal Framework for Peace amendment allowed authorities to fully suspend prison sentences even for those deemed “most responsible.”⁷⁵ This provision

also “Colombia – Fix Flaws in Transitional Justice Bill,” Human Rights Watch news release, June 12, 2012, <https://www.hrw.org/news/2012/06/12/colombia-fix-flaws-transitional-justice-bill>.

⁷¹ Human Rights Watch interview with former Defense Ministry official, June 17, 2016; and telephone interview with civil society representative, June 29, 2016. “Systematicity” refers to an element of crimes against humanity under international criminal law. Under Rome Statute art. 7, underlying acts such as murder must be, among other elements, widespread or systematic to amount to crimes against humanity. Broadly, “systematic” refers to the fact that crimes are somehow organized and follow a regular pattern. While “systematicity” is not an element of war crimes under international law, the ICC has jurisdiction in particular over the large-scale commission of war crimes, or where those crimes are committed pursuant to a plan or policy. Rome Statute, art. 8.

⁷² See “Report on the first debate in the Senate (second round) on Constitutional Amendment no. 14 of the 2011 Senate-094 of 2011 Chamber” (“Informe de ponencia para primer debate en senado (segunda vuelta) al proyecto de Acto Legislativo no. 14 de 2011 Senado – 094 de 2011 Cámara”), *Congreso de Colombia*, May 30, 2012, ftp://backups.senado.gov.co/atencion_ciudadana/Backup%20omonica%20vanegas/ATENCION%20CIUDADANA/COMUNICACION%20DE%20PRENSA%20-%20CORTE%20CONSTITUCIONAL/ACTOS%20LEGISLATIVOS/AL%202012/ACTO%20LEGISLATIVO%2001-12/II%20Segunda%20Vuelta/P.%201ER%20D.%20PAL%2014-11%20MARCO%20PARA%20LA%20PAZ%20II%20VUELTA.doc (accessed November 28, 2017).

⁷³ Human Rights Watch telephone interview with former vice minister of justice, July 11, 2016.

⁷⁴ See Letter from Human Rights Watch to President of the Senate Juan Manuel Corzo, President of the Chamber of Representatives Simón Gaviria, and President of the First Commission of the Senate Luis Fernando Velasco, “Colombia: Correct Serious Flaws in Transitional Justice Bill,” May 1, 2012, <https://www.hrw.org/news/2012/05/01/colombia-correct-serious-flaws-transitional-justice-bill>.

⁷⁵ Constitutional Amendment 01 of July 31, 2012, <http://www.altocomisionadoparalapaz.gov.co/desarrollos-legislativos-paz/marco-juridico-para-la-paz/Documentos%20compartidos/Acto-Legislativo-N-01-del-31-de-julio-de-2012-4.pdf>, art. 1.

seemed designed to facilitate justice negotiations with the FARC and severely undermined the chances of meaningful justice for grave abuses.

In July and August 2013, the OTP sent letters to Colombian authorities clarifying its views on these two issues. The first, sent on July 26, argued that suspended sentences for those most responsible for the worst crimes were incompatible with the Rome Statute.⁷⁶ The second, sent on August 7, clarified that the OTP's prosecutorial policy focuses on those most responsible in its own cases before the ICC, while also supporting national investigations for lower-ranking perpetrators to ensure that offenders are brought to justice by some other means.⁷⁷ The letters were leaked in August 2013, published in *Semana* magazine, and widely reported.⁷⁸

Although the OTP's letters were controversial and led to some civil society representatives criticizing the OTP, several interviewees, including a Constitutional Court judge, agreed the letters had a significant influence over the August 2013 Constitutional Court ruling.⁷⁹ The ruling declared that the Legal Framework for Peace was constitutional, but prohibited the full suspension of penalties for those "most responsible" for crimes against humanity, genocide, and war crimes committed in a systematic manner.⁸⁰

2. Bills Expanding Military Jurisdiction

From 2012 to 2015, the Defense Ministry presented numerous bills that would transfer "false positive" cases from civilian to the military jurisdiction, where—given the military jurisdiction's lack of independence—it was not expected they would be prosecuted.⁸¹

⁷⁶ OTP, "Report on Preliminary Examination Activities 2013," <https://www.legal-tools.org/en/doc/dbf75e/>, para. 149.

⁷⁷ Ibid.

⁷⁸ "A 'letter bomb'" ("Una 'carta bomba'"), *Semana*, August 17, 2013, <http://www.semana.com/nacion/articulo/una-carta-bomba/354430-3> (accessed November 28, 2017).

⁷⁹ Human Rights Watch separate interviews with civil society representative, Bogotá, June 29, 2016; Constitutional Court judge, Bogotá, August 30, 2016; and civil society representative, Bogotá, September 29, 2016.

⁸⁰ See Ruling C-79/13, Constitutional Court of Colombia, August 28, 2013, <http://www.corteconstitucional.gov.co/relatoria/2013/C-579-13.htm> (accessed November 29, 2017); Human Rights Watch separate interviews with former attorney general, Bogotá, June 21, 2016; and Constitutional Court judge, August 30, 2016.

⁸¹ For a further discussion on how these bills would transfer "false positive" cases to the military jurisdiction see Letter from Human Rights Watch to Minister Juan Carlos Pinzón, "Colombia: Withdraw Military Jurisdiction Expansion Bill," July 08, 2014, <https://www.hrw.org/news/2014/07/08/colombia-withdraw-military-jurisdiction-expansion-bill>; "Colombia: Military Justice Law a Blow to Human Rights," Human Rights Watch news release, June 18, 2013, <https://www.hrw.org/news/2013/06/18/colombia-military-justice-law-blow-human-rights>; Letter from Human Rights Watch

Such proposals ran contrary to the view of the UN Human Rights Committee that civilian justice authorities should investigate and prosecute alleged human rights violations.⁸² One of these bills was passed in December 2012, but was struck down by the Constitutional Court in October 2013 on procedural grounds. Attempts to pass new legislation opening the door to the transfer of extrajudicial killings to military jurisdiction were frustrated largely due to pressure by domestic and international NGOs, which had also been important voices in opposing such bills from the outset.

The OTP included these bills as part of their focus on Colombia in its 2012 interim report, noting that it “[would] seek further information and clarification ... on the legislative efforts pertaining to the jurisdiction of military courts.”⁸³

In their 2013 visits, OTP officials discussed the bills with government officials.⁸⁴ According to a former Defense Ministry official, during one meeting, OTP officials “threatened” that transferring “false positives” to military jurisdiction could affect the OTP’s assessment of admissibility.⁸⁵ Civil society representatives asked the OTP to explicitly condemn the bills.⁸⁶

The threat that the passing of these bills would help foster an ICC investigation played a significant role in the public debate in Colombia.⁸⁷ In fact, many statements by civil society

to President Juan Manuel Santos, “Colombia: Shelve Proposed Expansion of Military Jurisdiction,” December 12, 2011, <https://www.hrw.org/news/2011/12/12/colombia-shelve-proposed-expansion-military-jurisdiction>. For a discussion on why the military jurisdiction poses a major obstacle to accountability in “false positive” killings, see Human Rights Watch, *On Their Watch*, pp. 77-84.

⁸² The UN Human Rights Committee has stated that members of the armed forces accused of human rights abuses should be tried by independent civilian courts. See, for example, UN Human Rights Committee, Concluding Observations, Colombia, UN Doc. CCPR/C/79/Add.76, May 3, 1997, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f79%2fAdd.76&Lang=en (accessed November 29, 2017), para. 34. See also UN Commission on Human Rights, “Updated Set of principles for the protection and promotion of human rights through action to combat impunity, 2 Addendum to “Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher,” E/CN.4/2005/102/Add.1, February 8, 2005, <http://www.un.org/Docs/asp/ws.asp?m=E/CN.4/2005/102/Add.1> (accessed November 29, 2017), principle 29.

⁸³ OTP, “Situation in Colombia: Interim report,” <https://www.legal-tools.org/doc/7029e5/pdf/>, para. 222.

⁸⁴ Human Rights Watch interview with former Defense Ministry official, June 17, 2016.

⁸⁵ *Ibid.*

⁸⁶ Human Rights Watch interview with civil society representative, June 29, 2016.

⁸⁷ *Ibid.*

groups highlighted that the bills would open the door for an ICC investigation.⁸⁸ Human Rights Watch also referred to the ICC in its advocacy against the bills.⁸⁹

Indeed, according to Human Rights Watch interviews, including one with a defense official, members of the Colombian army responsible for “false positive” killings seemed to fear an ICC investigation, giving leverage to government officials in discussions with members of the military about progress in prosecutions or legislative reforms.⁹⁰ For example, a former Defense Ministry official said that he often “used the ICC as a backup in negotiations with members of the military” about legislative proposals to prosecute them.⁹¹

In its 2013 report on preliminary activities, the OTP took note of the concerns by civil society representatives, international NGOs, and human rights bodies. However, it reported that the bills were not inconsistent with the Rome Statute since the “analysis of national proceedings is case specific, and there is no assumed preference for national proceedings to be conducted in civilian as opposed to military jurisdictions *per se*.” It went on to indicate that it would “evaluate whether specific national proceedings have been or are being carried out genuinely.”⁹²

⁸⁸ See, for example, Colectivo de Abogados “José Alvear Restrepo”, “Reform of the military jurisdiction: a historic setback that promotes impunity” (“Reforma del fuero penal militar: Un retroceso histórico para favorecer la impunidad”), April 26, 2012, <http://www.colectivodeabogados.org/Reforma-del-fuero-penal-militar-Un> (accessed November 29, 2017); Colectivo de Abogados “José Alvear Restrepo”, “Legal war and reform of the Military jurisdiction” (“Guerra jurídica y reforma al Fuero Penal Militar”), September 25, 2012, <http://www.colectivodeabogados.org/Guerra-juridica-y-reforma-al-Fuero> (accessed November 29, 2017); Open letter from Federación Internacional de Derechos Humanos and Coordinación Colombia Europa Estados Unidos to the Congress of Colombia (“Carta abierta al Congreso de la República ante la inminencia de la aprobación de la ley estatutaria sobre el Fuero Penal Militar”), June 17, 2013, <https://www.fidh.org/es/region/americas/colombia/colombia-carta-abierta-al-congreso-de-la-republica-ante-la-inminencia-de-13476> (accessed November 29, 2017).

⁸⁹ See, for example, Letter from Human Rights Watch to Minister Juan Carlos Pinzón, “Withdraw Military Jurisdiction Expansion Bill,” <https://www.hrw.org/news/2014/07/08/colombia-withdraw-military-jurisdiction-expansion-bill>.

⁹⁰ Human Rights Watch separate interviews with former Defense Ministry official, June 17, 2016; former senior official in the Attorney General’s Office, June 18, 2016; member of international human rights group, June 20, 2016; human rights lawyer, June 21, 2016; former attorney general, June 21, 2016; prosecutor, Bogotá, June 22, 2016; and prosecutor, Bogotá, June 27, 2016. Some civil society representatives thought, however, that this fear had decreased with the passing of time. Human Rights Watch separate interviews with civil society representatives, Bogotá, June 21 and 22, 2016.

⁹¹ Human Rights Watch interview with former Defense Ministry official, June 17, 2016.

⁹² OTP, “Report on Preliminary Examination Activities 2013,” <https://www.legal-tools.org/en/doc/dbf75e/>, para. 138.

The OTP's assertion that there was no preference for civilian jurisdiction under the Rome Statute effectively ended public debate regarding the role of the ICC,⁹³ and may even have helped the government advance these bills. A former Defense Ministry official told Human Rights Watch that the fact that the OTP did not consider the bills inconsistent with the Rome Statute was "very helpful" for him in his discussions with civil society and other government officials.⁹⁴ Officials from the Attorney General's Office said that the OTP had remained "silent" and failed to help show potential problems with these bills.⁹⁵

From one perspective, the OTP was constrained by the Rome Statute regarding the proposed expansion of the military jurisdiction to include "false positive" cases; the Rome Statute does not include a preference for civilian over military jurisdiction.

However, it does provide that trials that are not conducted independently or impartially and in a manner consistent with an intent to bring the person concerned to justice may indicate that the state is unwilling to conduct genuine proceedings. Human rights bodies have repeatedly found that military courts have failed to deliver independent and impartial trials for alleged abuses committed by the military.

It seems possible that the OTP could have acted more flexibly in expressing its views and, in the context of its intent to monitor specific proceedings, explicitly credited the well-documented concerns with military jurisdiction over these cases. Although it did so initially, its subsequent announcement that military jurisdiction was not per se inconsistent with the Rome Statute undermined civil society advocacy.

⁹³ Human Rights Watch reviewed all the publicly available documents from five leading Colombian NGOs advocating against the military reform bills (Comision Colombiana de Juristas, Colectivo de Abogados "José Alvear Restrepo", DeJusticia, Comité de Solidaridad con los Presos Políticos, and Cordinacion Colombia-Europa-Estados Unidos) and could not find one document released after November 2013 mentioning that the military jurisdiction bills could open the door to an ICC investigation. Compare with Letter from Human Rights Watch to Minister Juan Carlos Pinzón, "Withdraw Military Jurisdiction Expansion Bill," <https://www.hrw.org/news/2014/07/08/colombia-withdraw-military-jurisdiction-expansion-bill>.

⁹⁴ Human Rights Watch interview with former Defense Ministry official, June 17, 2016.

⁹⁵ Human Rights Watch interview with prosecutor, Medellín, June 15, 2016; and telephone interview with former senior official in the Attorney General's Office, June 18, 2016.

3. OTP's Impact on Prosecutorial Strategies

Between 2012 and 2015, the Attorney General's Office under Attorney General Eduardo Montealegre designed some promising prosecutorial strategies that sought to overcome obstacles faced in prosecuting atrocities, including "false positive" killings.

One key prosecutorial strategy was developing a prioritization strategy, designed under an October 2012 directive.⁹⁶ The directive created a committee, led by the deputy attorney general, that was in charge of establishing general prioritization strategies and approving prioritization strategies defined by the units within the Attorney General's Office.⁹⁷

A second key shift was the creation of the Unit of Analysis and Contexts (*Unidad de Analisis y Contextos*, UNAC; later called *Direccion de Analisis y Contextos*, DINAC) in 2012.⁹⁸ As of August 2016, the DINAC was composed of about 400 officials, including around 40 prosecutors, judicial investigators, and analysts from a range of social sciences. It was designed to carry out a context and pattern-based analysis of the crimes, including "false positive" cases, to determine the structure of the groups and identify those most responsible for abuses, addressing a key challenge posed by what had been incident-based prosecutions, as discussed above.⁹⁹

Attorney General Montealegre told Human Rights Watch that the prioritization model and UNAC were influenced by the case law and prosecutorial strategies of international courts,

⁹⁶ Directive 01/2012 to adopt new criteria for the prioritization of situations and cases and create a new system of criminal investigation and management in the Attorney's General Office, *Fiscalía General de la Nación*, <http://www.fiscalia.gov.co/colombia/wp-content/uploads/Directiva-N%C2%Bo-0001-del-4-de-octubre-de-2012.pdf>. Later modified by Directive 2/2015 to expand and modify Directive 01/2012, to develop the scope of the criteria of prioritization of situations and cases, and establish guidelines for the strategic planning and management of the criminal investigation in the Attorney General's Office (Directiva 2/2015 por medio de la cual se amplía y modifica la Directiva 01 de 2012, se desarrolla el alcance de los criterios de priorización de situaciones y casos, y se establecen lineamientos para la planificación y gestión estratégica de la investigación penal en la Fiscalía General de la Nación), *Fiscalía General de la Nación*, December 9, 2015, <http://www.fiscalia.gov.co/colombia/wp-content/uploads/0002-0021.pdf> (accessed November 29, 2017).

⁹⁷ Directive 01/2012 to adopt new criteria for the prioritization of situations and cases and create a new system of criminal investigation and management in the Attorney's General Office, *Fiscalía General de la Nación*, <http://www.fiscalia.gov.co/colombia/wp-content/uploads/Directiva-N%C2%Bo-0001-del-4-de-octubre-de-2012.pdf>, p. 33.

⁹⁸ Resolution 01810 to create the Unit of Analysis and Context (Resolución 01810 por medio de la cual se crea la Unidad de Análisis y Contextos), *Fiscalía General de la Nación*, October 4, 2012, <http://www.fiscalia.gov.co/colombia/wp-content/uploads/2013/02/0-1810-12-1.pdf> (accessed November 29, 2017).

⁹⁹ Human Rights Watch telephone interview with former senior official in the Attorney General's Office, June 18, 2016; and interviews with senior officials in the Attorney General's Office, June 20 and 22, 2016.

including the ICC.¹⁰⁰ Indeed, prioritization was a key recommendation in the OTP's November 2012 interim report.¹⁰¹ Montealgre said that he decided to adopt a prioritization model in part because of the threat of an ICC investigation, but also because he thought it would enable more efficient prosecutions.¹⁰²

When it comes to UNAC, OTP officials have shown significant interest and have repeatedly visited the unit.¹⁰³ In 2014, a delegation of the Attorney General's Office, including Deputy Attorney General Jorge Fernando Perdomo, visited the ICC to discuss the methodology and challenges of the UNAC.¹⁰⁴ In December 2014, the OTP commended the UNAC's mapping of "false positive" killings, noting that it was partly consistent with information analyzed by the OTP regarding the military units allegedly involved in the crimes across the country.¹⁰⁵

Ultimately, however, the effect of these developments has been limited. Below we describe their implementation through mid-2016.

A prioritization strategy for the Human Rights Unit—the unit within the Attorney General's Office that carries out many of the prosecutions of "false positive" cases in the ordinary justice system—was not approved until March 2015.¹⁰⁶ Some prosecutors had prioritized "false positive" killings before the resolution, but many had not and were not legally required to do so.¹⁰⁷

UNAC's role shifted over time. Instead of supporting investigations that other units conducted with context and pattern-based analysis, after 2014, it operated more like a

¹⁰⁰ Human Rights Watch interview with former attorney general, June 21, 2016. See also Directive 01/2012 to adopt new criteria for the prioritization of situations and cases and create a new system of criminal investigation and management in the Attorney's General Office, *Fiscalía General de la Nación*, <http://www.fiscalia.gov.co/colombia/wp-content/uploads/Directiva-N%C2%Bo-0001-del-4-de-octubre-de-2012.pdf>, pp. 4-12 (citing case law from international bodies and international standards, including from the Rome Statute. Human Rights Watch does not necessarily agree that such interpretation of international standards is accurate).

¹⁰¹ OTP, "Situation in Colombia: Interim Report," <https://www.legal-tools.org/doc/7029e5/pdf/>, paras. 197-200.

¹⁰² Human Rights Watch interview with former attorney general, June 21, 2016.

¹⁰³ Human Rights Watch telephone interview with former senior official in the Attorney General's Office, June 18, 2016; and interview with prosecutor, June 22, 2016.

¹⁰⁴ Human Rights Watch group interview with ICC staff, August 2, 2016.

¹⁰⁵ OTP, "Report on Preliminary Examination Activities 2014," <https://www.legal-tools.org/en/doc/3594b3/>, para. 126.

¹⁰⁶ Human Rights Watch interviews with prosecutors, June 22 and August 25, 2016.

¹⁰⁷ Human Rights Watch interview with human rights lawyer, June 21, 2016; and telephone interview with prosecutor, Bogotá, December 8, 2016.

normal unit in charge of prosecuting some cases and was staffed with more prosecutors and fewer analysts.¹⁰⁸ This means it could not support the Human Rights Unit on “false positive” cases. Also, UNAC stopped directly investigating “false positive” cases in 2014, focusing instead mainly on crimes committed by the ELN and FARC guerrillas.

OTP officials said that government officials told them that this decision was taken because the UNAC had mapped “false positive” killings, so the cases were transferred to the competent prosecutors for individual prosecutions.¹⁰⁹ But Attorney General Montealegre told Human Rights Watch that, although UNAC might investigate army officials in the future, UNAC’s focus shift was a “circumstantial decision due to the peace process.”¹¹⁰

Effective coordination between the relevant units within the Attorney General’s Office in charge of prosecuting “false positive” killings, including the Human Rights Unit, prosecutors before the Supreme Court, and the UNAC also remains limited.¹¹¹

4. OTP’s Impact on Individual Cases

The OTP’s preliminary examination does not appear to have triggered the initial investigations of “false positive” cases. In fact, at the time investigations began, the attorney general told Human Rights Watch that he thought that the OTP was not looking at the issue of “false positives” when his office started investigations in 2007.¹¹² Rather, other actors—particularly the US government and NGOs— had a key role in the initial investigations.

The OTP’s continued monitoring of “false positive” cases and its regular engagement with authorities around these cases, particularly since 2012, has contributed to continued forward movement in prosecutions. During missions, OTP officials followed-up on progress

¹⁰⁸ Human Rights Watch telephone interview with prosecutor, December 8, 2016.

¹⁰⁹ Human Rights Watch group interview with ICC staff, August 2, 2016.

¹¹⁰ Human Rights Watch interview with former attorney general, June 21, 2016. In addition, a former UNAC official noted that the mapping of “false positive” cases was not actually finished when the UNAC stopped working on “false positives,” and only some UNAC prosecutors and analysts with expertise on “false positive” killings were transferred to work alongside delegate prosecutors before the Supreme Court. Human Rights Watch interview with prosecutor, August 25, 2016.

¹¹¹ See Human Rights Watch, *On Their Watch*, p. 85. Lawyers with detailed knowledge of the functioning of the Attorney General’s Office told Human Rights Watch that there are no legal limitations for units to cooperate in their work. Human Rights Watch email correspondence with former senior official in the Attorney General’s Office, December 7, 2016; and telephone interview with prosecutor, December 8, 2016.

¹¹² Human Rights Watch interview with former attorney general, September 1, 2016.

made by domestic authorities in prosecuting the crimes identified in the interim report, including “false positives,” and discussed relevant legislative proposals.¹¹³

Many government officials and civil society representatives interviewed by Human Rights Watch thought that the OTP had influence over the Colombian Attorney General’s Office,¹¹⁴ albeit as one of the several factors catalyzing national prosecutions in Colombia.¹¹⁵

For example, an official noted that while “we did not work with the idea that they could open an investigation, [the OTP] was helpful mostly because it was watching us.”¹¹⁶ Other factors with significant influence over the progress of prosecutions included the Inter-American human rights system, the Office of the UN High Commissioner for Human Rights in Colombia, the US government, and national and international NGOs, among others.¹¹⁷

However, overall, progress in prosecuting senior army officials remains slow. Interviewees suggested that while OTP visits or statements often have short-term impact, they did not lead to meaningful progress in prosecutions.¹¹⁸ One official noted, for example, that they would often put in place “temporary” measures to address the OTP’s concerns, just to “extinguish the fire.”¹¹⁹ While one official recalled that the Attorney General’s Office questioned four active or retired army generals between July and September 2015 in reaction to the OTP’s May 2015 visit,¹²⁰ this has not, to date, translated into significant progress in cases involving army generals.

¹¹³ See, for example, OTP, “Report on Preliminary Examination Activities 2013,” <https://www.legal-tools.org/en/doc/dbf75e/>.

¹¹⁴ Human Rights Watch separate interviews with prosecutors, Bogotá, June 21 and 22, 2016; civil society representative, June 29, 2016; and former attorney general, September 1, 2016.

¹¹⁵ Human Rights Watch separate interviews with government official; former senior official in the Attorney General’s Office, June 18, 2016; and telephone interview with former vice minister of justice, July 11, 2016.

¹¹⁶ Human Rights Watch interview with senior prosecutor, June 22, 2016.

¹¹⁷ On the role of the Office of the UN High Commissioner for Human Rights in Colombia see, for example, Christian Salazar Volkmann, “Evaluating the Impact of Human Rights Work: The Office of the United Nations High Commissioner for Human Rights and the Reduction of Extrajudicial Executions in Colombia,” *Journal of Human Rights Practice*, vol. 4, no. 3 (2012), <https://doi.org/10.1093/jhuman/huso27> (accessed November 29, 2017); “Report on Key Cases: 2012-2016” (“Informe de Connotación 2012-2016”), *Fiscalía General de la Nación*, no date, copy on file with Human Rights Watch.

¹¹⁸ Human Rights Watch telephone interview with former senior official in the Attorney General’s Office, June 18, 2016; separate interviews with senior official in the Attorney General’s Office, June 22, 2016; and civil society representatives, Bogotá, June 21, 22, and 28, and September 29, 2016.

¹¹⁹ Human Rights Watch interview with former senior official in the Attorney General’s Office, June 22, 2016.

¹²⁰ Human Rights Watch interview with prosecutor, June 22, 2016.

An OTP official's description of the effect of OTP missions gives additional context to the views of these interlocutors. He thought that responses elicited by OTP missions were positive, in that they moved the balance of conflicting domestic forces in favor of progress in prosecutions. But the official said this did not amount to shifting the balance definitively toward prosecuting high-level officials.¹²¹

A number of current and former officials interviewed by Human Rights Watch indicated widespread belief is lacking in the Attorney General's Office that the OTP will open an ICC investigation, undercutting its leverage.¹²² A number of factors, some interrelated, have led to this result.

First, the peace process appears to have been influential: many interviewees in the government and civil society said it was unlikely the OTP would open an investigation amid a peace process.¹²³

"The OTP walks a thin line, especially regarding the peace process," an OTP official said. "Being responsible requires that we are cautious ... and the credibility of the OTP could be at stake... no one undermines a peace process irresponsibly."¹²⁴ The OTP official added this meant it would not interfere in a peace process unless it believed that the peace process would result in impunity. According to the official, the OTP does not take the "back seat" when peace negotiations are ongoing in an ICC state party. Instead, it "tries ... [to] have peace processes adjust to the Rome Statute."¹²⁵

Interviewees described the OTP's engagement via its public statements as "cautious," which they attributed to the peace process.¹²⁶ (See discussion of OTP media engagement below.)

¹²¹ Human Rights Watch interview with ICC staff, July 21, 2016.

¹²² Human Rights Watch separate interviews with former attorney general, June 21, 2016; senior officials in the Attorney General's Office, June 20 and 22, 2016; and prosecutor, July 11, 2016; telephone interviews with former senior official in the Attorney General's Office, June 18, 2016; and former vice minister of justice, July 11, 2016.

¹²³ Human Rights Watch separate interviews with government official; and civil society representatives, Bogotá, June 20 and 29, 2016; and telephone interview with former vice minister of justice, July 11, 2016.

¹²⁴ Human Rights Watch interview with ICC staff, July 21, 2016.

¹²⁵ Human Rights Watch email correspondence with ICC staff, April 5, 2017.

¹²⁶ Human Rights Watch separate interviews with member of international human rights group, June 20, 2016; and civil society representatives, June 28 and 29, and September 29, 2016; and telephone interview with former vice minister of justice, July 11, 2016.

Second, the length of the preliminary examination appears to have diminished the threat of an investigation.¹²⁷ In particular, recent significant progress in prosecuting some international crimes could make it hard for officials to believe that the OTP would open an investigation now.¹²⁸

This may have been compounded by public statements, particularly from then-Prosecutor Moreno Ocampo, describing the preliminary examination in Colombia as a “success story.” For example, in December 2010, he told *El Tiempo* newspaper: “Colombia has learned, it seems to me, and can teach. The concept of the Law of Justice and Peace is very interesting, very unique. It’s important to keep a close eye in order to accomplish it. There [remains the challenge for] judges and prosecutors [to] wrap up cases and show that it works.”¹²⁹

Third, according to the OTP, the scope of crimes and relevant proceedings is such that while it can discuss specific cases by conduct and alleged group bearing responsibility, there is often not enough time for it to discuss the possible criminal responsibility of specific individuals during missions. In addition, although the OTP has on occasion requested that officials make progress in a given period and conveyed that it was losing its patience to spur progress, it has not set specific benchmarks on a regular basis.¹³⁰

In 2017, however, the OTP provided the Colombian authorities with a report regarding 29 active or retired army generals and six active or retired army colonels, whom it was examining for possible criminal responsibility for “false positives.”¹³¹

¹²⁷ Human Rights Watch telephone interview with former senior official in the Attorney General’s Office, June 18, 2016; and interview with civil society representative, June 29, 2016.

¹²⁸ Human Rights Watch telephone interview with former senior official in the Attorney General’s Office, June 18, 2016; and interview with human rights lawyer, June 14, 2017.

¹²⁹ Edulfo Pena, “‘Colombia can offer its experience:’ ICC chief prosecutor” (“Colombia puede ofrecer su experiencia’: fiscal jefe de la CPI”), *El Tiempo*, December 6, 2010, <http://www.eltiempo.com/archivo/documento/CMS-8537230> (accessed November 29, 2017) (Human Rights Watch translation).

¹³⁰ Human Rights Watch group interview with ICC staff, August 2, 2016; and email correspondence with ICC staff, April 5, 2017.

¹³¹ OTP, “Report on Preliminary Examination Activities 2017,” December 4, 2017, <http://www.legal-tools.org/doc/e50459/> (accessed December 18, 2017), para. 151.

But the OTP's overall broad approach did not place officials under pressure to act, according to several interviewed for this report.¹³² One interviewee, for example, pointed to a meeting where an OTP official asked Colombian prosecutors a broad question about how they would address command responsibility under the criminal code. While the use of command responsibility is highly relevant to advancing progress in cases against high-level officials, in the context of this meeting, this official thought that the OTP's broad approach opened the door to a discussion that was more theoretical, rather than pressing the government to be specific about its plans and progress.¹³³

The OTP acknowledged that missions included some conversations of a more academic or theoretical nature, but indicated that it sought to apply such discussions to the cases under investigation in Colombia. The OTP considered that this would eliminate the ability of authorities to find excuses in criminal law standards or reach wrong conclusions about commanders' responsibility.¹³⁴ Indeed, one official from the Attorney General's Office said he felt OTP meetings were helpful to him as an occasion to test his ideas about how to charge commanders for crimes their troops committed.¹³⁵ OTP officials also highlighted that there had sometimes been some strong discussions, and that, as reflected in its annual reports, it had pressed the government to provide more details on specific cases and defendants.¹³⁶

Overall, however, most interviewees suggested that the OTP's style of engagement had a limited effect. In fact, some government officials noted that the OTP seemed to be satisfied with the work of the Attorney General's Office.¹³⁷ An official noted, for example, that during an OTP mission he felt that the OTP "wanted to support us so they could close [the preliminary examination] because they have too many troubles" in other countries.¹³⁸

¹³² Human Rights Watch telephone interview with a former senior official in the Attorney General's Office, June 18, 2016; and separate interviews with senior official in the Attorney General's Office, June 20, 2016; senior official in the Attorney General's Office, June 22, 2016; former senior official in the Attorney General's Office, June 22, 2016; and prosecutor, June 27, 2016 and a.

¹³³ Human Rights Watch telephone interview with a former senior official in the Attorney General's Office, June 18, 2016.

¹³⁴ Human Rights Watch interview with ICC staff, July 21, 2016.

¹³⁵ Human Rights Watch interviews with prosecutor, June 22, 2016.

¹³⁶ Human Right Watch interview with ICC staff, July 21, 2016; and email correspondence with ICC staff, January 26, 2018.

¹³⁷ Human Rights Watch separate interviews with senior officials in the Attorney General's Office, June 20 and 22, 2016; and prosecutor, June 22, 2016.

¹³⁸ Human Rights Watch interview with senior official in the Attorney General's Office, June 22, 2016.

E. Strategic Alliances

The OTP's approach in Colombia has not taken full advantage of opportunities to strengthen its leverage with government authorities by way of building strategic alliances with other key partners.

1. Colombian Civil Society

The OTP has developed a significant relationship with human rights groups in Colombia. The vast majority of the civil society representatives whom Human Rights Watch interviewed had been in contact with the OTP, which had asked them for information, including related to the prosecution of cases they worked on.¹³⁹

Many human rights groups have used the OTP and a potential ICC investigation as leverage in their advocacy meetings and in their documents, arguing that the expansion of the criminal military jurisdiction, the Legal Framework for Peace, and generally a lack of progress in the prosecution of “false positive” killings could trigger an ICC investigation.¹⁴⁰ A former attorney general described these efforts as a “culture of international justice” within the Colombian civil society, that is, a repeated appeal to the ICC and human rights bodies to advocate for justice.¹⁴¹

However, many civil society representatives interviewed were disappointed with the OTP's work in Colombia. Some felt that the OTP had taken too long to open an ICC investigation, and that its engagement with the government had been too soft.¹⁴² The disappointment seemed to have been particularly significant regarding—although not limited to—the

¹³⁹ Human Rights Watch separate interviews with three civil society representatives, June 20, 21, and 29, 2016; and telephone interview with civil society representative, June 29, 2016.

¹⁴⁰ Human Rights Watch separate interviews with three civil society representatives, June 20 and 21, 2016. See, for example, Colectivo de Abogados “José Alvear Restrepo”, “Reform of the military criminal court: a historical setback that promotes impunity”, <http://www.colectivodeabogados.org/Reforma-del-fuero-penal-militar-Un>; Colectivo de Abogados “José Alvear Restrepo”, “Legal war and reform of the military jurisdiction”, <http://www.colectivodeabogados.org/Guerra-juridica-y-reforma-al-Fuero>; Comisión Colombiana de Juristas, “Comments on ‘the legal framework for peace’” (“Comentarios al ‘marco jurídico para la paz’”), June 4, 2012, http://www.coljuristas.org/documentos/actuaciones_judiciales/comentarios_marco_juridico_2012-06-04.pdf (accessed November 29, 2017).

¹⁴¹ Human Rights Watch interview with former attorney general, September 1, 2016.

¹⁴² Human Rights Watch separate interviews with two civil society representatives, Bogotá, June 21 and 28, 2016.

tenure of Moreno Ocampo; many civil society representatives disagreed with his assessment on whether Colombia was pursuing national prosecutions.¹⁴³

One civil society representative said of the OTP's more recent engagement: "The Colombian state plays with the OTP and the OTP seems to follow the game."¹⁴⁴ In addition, many civil society representatives said they believed the OTP would most likely close the preliminary examination without initiating an ICC investigation.¹⁴⁵

On the other hand, some civil society representatives thought the OTP had often been too strong in its engagement regarding the peace process, especially in the letters it sent to the Constitutional Court regarding shortcomings in the Legal Framework for Peace.¹⁴⁶ One of these representatives, for example, thought that the letters "damaged" the peace process by demanding too rigid justice standards and bolstering the views of opponents of the negotiations.¹⁴⁷

2. International Partners

Civil society representatives and government officials interviewed for this report believed that other international actors, such as the US government, had a higher degree of influence over the Colombian government than the OTP.¹⁴⁸

This is unsurprising; there is a huge disparity between US influence and that of the ICC. Many pointed out, for example, that US authorities were very influential with the Colombian government, which would risk losing access to US funding if it failed to comply with human rights conditions. Colombian elites have also long given importance to the US.¹⁴⁹

¹⁴³ Human Rights Watch separate interviews with civil society representative, June 13, 2016; and human rights lawyer, June 14, 2017.

¹⁴⁴ Human Rights Watch interview with civil society representative, June 28, 2016.

¹⁴⁵ Human Rights Watch interviews with civil society representatives, June 20 and 21, 2016.

¹⁴⁶ Human Rights Watch interview with civil society representative, June 29, 2016; and group interview with ICC staff, August 2, 2016.

¹⁴⁷ Human Rights Watch telephone interview with civil society representative, June 29, 2016.

¹⁴⁸ Human Rights Watch telephone interview with former official in the Attorney General's Office, June 18, 2016; and separate interviews with prosecutors, June 22, 2016; Constitutional Court judge, August 30, 2016; government official; and former attorney general, September 1, 2016.

¹⁴⁹ Human Rights Watch separate interviews with civil society representative, June 21, 2016; human rights lawyer, June 21, 2016; prosecutor, June 22, 2016; and former attorney general, September 1, 2016.

However, the OTP has not sought actively to capitalize on the pressure that these other actors could bring to bear on the issue of accountability. While the OTP has had some isolated meetings with authorities from the US government and the Inter-American human rights system, it did not pursue a specific strategy to develop coordinated or joint efforts on complementarity.¹⁵⁰

There may have been some obstacles to increased coordination between the OTP and these other actors; the US is not an ICC member country, although it has supported ICC investigations under certain circumstances, and has been engaged in Guinea to support the preliminary examination there. The need for justice for “false positives,” however, has been a significant issue in the Colombia-US relationship, especially under the Obama administration.¹⁵¹ There are also significant differences in the mandates of the Inter-American human rights system as compared to the ICC. However, the backing of relevant members of the international community may have allowed the OTP to strengthen its leverage, possibly by alleviating concerns that the ICC would have been isolated and cast as the “spoiler” of the peace process.

F. Media

Colombia has sophisticated media compared to other countries in the region. Media outlets give an unusual importance to human rights issues and seem to be highly influential with national authorities. Statements and visits by OTP officials are widely reported.

However, this does not seem to have played a significant role with respect to government policies.¹⁵² As an official in the Attorney General’s Office said, press coverage creates

¹⁵⁰ Human Rights Watch group interview with ICC staff, August 2, 2016.

¹⁵¹ See, for example State Department, “Report and Memorandum of Justification Concerning Human Rights Conditions with Respect to Assistance for the Colombian Armed Forces,” September 19, 2016, on file with Human Rights Watch (mentioning that a portion of Foreign Military Funding to Colombia in 2016 was conditioned to evidence that Colombia was prosecuting soldiers credibly alleged to have engaged in abuses); State Department, “Certification Related to Foreign Military Financing for Colombia Under Section 7045(b)(6) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2017,” September 18, 2017, <https://www.federalregister.gov/documents/2017/09/18/2017-19837/certification-related-to-foreign-military-financing-for-colombia-under-section-7045b6-of-the> (accessed November 29, 2017) (mentioning that a portion of Foreign Military Funding to Colombia in 2017 was conditioned to evidence that Colombia was investigating, prosecuting, and appropriately punishing soldiers responsible for “false positives.”).

¹⁵² Human Rights Watch separate interviews with prosecutors, Bogotá, June 22, 2016, and August 17, 2016; and senior official in the Attorney General’s Office, June 22, 2016.

“paranoia” regarding the OTP in the Colombian society, but it “does not affect us, [since] these are things we already know.”¹⁵³

OTP officials do not accept interviews in Colombian media; their media engagement takes place via workshops, press conferences during missions, press statements, and op-eds.¹⁵⁴ Since the preliminary examination was opened, as of December 2017, the OTP has released five press statements (two on the peace process and three on concluded missions) and participated in eight workshops or conferences involving Colombia.¹⁵⁵

According to OTP officials, the OTP considers that more frequent use of media would not be effective per se; rather it has sought to be strategic regarding timing and to control its messaging. In its experience, the OTP has had to make significant efforts to ensure that statements are covered accurately and has had to work to correct misrepresentations of OTP’s view in the Colombian press.¹⁵⁶

OTP statements are usually broad and do not reference specific examples of progress or concerns. This may explain why government officials feel that these include nothing new. Meanwhile, media coverage on the annual reports on preliminary examination activities or the 2012 interim report, which include a more detailed analysis of prosecutions, is usually

¹⁵³ Human Rights Watch interview with prosecutor, June 22, 2016.

¹⁵⁴ Human Rights Watch interview with OTP staff, July 21, 2016; and group interview with OTP staff, August 2, 2016.

¹⁵⁵ “Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the conclusion of her visit to Colombia (10-13 September 2017),” OTP statement, September 13, 2017, <https://www.icc-cpi.int/Pages/item.aspx?name=170913-otp-stat-colombia> (accessed November 29, 2017); “ICC Office of the Prosecutor concludes visit to Colombia,” OTP press release, April 19, 2013, <https://www.icc-cpi.int/Pages/item.aspx?name=pr900> (accessed November 29, 2017); “The Office of the Prosecutor concludes mission to Colombia,” OTP press release, March 2, 2015, <https://www.icc-cpi.int/Pages/item.aspx?name=pr1090> (accessed November 29, 2017); “Statement of the Prosecutor on the Agreement on the Creation of a Special Jurisdiction for Peace in Colombia,” OTP statement, September 24, 2015, https://www.icc-cpi.int/Pages/item.aspx?name=otp_stat_24-09-2015 (accessed November 29, 2017); “Statement of ICC Prosecutor, Fatou Bensouda, on the conclusion of the peace negotiations between the Government of Colombia and the Revolutionary Armed Forces of Colombia – People’s Army,” OTP statement, September 1, 2016, <https://www.icc-cpi.int/Pages/item.aspx?name=160901-otp-stat-colombia> (accessed November 29, 2017); OTP, “Report on Preliminary Examination Activities 2015,” <http://www.legal-tools.org/doc/acoed2/>, para. 162; OTP, “Report on Preliminary Examination Activities 2014,” <https://www.legal-tools.org/en/doc/3594b3/>, para. 128; OTP, “Report on Preliminary Examination Activities 2013,” <https://www.legal-tools.org/en/doc/dbf75e/>, para. 147; OTP, “Report on Preliminary Examination Activities 2011,” December 13, 2011, <https://www.legal-tools.org/en/doc/4aad1d/> (accessed November 29, 2017), para. 84; “ICC Prosecutor visits Colombia,” OTP press release, August 21, 2008, <https://www.icc-cpi.int/Pages/item.aspx?name=icc+prosecutor+visits+colombia> (accessed October 24, 2017).

¹⁵⁶ Human Rights Watch group interview with ICC staff, August 2, 2016; and email correspondence with ICC staff, April 5, 2017.

limited.¹⁵⁷ For example, the Colombian media did not cover the OTP's reference in its 2015 report to the government's reluctance to share information about progress in prosecuting "false positive" killings.

G. Conclusions

The Colombian preliminary examination shows that it may be easier for the OTP to influence legislation and prosecutorial *strategies*, rather than *implementation* of laws and policies in specific cases. This makes sense, given that progress in specific cases against high-level defendants will inevitably be more sensitive.

However, in Colombia, this seems to have been compounded by the OTP's strategy not to set out benchmarks regarding specific proceedings in its discussions with government officials. While thousands of crimes have been committed in Colombia, it seems possible that the OTP could have engaged with authorities on some of the specific incidents or proceedings it considered most significant. Its public statements have tended to be general and not perceived by authorities as a significant source of pressure.

Since 2012, the peace process has made the OTP's engagement more difficult, narrowing opportunities for a more confrontational approach lest it be viewed as spoiling the peace.

¹⁵⁷ Human Rights Watch carried out a comprehensive search on media coverage of the 2012 interim report and reports on preliminary activities, and was only able to find the following: "'False positives' have been part of state politics: International Criminal Court" ("Falsos positivos" sí han sido política de Estado: Corte Penal Internacional), *Caracol Radio*, September 28, 2015, http://caracol.com.co/programa/2012/11/28/6am_hoy_por_hoy/1354084680_802633.html (accessed November 29, 2017); "CPI warns Colombia about the peace process with the Farc" ("CPI lanza advertencia a Colombia sobre el proceso de paz con las Farc"), *El País*, December 2, 2014, <http://www.elpais.com.co/elpais/judicial/noticias/cpi-lanza-advertencia-colombia-sobre-proceso-paz-con-farc> (accessed November 29, 2017); "International Criminal Court: the peace process should be compatible with the Rome Statue" ("Corte Penal Internacional: el acuerdo de paz debe ser compatible con el Estatuto de Roma"), *Noticias RCN*, December 2, 2014, <http://www.noticiasrcn.com/nacional-pais/corte-penal-internacional-el-acuerdo-paz-debe-ser-compatible-el-estatuto-roma> (accessed November 29, 2017); "Harsh warning from the International Criminal Court" ("Dura advertencia de la Corte Penal Internacional a Colombia"), *El Tiempo*, December 2, 2014, <http://www.eltiempo.com/politica/justicia/dura-advertencia-de-la-corte-penal-internacional-a-colombia/14920616> (accessed October 25, 2017). At times, OTP reports have been quoted indirectly, based on information provided to the press by civil society groups. See, for example, "Criminal Court follows-up on sexual crimes in the country" ("Delitos sexuales, objeto de seguimiento de la Corte Penal en el país"), *El Tiempo*, November 16, 2012, <http://www.eltiempo.com/archivo/documento/CMS-12381542> (accessed November 29, 2017); "Impunity for sexual violence over 95% in Colombia" ("Impunidad en casos de violencia sexual supera el 95 % en Colombia"), *El Tiempo*, November 25, 2015, <http://www.eltiempo.com/politica/justicia/impunidad-en-casos-de-violencia-sexual-en-el-conflicto-armado-en-colombia/16441056> (accessed March 8, 2018); "Colombia: last warning from the International Criminal Court" ("Colombia: última advertencia de la Corte Penal Internacional"), *Semana*, November 15, 2012, <http://www.semana.com/nacion/articulo/colombia-ultima-advertencia-corte-penal-internacional/267884-3> (accessed November 29, 2017). The Colombia section of the OTP's annual preliminary examination report was not translated into Spanish until 2015.

A more limited influence therefore reflects certain realities about the political landscape in which the OTP must work.

Nonetheless, the OTP seems to have been at times excessively cautious in its engagement. A strengthened approach in discussions with officials and a communications strategy—backed by the necessary expertise in the Colombian media landscape—to more clearly articulate the status of the OTP’s analysis and gaps in government action and cooperation with the ICC could have increased the OTP’s influence with the government.

While the OTP has had a high level of engagement with civil society organizations, being seen to be more effective in its approach with government officials may have increased confidence among these actors and their willingness to support the OTP’s efforts. Additionally, a stronger effort to capitalize on pressure from other international actors could have helped address the challenges of demanding accountability in the midst of the peace process.

Over the course of 2017 there were indications of a shift in approach, including the OTP’s provision of a report to the authorities regarding its analysis of the status of proceedings in “false positive” related cases, and clearer public statements regarding a lack of cooperation, particularly in the context of the high-level September 2017 mission, led by Bensouda. The OTP’s 2017 annual preliminary examination report provides more specific details regarding the five potential cases identified by its analysis. This includes a specific number of officials under whose command high numbers of “false positive” killings were allegedly committed, and as to whom it is assessing the status of national proceedings.¹⁵⁸ While assessing the impact of these developments is beyond the timeframe of the research conducted for this report, taken together, they suggest a more concrete approach to engagement, which, consistent with the findings of our research, could positively improve the OTP’s influence with Colombian authorities.

¹⁵⁸ OTP, “Report on Preliminary Examination Activities 2017,” December 4, 2017, <http://www.legal-tools.org/doc/e50459/> (accessed December 18, 2017), paras. 131-35, 151-52.

II. Georgia

A. Overview

The international armed conflict in August 2008 between Georgia and Russia over South Ossetia—a breakaway region of Georgia that maintains very close ties with Russia, with which it shares a border—left a trail of devastation in its wake. The week-long conflict, and the many weeks of rampant violence, along with insecurity in the affected districts, cost hundreds of lives on all sides, resulted in the forced displacement of about 20,000 ethnic Georgians from South Ossetia, and caused extensive damage to civilian property.

On August 14, 2008, then-prosecutor of the International Criminal Court (ICC), Luis Moreno Ocampo, announced that the situation in Georgia, an ICC member country, was under analysis by his office.¹⁵⁹ However, it was not until seven years later, on October 13, 2015, that the current ICC prosecutor, Fatou Bensouda, sought approval from the court’s judges to open an investigation in Georgia.¹⁶⁰

Georgian authorities, under two successive governments, committed to carrying out national investigations, but, on March 17, 2015, the government informed the Office of the Prosecutor (OTP) that further progress was halted because of “a fragile security situation in the occupied territories in Georgia and in the areas adjacent thereto, where violence against civilians is still widespread.”¹⁶¹

The prosecutor’s application to the judges seeking authorization of an investigation followed several months later, and, on January 27, 2016, the ICC’s judges approved the

¹⁵⁹ “Prosecutor’s statement on Georgia,” International Criminal Court (ICC) Office of the Prosecutor (OTP) statement, August 14, 2008, <http://www.legal-tools.org/doc/5bc2c2/> (accessed November 30, 2017). This was subsequently confirmed by the office on August 20, 2014. See “ICC Prosecutor confirms situation in Georgia under analysis,” OTP press release, ICC-OTP-20080820-PR346, August 20, 2008, <http://www.legal-tools.org/doc/1e947b/> (accessed January 30, 2018).

¹⁶⁰ See “The Prosecutor of the International Criminal Court, Fatou Bensouda, requests judges for authorization to open an investigation into the Situation in Georgia,” OTP press release, ICC-OTP-20151013-PR1159, October 13, 2015, <http://www.legal-tools.org/doc/81beed/> (accessed January 30, 2018); *Situation in Georgia*, ICC, Case No. ICC-01/15, Corrected Version of ‘Request for authorization of an investigation pursuant to article 15,’ November 17, 2015, <http://www.legal-tools.org/doc/eca741/> (accessed November 30, 2017).

¹⁶¹ *Situation in Georgia*, ICC, Case No. ICC-01/15, Corrected Version of ‘Request for authorization of an investigation pursuant to article 15,’ <http://www.legal-tools.org/doc/eca741/>, para. 302.

opening of an investigation into “events related to the conflict in and around South Ossetia between 1 July and 10 October 2008.”¹⁶²

In Georgia, the OTP’s main focus was the assessment of the scope and progress of investigations in Georgia and Russia. With a view toward avoiding manipulation of the ICC’s mandate—given interest by each side in an ICC investigation on its own terms—the OTP stressed that any ICC investigation would be impartial. The preliminary examination and the OTP’s regular engagement with authorities in Georgia does appear to have spurred a certain amount of investigative activity. Ultimately, however, the absence of effective national proceedings led to the ICC’s decision to open an investigation.

This chapter reviews the domestic investigations opened in Georgia and the OTP’s approach to its engagement in the country. It then assesses a number of stumbling blocks in the domestic investigations, before evaluating the OTP’s influence on national justice efforts in Georgia in light of these obstacles.

It concludes that there were a number of factors that limited the OTP’s influence on national accountability efforts, in part because of the very limited political will of the Georgian government to see national accountability. Nonetheless, the chapter draws lessons, particularly with regard to the importance of strengthened engagement between the OTP and other relevant actors, including media, civil society, and international partners. These lessons may be particularly relevant to expediting the OTP’s assessment of its own jurisdiction, leading to an earlier decision to seek to open investigations.

Finally, although there have been national proceedings in Russia too, this chapter looks exclusively at the OTP’s engagement with Georgian authorities, in part because of our limited access to the relevant government sources in Russia, while referring below to how the cross-border context here presented unique challenges for complementarity.¹⁶³

¹⁶² *Situation in Georgia*, ICC, Case No. ICC-01/15, Decision on the Prosecutor’s request for authorization of an investigation, January 27, 2016, <https://www.legal-tools.org/doc/a3d07e/pdf/> (accessed November 30, 2017), para. 64.

¹⁶³ It is important to note that the preliminary examination was not limited to a relationship solely between the OTP and the Georgian authorities, thus, representing a departure from the more typical scenario in which the OTP is seeking to encourage a single government to conduct its own proceedings. Russian authorities also conducted investigations into allegations against Russian forces regarding the forcible displacement campaign to expel ethnic Georgians from South Ossetia and the “buffer zone,” and attacks on Russian peacekeepers. See *ibid.*, para. 42. At the time of the decision authorizing the opening of the investigation, the Pretrial Chamber was unable to determine if Russian investigations into the forcible displacement

B. The 2008 Georgia-Russia Conflict

Georgia's breakaway region of South Ossetia maintained very close ties with Russia. On August 7, 2008, after months of escalating tensions between Russia—which had long stationed “peacekeeping forces” in South Ossetia—and Georgia, and following skirmishes between Georgian and South Ossetian forces across South Ossetia's administrative border, Georgian forces launched an artillery assault on Tskhinvali, South Ossetia's capital, and outlying villages.

Assaults by Georgian ground and air forces followed. Russia's military response began the next day, culminating in the occupation of several key cities in undisputed Georgian territory. South Ossetian forces consisting of several elements also participated in the fighting, which continued until an August 15 ceasefire agreement between Russia and Georgia, which the French European Union presidency brokered.¹⁶⁴

Despite the ceasefire, looting and torching of ethnic Georgian villages in the conflict zone continued intermittently through September, and in some cases through October and November.¹⁶⁵ Russian forces claimed to have completed their withdrawal from undisputed Georgian territory on October 10, in accordance with the ceasefire.

Research by Human Rights Watch and other domestic and international nongovernmental organizations, as well as an EU fact-finding mission, found that Georgian, Russian, and South Ossetian forces violated international human rights and humanitarian law.¹⁶⁶ The

campaign were insufficient to warrant ICC investigation. Nonetheless, it decided to authorize the prosecutor's investigation, considering that there were other potential cases beyond those possibly covered by ongoing Russian proceedings and that admissibility issues could be resolved more definitively at a later stage. *Ibid.*, para. 46. As for attacks on Russian peacekeepers, the Pretrial Chamber found that the ongoing national investigations in Russia could ultimately cut off the ICC's jurisdiction. *Ibid.*, para. 50.

¹⁶⁴ Human Rights Watch, *Up in Flames: Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, January 2009, <https://www.hrw.org/sites/default/files/reports/georgia0109web.pdf>, p. 5. The South Ossetian forces consisted of the following elements: South Ossetian Ministry of Defense and Emergencies, South Ossetian Ministry of Internal Affairs, South Ossetian Committee for State Security, volunteers, and Ossetian peacekeeping forces. While Russian forces often fought side by side with Ossetian forces, they were not part of the South Ossetian forces.

¹⁶⁵ *Ibid.*, p. 9.

¹⁶⁶ Human Rights Watch, *Up in Flames*; Amnesty International, “Civilians in the Line of Fire: The Georgia-Russia Conflict,” November 2008, <https://www.amnesty.org/en/documents/EURo4/005/2008/en/> (accessed December 5, 2017); Georgian Young Lawyers' Association, Article 42 of the Constitution, Human Rights Center, 21st Century, and Center for the Protection of Constitutional Rights, “August Ruins: Report of the Georgian Non-Governmental Organizations on Violation of Fundamental Human Rights & International Humanitarian Law,” 2009,

violations included indiscriminate attacks on civilians by the Georgian and Russian militaries and a widespread campaign of looting and burning of ethnic Georgian villages, along with ill-treatment, beating, hostage-taking, and arbitrary arrests by South Ossetian forces. The Russian military—which was an occupying power in Georgia—failed to prevent or stop violations by the Ossetian militia.¹⁶⁷

C. Overview of Georgia’s Criminal Investigation

Georgian authorities launched investigations under two successive governments, but these did not yield prosecutions. There have been no prosecutions in Georgia for crimes committed during the conflict, whether by Georgian, Russian, or Ossetian forces.

The Georgian authorities initially reacted very quickly following the outbreak of conflict. Under the government of then-President Mikheil Saakashvili, on August 9, 2008, authorities opened an investigation into allegations of genocide and violations of humanitarian law in armed conflict, followed by a second investigation on August 11 into looting as a war crime.¹⁶⁸

The Office of the Chief Prosecutor of Georgia (the General Prosecutor’s Office) assembled a large team to obtain as much information as quickly as possible, according to a former official.¹⁶⁹ A government official said that a special department was established within the General Prosecutor’s Office to facilitate cooperation with Russian officials.¹⁷⁰ Another official who reviewed the investigation files told Human Rights Watch that there was a significant amount of fact-finding done in the first six months of the investigations.¹⁷¹ These investigations were both opened before the August 14, 2008 announcement by the OTP that the situation in Georgia was under analysis.

https://www.osgf.ge/files/publications/2010/Etnikuri_cmenda_English_WEB_version.pdf (accessed December 5, 2017); Independent International Fact-Finding Mission on the Conflict in Georgia, “Report,” vols. 1-3, September 2009, http://www.mpil.de/en/pub/publications/archive/independent_international_fact.cfm (accessed December 5, 2017).

¹⁶⁷“Georgia/Russia: A Year Later, Justice Still Needed,” Human Rights Watch news release, October 1, 2009, <https://www.hrw.org/news/2009/10/01/georgia/russia-year-later-justice-still-needed>.

¹⁶⁸ *Situation in Georgia*, ICC, Case No. ICC-01/15, Corrected Version of ‘Request for Authorization of an Investigation Pursuant to Article 15,’ <http://www.legal-tools.org/doc/eca741/>, para. 284.

¹⁶⁹ Human Rights Watch interview with official from the General Prosecutor’s Office and representative from the Ministry of Justice, Tbilisi, December 17, 2015.

¹⁷⁰ Human Rights Watch interview with former government official, Tbilisi, December 15, 2015.

¹⁷¹ Human Rights Watch interview with government official, Tbilisi, December 15, 2015.

In 2009, the chief prosecutor of Georgia transmitted both investigations to the Investigative Division of his office, where they were consolidated into one covering all crimes during the August 2008 armed conflict and its aftermath. The genocide investigation was soon dropped as being “manifestly ill-founded.”¹⁷² Moreover, the lack of access to South Ossetia hampered fact-gathering, limiting the scope of the investigation.

Through 2010, the officials in the national investigation reportedly identified South Ossetian suspects but did not proceed.¹⁷³ In December 2011, the Georgian government told the OTP that it still needed “certain verifications and corroborations [...] to attain charges,” without providing further details about the timeframe.¹⁷⁴

An official in the General Prosecutor’s Office told Human Rights Watch that there were draft indictments to file charges against the de facto authorities in South Ossetia, but moving ahead brought a serious risk of backlash, as the South Ossetians would “exact revenge and kidnap more [...] people.”¹⁷⁵ The investigators were also concerned that they had insufficient expertise in international humanitarian law to properly evaluate the evidence and sought to obtain personnel with such expertise.¹⁷⁶

In the October 2012 parliamentary elections, the opposition Georgian Dream coalition defeated President Saakashvili’s political party and formed a new government. The new government committed to renewing the probe into the 2008 war.¹⁷⁷ But in October 2012, the new chief prosecutor restructured and reorganized the office, causing delays in the investigation. By the end of 2012, the General Prosecutor’s Office had informed the ICC that its investigation into acts allegedly committed by the Georgian military were hindered

¹⁷² *Situation in Georgia*, ICC, Case No. ICC-01/15, Corrected Version of ‘Request for authorization of an investigation pursuant to article 15,’ <http://www.legal-tools.org/doc/eca741/>, para. 285.

¹⁷³ *Ibid.*, para. 295.

¹⁷⁴ *Ibid.*

¹⁷⁵ Human Rights Watch interview with official from the General Prosecutor’s Office and representative from the Ministry of Justice, December 17, 2015.

¹⁷⁶ *Ibid.*

¹⁷⁷ See Daniel McLaughlin, “Georgian PM backs inquiry into Saakashvili’s handling of Russia war,” *Irish Times*, April 12, 2013, <http://www.irishtimes.com/news/world/europe/georgian-pm-backs-inquiry-into-saakashvili-s-handling-of-russia-war-1.1357610> (accessed December 5, 2017). See also “Georgian Investigative Group to Probe 2008 War With Russia,” *Radio Free Europe/Radio Liberty*, May 14, 2013, <http://www.rferl.org/content/georgia-russia-war-investigation/24985760.html> (accessed December 5, 2017).

by the lack of access to the crime scene—since there was no access to South Ossetia—and lack of cooperation from Russia and South Ossetia.¹⁷⁸

The investigation seemed to gather momentum in the first half of 2013, culminating in the chief prosecutor announcing in May 2013 that his office would relaunch investigations into alleged crimes committed by all sides during the August 2008 conflict.¹⁷⁹

Between November 2013 and January 2014, the government replaced the chief prosecutor twice, once again stunting the investigation's progress.¹⁸⁰ By June 2014, the OTP showed signs of losing patience, telling Georgian authorities to provide “concrete, tangible and pertinent evidence” about genuine national proceedings against those most responsible for crimes, or the office would ask ICC judges to authorize an investigation.¹⁸¹

Towards the end of 2014, the OTP concluded that, based on the information available, both Russia and Georgia were ostensibly making progress towards prosecutions.¹⁸² But at the end of 2014, the OTP flagged in its annual report on preliminary examinations that “progress in [the Georgian and Russian] investigations appears limited, and more than six years after the end of the armed conflict, no alleged perpetrator has been prosecuted, nor has there been any decision not to prosecute the persons concerned as a result of these investigations.”¹⁸³

Even so, the OTP was receiving information from the Georgian government as late as January 2015 that indicated it had progressed in its investigation to the point of deciding whether to prosecute.¹⁸⁴

¹⁷⁸ OTP, “Report on Preliminary Examination Activities 2012,” November 2012, <http://www.legal-tools.org/doc/ob1cfc/> (accessed December 5, 2017), para. 136.

¹⁷⁹ *Situation in Georgia*, ICC, Case No. ICC-01/15, Corrected Version of ‘Request for authorization of an investigation pursuant to article 15,’ <http://www.legal-tools.org/doc/eca741/>, para. 297.

¹⁸⁰ *Ibid.*, para. 299; Human Rights Watch interview with official from the General Prosecutor’s Office and representative from the Ministry of Justice, December 17, 2015.

¹⁸¹ *Situation in Georgia*, ICC, Case No. ICC-01/15, Corrected Version of ‘Request for authorization of an investigation pursuant to article 15,’ <http://www.legal-tools.org/doc/eca741/>, para. 301.

¹⁸² *Ibid.*, para. 13.

¹⁸³ OTP, “Report on Preliminary Examination Activities 2014,” December 2, 2014, <http://www.legal-tools.org/doc/3594b3/> (accessed December 5, 2017), para. 154.

¹⁸⁴ Human Rights Watch interview with ICC staff, The Hague, January 27, 2016.

Nonetheless, in March 2015, the Georgian government informed the ICC that further progress was not possible due to the fragile security situation in and around the occupied territories in Georgia, and fears that prosecutions could trigger “aggressive and unlawful reactions by the occupying forces.”¹⁸⁵ The government also said that the precarious security situation could undermine the security of witnesses of alleged crimes, who could face threats and arbitrary detention by South Ossetian authorities.¹⁸⁶

D. OTP’s Approach to Georgia’s National Justice Efforts

In the first two years of the ICC’s preliminary examination, the OTP focused on assessing whether the court had subject matter jurisdiction over the crimes alleged during the 2008 conflict.¹⁸⁷ As part of this analysis, the OTP concluded that the alleged crimes, which included the forcible displacement of 75 percent of the ethnic Georgian population from South Ossetia, were sufficiently grave under the Rome Statute.¹⁸⁸

From an early point, however, and consistent with its approach at that time to preliminary examinations, the OTP engaged with national authorities regarding domestic proceedings, given that both sides indicated they intended to pursue investigations. While there were domestic investigations in both Russia and Georgia, each side had an interest in pushing forward its version of events and painting the other side as being at fault.

As a result, the office was aware of the possible risk of being used by both sides.¹⁸⁹ The office did engage with national authorities regarding the importance of national justice, but the focus was on pressing the Georgian and Russian authorities to broaden the scope of their respective national investigations to include allegations against their own service members, an important metric of the impartiality and genuineness of the national efforts.¹⁹⁰

¹⁸⁵ *Situation in Georgia*, ICC, Case No. ICC-01/15, Corrected Version of ‘Request for Authorization of an Investigation Pursuant to Article 15,’ <http://www.legal-tools.org/doc/eca741/>, para. 302.

¹⁸⁶ *Ibid.*

¹⁸⁷ Human Rights Watch interview with ICC staff, January 27, 2016.

¹⁸⁸ Human Rights Watch telephone interview with ICC staff, The Hague, April 15, 2016; *Situation in Georgia*, ICC, Case No. ICC-01/15, Decision on the Prosecutor’s request for authorization of an investigation, <https://www.legal-tools.org/doc/a3d07e/pdf>, para. 54.

¹⁸⁹ Human Rights Watch interview with ICC staff, January 27, 2016.

¹⁹⁰ *Ibid.*

Through the course of the preliminary examination in Georgia, representatives of the OTP visited Georgia six times: in November 2008, June 2010, March 2013, September 2013, April 2014, and January 2015.¹⁹¹ The office also visited Russia three times: in March 2010, February 2011, and January 2014.¹⁹²

In the interim, the office maintained email and video link communication with staff in the General Prosecutor's Office, although this did not generally involve conveying any sensitive information given concerns about secure transmission.¹⁹³ During the visits, OTP officials met with government officials and staff from the General Prosecutor's Office, and sometimes with civil society representatives. As discussed further below, these visits for the most part lacked a public dimension.

Every year, the ICC sent one to two-page questionnaires to the relevant authorities.¹⁹⁴ The questionnaires were very specific and aimed at measuring progress in investigations, and included questions relating to forensic evidence, satellite images, and witnesses questioned.¹⁹⁵ Georgian authorities sent lengthy progress reports, sometimes 30 to 40 pages long.¹⁹⁶

The OTP confirmed that the responses were relatively detailed, but it was difficult at certain points in time to assess the validity of the information.¹⁹⁷ Indeed, as discussed below, civil society formally expressed concern to the OTP about the state of national investigations.

¹⁹¹ OTP, "OTP Weekly Briefing #45," July 6-12, 2016, <https://www.icc-cpi.int/NR/rdonlyres/BF736822-506B-46F6-BF82-C6DBEoDEDDC7/282366/OTPWeeklyBriefing612JulyIssue45.pdf> (accessed December 5, 2017), p. 5; OTP, "Report on Preliminary Examination Activities 2013," November 2013, <https://www.legal-tools.org/en/doc/dbf75e/> (accessed December 5, 2017), paras. 172, 174; OTP, "Report on Preliminary Examination Activities 2014," <http://www.legal-tools.org/doc/3594b3/>, para. 152; OTP, "Report on Preliminary Examination Activities 2015," November 12, 2015, <http://www.legal-tools.org/doc/acoed2/> (accessed December 5, 2017), paras. 263-264.

¹⁹² OTP, "OTP Weekly Briefing #45," <https://www.icc-cpi.int/NR/rdonlyres/BF736822-506B-46F6-BF82-C6DBEoDEDDC7/282366/OTPWeeklyBriefing612JulyIssue45.pdf>, p. 5; OTP, "Report on Preliminary Examination Activities 2011," December 13, 2011, <https://www.legal-tools.org/en/doc/4aad1d/> (accessed December 5, 2017), para. 100; OTP, "Report on Preliminary Activities 2014," <http://www.legal-tools.org/doc/3594b3/>, para. 151.

¹⁹³ Human Rights Watch separate interviews with former government official, Tbilisi, December 14, 2015; and official from the General Prosecutor's Office and representative from the Ministry of Justice, December 17, 2015.

¹⁹⁴ *Ibid.*

¹⁹⁵ Human Rights Watch interview with former government official, December 14, 2015.

¹⁹⁶ *Ibid.*

¹⁹⁷ Human Rights Watch interview with ICC staff, January 27, 2016.

E. Stumbling Blocks in National Investigations and Prosecutions

1. Georgia-Russia Relationship

The unresolved nature of the Georgian-Russian conflict over South Ossetia and longstanding mutual distrust between Moscow and Tbilisi created significant obstacles to national investigations.

Georgia and Russia severed all diplomatic ties following the August war, further complicating efforts to cooperate on legal matters. For example, on the Georgian side there were concerns that Russian authorities were sending witness statements that were falsified or otherwise less than credible.¹⁹⁸ The OTP noted Georgia's claims about Russia's limited cooperation in its Request for Authorization.¹⁹⁹ The OTP similarly noted Russia's claim that it could not proceed with its national investigation because Georgia refused to provide legal assistance and because of the immunity of Georgian officials. However, in January 2014, Moscow claimed that these obstacles ceased to exist after the new government came to power in October 2012.²⁰⁰

This atmosphere undermined the limited cooperation between Georgia and Russia in their respective criminal investigations. At various stages, both Georgia and Russia issued invitations for victims of the other country to give testimony in their national investigations. However, Russia and Georgia refused each other's invitations. Georgia, in particular, was concerned about the treatment of its victims in Russian proceedings. The General Prosecutor's Office of Georgia unsuccessfully tried to organize video conferencing with its Russian counterpart to resolve this impasse.²⁰¹

The OTP tried to use a pre-existing cooperation mechanism on civil matters to promote mutual legal assistance, in response to complaints that neither side was cooperating with

¹⁹⁸ Human Rights Watch interview with official from the General Prosecutor's Office and representative from the Ministry of Justice, December 17, 2015.

¹⁹⁹ *Situation in Georgia*, ICC, Case No. ICC-01/15, Corrected Version of 'Request for authorization of an investigation pursuant to article 15,' <http://www.legal-tools.org/doc/eca741/>, para. 290.

²⁰⁰ *Ibid.*, paras. 317-318.

²⁰¹ Human Rights Watch separate interviews with former government official, December 14, 2015; official from the General Prosecutor's Office and representative from the Ministry of Justice, December 17, 2015.

the other in its own investigations.²⁰² The OTP had also informally encouraged cooperation between the Russian and Georgian judiciaries. Ultimately, however, these strategies were unsuccessful.

2. Lack of Expertise and Resources

Several civil society activists expressed concern to Human Rights Watch about the limited resources within the General Prosecutor's Office in Georgia to conduct investigations.²⁰³

An official in the office acknowledged that at the end of 2010, when the evidence collection was ostensibly completed, those responsible for the investigation saw gaps in international humanitarian law expertise and decided to engage people with this knowledge.²⁰⁴ A former official in the prosecutor's office shared the view that more assistance on international humanitarian law, international criminal law, and military expertise, as well as help in obtaining satellite imagery, would have been useful.²⁰⁵ The OTP, at the request of the prosecutor's office, provided a presentation on the elements of crimes against humanity and its approach to the investigation of such crimes.²⁰⁶

More broadly, the EU Special Advisor on Constitutional and Legal Reform and Human Rights in Georgia Thomas Hammarberg noted the "little developed" investigation skills among prosecutors and expressed concern about the abrupt turnover of chief prosecutors since October 2012, which "slowed down the institutional strengthening."²⁰⁷

²⁰² Human Rights Watch email correspondence with ICC staff, The Hague, September 13, 2016.

²⁰³ Human Rights Watch separate interviews with international civil society representative, Tbilisi, December 14, 2015; and representatives of two civil society organizations, Tbilisi, December 14 and 16, 2015.

²⁰⁴ Human Rights Watch interview with official from the General Prosecutor's Office and representative from the Ministry of Justice, December 17, 2015.

²⁰⁵ Human Rights Watch interview with former government official, December 15, 2015.

²⁰⁶ Human Rights Watch email correspondence with ICC staff, January 26, 2018.

²⁰⁷ "Recommendations to the Government of Georgia By Special Advisor to Georgia on Human Rights, Constitutional and Legal Reforms – Thomas Hammarberg (Follow up on the final mission – 4-9 June, 2014)," September 7, 2014, http://eeas.europa.eu/archives/delegations/georgia/documents/human_rights_2012/th_recommendations_to_the_government_of_georgia_en.pdf (accessed December 5, 2017), pp. 3-4.

3. *Limited Political Will*

Notwithstanding the above capacity challenges and the difficulty of assessing the information that Georgian authorities provided, the OTP did not have significant concerns that, at least through 2012, there was a lack of genuine will to at least investigate.²⁰⁸

Georgian authorities tried to address gaps in knowledge by engaging experts in international humanitarian law and the elements of crimes.²⁰⁹ In addition, although the precarious security situation and lack of access to crime scenes in South Ossetia hindered Georgian authorities' capacity to investigate, the OTP did not see the lack of access, in and of itself, as precluding investigation.²¹⁰ Rather, in the OTP's view, the primary obstacle to further progress at the national level was authorities' lack of willingness to move forward with prosecutions.²¹¹

Our research confirmed this view.

Interlocutors interviewed for this report pointed out that, after the war, there was a strong narrative in Georgia of it being a victim of Russian aggression, which it sought to broadcast internationally.²¹² The ICC was only one such opportunity.

In August 2008, the Georgian government filed an interstate complaint against Russia at the International Court of Justice in The Hague seeking a declaration that Russia was in violation of its obligations under the International Convention on the Elimination of Racial Discrimination (ICERD), and asked for compensation.²¹³ In April 2011, the ICJ dismissed the complaint because it lacked jurisdiction since Georgian authorities had not first sought to negotiate a solution with Russia before lodging its complaint.²¹⁴

²⁰⁸ Human Rights Watch interview with ICC staff, January 27, 2016.

²⁰⁹ Human Rights Watch telephone interview with ICC staff, April 15, 2016.

²¹⁰ Human Rights Watch separate telephone interviews with ICC staff, The Hague, December 11, 2015; and April 15, 2016.

²¹¹ Human Rights Watch telephone interview with ICC staff, April 15, 2016.

²¹² Human Rights Watch telephone interview with diplomat, December 3, 2015; and interview with civil society activist, December 11, 2015.

²¹³ *Georgia v. Russian Federation*, International Court of Justice (ICJ), Application of the International Convention on the Elimination of All Forms of Racial Discrimination, General List No. 140, August 12, 2008, <http://www.icj-cij.org/files/case-related/140/14657.pdf> (December 5, 2017).

²¹⁴ *Georgia v. Russian Federation*, ICJ, Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination, Preliminary Objections, Judgment of April 1, 2011, <http://www.icj-cij.org/files/case->

In February 2009, Georgia lodged a formal complaint before the European Court of Human Rights (ECHR) in Strasbourg, alleging that Russia allowed, or caused to develop, an administrative practice through indiscriminate and disproportionate attacks against civilians and their property in two autonomous regions of Georgia, Abkhazia, and South Ossetia, by Russian military forces and the separatist forces under their control.²¹⁵ There is also a large number of individual applications against both Georgia and Russia in relation to the conflict pending before the ECHR.²¹⁶

Initially, both sides—Russia and Georgia—were interested in pushing their respective narratives about the conflict to the ICC.²¹⁷ However, the relationship of both countries with the ICC quickly evolved into one of ambivalence. Once it became clear that the ICC would investigate impartially, which included allegations against their respective service members, sources outside of these governments indicated that both sides appeared to lose interest in the ICC.²¹⁸

A number of civil society activists interviewed by Human Rights Watch shared the view that ultimately, it was the government's unwillingness that was the primary obstacle to further progress on national accountability for crimes committed during the 2008 war.²¹⁹ The

related/140/140-20110401-JUD-01-00-EN.pdf (accessed December 5, 2017); "ICJ dismisses Georgia's case against Russia: The International Court of Justice dismisses Georgia's discrimination case on the basis of jurisdiction," *Hague Justice Portal*, April 1, 2011, <http://www.haguejusticeportal.net/index.php?id=12527> (accessed December 5, 2017).

²¹⁵ Georgia lodged an initial complaint with the European Court of Human Rights (ECHR) in August 2008, after which the court called on Georgia and Russia to comply with their engagements under the Convention, particularly in respect of articles 2 (right to life) and 3 (prohibition of torture and of inhuman or degrading treatment). See "Court declares case concerning armed conflict between Georgia and Russia admissible," ECHR press release, ECHR 291, December 19, 2011, <http://hudoc.echr.coe.int/eng-press?i=003-3786046-4333408> (accessed December 5, 2017). The ECHR heard oral arguments in September 2011, and has declared the case admissible, but has not yet reached a decision. See Gentian Zyberi, "The Case of Georgia v. Russia before the ECtHR, post to "International Law Observer" (blog), October 4, 2011, <http://www.internationallawobserver.eu/2011/10/04/georgia-v-russia-ecthr/> (accessed December 5, 2017).

²¹⁶ According to one estimate, there are 1,712 individual cases pending against Georgia; 208 applications involving more than 900 applicants against Russia; and 20 individual applications against both Georgia and Russia. See "The Case of Georgia v. Russia before the ECtHR," *International Law Observer*, <http://www.internationallawobserver.eu/2011/10/04/georgia-v-russia-ecthr/>. See also "1,549 cases against Georgia concerning the Georgia-Russia conflict of August 2008 struck out by the European Court of Human Rights," ECHR press release, No. 006, January 10, 2011, <http://hudoc.echr.coe.int/eng-press?i=003-3391240-3803578> (accessed December 5, 2017).

²¹⁷ Human Rights Watch interview with ICC staff, January 27, 2016.

²¹⁸ *Ibid.*; Human Rights Watch telephone interview with diplomat, December 3, 2015.

²¹⁹ Human Rights Watch separate interviews with civil society activist, December 11, 2015; and representatives of three civil society organizations, Tbilisi, December 14 and 15, 2015.

government did not want to pursue a track that could potentially damage Georgia's interest, which included prosecuting members of its own military.²²⁰

This lack of enthusiasm for accountability for crimes continued under the new government. After the late 2012 parliamentary elections, which led to a change of government in Georgia, several sources flagged the government's initial enthusiasm to investigate its predecessor's role in the 2008 war.²²¹ This enthusiasm soon waned. One source pointed to the new government's foreign policy objective of thawing relations with Russia as a reason to abandon a full investigation.²²² Another source flagged the pervasive view in Georgia of Russia's responsibility for the 2008 war that persisted under the new government.²²³

F. OTP's Engagement with National and International Actors on Political Will

The OTP's opening of the preliminary examination coincided with a certain level of investigative activity in Georgia. By engaging with authorities and insisting on regular updates, the OTP tried to address the risk that Georgia would not conduct impartial investigations into its own service members. The OTP also relied on Georgia's political partners to impress upon the government how important it was to ensure Georgians were also held accountable.²²⁴

According to the OTP, its insistence on impartiality in investigations was at least one factor that helped generate results: once Georgian authorities realized that the ICC investigation would not be limited to one side, the national investigation broadened in scope to include allegations against Georgian service members.²²⁵

²²⁰ Human Rights Watch separate interviews with civil society activist, December 11, 2015; civil society representative, Tbilisi, December 15, 2015; and telephone interview with diplomat, April 20, 2016.

²²¹ Human Rights Watch separate interviews with three civil society representatives, Tbilisi, December 14-16, 2015; Daniel McLaughlin, "Georgian PM backs inquiry into Saakashvili's handling of Russia war," *Irish Times*, <http://www.irishtimes.com/news/world/europe/georgian-pm-backs-inquiry-into-saakashvili-s-handling-of-russia-war-1.1357610>.

²²² Human Rights Watch telephone interview with civil society activist, December 11, 2015.

²²³ Human Rights Watch telephone interview with diplomat, April 19, 2016.

²²⁴ Human Rights Watch interview with ICC staff, The Hague, June 10, 2016.

²²⁵ Human Rights Watch separate interviews with civil society activist, December 11, 2015; former government official, December 14, 2015; and ICC staff, January 27 and June 10, 2016. According to a report by the Georgian government to the ICC in November 2014, the Office of the Chief Prosecutor of Georgia divided the investigation into five lines of inquiry: a) "ethnic cleansing," addressing the forcible displacement of ethnic Georgians from South Ossetia; b) "unlawful attacks on the civilian population," attributed to both Georgian and Russian armed forces; c) "attacks on peacekeeping forces," including the

And yet, investigations in Georgia did not lead to prosecutions, given, as outlined above, the absence of political will to move forward.

In Georgia, our research suggests that barriers to political will to support prosecution—including, when it came to South Ossetian or Russian forces, the international dimension of the conflict—meant it was unlikely that the OTP could have significantly shifted this landscape. Below we assess factors limiting the OTP’s impact on the political will necessary to support national justice in Georgia. Our analysis suggests, however, that different forms of engagement by the OTP might nonetheless have made this lack of political will more transparent, enabling it to expedite the preliminary examination and seek authorization for its own investigation at an earlier point in time.

1. Weak Domestic Demand for Accountability

Georgia’s human rights ombudsman, the Office of the Public Defender of Georgia, repeatedly tried to draw public attention to the situation and the ongoing investigations in its annual Parliamentary Reports.

For example, in 2013, the ombudsman observed in its annual report that the General Prosecutor’s Office’s 2008 investigation had not yet produced results. It recommended that the investigation “be conducted effectively, in a short time period.”²²⁶ Similarly in 2014, the ombudsman recommended that the General Prosecutor’s Office conclude its investigation “effectively and in the shortest time possible.”²²⁷ The 2015 Annual Report described the OTP’s Request for Authorization, and the granting of that application by the ICC, as “[a]n important event.”²²⁸

alleged attack against the Russian peacekeepers carried out by Georgian armed forces; d) “enforced disappearance and torture incidents” allegedly committed by Russian, South Ossetian, and Georgian forces; and e) “non-organized acts of war crimes and other allegations” that appear to be isolated and sporadic. See *Situation in Georgia*, ICC, Case No. ICC-01/15, Corrected Version of ‘Request for authorization of an investigation pursuant to article 15,’ <http://www.legal-tools.org/doc/eca741/>, para. 286.

²²⁶ Public Defender of Georgia, “Annual Report of the Public Defender of Georgia: The Situation of Human Rights and Freedoms in Georgia,” 2013, <http://www.ombudsman.ge/uploads/other/1/1934.pdf> (accessed December 5, 2017), p. 94.

²²⁷ Public Defender of Georgia, “Annual Report of the Public Defender of Georgia: The Situation of Human Rights and Freedoms in Georgia,” 2014, <http://www.ombudsman.ge/uploads/other/3/3510.pdf> (accessed December 5, 2017), p. 192.

²²⁸ Public Defender of Georgia, “The Report of the Public Defender of Georgia on the Situation of Protection of Human Rights and Freedoms in Georgia (Short Version),” 2015, <http://www.ombudsman.ge/uploads/other/3/3652.pdf> (accessed December 5, 2017), p. 10.

Overall, however, Human Rights Watch heard from a number of sources that the demand for accountability for the 2008 conflict was weak. One source noted that the crimes committed during Georgia's ethnic conflicts with breakaway Abkhazia and South Ossetia in the early 1990s still have not been addressed. In this context, "accountability [for 2008 crimes] doesn't mean much," as it was an abstract concept with no expectation as to what accountability could actually deliver.²²⁹

Another activist agreed that accountability after the 2008 conflict was a "non-issue."²³⁰

Some of those interviewed attributed this to the view held by many victims that there was no way officials from Russia and South Ossetia, the perceived aggressors in the conflict, could ever be brought to justice.²³¹ Still others told Human Rights Watch that victims, especially those who were displaced, were more concerned with returning home.²³²

There was also little awareness of the ICC in Georgia; victims' support organizations were more invested in submitting applications to the European Court of Human Rights.²³³ The Strasbourg court already had a track record among Georgians in holding Russia to account: in 2014, the court found that in the autumn of 2006, Russia implemented a coordinated policy of arresting, detaining, and expelling Georgian nationals, in violation of the European Convention on Human Rights, to which Russia is a party.²³⁴ In addition, although

²²⁹ Human Rights Watch telephone interview with diplomat, April 19, 2016. The 2008 war in Georgia was deeply rooted in decades of unresolved ethnic conflicts in Georgia. Following the fall of the Soviet Union, Georgia faced internal division from the self-ruling aspirations of South Ossetia and Abkhazia, which had gained autonomous status while Georgia was still part of the Soviet Union. In September 1990, South Ossetia proclaimed full sovereignty within the USSR. In response, in December 1990, Georgia's newly elected nationalist government abolished South Ossetia's autonomy. The move contributed to rising tensions that eventually escalated into a non-international armed conflict between 1991 and 1992. Amidst this turmoil, in early 1991, Georgia declared its independence from the Soviet Union. See *Situation in Georgia*, ICC, Case No. ICC-01/15, Corrected Version of 'Request for authorization of an investigation pursuant to article 15,' <http://www.legal-tools.org/doc/eca741/>, paras. 20-21; Rebecca Ratliff, "South Ossetian Separatism in Georgia," Inventory of Conflict and Environment case study No. 180, May 2006, <http://mandalaprojects.com/ice/ice-cases/ossetia.htm> (accessed December 5, 2017).

²³⁰ Human Rights Watch interview with civil society activist, December 11, 2015.

²³¹ Human Rights Watch separate interviews with international civil society representative, December 14, 2015; and human rights lawyer, Tbilisi, December 15, 2015; and group interview with civil society representatives, December 16, 2015.

²³² Human Rights Watch separate interviews with representatives of two civil society organizations, December 15 and 16, 2015.

²³³ Human Rights Watch separate interviews with former government official, December 15, 2015; representatives of two civil society organizations, December 15 and 16, 2015; and telephone interview with diplomat, April 19, 2016.

²³⁴ *Georgia v. Russia (I) (GC)*, ECHR, Application no. 13255/07, Judgment, July 3, 2014, <http://www.civil.ge/files/files/2014/ECHR-GEORGIAV.RUSSIA-I.pdf> (accessed December 5, 2017).

the ICC provides for reparations in event of a conviction, it had no track record yet in this regard. In contrast, cases under the ECHR regularly result in orders of compensation.²³⁵

With regard to broader public opinion, there was a sense among some activists that there was no public pressure on the government to take concrete action.²³⁶ In light of the prevailing nationalistic atmosphere in the country detailed above, this is unsurprising.

2. Limited Engagement with Partners

Civil Society

Civil society organizations in Georgia faced challenges pressing for justice at the national level. Notably, a coalition of five NGOs produced a comprehensive report, “August Ruins,” which detailed grave human rights abuses committed during and immediately after the August 2008 war.²³⁷ The OTP acknowledged the high quality of the reporting by Georgian civil society.²³⁸

However, despite important efforts to document abuses, a human rights lawyer told Human Rights Watch that under the previous government, civil society organizations were not a real source of pressure, limiting how effective civil society could have been on national justice.²³⁹

To dismiss civil society’s pressure for accountability, Saakashvili’s government used nationalistic rhetoric, questioning NGOs’ allegiances and undermining their credibility.

When NGO representatives asked for effective investigations into crimes committed during the conflict, the government “demonized” the NGO sector, and accused civil society of

²³⁵ European Commission on Human Rights, Frequently Asked Questions, <http://echr-online.info/faq/> (accessed December 5, 2017).

²³⁶ Human Rights Watch separate interviews with representatives of two civil society organizations, December 14 and 15, 2015.

²³⁷ Georgian Young Lawyers' Association, Article 42 of the Constitution, Human Rights Center, 21st Century, and Center for the Protection of Constitutional Rights, “August Ruins: Report of the Georgian Non-Governmental Organizations on Violation of Fundamental Human Rights & International Humanitarian Law August War, 2008,” https://www.osgf.ge/files/publications/2010/Etnikuri_cmenda_English_WEB_version.pdf.

²³⁸ Human Rights Watch interview with ICC staff, January 27, 2016.

²³⁹ Human Rights Watch interview with human rights lawyer, December 15, 2015.

“backing Russia.”²⁴⁰ Those who worked on cases involving allegations of abuse by Georgian servicemen were considered “traitors,” while those attempting to cooperate with Russia’s investigation were labeled “enemies of the state.”²⁴¹ Another observer confirmed that especially after the war and through 2009, those who called into question the conduct of Georgia and its military were considered traitors.²⁴²

In spite of this pressure on civil society, a number of NGOs continued to work actively. But their lack of access to information about the investigations created real obstacles to making the most of what leverage they could have had.

Of course, there are limits to what can be revealed in the course of a confidential criminal investigation, in part to avoid compromising the safety of those involved, protecting the due process rights of suspects and others, or tipping off those under investigation.

However, general information about investigative steps, such as the number of people interviewed or crime scenes investigated, and efforts to engage forensic or other experts as needed, can help demonstrate the scale of the investigation and its seriousness.²⁴³ Regular reporting of this kind of information can be essential to measure whether, and how much, progress has been made. Over time, this analysis could give civil society and others, including diplomats, traction to press the government on the genuineness of its national accountability efforts.

Local civil society groups made concrete, albeit ultimately unsuccessful, efforts to press the government to shed more light on national accountability efforts.²⁴⁴ In September 2012, a group of seven NGOs raised concern that for more than three years “no information

²⁴⁰ Human Rights Watch interview with civil society representative, December 15, 2015.

²⁴¹ Human Rights Watch separate interviews with international civil society representative, December 14, 2015; and civil society representative, December 15, 2015.

²⁴² Human Rights Watch telephone interview with diplomat, April 19, 2016.

²⁴³ Human Rights Watch interview with civil society activist, April 25, 2016.

²⁴⁴ On December 1, 2011, the Office of the Chief Prosecutor of Georgia, in responding to an inquiry by Human Rights Watch, sent a private letter outlining only the general parameters of the criminal investigation, copy on file with Human Rights Watch.

whatsoever has been available to the victims, their legal representatives, the public or other interested parties about any national investigations being undertaken.”²⁴⁵ One civil society activist told Human Rights Watch that the only place to get information about the national investigations in Georgia was in the OTP’s annual reports on preliminary examinations.²⁴⁶

Among the recommendations made in their 2012 letter, the groups urged then-ICC Prosecutor Luis Moreno Ocampo and his deputy (and current ICC prosecutor), Fatou Bensouda, to “strengthen the dialogue with the Georgian and Russian governments on the status of the investigations undertaken at the national level and to insist ... that the progress and outcomes of national investigations are available to the public.”²⁴⁷

The OTP told Human Rights Watch that the issue of transparency was raised in private meetings with the Georgian prosecutor.²⁴⁸ However, aside from citing the NGO letter in its 2012 report on preliminary examinations, the OTP does not reference the need for more transparency about investigative steps at the national level in its public statements.²⁴⁹ None of the OTP’s preliminary examination reports provide general statistics about investigative steps taken by the Georgian authorities.

It was not until the October 2015 application to the Pretrial Chamber for authorization to open an investigation that the OTP made this information public. There, the OTP reported that in the course of its investigation the Office of the Chief Prosecutor of Georgia reportedly interviewed over 7,000 witnesses, and conducted a number of concrete steps, including: on-site investigations in over 30 affected areas; forensic medical and property analyses; collecting telephone intercepts; gathering various public statements and

²⁴⁵ “ICC: A formal investigation must be opened on the 2008 conflict in Georgia,” International Federation of Human Rights (FIDH) press release, April 24, 2012, <https://www.fidh.org/en/region/europe-central-asia/georgia/Petition-to-the-Office-of-the> (accessed December 5, 2017).

²⁴⁶ Human Rights Watch interview with civil society representative, December 15, 2015.

²⁴⁷ “ICC: A formal investigation must be opened on the 2008 conflict in Georgia,” FIDH press release, <https://www.fidh.org/en/region/europe-central-asia/georgia/Petition-to-the-Office-of-the>.

²⁵² Human Rights Watch interview with ICC staff, June 10, 2016.

²⁴⁹ OTP, “Report on Preliminary Examination Activities 2012,” <https://www.legal-tools.org/en/doc/ob1cfc/>, para. 139.

intelligence reports by South Ossetian authorities; and seeking satellite imagery to identify destroyed property in South Ossetia.²⁵⁰

The lack of information available to NGOs about the status of investigations weakened their leverage with the OTP, which did not consider them to be best placed to assess proceedings or to push the government on accountability.²⁵¹

Some civil society activists had the impression that the OTP's engagement with NGOs was not a priority.²⁵² As a result, one activist told Human Rights Watch that NGO interest in the ICC "faded away" with the lack of information from the OTP.²⁵³

International Partners

The key diplomatic players in Georgia, including the United States, the European Union, and the Council of Europe, devoted some political capital to pressing Georgian authorities on justice for crimes committed during the 2008 conflict. Overall, however, these efforts and, unsurprisingly, results have been limited.

As discussed earlier, in December 2008 the EU funded the independent fact-finding mission to examine "the origins and the course of the conflict ... with regard to international law, humanitarian law and human rights, and the accusations made in that context."²⁵⁴ However, the EU distanced itself from the report's findings even before it was released in September 2009 by limiting its support to funding.

²⁵⁰ *Situation in Georgia*, ICC, Case No. ICC-01/15, Corrected Version of 'Request for authorization of an investigation pursuant to article 15,' <http://www.legal-tools.org/doc/eca741/>, para. 288.

²⁵¹ Human Rights Watch interview with ICC staff, January 27, 2016; and email correspondence from ICC staff, September 13, 2016.

⁹⁴ Human Rights Watch separate interviews with international civil society representative, December 14, 2015; and civil society representative, December 15, 2015.

²⁵³ Human Rights Watch telephone interview with civil society representative, December 9, 2015.

²⁵⁴ Philippa Runner, "Swiss diplomat outlines Georgia war probe," *EUobserver*, December 3, 2008, <http://euobserver.com/24/27221> (accessed December 5, 2017). The establishment of the Independent International Fact-Finding Mission on the Conflict in Georgia (IIFMCG) marked the first time that the EU decided to intervene actively in a serious armed conflict. It was also the first time that the EU set up such a mission as a means of political and diplomatic follow-up to the conflict. See IIFMCG, "Report," vol. 1, September 2009, http://www.mpil.de/files/pdf4/IIFMCG_Volume_12.pdf (accessed December 5, 2017), p. 2.

The report quickly became politicized, with Moscow and Tbilisi picking parts of the report about the other's violations and using it for propaganda. The EU missed an opportunity to advance justice when it failed to more forcefully claim a sense of ownership over the report and use it to push for domestic accountability for international humanitarian law violations in bilateral relations with Tbilisi and Moscow.

The report concluded that “despite a long period of increasing tensions, provocations and incidents,” open hostilities began by the shelling of Tskhinvali by Georgian armed forces during the night of August 7.²⁵⁵ The report also concluded that “evidence of systematic looting and destruction of ethnic Georgian villages” suggests that “ethnic cleansing was indeed practiced against ethnic Georgians in South Ossetia.” International media, especially key European outlets, focused heavily on the conclusion about who started the war, while Georgian leadership focused on ethnic cleansing elements of the report.²⁵⁶ Although the report detailed human rights violations by all sides and included some accountability recommendations, there was very little follow up.²⁵⁷ One civil society activist observed that the EU report was “soon forgotten.”²⁵⁸

One way that the EU could have followed up the findings of the independent commission would have been to regularly include its recommendations in bilateral talks with Georgia. In 2009, the EU and Georgia initiated a human rights dialogue, a biannual meeting providing an opportunity to recognize progress and raise issues of concern by Brussels and Tbilisi. This was also an opportunity, albeit limited, for the EU to periodically raise national justice efforts and the ICC.²⁵⁹

²⁵⁵ IIFFMCG, “Report,” vol. 1, http://www.mpil.de/files/pdf4/IIFFMCG_Volume_I2.pdf, para. 19.

²⁵⁶ See, for example, “Georgia started ‘unjustified war,’” BBC News Online, September 30, 2009, <http://news.bbc.co.uk/2/hi/europe/8281990.stm> (accessed December 5, 2017); “Georgian president Mikheil Saakashvili blamed for starting Russian war,” *The Guardian*, September 30, 2009, <https://www.theguardian.com/world/2009/sep/30/georgia-attacks-unjustifiable-eu> (accessed December 5, 2017); Andrew Rettman, “EU-sponsored report says Georgia started 2008 war,” *EUobserver*, September 30, 2009, <https://euobserver.com/foreign/28747> (accessed December 5, 2017); Benjamin Bidder, “New Report on Russia-Georgia War: EU Investigators Debunk Saakashvili's Lies,” *Der Spiegel Online*, October 1, 2009, <http://www.spiegel.de/international/world/new-report-on-russia-georgia-war-eu-investigators-debunk-saakashvili-s-lies-a-652512.html> (accessed December 5, 2017).

²⁵⁷ IIFFMCG, “Report,” vol. 1, http://www.mpil.de/files/pdf4/IIFFMCG_Volume_I2.pdf, pp. 33-38; IIFFMCG, “Report,” vol. 2, September 2009, http://www.mpil.de/files/pdf4/IIFFMCG_Volume_I11.pdf, pp. 435-438.

²⁵⁸ Human Rights Watch interview with civil society activist, April 25, 2016.

²⁵⁹ Human Rights Watch telephone interview with former EU representative, April 20, 2016; and email correspondence with diplomat, April 26, 2016.

Although the human rights dialogues are held in private, they are usually followed by a press release with limited details on the substance of the discussions.²⁶⁰ The press releases have alluded to the war and have periodically expressed concern with regard to the “human rights situation” in the region of South Ossetia and Abkhazia but did not specifically refer to the ICC’s preliminary examination or the need for accountability.²⁶¹

The EU was heavily engaged in pressing for judicial reform in Georgia. However, such support does not include a strong emphasis on strengthening domestic accountability efforts for crimes committed during the 2008 war. The EU’s 2007-2013 strategy for Georgia identified criminal justice reform as a priority but did not focus on building ties with the ICC or capacity to support national investigations through technical assistance.²⁶²

In 2013, after the change of the government in Georgia, the EU hired Thomas Hammarberg as special adviser on constitutional and legal reform and human rights in Georgia.²⁶³ In his 2013 report, Hammarberg highlighted, among other issues, the overarching challenges facing Georgia’s judicial system and flagged the need for improvement in delivering justice.²⁶⁴ In 2014, Hammarberg issued follow-up recommendations to the Georgian

²⁶⁰ Human Rights Watch email correspondence with diplomat, April 25, 2016. The first dialogue referenced the 2008 conflict, although the emphasis was on addressing the humanitarian situation, rather than accountability for grave crimes. See Mission of Georgia to the European Union and Embassy of Georgia to the Kingdom of Belgium, “The 1st EU-Georgia Human Rights Dialogue was held at the Ministry of Foreign Affairs of Georgia,” April 29, 2009, http://belgium.mfa.gov.ge/index.php?lang_id=ENG&sec_id=595&info_id=651 (accessed December 5, 2017).

²⁶¹ See, for example, “EU-Georgia Human Rights Dialogue 2014,” EU External Action Service press release, 140620/02, June 20, 2014, copy on file with Human Rights Watch; “Joint Press Release on the EU-Georgia Human Rights Dialogue,” EU External Action Service & Georgia joint press release, 160421/01, April 21, 2016, http://eeas.europa.eu/statements-eeas/2016/160421_01_en.htm (accessed December 5, 2017).

²⁶² Human Rights Watch interview with former EU official, Tbilisi, December 15, 2015.

²⁶³ In 2010, Thomas Hammarberg, in his capacity as the Council of Europe’s commissioner for human rights, issued a report on Monitoring of Investigations into cases of missing persons during and after the August 2008 armed conflict in Georgia. The report is based on the findings of two independent experts, who were tasked with monitoring national investigations and providing advice and support to establish the circumstances around the cases of missing persons in several emblematic cases. See Council of Europe, Commissioner for Human Rights, “Monitoring of Investigations into cases of missing persons during and after the August 2008 armed conflict in Georgia,” September 29, 2010, https://wcd.coe.int/ViewDoc.jsp?p=&id=1675137&direct=true#P46_1289 (accessed December 5, 2017). The OTP used the report for contextual background, although it was less relevant to the office’s admissibility assessment. Human Rights Watch interview with ICC staff, June 10, 2016.

²⁶⁴ Thomas Hammarberg, EU Special Advisor on Constitutional and Legal Reform and Human Rights in Georgia, “Georgia in Transition: Report on the Human Rights Dimension: Background, Steps Taken and Remaining Challenges,” September 2013, <http://www.sida.se/globalassets/global/countries-and-regions/europe-incl.-central-asia/georgia/georgia-in-transition-hammarberg.pdf> (accessed December 5, 2017).

authorities on judicial reform and other areas but did not reference the need for accountability for crimes committed during the August 2008 war.²⁶⁵

The Association Agenda between the EU and Georgia, which provides a list of priorities for joint work between 2014 and 2016, states that Georgia should cooperate with the ICC “with respect to August 2008 war investigations.”²⁶⁶ The agenda also outlines a number of priorities to strengthen the justice sector overall, including strengthening judicial independence and reforming the prosecutor’s office, which could benefit the adjudication of all crimes, including those committed during the war. However, there is no reference to Georgia’s August 2008 war investigations.²⁶⁷

The OTP indicated accountability was not an issue that was at the top of the international community’s agenda.²⁶⁸ A diplomat confirmed that justice was not really a topic in the first few months after the conflict, as the immediate focus was on addressing the humanitarian crisis that emerged following the mass displacement from South Ossetia.²⁶⁹ Moreover, there was little appetite, or space, to challenge the government’s narrative—which was also reflected in broader society—of Georgia as a victim.²⁷⁰

In the absence of stronger messages from international partners about the importance of national justice, the OTP was left as the only actor raising the issue of accountability on a regular basis.

3. Media

National and international media can be vital levers to pressure the government to act. However, in Georgia, as a human rights lawyer put it, the previous government was not

²⁶⁵ Thomas Hammarberg, “Recommendations to the Government of Georgia: Follow-up on the final mission – 4-9 June, 2014,” http://eeas.europa.eu/archives/delegations/georgia/documents/human_rights_2012/th_recommendations_to_the_government_of_georgia_en.pdf.

²⁶⁶ Association Agenda between the European Union and Georgia, https://eeas.europa.eu/delegations/georgia/documents/eap_aa/associationagenda_2014_en.pdf (accessed December 5, 2017), p. 10.

²⁶⁷ *Ibid.*, pp. 4-5.

²⁶⁸ Human Rights Watch telephone interview with ICC staff, April 15, 2016.

²⁶⁹ Human Rights Watch telephone interview with diplomat, April 19, 2016.

²⁷⁰ *Ibid.*; Human Rights Watch email correspondence with diplomat, April 26, 2016.

sensitive to local media; there were only a few objective channels and the government did not pay attention.²⁷¹ Another activist raised doubts about the objectivity of media in Georgia and, in any event, until the ICC prosecutor filed an application to investigate in Georgia, the media was not really interested in the aftermath of the 2008 war.²⁷² At the same time, President Saakashvili's government was sensitive to international opinion.²⁷³

The OTP's engagement with national and international media on the Georgia situation was extremely limited, possibly missing an opportunity for the preliminary examination to add pressure on authorities to act.

After the OTP confirmed that the situation in Georgia was under examination, it issued three press releases between 2008 and September 2015 in relation to the Georgia situation: one in March 2010 after a delegation of Georgian officials visited The Hague; another in June 2010, after the office visited Georgia; and a third in February 2011, following a visit by the office to Russia.²⁷⁴ All other reporting about the Georgia situation took place in the office's yearly reports on preliminary examinations, which began in 2011.

The press releases welcomed the cooperation of the Georgian and Russian governments, respectively, but did not reference any concerns about the pace or scope of investigations. In its 2014 preliminary examination report, the office began to express concern about the pace of the investigation and raise doubts about the genuineness of Georgia's justice efforts.²⁷⁵

An OTP staff member explained that, had the OTP engaged with media, it may have been seen as confrontational, possibly compromising the OTP's attempts to build trust with the Georgian government. Furthermore, the OTP did not want to disclose confidential information given to it by the Georgian authorities, who were particularly concerned that

²⁷¹ Human Rights Watch interview with human rights lawyer, December 15, 2015.

²⁷² Human Rights Watch group interview with civil society representatives, December 14, 2015.

²⁷³ Human Rights Watch separate interviews with former government official, December 14, 2015; human rights lawyer, December 15, 2015; civil society representative, December 15, 2015; and telephone interview with former EU official, October 11, 2016.

²⁷⁴ OTP, "OTP Weekly Briefing #45," <https://www.icc-cpi.int/NR/rdonlyres/BF736822-506B-46F6-BF82-C6DBE0DED7/282366/OTPWeeklyBriefing612JulyIssue45.pdf>, p. 5; OTP, "Report on Preliminary Examination Activities 2011," <https://www.legal-tools.org/en/doc/4aad1d/>, para. 100.

²⁷⁵ OTP, "Report on Preliminary Examination Activities 2014," <http://www.legal-tools.org/doc/3594b3/>, para. 154.

Russia would learn about this information. Additionally, the OTP considered that there was little interest from the public in its involvement in Georgia.²⁷⁶

G. Conclusions

The ICC's seven-year long preliminary examination into crimes in Georgia unfolded amid a complicated political landscape. The OTP found itself in the difficult position of evaluating crimes committed during an international armed conflict and assessing proceedings in two countries to address possible criminal conduct of three sides. The political landscape in Georgia, consumed by nationalist rhetoric in the aftermath of the conflict, limited the space for civil society and other partners to press for national accountability.

The change in Georgia's government in 2013 raised a further obstacle to any effort to press national authorities on justice given upheaval within the prosecutor's office and changing political interests.

Nonetheless, the ICC's preliminary analysis did have some impact on national accountability efforts in that, at least according to the OTP, its emphasis on impartiality sparked increased efforts in Georgia to investigate the actions of its own service members. Ultimately, however, Georgia proved to be unwilling to move beyond investigations toward prosecutions.

Overall, the OTP's engagement with various actors and dynamics within Georgia was limited. While there were objective obstacles to national accountability, our research suggests that the OTP missed some opportunities to more proactively assess the government's political will. A more robust approach by the OTP could have led the office, at the very least, to open an investigation sooner.

While the length of the preliminary examination was, in part, affected by the OTP's need to assess proceedings in two different states, it was also affected by the OTP's preference at the time for "uncontested admissibility." That is, it preferred to proceed

²⁷⁶ Human Rights Watch interview with ICC staff, June 10, 2016.

with Article 15 requests to authorize investigations when the potential cases identified appeared clearly admissible.²⁷⁷

It may have been difficult in the court's earliest years for the OTP to predict just what it would need to show the judges to satisfy the statute's admissibility requirements. It was only with the first article 15 investigation, in Kenya, where judges had the opportunity to clarify what admissibility would look like at this phase of proceedings, namely, as indicated above, that it would be measured with regard to potential cases, rather than a more abstract assessment of the situation as a whole. While waiting for a clear indication of domestic inaction may have improved the OTP's chances before the judges, it can also lead to delay in ICC action without corresponding progress nationally.

The OTP has indicated that it is moving away from a clear preference for "uncontested admissibility."²⁷⁸ But as one source told Human Rights Watch, with regard to Georgia, "if you wait for the government to make that statement [on inability], it may never come. If you [the government] believe that you can postpone responses, then you do it."²⁷⁹

As an alternative, strengthened or different forms of engagement with civil society groups and national and international media by the OTP, as well as stronger, independent approaches by Georgia's international partners, could have made the shortcomings or inaction on the part of both the Saakashvili and the successive governments more transparent, bolstering the OTP's ability to prove the admissibility of potential cases before the ICC, even without an official government confirmation of inaction.

First, the OTP potentially missed an opportunity to strengthen the hand of national civil society partners by more openly pressing national authorities to be transparent about progress in its investigations. Even without divulging confidential information, such information could have given civil society more traction in putting pressure on the government to show results and be more up front about the lack of domestic progress at

²⁷⁷ Human Rights Watch interview with ICC staff, January 27, 2016; and email correspondence with OTP, September 13, 2016. See also OTP, "Informal expert paper: The principle of complementarity in practice," 2003, <https://www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf> (accessed on December 5, 2017).

²⁷⁸ Human Rights Watch interview with ICC staff, January 27, 2016.

²⁷⁹ Human Rights Watch interview with government official, December 15, 2015.

an earlier stage. It might have also strengthened their standing to raise concerns about a lack of progress with other partners, for example, the EU, which, in turn, might have strengthened its own approach to the government on justice.

Second, in the face of the “pressure void” on Georgian authorities noted by civil society, the OTP could have used international media more effectively to convey to the Georgian government the importance of making concrete progress in its cases. The few press releases on the Georgia situation welcomed assurances of Georgian and Russian authorities to cooperate with the ICC but did little to urge the governments to move forward. While the OTP’s yearly reports on preliminary examinations offered a few more details about the status of national investigations, it was not until late 2014, more than six years after the conflict, that the office began to voice serious concern about lack of progress.

The OTP is not the only relevant actor when it comes to positive complementarity, and, indeed, is unlikely to be successful in isolation. Georgia’s international partners, notably the EU, could have been more consistent and vocal in support for accountability, and used leverage to press for more information from the government. Indeed, pressing the authorities on the importance of showing progress in August 2008 investigations and urging transparency on the investigative steps taken could have better supported both the ICC in its analysis and civil society in pressing for accountability for August 2008 crimes. At the very least, this could have supported efforts by civil society and others to urge the government to show its hand much sooner.

III. Guinea

A. Overview

On September 28, 2009, Guinea’s security forces opened fire on tens of thousands of opposition supporters peacefully gathered at a stadium in Conakry, the country’s capital. Some 150 Guineans were killed, and dozens of women suffered brutal sexual violence perpetrated by members of the security forces. An international commission of inquiry concluded that the crimes amounted to crimes against humanity, as did Human Rights Watch.

On October 14, 2009, the International Criminal Court (ICC) announced that the situation in Guinea was under preliminary examination. Six days later the Guinean foreign minister visited the ICC and indicated to the court that Guinea would ensure justice for the September 2009 crimes through its national courts.

Guinea has since made major strides in pursuing justice for the crimes: in the most significant development, in December 2017, the justice minister announced that an investigation into the crimes by a panel of judges was complete. During the investigation, judges took testimony from hundreds of victims, interviewed members of the security forces, and brought charges against high-level suspects. The case has now been referred to a court of first instance in Conakry for trial.

Progress to date has surpassed local expectations of what could be achieved in Guinea’s domestic justice system.

At the same time, the judges’ investigation was halting, and any trial has yet to start more than eight years after the investigation opened.

The ICC has pursued a robust program of activity to help promote justice for the September 2009 crimes, as one of several relevant international and domestic actors, with particularly strong efforts by victims, civil society, and the Office of the UN Special Representative of the Secretary-General for Sexual Violence in Conflict. Their collective efforts—combined with changes in Guinea’s political landscape and the commitment of the judges tasked with investigating the crimes—appear to have contributed to the significant progress in the case.

The ICC appears to have generally galvanized progress over time and contributed to the resolution of several specific challenges the investigation faced. As discussed below, the Office of the Prosecutor's (OTP) strategy of active encouragement and close scrutiny of progress in the investigation, regular visits to implement its strategy, benchmarking of needed steps in the investigation, and strategic alliances have been particularly important.

The OTP's engagement with Guinean authorities has also met with criticism from some civil society activists who are concerned that the ICC is offering legitimacy to an investigation that will never result in meaningful prosecutions. The Guinea example highlights that where progress on national justice is slow, the OTP could risk being perceived as legitimizing government inaction or undermining its own mandate. This underscores the need for the OTP to employ specific strategies to mitigate these risks.

After setting out some brief background regarding the September 28 stadium massacre, this chapter describes the evolution in the domestic investigation and identifies a number of contributing factors to progress in the investigation, including the role of the OTP. It then turns to a closer examination of the OTP's role and an evaluation of its engagement with key strategic partners on complementarity, before drawing lessons learned for future practice.

B. September 28 Stadium Massacre

On September 28, 2009, several hundred members of Guinea's security forces burst into a stadium in Guinea's capital, Conakry, and opened fire on tens of thousands of opposition supporters peacefully gathered there.²⁸⁰ The demonstrators had gathered to protest the decision by the then self-proclaimed president, Capt. Moussa Dadis Camara, to run in elections planned for 2010. By late afternoon, at least 150 Guineans lay dead or dying in and around the stadium. Dozens of women at the rally suffered sexual violence by security forces, including individual and gang rape and sexual assault with objects such as sticks, batons, rifle butts, and bayonets.

In the hours and days after the stadium violence, heavily armed soldiers dressed in camouflage and wearing red berets, and civilians armed with knives, machetes, and

²⁸⁰ Unless otherwise noted, information in this summary is taken from Human Rights Watch, *Bloody Monday: The September 28 Massacre and Rapes by Security Forces in Guinea*, December 17, 2009, <https://www.hrw.org/report/2009/12/17/bloody-monday/september-28-massacre-and-rapes-security-forces-guinea>.

sticks, committed scores of abuses in those neighborhoods where the majority of participants in the September 28 rally lived. Many women endured days of sexual assault after being detained at or near the stadium.

A Human Rights Watch investigation found that the killings, rapes, and other abuses rose to the level of crimes against humanity. A commission of inquiry established by the UN secretary-general had similar conclusions.²⁸¹

C. Evolution of the Domestic Investigation

On October 14, 2009, the ICC announced that the situation in Guinea was under preliminary examination.²⁸² In response, the then-minister of foreign affairs traveled one week later to The Hague to meet with the ICC Office of the Prosecutor, where he told then-ICC Deputy Prosecutor Fatou Bensouda—as reflected in an ICC press release issued the day after the meeting—that Guinea’s justice system was “able and willing” to handle the investigation and prosecution of the stadium crimes domestically.²⁸³

Within four months, in early 2010, and just days ahead of the ICC’s first visit to Guinea, a Guinean prosecutor assigned a three-judge panel to investigate the crimes committed around September 28, 2009. These developments suggest one important apparent effect of the ICC’s intervention in Guinea: its initial engagement and first planned visit may have spurred the formation of the panel to investigate the 2009 crimes.²⁸⁴

²⁸¹ See United Nations Security Council, “Report of the International Commission of Inquiry mandated to establish the facts and circumstances of the events of 28 September 2009 in Guinea” (“ICOI Report”), S/2009/693, December 18, 2009, <http://www.unhcr.org/refworld/docid/4b4f49ea2.html> (accessed November 8, 2017), p. 3.

²⁸² International Criminal Court (ICC) Office of the Prosecutor (OTP), “Report on Preliminary Examination activities 2011,” December 13, 2011, <https://www.legal-tools.org/en/doc/4aad1d/> (accessed November 8, 2017), paras. 105, 114. Guinea is a state party to the ICC, having ratified the Rome Statute on July 14, 2003.

²⁸³ “Guinea Minister visits the ICC - Prosecutor Requests Information on National Investigations into 28 September Violence,” ICC press release, October 21, 2009, <https://www.icc-cpi.int//Pages/item.aspx?name=pr468> (accessed November 8, 2017).

²⁸⁴ See International Federation for Human Rights (FIDH) and the Guinean Organization for Human Rights (FIDH-OGDH), “Commemoration of 28 September Massacre Overshadowed by Political Tension” (“Commemoration Note”), September 2011, http://www.fidh.org/IMG/pdf/note_guinee_28092011_en.pdf (accessed November 8, 2017), p. 6; “Fatou Bensouda: Guinea, The International Criminal Court and the entire international community will work together to deliver justice to the victims of Guinea,” OTP statement, February 19, 2010, <http://www.icc-cpi.int/NR/rdonlyres/25184FEE-1BCF-48EF-B358-B7F9D3F5FCA9/281566/FatousstatementGuinesENG1.pdf> (accessed November 9, 2017). See also “Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the occasion of the 28 September 2013 elections in Guinea,” OTP statement, September 27, 2013, <https://www.icc-cpi.int//Pages/item.aspx?name=statement-OTP-27-09-2013> (accessed November 9, 2017): “In accordance with our policy of encouraging national proceedings, my Office has been

Since its first visit in 2010, the ICC has conducted regular visits to Guinea—averaging roughly twice a year—to assess progress in the investigation and press for further advances. During these visits, OTP officials meet with government representatives, the panel of investigative judges, civil society, the donor community, and media. During some visits, the OTP has held press conferences and issued press statements. On a small number of occasions, the prosecutor has also met with Guinean President Alpha Condé.²⁸⁵

As indicated above, the case has made significant progress: judges have taken statements from hundreds of victims of abuses, interviewed members of the security forces, brought charges against high-level suspects, and concluded their investigation. But there have also been several periods since 2009 during which activity by the judges drastically slowed or ground to a halt. These periods, which lasted several months each, included the periods preceding and directly following elections: the tense-presidential elections of 2010, the parliamentary elections of 2013, and the presidential elections of 2015. Work also basically ceased from May to September 2012, as discussed below.

In its first two years, the investigation focused on interviewing victims and their families, as one of the less sensitive aspects of the investigation, and some 450 victims have been interviewed since 2010.²⁸⁶ Many of these individuals are involved in a *partie civile*²⁸⁷ action to the investigation.²⁸⁸

engaging with the Guinean authorities on an on-going basis. As a result, a national investigation into the events of 28 September 2009 is underway and already several persons who may be amongst those most responsible for the crimes committed have been charged.”

²⁸⁵ See OTP, “Report on Preliminary Examination Activities 2015” November 12, 2015, <http://www.legal-tools.org/doc/acoed2/> (accessed November 9, 2017), paras. 179-182; and OTP, “Report on Preliminary Examination Activities 2012,” November 22, 2012, <http://www.legal-tools.org/doc/ob1cfc/> (accessed November 9, 2017), para. 160.

²⁸⁶ Human Rights Watch separate interviews with legal practitioner, Conakry, June 26, 2012; and justice practitioner, Conakry, March 22, 2016; “Guinea/massacre of September 28, 2009: finally a path to a trial!” (“Guinée / massacre du 28 septembre 2009 : enfin la voie à un procès !”), November 7, 2017, <https://www.fidh.org/fr/regions/afrique/guinee-conakry/guinee-massacre-du-28-septembre-2009-la-fin-de-l-information> (accessed November 27, 2017); OTP “Report on Preliminary Examination Activities 2015,” <http://www.legal-tools.org/doc/acoed2/>, para. 177.

²⁸⁷ *Partie civile* is a feature of civil law systems that allows victims to act as formal parties in criminal cases and participate in proceedings more fully than if they serve as witnesses, such as by having the opportunity to inspect documents related to the proceedings. For more information, see FIDH, “Victims’ Rights Before the International Criminal Court: A Guide for Victims, their Legal Representatives and NGOs,” April 23, 2007, http://www.fidh.org/IMG/pdf/4-CH-I_Background.pdf (accessed November 9, 2017), pp. 10-11; see also FIDH-OGDH, Commemoration Note, http://www.fidh.org/IMG/pdf/note_guinee_28092011_en.pdf.

²⁸⁸ FIDH and OGDH initiated the action and are representing victims’ associations—including Association of Victims, Parents and Friends of September 28, 2009 (Association des victimes, parents et amis du 28 septembre 2009, AVIPA) and Association of Family and Friends of Disappeared on September 28, 2009 (Association des Familles et Amis de Disparus du

In advance of the 2010 presidential election, the work of the investigative judges faced security challenges when a floor of the building in which the panel was housed was allocated to a special unit comprised of gendarmes and police tasked with providing election security.²⁸⁹ After considerable pressure—including by the ICC and civil society groups, as discussed in Part E—the judges’ offices were in September 2011 moved to the Court of Appeal.²⁹⁰

The charging of suspects began in 2010, although judges largely did not charge higher level suspects until 2012.²⁹¹ This changed in February 2012, when Moussa Tiégboro Camara was charged. Camara had expressed interest in appearing before the judges, which some observers suggested led to this breakthrough.²⁹² Tiégboro Camara is Guinea’s minister in charge of fighting drug trafficking and organized crime, a post he has held since early 2009.

28 septembre 2009, AFADIS)—and individual victims in the action. Human Rights Watch interview with legal practitioner, June 26, 2012; telephone interview with legal practitioner, Conakry, October 5, 2012; and email exchange with civil society representative, Conakry, October 11, 2016. FIDH-OGDH, Commemoration Note, http://www.fidh.org/IMG/pdf/note_guinee_28092011_en.pdf, p. 6; FIDH-OGDH, “The Fight Against Impunity in Guinea: Progress Observed, Actions Awaited,” September 2012, <https://www.fidh.org/IMG/pdf/rapguinee596ang.pdf> (accessed on November 9, 2017), p. 6.

²⁸⁹ This created risks as sensitive activities became vulnerable to monitoring by individuals with possible ties to security service members. Human Rights Watch interview with Guinean Justice Ministry official, Conakry, June 20, 2012. See also Human Rights Watch, “*We Have Lived in Darkness*”: A Human Rights Agenda for Guinea’s New Government, May 24, 2011 <https://www.hrw.org/report/2011/05/24/we-have-lived-darkness/human-rights-agenda-guineas-new-government>, pp. 27-28; FIDH-OGDH, Commemoration Note, http://www.fidh.org/IMG/pdf/note_guinee_28092011_en.pdf, p. 6.

²⁹⁰ While at the Court of Appeal, security for the judges was for a period available only “as needed,” but security guards are now stationed at the premises whenever the judges are working. See OHCHR, “Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Guinea,” A/HRC/19/49, January 17, 2012, http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-49_en.pdf (accessed November 9, 2017), para. 26; FIDH-OGDH, Commemoration Note, http://www.fidh.org/IMG/pdf/note_guinee_28092011_en.pdf, p. 6; Human Rights Watch interview with civil society representative, Conakry, March 21, 2016; group interview with justice practitioners, Conakry, March 22, 2016; and interview with ICC staff, The Hague, June 24, 2016.

²⁹¹ One exception was a higher-level suspect, Lt. Aoubakar “Toumba” Diakité, who faced charges in 2010, but he had been on the run with his whereabouts unknown since late 2009.

²⁹² Human Rights Watch interview with UN staff, Conakry, March 21, 2016. See also “Lieutenant Colonel Tiegboro charged: Cellou Dalein is skeptical...” (“Inculpation du Lieutenant Colonel Tiegboro: Cellou Dalein est sceptique...”), *Africaguinee.com*, February 10, 2012, <http://www.africaguinee.com/~archives/index.php?monAction=detailNews&id=11716> (accessed November 9, 2017); FIDH-OGDH, “The Fight Against Impunity in Guinea: Progress Observed, Actions Awaited,” <https://www.fidh.org/IMG/pdf/rapguinee596ang.pdf>, pp. 6-7, 16. “Indictment of former Minister on the eve of the third anniversary of 28 September 2009 massacre,” FIDH press release, September 21, 2012, <https://www.fidh.org/en/region/Africa/guinea-conakry/Indictment-of-former-Minister-on-12211> (accessed November 9, 2017); Mamadou Dian Baldé, “Where is Toumba Diakité?” (“Où est passé Toumba Diakité ?”), *guineeActu.com*, December 8, 2009, <http://guineeactu.info/HTML/0%C3%B9-est-passe-toumba-diakite-.htm> (accessed November 9, 2017); FIDH-OGDH, “Guinea: The time of justice?” (“Guinée : Le temps de la justice ?”), May 2015, https://www.fidh.org/IMG/pdf/guinee_rapport_le_temps_de_la_justice.pdf (accessed January 31, 2018), pp. 14-15.

Investigations were essentially suspended, however, from May to September 2012, due to serious shortcomings in resources available to the panel of investigative judges.²⁹³ During this period of suspended work, the OTP began to seriously contemplate submitting a request to the ICC judges to open an investigation in Guinea, and set a six-month window in which progress would need to be made for Guinea to avoid making such a request.²⁹⁴ The OTP communicated with Guinean officials about the six-month window in which progress needed to be made, including with a letter to President Condé in July 2012 raising concerns about lack of progress and inadequate support for the investigation.²⁹⁵

The OTP specifically raised the importance of additional financial resources for the panel. Guinean government representatives assured OTP officials that such resources would be made available—which was acknowledged publicly by then-Deputy Prosecutor Fatou Bensouda.²⁹⁶ The government took months to begin to resolve the panel’s lack of basic supplies,²⁹⁷ but the panel ultimately received a computer, along with a weekly stipend, in September 2012, after which it resumed taking statements from victims.²⁹⁸

The OTP also pressed for the appointment of an international expert—that had been offered by the Team of Experts on the Rule of Law/Sexual Violence in Conflict, within the

²⁹³ Human Rights Watch, *Waiting for Justice: Accountability before Guinea’s Courts for the September 8, 2009 Stadium Massacre, Rapes, and Other Abuses*, December 5, 2012, <https://www.hrw.org/report/2012/12/05/waiting-justice/accountability-guineas-courts-september-28-2009-stadium-massacre>, pp. 35-37.

²⁹⁴ Human Rights Watch interview with ICC staff, The Hague, November 24, 2015.

²⁹⁵ Human Rights Watch interview with ICC staff, June 24, 2016; and email correspondence with ICC staff, The Hague, September 13, 2016.

²⁹⁶ Human Rights Watch telephone interview with ICC staff, The Hague, July 16, 2012; “Press statement by Ms Fatou Bensouda, Deputy Prosecutor of the International Criminal Court,” OTP statement, April 5, 2012, <https://www.icc-cpi.int/NR/rdonlyres/8BEEEB8C-D22E-48F6-AFB9-E4B72B92E3CF/o/StatementFatouBensoudaConakry050412Eng.pdf> (accessed November 9, 2017). See also OTP, “Report on Preliminary Examination Activities 2012,” <http://www.legal-tools.org/doc/ob1cfc/>, para. 161; FIDH-OGDH, “The Fight Against Impunity in Guinea: Progress Observed, Actions Awaited,” <https://www.fidh.org/IMG/pdf/rapguinee596ang.pdf>, p. 7.

²⁹⁷ In addition to pressure for more support to the panel by the ICC, international and Guinean NGOs pressed for these developments. Human Rights Watch interview with justice ministry official, June 20, 2012, and legal practitioner, Conakry, June 24, 2012; FIDH-OGDH, Commemoration Note, http://www.fidh.org/IMG/pdf/note_guinee_28092011_en.pdf, p. 6; Human Rights Watch, *Waiting for Justice*, p. 5. See also Human Rights Watch telephone interview with two legal practitioners, September 13 and October 5, 2012. See also FIDH-OGDH, “The Fight Against Impunity in Guinea: Progress Observed, Actions Awaited,” <https://www.fidh.org/IMG/pdf/rapguinee596ang.pdf>, p. 7; OTP, “Report on Preliminary Examination Activities 2012,” <http://www.legal-tools.org/doc/ob1cfc/>, para. 161.

²⁹⁸ Human Rights Watch telephone interviews with two legal practitioners, September 13 and October 5, 2012. See also FIDH-OGDH, “The Fight Against Impunity in Guinea: Progress Observed, Actions Awaited,” <https://www.fidh.org/IMG/pdf/rapguinee596ang.pdf>, p. 7 (although it indicates the support actually arrived in August); OTP, “Report on Preliminary Examination Activities 2012,” <http://www.legal-tools.org/doc/ob1cfc/>, para. 161.

UN Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict—to support the panel of investigative judges.²⁹⁹ After months of delay, in-depth consultations with the government, and revisions to the expert’s terms of reference, the former justice minister and president of the Supreme Court of Mauritania, Ahmedou Tidjane Bal, was appointed as the expert and began work in late 2012.³⁰⁰

In June 2013, the panel of judges brought charges against Lt. Col. Claude “Coplan” Pivi. Pivi is Guinea’s minister for presidential security, a post he also held during the stadium massacre. This represented a qualitative step forward as Pivi was one of the highest-level suspect to be charged in the investigation and has been seen as a powerful figure in Guinea.³⁰¹ The questioning of Pivi was cancelled later that month, however, when his supporters held protests around Conakry, and did not take place until September 10, 2014.³⁰²

Progress was again slow in the second half of 2013 likely due to the holding of long-awaited and previously postponed parliamentary elections in September 2013, and continued lack of adequate financial and political support to the investigation by the Guinean government.³⁰³ Greater caution on the part of the panel of investigative judges following the protests around Pivi’s questioning likely was an additional factor.

²⁹⁹ Human Rights Watch telephone interviews with two legal practitioners, Conakry, September 6 and 11, 2012; interview with ICC staff, November 24, 2015; group interview with two UN staff, New York, May 13, 2016; and email correspondence with ICC staff, September 13, 2016. See also OTP, “Report on Preliminary Examination Activities 2013,” November 2013, <http://www.legal-tools.org/doc/dbf75e/> (accessed November 9, 2017), paras. 197-199.

³⁰⁰ See Human Rights Watch separate interviews with ICC staff, November 24, 2015; UN staff, May 13, 2016; and email correspondence with UN staff, New York, August 10, 2017. See also Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict, “Team of experts: Rule of Law and Sexual Violence in Conflict Annual Report 2013,” 2013, <http://www.undp.org/content/undp/en/home/librarypage/crisis-prevention-and-recovery/un-team-of-experts--rule-of-law-and-sexual-violence-in-conflict-.html> (accessed November 9, 2017), pp. 26-27.

³⁰¹ Human Rights Watch separate interviews with two civil society representatives, Conakry, March 22, 2016; and diplomat, March 22, 2016. FIDH-OGDH, “Guinea: The time of justice?,” https://www.fidh.org/IMG/pdf/guinee_rapport_le_temps_de_la_justice.pdf, p. 8; “Guinea, the case of 28 September 2009: Colonel Claude Pivi indicted,” FIDH, July 3, 2013, <https://www.fidh.org/en/region/Africa/guinea-conakry/guinea-the-case-of-28-september-2009-colonel-claude-pivi-indicted-13682> (accessed November 14, 2017).

³⁰² Human Rights Watch interview with ICC staff, November 24, 2015; and email correspondence with justice practitioner, Conakry, November 17, 2016. See also “Guinea: High-Level Charges in 2009 Massacre,” Human Rights Watch news release, July 3, 2013, <https://www.hrw.org/news/2013/07/03/guinea-high-level-charges-2009-massacre>; “Guinea: Stadium Massacre Victims Deserve Justice,” Human Rights Watch news release, September 27, 2013, <https://www.hrw.org/news/2013/09/27/guinea-stadium-massacre-victims-deserve-justice>.

³⁰³ Human Rights Watch separate interviews with four Justice Ministry officials, Conakry, June 20 and 21, 2012; three diplomats, Conakry, June 20, 21, and 23, 2012; legal practitioner, Conakry, June 20, 2012; international expert, Conakry, June 22, 2012; ICC staff, November 24, 2015; and group interview with justice practitioners, March 22, 2016. See also “Guinea: 5 Years On, No Justice for Massacre,” Human Rights Watch news release, September 27, 2014,

The appointment of a new justice minister, Cheick Sako, who began his work in 2014, is widely credited with helping to energize progress in the investigation, as discussed further in Part D.³⁰⁴ Since Sako's appointment, the number of security force members questioned increased, and more of them responded to judicial summons to appear for questioning.³⁰⁵

In July 2015, the judges finally questioned former self-proclaimed President Moussa Dadis Camara—and then brought charges against him—more than four years after they first requested to question him in Burkina Faso, where he is in exile.³⁰⁶

Activity in the investigation again slowed during the presidential election period, in which President Condé was reelected. In spite of expectations among civil society and Guinea's international partners that the investigation would soon be completed, it progressed slowly—and did not close—in 2016.

In a major development, Abubakar “Toumba” Diakité, a suspect who had been on the run since December 2009, was arrested in Dakar, Senegal, on December 16, 2016.³⁰⁷ Toumba commanded Guinea's presidential guard, also known as the Red Berets, at the time of the 2009 crimes. On March 12, 2017, Toumba was extradited from Senegal to Conakry, Guinea, where he is currently being detained.³⁰⁸ The panel of investigative judges questioned Toumba at the end of March 2017.³⁰⁹

<https://www.hrw.org/news/2014/09/27/guinea-5-years-no-justice-massacre>; “Guinea: Stadium Massacre Victims Deserve Justice,” Human Rights Watch, <https://www.hrw.org/news/2013/09/27/guinea-stadium-massacre-victims-deserve-justice>; OTP, “Report on Preliminary Examination Activities 2013,” <http://www.legal-tools.org/doc/dbf75e/>, para. 194 FIDH-OGDH, “Guinea: The time of justice?,” https://www.fidh.org/IMG/pdf/guinee_rapport_le_temps_de_la_justice.pdf, p. 8.

³⁰⁴ Human Rights Watch separate interviews with ICC staff, November 24, 2015; UN staff, March 21, 2016; and group interview with justice practitioners, March 22, 2016.

³⁰⁵ When the judges began to request to question witnesses in the security services, the individuals at first did not comply with their requests, but this has changed over time. Human Rights Watch interview with justice practitioner, March 22, 2016.

³⁰⁶ Dadis Camara stepped down as president after being shot in December 2009. He went to Burkina Faso, where he seems to have largely recovered from his injuries. See, for example, “Guinea 'blocking ex-junta leader Dadis Camara's return,” BBC News Online, August 28, 2015, <http://www.bbc.com/news/world-africa-34086325> (accessed November 21, 2017).

³⁰⁷ See “Guinean soldier Aboubacar Sidiki Diakité, known as ‘Toumba’ arrested in Senegal” (“Le militaire guinéen Aboubacar Sidiki Diakité, dit « Toumba » arrêté au Sénégal”), *RFI Afrique*, December 20, 2016, <http://www.rfi.fr/afrique/20161220-militaire-guineen-aboubacar-sidiki-diakite-toumba-arrete-senegal> (accessed November 14, 2017).

³⁰⁸ “Guinea: the soldier ‘Toumba’ Diakité now incarcerated in Conakry” (“Guinée : le militaire « Toumba » Diakité désormais incarcéré à Conakry”) *RFI Afrique*, March 13, 2017, <http://www.rfi.fr/afrique/20170313-guinee-militaire-toumba-diakite-desormais-incarcere-prison-conakry-senegal-extrade> (accessed November 14, 2017).

³⁰⁹ On April 3, 2017, Toumba's counsel filed a request for interim release, which the investigative judges denied. Toumba's lawyers also denounced the conditions of Toumba's detention at the Conakry central prison and requested a change in his

On November 9, 2017, the justice minister announced that the judges had concluded their investigation and handed the dossier over to the prosecutor for review. In December 2017, the justice minister announced that the investigation was complete and that the case had been referred for trial before a court of first instance in Conakry.

During the investigation, at least 14 individuals had been charged.³¹⁰ Some suspects have been questioned without legal representation, contrary to international fair trial standards,³¹¹ and some suspects have been held in pretrial detention beyond the two-year limit under Guinean law.³¹² In addition, two suspects have remained in high-level government posts, and another has been appointed to a government post, despite calls by

living arrangement. See “Guinea : Toumba Diakité’s lawyers denounce the detention conditions” (“Guinée : les avocats de Toumba Diakité dénoncent les conditions de détention”), *RFI Afrique*, April 14, 2017, <http://www.rfi.fr/afrique/20170414-guinee-avocats-toumba-diakite-denoncent-conditions-detention> (accessed November 14, 2017); “Guinea Conakry: anger of the lawyers of the military officer “Toumba” Diakité” (“Guinée Conakry : colère des avocats du militaire « Toumba » Diakité”), *RFI Afrique*, May 9, 2017, <http://www.rfi.fr/afrique/20170508-guinee-conakry-toumba-diakite-massacre-stade-conakry-avocats-defense> (accessed November 14, 2017); “Events of 28 September 2009: case of Toumba Diakité in 11 dates” (“Affaire 28 septembre 2009 : le cas Toumba Diakité en 11 dates”), *Guineenews.org*, April 15, 2017, <https://guineenews.org/affaire-28-septembre-2009-le-cas-toumba-diakite-en-11-dates/> (accessed November 14, 2017).

³¹⁰ Other suspects include Col. Abdoulaye Cherif Diaby, who was Guinea’s health minister on September 28, 2009, former junta vice-president Mamadouba Toto Camara, and Gen. Mathurin Bangoura. See OTP, “Report on Preliminary Examination Activities 2015,” <http://www.legal-tools.org/doc/acoed2/>, para. 177; “[INFOGRAPHIC] Guinea: six years after the 28 September massacre, will justice be done?,” FIDH, September 25, 2015, <https://www.fidh.org/en/region/Africa/guinea-conakry/infographic-guinea-six-years-after-the-28-september-massacre-will> (accessed November 14, 2017); Abdoulaye Bah, “Governorate of Conakry: Mathurin Bangoura responds to his critics” (“Gouvernorat de Conakry : Mathurin Bangoura répond à ses détracteurs”), *Le Jour Guinée*, March 31, 2016, http://www.lejourguinee.com/index.php?option=com_content&view=article&id=1718:gouvernorat-de-conakry-mathurin-bangoura-repond-a-ses-detractions&catid=10&Itemid=142&lang=fr (accessed November 21, 2017); Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict, “Team of experts: Rule of Law and Sexual Violence in Conflict 2016 Annual Report,” <http://www.stoprapenow.org/uploads/advocacyresources/1493911578.pdf> (accessed November 15, 2017) (suggesting 17 have been charged). Given that crimes against humanity and torture are not incorporated into Guinea’s domestic law, suspects are charged with ordinary crimes, such as murder and rape. Human Rights Watch has urged for the incorporation of international crimes into Guinea’s domestic law. Human Rights Watch, *Waiting for Justice*, pp. 7, 23, and 43. Guinean officials indicated that a draft law that will incorporate such crimes into domestic law was pending as of March 2016. Human Rights Watch interview with justice practitioner, Conakry, March 20, 2016.

³¹¹ Human Rights Watch review of detention document, Conakry, June 24, 2012. Human Rights Watch interview with defense lawyer, Conakry, June 24, 2012. International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, art. 14.

³¹² Code of Criminal Procedure of the Republic of Guinea (Code de Procédure Pénale de la République de Guinée, CPP), *Assemblée Nationale de la République de Guinée*, Law N. 037/AN/98, December 31, 1998, art. 142-2; Human Rights Watch separate interviews with defense lawyer and legal practitioner, June 24, 2012; civil society representative, Conakry, March 20, 2016; and group interview with justice practitioners, March 22, 2016.

local and international civil society groups for them to be placed on administrative leave pending investigation.³¹³

D. Contributors to Progress

While progress in the investigation of the September 28, 2009 crimes has been very slow, the advances have surpassed local expectations and arguably represent the greatest progress in accountability for serious human rights violations in Guinea's history.

Civil society activists told Human Rights Watch they had not believed an investigation in the domestic system would progress to the extent it has, particularly with the charging of such high-level suspects.³¹⁴ One activist exclaimed in 2016: "Members of the military have been charged!"³¹⁵; and one justice official indicated that several individuals who "[we] never could have imagined" would face charges for these types of crimes have indeed been charged.³¹⁶

Shifts in Guinea's political landscape, and domestic and international pressure, appear to be significant factors in the progress that has occurred, alongside the commitment of the judges to advance the investigation. This part focuses on contributions by other actors beyond the OTP; the role of the OTP is detailed in Part E.

1. Shifts in Guinea's Domestic Political Landscape

Progress in ensuring Guinea's transition from 50 years of largely authoritarian military rule to more democratic rule is a key factor that appears to underlie progress in the investigation.

³¹³ This is necessary to ensure against any influence by them on the investigation or perceptions thereof. "General Mathurin Bangoura appointed governor of Conakry, a negative signal for the fight against impunity" ("Le général Mathurin Bangoura nommé gouverneur de Conakry, un signal négatif pour la lutte contre l'impunité"), FIDH press release, March 18, 2016, <https://www.fidh.org/fr/regions/afrique/guinee-conakry/guinee-le-general-mathurin-bangoura-nomme-gouverneur-de-la-ville-de> (accessed November 14, 2017). See also "Guinea: Stadium Massacre Victims Deserve Justice," Human Rights Watch news release, <https://www.hrw.org/news/2013/09/27/guinea-stadium-massacre-victims-deserve-justice>.

³¹⁴ Human Rights Watch interviews with civil society activists, Conakry, June 2012 and March 2016. The French term for the charges brought is "inculpation". Some sources translate this term as "indictment". Such a translation may be misleading as the charges will need to withstand additional review before a trial may go forward.

³¹⁵ Human Rights Watch interview with civil society representative, Conakry, March 22, 2016.

³¹⁶ Human Rights Watch interview with justice official, Conakry, March 23, 2016.

While violent and flawed, the largely free and fair 2010 elections, which brought President Condé to power, effectively signaled an end to decades of abusive military rule. The 2010 elections, as well as the similarly flawed though less violent 2015 elections, which elected Condé to a second term, are widely considered to have led to reducing the power wielded by the security sector in particular. This has been a major shift that has enabled victims to come forward in a trial largely implicating members of the security forces.

Discipline within and civilian control over the security forces have since 2010 progressively improved. Guinean authorities have demonstrated somewhat more willingness to sanction members of the security forces implicated in violations.³¹⁷

Under Condé's leadership, the government has also been keen to improve Guinea's international reputation after years of authoritarian rule, and showing Guinea to be a country that can avoid ICC investigation contributes to that improved reputation.³¹⁸ When Condé was elected, he emphasized that change in Guinea must begin with an end to impunity and corruption. He later declared 2013 the "Year of Justice" and has continued to proclaim a commitment to fighting impunity,³¹⁹ although progress in achieving these goals and even consistent emphasis on them in public comments has been mixed.³²⁰

³¹⁷ Human Rights Watch, *World Report 2016* (New York: Human Rights Watch, 2016), Guinea chapter, <https://www.hrw.org/world-report/2016/country-chapters/guinea>; Human Rights Watch, *World Report 2015* (New York: Human Rights Watch, 2015), Guinea chapter, <https://www.hrw.org/world-report/2015/country-chapters/guinea>.

³¹⁸ Human Rights Watch separate interviews with two civil society representatives, Conakry, March 19, 20, 2016.

³¹⁹ See Donaig Le Du, "Alpha Condé, the new president of Guinea, speaks on RFI" ("Alpha Condé, nouveau président de Guinée, parle sur RFI"), *RFI Afrique*, December 10, 2010, <http://www.rfi.fr/afrique/20101206-alpha-conde-nouveau-president-guinee-parle-rfi> (accessed November 14, 2017); "Oath-taking: Alpha Condé takes office" ("Prestation de serment: Alpha Condé prend fonction"), Xinhua, December 22, 2010, <http://amdys.over-blog.com/article-prestation-de-serment-alpha-conde-prend-fonction-63560674.html> (accessed November 14, 2017). See also OHCHR, "Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Guinea," A/HRC/19/49, http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-49_en.pdf, para. 3. See also Aissatou Bah, "Justice reform: President Alpha Condé sets up a commission" ("Réforme de la justice: Le président Alpha Condé met en place une commission"), March 21, 2013, [Africaguinee.com](http://www.africaguinee.com/~archives/index.php?monAction=detailNews&id=17454), <http://www.africaguinee.com/~archives/index.php?monAction=detailNews&id=17454> (accessed November 14, 2017); "Alpha Condé wants to end culture of impunity" ("Alpha Condé veut mettre fin à la culture de l'impunité"), *Vision Guinée*, November 9, 2016, <http://www.visionguinee.info/2016/11/09/alpha-conde-veut-mettre-fin-a-la-culture-de-limpunite/> (accessed November 14, 2017).

³²⁰ See, for example, Sidy Bah, "Here Are the Promises of Alpha Condé for his Second Term" ("Pour son second mandat, voici les promesses d'Alpha Condé"), *Vision Guinée*, December 14, 2015, <http://www.visionguinee.info/2015/12/14/pour-son-second-mandat-voici-les-promesses-dalpha-conde/> (accessed November 14, 2017); François Soudan, "Alpha Condé: 'Those Who Will Prevent Me from Succeeding Are Not Yet Born'" ("Alpha Condé : 'Ceux qui m'empêcheront de réussir ne sont pas encore nés'"), *Jeune Afrique*, May 19, 2015, <http://www.jeuneafrique.com/232320/politique/alpha-cond-ceux-qui-m-empêcheront-de-r-ussir-ne-sont-pas-encore-n-s/> (accessed November 14, 2017).

One Guinean justice official suggested that the case is a “test for the country” and a “test for Africa” to show that a country can try its former president for human rights violations before its national courts.³²¹ Others suggested that Guinea moving forward in the case is a “question of sovereignty,”³²² and there is a desire to avoid Guinea’s internal problems being judged outside of the country.³²³

Another significant factor is the role played by current Justice Minister Sako. Interlocutors were unable to cite specific steps in the 2009 investigation that came about due to Sako’s appointment, but suggested that he has given greater political support to the investigation and contributed to its forward momentum.³²⁴ While the former justice minister expressed general support for the investigation, Sako has on numerous occasions articulated this commitment publicly and with more specifics, such as regarding funding for the panel’s work, and also has been more open to interaction with local civil society activists.³²⁵ In addition, he has presided over several important reforms that had been stalled prior to the 2013 legislative elections, which have served to strengthen the justice system more generally.³²⁶

³²¹ Human Rights Watch separate interviews with justice official, Conakry, March 21, 2016; and government official, Conakry, March 21, 2016. Such sentiments could be related to backlash against the ICC by a vocal minority of other African leaders since the ICC issued its first arrest warrant for Sudanese President Omar al-Bashir for alleged crimes in Darfur. Claims that the ICC is “targeting Africa” have been a major feature of the backlash. At the same time, the backlash against the ICC did not emerge in our interviews with local interlocutors as a significant issue.

³²² Human Rights Watch separate interviews with justice practitioner, March 20, 2016; and justice official, March 21, 2016.

³²³ Human Rights Watch interview with justice practitioner, March 21, 2016.

³²⁴ Human Rights Watch separate interviews with ICC staff, November 24, 2015; UN staff, March 21, 2016; justice practitioner, March 22, 2016; and group interview with justice practitioners, March 22, 2016. See also “Guinea: 5 Years On, No Justice for Massacre,” Human Rights Watch news release, <https://www.hrw.org/news/2014/09/27/guinea-5-years-no-justice-massacre>.

³²⁵ Soon after Justice Minister Sako was appointed to his post in January 2014, he told the ICC “that the will of the government was there in every way to bring to fruition the case, and that everyone implicated in this punitive expedition would be heard by justice.” See, for example, “An ICC mission in Conakry on 28 September massacres: Claude PIVI and Thiegboro targeted?” (“Une mission de la CPI à Conakry sur les massacres du 28 septembre : Claude PIVI et Thiegboro visés ?”), *Guinée 58*, February 20, 2014, http://www.guinee58.com/index.php?option=com_content&view=article&id=7089:une-mission-de-la-cpi-a-conakry-sur-les-massacres-du-28-septembre-claude-pivi-et-thiegboro-vises-&catid=34:politique-guinee-conakry&Itemid=68 (accessed November 14, 2017). In June 2014, he expressly committed to the judges having the resources and support they need to complete the investigation. Ahmed Tounkara, “Justice: Minister Cheick Sackho says to be ‘surprised’ after general Sékouba Konaté’s declarations” (“Justice : Le ministre Cheick Sackho se dit ‘surpris’ des déclarations du Général Sékouba Konaté”), *Africaguinee.com*, June 20, 2014, <http://www.africaguinee.com/articles/2014/06/20/justice-le-ministre-cheick-sackho-se-dit-surpris-des-declarations-du-general> (accessed November 14, 2017).

³²⁶ Reforms include adoption of a law on judicial ethics and discipline, increased salaries for the judges, and new laws to update the criminal code. Human Rights Watch separate interviews with justice practitioner, March 20, 2016; civil society representative, March 20, 2016; civil society representative, Conakry, March 21, 2016; and group interview with justice practitioners, March 22, 2016. In March 2016, Justice Minister Sako suggested that the investigation could be expected to be completed during 2016, although this remains an independent judicial determination. See, for example, “Fight against

In addition, some international actors have suggested that President Condé has over time become increasingly more open to progress in the case.³²⁷ The case creates political risks for the president, as some of the suspects are part of ethnic constituencies on which he has depended for support. President Condé notably began his second term in December 2015 and cannot run for a third term under Guinea’s Constitution.³²⁸

Consistent with this trajectory, some Guinean justice practitioners told Human Rights Watch that, as of March 2016, they believed that political roadblocks to the investigation—such as inadequate resources and lack of responses to judicial requests to interview members of the security services—had been significantly reduced, and that the investigative judges largely benefitted from political will for the case to move ahead.³²⁹

2. *International and Domestic Pressure*

Steps forward in the September 28, 2009 investigation, and by extension, the fight against impunity more generally, cannot be explained solely by shifts in Guinea’s political landscape, however. Progress in ensuring investigations and prosecutions of security force members implicated in many other human rights crimes, notably for the 2013 and 2015 election-related violence, continues to remain out of reach.³³⁰

A range of international and domestic actors have repeatedly pushed for advances in the investigation. The efforts of civil society—including with victims through the *partie civile* action, the UN Office of the Special Representative of the Secretary-General for Sexual Violence in Conflict, and the ICC—stand out for their persistence and intensity. These actors have repeatedly and over a long period of time tracked progress and challenges in the investigation and insisted on justice for the September 28, 2009 crimes. They all have

impunity in Guinea: FIDH increases pressure on Alpha Condé’s regime” (“Lutte contre l’impunité en Guinée : FIDH accentue la pression sur le régime d’Alpha Condé”), Guinée 58, March 4, 2016, <http://www.guinees58.com/politique/9446-2016-03-04-14-20-51> (accessed November 14, 2017).

³²⁷ Human Rights Watch separate interviews with diplomat, March 22, 2016; and two UN staff, May 13, 2016.

³²⁸ See Constitution of 7 May 2010, Republic of Guinea (Constitution du 7 mai 2010, République de Guinée), 2010, <http://mjp.univ-perp.fr/constit/gn2010.htm> (accessed November 14, 2017), art. 27.

³²⁹ Human Rights Watch group interviews with justice practitioners, Conakry, March 21, 2016; and justice practitioners, March 22, 2016; separate interviews with justice practitioner, Conakry, March 23, 2016; and two justice practitioners, March 23, 2016.

³³⁰ Human Rights Watch separate interviews with civil society representative, Conakry, March 19, 2016; civil society representative, March 20, 2016; civil society representative, March 20, 2016; and two UN staff, May 13, 2016. See also “Guinea: Security Force Excesses, Crimes,” Human Rights Watch news release, July 30, 2015, <https://www.hrw.org/news/2015/07/30/guinea-security-force-excesses-crimes>.

kept justice on the political agenda by issuing press releases praising progress and denouncing problems, and raising the issue with Guinean officials. Local civil society groups also have held demonstrations and commemorative marches, in addition to participating in the *partie civile* action with the International Federation for Human Rights (FIDH).

These interlocutors often have also reinforced each other's efforts to focus attention on the need for continued progress and for certain specific challenges to be addressed, such as security and material support for the judges and the appointment of an international expert to support the investigative panel. Their efforts are explored in detail in Part E, with a particular focus on the relationship between the OTP and these other actors.

E. The Role of the OTP

The OTP has pursued a robust program of activity to promote accountability for the September 28, 2009 crimes in Guinea that includes: a strategy of active encouragement and scrutiny of domestic investigative steps; use of regular visits as a key tactic to advance the ICC's overall strategy; deploying benchmarks to assess progress in national proceedings; and leveraging strategic alliances with international and domestic players.

1. Strategy

From the beginning, reflecting the OTP's earlier approach to positive complementarity, the OTP deployed a strategy of genuine encouragement—accompanied by pressure on government officials for progress—to promote investigation and prosecution of the September 28 crimes before domestic courts.³³¹

The approach was characterized by close monitoring of specific progress and hands-on, active engagement with Guinean authorities, bolstered by specific and public reminders that an ICC investigation would go ahead in the absence of justice at the local level. As discussed below, visits have been the primary, although not the exclusive, way in which

³³¹ Human Rights Watch interview with ICC staff, November 24, 2015. See also OTP, "Report on Preliminary Examination Activities 2014," December 2, 2014, <http://www.legal-tools.org/doc/3594b3/> (accessed November 14, 2017), paras. 163-164, 167, 170; OTP, "Report on Preliminary Examination Activities 2012," <https://www.legal-tools.org/en/doc/ob1cfc/>, paras. 156, 160-161, 163; OTP, "Report on Preliminary Examination Activities 2013" ("Rapport sur les activités menées en 2013 par le Bureau du Procureur en matière d'examen préliminaire"), <http://www.legal-tools.org/doc/dbf75e/>, para. 200; OTP, "Report on Preliminary Examination Activities 2015," <http://www.legal-tools.org/doc/acoed2/>, paras. 181, 183, 185-186.

this strategy has been implemented. There has also been a ratcheting up of pressure and scrutiny when progress is less robust.

Guinean government officials, civil society activists, and international observers have all pointed to the ICC as being a positive factor in ensuring progress in the investigation and being pivotal in keeping accountability for the September 28, 2009 crimes on the agenda more generally.³³² Some of those interviewed also highlighted that the ICC can bring to bear a unique form of pressure because it could potentially open an investigation on the basis of inadequate progress in domestic accountability efforts.³³³

OTP staff suggested that this approach was facilitated in Guinea by a couple of factors. First, the government was quite open to interaction and cooperation with the ICC, which made the approach possible.³³⁴ Second, the OTP was able to become more deeply focused on developments in the Guinea investigation as the crimes under consideration were limited to one incident and related developments over a few days.³³⁵ OTP staff suggested it is more manageable to closely follow developments involving a small set of incidents and one investigation than situations involving many incidents and multiple investigations.³³⁶

This approach included regular exchange with local officials and other domestic and international players with the aim of increasing the likelihood of positive progress in the investigation.

The approach has been controversial at times within Guinea. Local activists were initially concerned that the Guinean justice system would never deliver justice for the crimes and pressed for the ICC to open an investigation.³³⁷ Some activists and journalists continue to

³³² Human Rights Watch separate interviews with two legal practitioners, Conakry, June 19 and June 20, 2012; justice ministry official, June 20, 2012; government official and international expert, June 22, 2012; group interview with UN officials, Conakry, June 22, 2012; and telephone interview with diplomat, Brussels, July 23, 2012.

³³³ Human Rights Watch separate interviews with civil society representative, March 19, 2016; civil society representative, March 20, 2016; and two UN staff, May 13, 2016.

³³⁴ Human Rights Watch interview with ICC staff, June 24, 2016.

³³⁵ *Ibid.*; Human Rights Watch interview with ICC staff, November 24, 2015.

³³⁶ *Ibid.*

³³⁷ Human Rights Watch interviews with multiple civil society representatives, Conakry, June 2012. See, for example, “One year after the Conakry stadium massacre, victims still demand justice” (“Un an après la tuerie du stade de Conakry, les victimes réclament toujours justice”), *France 24*, September 28, 2010, <http://www.france24.com/fr/20100928-un-an-apres-massacre-28-septembre-stade-conakry-guinee-victimes-reclament-toujours-justice> (accessed November 14, 2017); FIDH-

express skepticism that trials will take place in Guinea, and, as discussed below, have faulted the OTP's approach as legitimizing government inaction on justice.³³⁸

2. Visits

A highly significant element to the ICC's approach of close monitoring, combined with active encouragement and pressure as needed, appears to have been regular visits to the country focused on assessing progress in the investigation and encouraging advances.

The OTP completed its first visit to Guinea in February 2010, during which then-Deputy Prosecutor Bensouda stated, "This visit has left me certain that crimes constituting crimes against humanity were committed" and that those responsible should face justice.³³⁹ As of March 2017, the OTP had made 14 separate visits to Guinea.³⁴⁰ OTP staff had met with President Condé on a small number of times.³⁴¹ The OTP visits reflect the bulk of its engagement on Guinea. Email is not commonly used, although phone calls may take place from time to time.³⁴²

Visits can serve multiple purposes that are not otherwise easily achieved. They allow the ICC to obtain a detailed picture of progress or stagnation by giving OTP officials the chance

ODGH, "Guinea: The time of justice?," https://www.fidh.org/IMG/pdf/guinee_rapport_le_temps_de_la_justice.pdf, p. 10; "Remember that Int'l. Criminal Court Investigation of the State-Sponsored Massacre on Sept. 28, 2009? So Far, No Action," post to "Guinea Oye" (blog), May 11, 2011, <https://guineaoye.wordpress.com/2011/05/11/remember-that-intl-criminal-court-investigation-of-the-state-sponsored-massacre-on-sept-28-2009-so-far-no-action/> (accessed November 14, 2017).

³³⁸ Human Rights Watch separate group interviews with civil society representatives, Conakry, March 20, 2016; and journalists, Conakry, March 20, 2016.

³³⁹ "Fatou Bensouda: Guinea, the International Criminal Court and the entire international community will work together to deliver justice to the victims in Guinea," OTP statement, February 19, 2010, <http://www.icc-cpi.int/NR/rdonlyres/25184FEE-1BCF-48EF-B358-B7F9D3F5FCA9/281566/FatousstatementGuinesENG1.pdf> (accessed July 17, 2012). See also OTP, "Report on Preliminary Examination activities 2011," <https://www.legal-tools.org/en/doc/4aad1d/>, paras. 107, 113, 116.

³⁴⁰ Assembly of States Parties (ASP), "Report on the activities of the International Criminal Court," ICC-ASP/15/16, November 9, 2016, <http://www.legal-tools.org/doc/144ca9/> (accessed November 14, 2017), p. 4; "Guinea: an ICC Delegation is Visiting Conakry" ("Guinée: une délégation de la Cour pénale internationale en visite à Conakry)," *RFI Afrique*, March 31, 2017, <http://www.rfi.fr/afrique/20170330-visite-experts-cour-penale-cpi-conakry-massace-28-septembre> (accessed November 14, 2017); Human Rights Watch interview with ICC staff, November 24, 2015. See OTP, "Report on Preliminary Examination Activities 2015," <http://www.legal-tools.org/doc/acoed2/>, paras. 181-182; Diallo Boubacar, "An ICC delegation in Conakry: Why did the envoys of Fatou Bensouda 'ignore' victims?" ("Une délégation de la CPI à Conakry : Pourquoi les émissaires de Fatou Bensouda ont 'ignoré' les victimes?"), *Africaguinee.com*, February 12, 2016, <http://www.africaguinee.com/articles/2016/02/12/une-delegation-de-la-cpi-conakry-pourquoi-les-emissaires-de-fatou-bensouda-ont> (accessed November 14, 2017).

³⁴¹ Human Rights Watch interview with ICC staff, November 24, 2015.

³⁴² *Ibid.*

to meet with different interlocutors, including justice practitioners; Guinean government officials; representatives of the UN, the European Union and other international partners; civil society; and journalists. This allows the OTP to have multiple sources of information with which to evaluate investigative steps that have been taken or not—such as completing the process of interviewing all victims—and the pace of activities.

While difficult to prove, the relationship between the ICC’s regular visits and concrete progress in the investigation was noted by several interlocutors, including the OTP. In addition to the appointment of the panel of judges for the investigation ahead of the ICC’s first visit, a team of gendarmes assigned to provide the judges’ security first appeared at the judges’ office one week before one of the ICC’s visits in late October 2011, and the Justice Ministry sought to establish a more comprehensive budget for the panel of judges directly after another ICC visit in April 2012.³⁴³ Former self-proclaimed President Capt. Moussa Dadis Camara also was questioned and charged within a few weeks of an ICC visit in 2015, although government and international interlocutors were clear that this was coincidental, and plans were underway for the questioning for some time. Even without direct impact to new investigative steps, visits appear to have helped keep up a momentum of progress.³⁴⁴ New charges have notably been brought at the rate of about two individuals a year, as the ICC has continued to visit around twice a year.³⁴⁵ More generally, progress has continued and over time became more robust, such as through interviewing witnesses from the security services.

One justice practitioner close to the investigation noted that when the ICC is set for a visit, the pace of activity increases significantly in what is otherwise a very slow-moving process.³⁴⁶ According to this practitioner, the judges seemed quicker to work longer hours and increase contact with the *partie civile* participants.³⁴⁷

³⁴³ Human Rights Watch interview with international expert, June 22, 2012; and separate telephone interviews with ICC staff, The Hague, November 7, 2011; and diplomat, May 6, 2016.

³⁴⁴ Human Rights Watch group interview with civil society representatives, March 20, 2016; and interview with civil society representative, Conakry, March 21, 2016.

³⁴⁵ Human Rights Watch group interview with civil society representatives, March 20, 2016.

³⁴⁶ Human Rights Watch interview with justice practitioner, March 22, 2016

³⁴⁷ Ibid.

One Guinean justice official noted that the simple fact that the ICC visits “boosts the political will [of the government] somewhat,” and this contributes to forward momentum in the investigation.³⁴⁸ This was echoed by other sources.³⁴⁹ Other interlocutors suggested that the visits increased the confidence of the judges and encouraged them to move ahead by creating a sense that they are not “going it alone” on such a sensitive case.³⁵⁰

The visits allow OTP officials to conduct direct advocacy with government officials to increase their support for the investigation, including by leveraging details on the state of progress from discussions with justice practitioners, the international expert supporting the investigation, UN staff, and civil society.³⁵¹ As one justice practitioner put it: “The ICC is useful because they talk to everyone when they come. This helps to unblock [problems].”³⁵²

Visits were the most readily identified action by the ICC among all interlocutors Human Rights Watch interviewed.

3. Media Engagement During Visits

The ICC’s use of media—both national and international—has effectively shined a regular public spotlight on the investigation—including progress that can be reinforced, and inadequate support, which needs to be addressed.³⁵³

During visits to Conakry, the ICC nearly always interacts with international and Guinean media to publicize its findings as to progress in the investigation, the parameters of the ICC’s role, and the importance of justice. Engagement with media has often taken place in

³⁴⁸ Human Rights Watch interview with justice official, March 21, 2016.

³⁴⁹ Human Rights Watch separate interviews with justice ministry official, June 20, 2012; legal practitioner, June 20, 2012; and government official, June 22, 2012.

³⁵⁰ Human Rights Watch interview with civil society representative, March 21, 2016; and group interview with justice practitioners, March 22, 2016.

³⁵¹ Human Rights Watch interview with ICC staff, November 24, 2015.

³⁵² Human Rights Watch group interview with justice practitioners, March 22, 2016.

³⁵³ Human Rights Watch interview with ICC staff, November 24, 2015. See also OTP, “Report on Preliminary Examination Activities 2015,” <http://www.legal-tools.org/doc/acoed2/>, para. 182.

press conferences organized by OTP officials at the end of their visits to the country.³⁵⁴ On a couple of occasions, the ICC has also held press conferences with Guinean officials.³⁵⁵

The ICC's visits generated strong media coverage,³⁵⁶ which appears to have helped to keep the issue of the accountability for the September 2009 massacre and rapes on the domestic agenda.

During the press events, the OTP has made specific assessments of progress or that greater progress is needed. In July 2015, Prosecutor Bensouda said during a visit to Guinea: "It is important to recognise the support provided by the Guinean authorities and in particular the Minister of Justice to the investigative judges in their work. The judges have received extra resources to execute their mandate in full independence, despite significant challenges such as the Ebola crisis which the country has been facing."³⁵⁷ This can be contrasted with statements by OTP official Amady Ba at the end of the visit in 2010: "We have noted with great satisfaction that justice is at the heart of the priorities of the new government.... It would be advisable, however, to redouble efforts so that this process comes to a close."³⁵⁸

OTP officials have also used visits to maintain public attention to the possibility of the ICC to intervene. For example, Bensouda stated in 2012: "If those most responsible are not

³⁵⁴ Human Rights Watch interview with ICC staff, November 24, 2015; and group interview with journalists, March 20, 2016.

³⁵⁵ See "Statement to the press by Ms Fatou Bensouda, Deputy Prosecutor," OTP statement, November 10, 2010, <https://www.icc-cpi.int/NR/rdonlyres/CA25A385-5AED-4B24-A001-69D3D188B291/282901/FatouGuineaENG.pdf> (accessed November 14, 2017); "Statement to the press by Mrs. Fatou Bensouda, Prosecutor of the International Criminal Court," OTP statement, July 4, 2015, <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-150704> (accessed November 14, 2017).

³⁵⁶ Local media also covered other ICC interventions on Guinea, such as press statements issued from The Hague, although journalists suggested such coverage was much less extensive than for visits. Journalists also indicated that they do not follow the ICC's coverage of Guinea in its annual preliminary examination reports. Human Rights Watch group interview with journalists, March 20, 2016.

³⁵⁷ "Statement to the press by Mrs. Fatou Bensouda, Prosecutor of the International Criminal Court," OTP statement, July 4, 2015, <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-150704>.

³⁵⁸ Human Rights Watch, *Waiting for Justice*, p. 48; "The ICC on 28 September events: 'If no tangible result is achieved, the Office of the Prosecutor will assume its responsibilities'" ("La CPI se prononçant sur les événements du 28 septembre : 'si nul résultat tangible n'est atteint, le Bureau du Procureur prendra ses responsabilités'"), *Le Jour.info*, April 2, 2011, http://www.lejour.info/index.php?option=com_content&view=article&id=2176:la-cpi-se-prononcant-sur-les-evenements-du-28-septembre-qi-nul-resultat-tangible-nest-atteint-le-bureau-du-procureur-prendra-ses-responsabilitesq-&catid=3:societe&Itemid=4 (accessed November 14, 2017) (informal translation by Human Rights Watch). See also "Declaration to Guinean press" ("Déclaration à la presse Guinéenne"), OTP statement, May 24, 2010, <https://www.icc-cpi.int/NR/rdonlyres/D7EBCAC7-BEA2-4E20-8603-B4BA0B3B62DB/281955/Guinea3.pdf> (accessed November 14, 2017).

prosecuted by the Guinean authorities, the ICC will prosecute them. As I have said previously, it is either one or the other; there is no third option.”³⁵⁹

In addition, in one instance OTP officials secured commitments from government officials that they then made public to media. During the April 2012 visit, Bensouda said: “The authorities have assured me that the judges will have all the resources they need and that they will continue to work in complete independence.”³⁶⁰

It is impossible to assess the specific impact of securing public commitments by government officials as opposed to securing such commitments only privately; at the same time, this approach seems to have the potential to foster greater pressure on the government to honor its commitments.

4. Benchmarking

One of the ways in which the ICC has operationalized its close monitoring is by identifying an informal list of benchmarks for progress in the investigation. Such an approach allows for interaction related to the investigation that is more specific, and for the ICC to become more active in its efforts to foster progress.

According to the OTP, these benchmarks were developed through consultation and exchange with Guinean officials and justice practitioners, and the OTP regularly discussed the benchmarks with Guinean officials during its visits.³⁶¹ Some of the benchmarks for progress that OTP staff identified included the judges conducting a site visit to the stadium, interviewing witnesses in the security services, and questioning the former

³⁵⁹ “Press statement by Ms Fatou Bensouda, Deputy Prosecutor of the International Criminal Court,” OTP statement, April 5, 2012, <https://www.icc-cpi.int/NR/rdonlyres/8BEEEB8C-D22E-48F6-AFB9-E4B72B92E3CF/o/StatementFatouBensoudaConakry050412Eng.pdf> (accessed November 14, 2017). See also “Fatou Bensouda: Guinea, the International Criminal Court and the entire international community will work together to deliver justice to the victims in Guinea,” OTP statement, February 19, 2010, <http://www.icc-cpi.int/NR/rdonlyres/25184FEE-1BCF-48EF-B358-B7F9D3F5FCA9/281566/FatousstatementGuinesENG1.pdf> (accessed July 17, 2012).

³⁶⁰ Human Rights Watch telephone interview with ICC staff, July 16, 2012; “Press statement by Ms Fatou Bensouda, Deputy Prosecutor of the International Criminal Court,” OTP statement, April 5, 2012, <https://www.icc-cpi.int/NR/rdonlyres/8BEEEB8C-D22E-48F6-AFB9-E4B72B92E3CF/o/StatementFatouBensoudaConakry050412Eng.pdf> (accessed November 14, 2017) See also “Guinea : The ICC demands ‘a rapid conclusion’ of the 2009 massacre case” (“Guinée : La CPI exige un ‘dénouement rapide’ du dossier du massacre de 2009”), *Jeune Afrique*, April 5, 2012, <http://www.jeuneafrique.com/actu/20120405T194207Z20120405T194206Z/> (accessed November 14, 2017).

³⁶¹ Human Rights Watch interview with ICC staff, June 24, 2016.

president.³⁶² During the second slowdown in work in late 2013, the OTP increased its attention and interaction with officials and the panel of judges on progress in specific steps that were needed to advance the investigation.³⁶³

As the OTP noted, the limited scope of the crimes under examination by the ICC in Guinea may lend itself more easily to positive encouragement from the ICC than situations where many crimes are at issue.³⁶⁴ As the situation in Guinea involves crimes committed around one major incident, the specific important investigative steps are easier to identify and track.

5. Strategic Alliances

The experience in Guinea underscores that OTP efforts to promote accountability for serious crimes before national courts have and will continue to benefit from strategic alliances with domestic and international players, whose efforts can be mutually reinforcing. At the same time, there is unlikely to be a “one-size-fits-all” approach as to which players are most relevant and valuable.

Government Partners

Guinea’s key international diplomatic partners—the European Union, France, and the United States in particular—have the potential to be important allies in the push for domestic accountability. They have representation in country and thus are well placed to regularly raise the importance of domestic accountability with government officials.

The OTP has sought to maximize the role of Guinea’s diplomatic partners by meeting with donors nearly every time they visit.³⁶⁵ The ICC often pursues such contact through group meetings with diplomats, often organized by the EU.³⁶⁶ OTP officials have also reached out to diplomats in capitals and The Hague to brief them on developments in the investigation and to press them to more consistently push for progress in the investigation.³⁶⁷

³⁶² Such efforts may have been reinforced by the fact that civil society organizations such as Human Rights Watch employed a benchmarking approach as well, as discussed in section C.

³⁶³ Human Rights Watch interview with ICC staff, November 24, 2015.

³⁶⁴ Human Rights Watch separate interviews with ICC staff, November 24, 2015; and June 24, 2016.

³⁶⁵ Human Rights Watch interview with ICC staff, November 24, 2015.

³⁶⁶ Human Rights Watch separate interviews with ICC staff, November 24, 2015; and two Western diplomats, March 22, 2016.

³⁶⁷ Human Rights Watch interview with ICC staff, November 24, 2015.

Despite such outreach, discussions with diplomats in Conakry in 2012 suggested that international government and intergovernmental partners did not prioritize progress in the September 28 investigation with the Guinean government at that time. While they did sometimes raise the issue in bilateral discussions with Guinean officials,³⁶⁸ the diplomatic community prioritized both private and public advocacy around elections, both parliamentary and presidential, and consequently issued few public statements to highlight the need for greater progress.³⁶⁹

One diplomat suggested that US representatives in Conakry were not prepared to take the issue up with the government in a more robust way until such time that they had more confidence the government in Guinea was serious about accountability.³⁷⁰ With the appointment of Minister Sako, US representatives in Conakry have followed progress in the investigation and possible US support to the investigation more closely.³⁷¹

The EU has offered an unparalleled contribution to help promote progress through financial support to the *partie civile* action.³⁷² As discussed below, the action has allowed for civil society to scrutinize and spur progress in the investigation through judicial activity.

³⁶⁸ See Human Rights Watch, *Waiting for Justice*, pp. 46, 53-55.

³⁶⁹ Human Rights Watch separate interviews with diplomats, Conakry, June 2012; and ICC staff, November 24, 2015. See also Human Rights Watch, *Waiting for Justice*, pp. 53-55. Diplomatic partners issued public statements around the anniversaries of the massacre inconsistently, if at all. See "Anniversary of Guinea Stadium Massacre," US State Department press release, September 29, 2016, <https://2009-2017.state.gov/r/pa/prs/ps/2016/09/262564.htm> (accessed November 15, 2017); "Fifth Anniversary of Massacre at Pro-Democracy Rally in Guinea," US State Department press release, September 28, 2014, <https://2009-2017.state.gov/r/pa/prs/ps/2014/09/232235.htm> (accessed November 15, 2017); "Anniversary of the 2009 Massacre at a Pro-Democracy Rally in Guinea," US State Department press release, September 28, 2012, <https://2009-2017.state.gov/r/pa/prs/ps/2012/09/198460.htm> (accessed November 15, 2017).

³⁷⁰ Human Rights Watch telephone interview with diplomat, Washington, DC, June 2012.

³⁷¹ Human Rights Watch separate interviews with two diplomats, Conakry, March 22, 2016. In April, US Under Secretary for Civilian Security, Democracy, and Human Rights traveled to Guinea with UN Special Representative on Sexual Violence in Armed Conflict, where they both raised the importance of progress in the September 28, 2009 investigation. US Department of State, "LiveAtState on Threats to Civilian Security in Africa with Under Secretary of State for Civilian Security, Democracy, and Human Rights Sarah Sewall," May 5, 2016, <https://ng.usembassy.gov/liveatstate-threats-civilian-security-africa-secretary-state-civilian-security-democracy-human-rights-sarah-sewall-m/> (accessed November 15, 2017); Embassy of the United States, "Under Secretary Dr. Sarah Sewall Visits Guinea," April 17, 2016, <https://gn.usembassy.gov/dr-sarah-sewall-visits-guinea/> (accessed November 15, 2017).

³⁷² See "Guinea: Country Strategy Paper and National Indicative Programme for the period 2008-2013" ("Guinée: Union européenne: Document de stratégie pays et Programme indicatif national pour la période 2008-2013"), European Commission, December 21, 2012, http://ec.europa.eu/europeaid/sites/devco/files/country-strategy-paper-mip-guinea-2012_fr.pdf (accessed November 15, 2017), p. 13, footnote 16.

United Nations

Three key UN entities have been involved in accountability efforts for the 2009 crimes: the Office of the Special Representative on Sexual Violence in Conflict and the Team of Experts for Rule of Law/Sexual Violence in Conflict (“Team of Experts”) within that office, the UN Peacebuilding Commission, and the Office of the High Commissioner for Human Rights, which maintains an office in Conakry.

These UN agencies and other UN bodies have the potential to serve as important allies in pressing for accountability for grave crimes before domestic courts, especially those that have representation in country. The OTP has been in regular contact with UN agencies engaged in Guinea, and the work of UN entities and the ICC has been mutually reinforcing.

The special representative and the Team of Experts within the Office of the Special Representative on Sexual Violence in Conflict have played the most significant role among UN entities in pushing for justice for the September 2009 crimes.

The special representative has issued public statements that repeatedly stress the importance of accountability for the September 28 crimes, visited the country multiple times, and facilitated an international expert to support the investigation through the Team of Experts.³⁷³ While the government of Guinea initially agreed to the deployment of an expert, then-Justice Minister Christian Sow later declined for Guinea to avail itself of the

³⁷³ Human Rights Watch email correspondence with UN staff, August 10, 2017. See also Joint statement from the government of Guinea and United Nations on the fight against sexual violence (Communiqué conjoint du Gouvernement de Guinée et l’Organisation des Nations Unies (ONU) sur la lutte contre les violences sexuelles), November 22, 2011, on file with Human Rights Watch; Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict, “Team of experts: Rule of Law and Sexual Violence in Conflict 2016 Annual Report,”

<http://www.stoprabenow.org/uploads/advocacyresources/1493911578.pdf>; “Perpetrators of mass rapes in Guinea must be brought to justice, stresses UN Official,” *UN News Centre*, September 28, 2012, <http://www.un.org/apps/news/story.asp?NewsID=43120&Cr=sexual+violence&Cr1=#.UGaaYnthico> (accessed November 15, 2017); UN Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict, Statement by Special Representative of the Secretary-General on Sexual Violence in Conflict Margot Wallström, “Guinea-Conakry: Political Rape Unpunished Two Years On,” September 28, 2011, http://www.stoprabenow.org/uploads/files/statement_srs_g_wallstrom_guinea_conakry_5.pdf (accessed November 15, 2017); “Atrocities in Guinea must never be forgotten, says UN envoy on sexual violence,” *UN News Center*, November 22, 2011, <http://www.un.org/apps/news/story.asp?NewsID=40484#.Vyd663r3arU> (accessed November 15, 2017); “Six years on, UN Special Representative urges continued efforts to end impunity for sexual violence crimes committed on 28 September 2009 in Guinea,” Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict press release, September 28, 2015, <http://www.un.org/sexualviolenceinconflict/press-release/six-years-on-un-special-representative-urges-continued-efforts-to-end-impunity-for-conflict-related-sexual-violence-crimes-in-guinea/> (accessed November 15, 2017).

expert, welcoming instead only logistical support.³⁷⁴ The Team of Experts had in-depth consultations with the government, including to revise the terms of reference, and the OTP also reached out to government officials, including President Condé, to promote acceptance of the expert.³⁷⁵

The expert, who has been deployed since December 2012, has been able to share expertise with the panel of judges, and offer moral and technical support as the judges continue precedent setting and sensitive work in Guinea.³⁷⁶ In addition, the expert works on a daily basis with the panel of judges, and has been based in Conakry for months at a time.³⁷⁷ The expert is mandated to assist the investigation through technical assistance, while the OTP ultimately has a more monitoring and assessment role.³⁷⁸

The expert has also worked to galvanize greater international attention and financial support for the investigation, and to liaise with victims' associations and government officials in Guinea.³⁷⁹ In addition, the Team of Experts has taken strategic measures to draw positive attention to progress in the investigation. For example, in 2013 the team hosted a visit by the Guinean justice minister to New York to discuss advances in

³⁷⁴ Human Rights Watch, *Waiting for Justice*, p. 51.

³⁷⁵ Human Rights Watch interview with ICC staff, November 24, 2015; email correspondence with ICC staff, September 13, 2016; and email correspondence with UN staff, August 10, 2017.

³⁷⁶ Group civil society meeting with minister of justice, panel of investigative judges, international expert, and OHCHR chief of Guinea field office, New York, March 14, 2016; Human Rights Watch group interview with justice practitioners, March 22, 2016; interview with two UN staff, May 13, 2016; and email correspondence with UN staff, August 10, 2017.

³⁷⁷ Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict, "Team of experts: Rule of Law and Sexual Violence in Conflict Annual Report 2013," <http://www.undp.org/content/undp/en/home/librarypage/crisis-prevention-and-recovery/un-team-of-experts--rule-of-law-and-sexual-violence-in-conflict-.html>, pp. 26-27. Human Rights Watch interview with two UN staff, May 13, 2016. See also Office of the Special Representative of the Secretary General on Sexual Violence in Conflict, "Team of Experts: Rule of Law/Sexual Violence in Conflicts Annual Report 2012," 2012, www.stoprapenow.org/uploads/advocacyresources/1372365509.pdf (accessed November 15, 2017), pp. 33-34.

³⁷⁸ Group civil society meeting with minister of justice, panel of investigative judges, international expert, and the OHCHR chief of Guinea field office, March 14, 2016; Human Rights Watch interview with two UN staff, May 13, 2016; and email correspondence with UN staff, August 10, 2017. See also Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict, "Team of experts: Rule of Law and Sexual Violence in Conflict Annual Report 2013," <http://www.undp.org/content/undp/en/home/librarypage/crisis-prevention-and-recovery/un-team-of-experts--rule-of-law-and-sexual-violence-in-conflict-.html>, p. 27.

³⁷⁹ For example, the expert has met with states in New York, including during the ICC's Assembly of States Parties 13th session. See, for example, "Sexual and Gender-Based Crimes in Conflict Must End," Remarks of SRSG Zainab Hawa Bangura, Hosted by Prosecutor Fatou Bensouda, December 7, 2014, https://www.icc-cpi.int/iccdocs/otp/ICC_SGBC_SRSG_ZHB_Remarks.pdf (accessed November 15, 2017), pp.3-4. Human Rights Watch group interview with justice practitioners, March 22, 2016; and separate interviews with ICC staff, November 24, 2015; and two UN staff, May 13, 2016.

accountability efforts in Guinea. The Team of Experts hosted a second delegation to New York and Washington, DC, in March 2016 that included the panel of judges in addition to the justice minister.³⁸⁰ The Team of Experts has also provided equipment to the panel; fostered information exchange on forensics and victim support with the governments of Colombia and Democratic Republic of Congo; and is offering assistance in judicial cooperation with neighboring states related to extradition and hearings convened with suspects outside the country.³⁸¹

The OTP maintains regular contact with the international expert and the Team of Experts, which allows all these actors to share information about progress and challenges in the investigation and develop strategies for overcoming the obstacles to progress in the investigation.³⁸²

The UN Peacebuilding Commission (PBC), which has supported programs in Guinea since 2011, has also played a helpful role in pushing for progress on the 2009 investigation.³⁸³ The investigation of the September 2009 crimes is regularly mentioned in PBC reports, and the PBC chair has regularly pushed for progress on and greater resources for the panel of judges investigating the September 2009 crimes.³⁸⁴

³⁸⁰ Human Rights Watch attended events with the delegations during both of these visits.

³⁸¹ See Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict, “Team of experts: Rule of Law and Sexual Violence in Conflict 2016 Annual Report,”

<http://www.stoprapenow.org/uploads/advocacyresources/1493911578.pdf>; Office of the Special Representative of the Secretary General on Sexual Violence in Conflict, “Team of Experts: Rule of law/Sexual Violence in Conflicts: Annual Report 2012”, 2012, www.stoprapenow.org/uploads/advocacyresources/1372365509.pdf, p. 34.

³⁸² Human Rights Watch separate interviews with ICC staff, November 24, 2015; and UN staff, May 13, 2016.

³⁸³ Human Rights Watch separate interviews with ICC staff, November 24, 2015; and civil society representative, March 20, 2016. See for example UN Peacebuilding Commission, “Conclusions and recommendations of the second review of the statement of mutual commitments on peacebuilding in Guinea between the Government of Guinea and the Peacebuilding Commission,” PBC/8/GUI/2, November 12, 2014, http://www.un.org/ga/search/view_doc.asp?symbol=PBC/8/GUI/2 (accessed November 15, 2017).

³⁸⁴ See UN Peacebuilding Commission, “Initial Mission by the Chairperson of the Guinea Configuration of the Peacebuilding Commission to the Republic of Guinea,” April 3-10, 2011,

http://www.un.org/en/peacebuilding/cscs/gui/pbc_visits/report_guinea_unofficial_en_trans.pdf (accessed November 15, 2017); UN Peacebuilding Commission, “Report of the mission to Guinea,” March 11-15, 2012,

[http://www.un.org/en/peacebuilding/cscs/gui/pbc_visits/PBC-GUI%20Visit%20March%202012%20-%20Report%20\(EN%20version\).pdf](http://www.un.org/en/peacebuilding/cscs/gui/pbc_visits/PBC-GUI%20Visit%20March%202012%20-%20Report%20(EN%20version).pdf) (accessed November 15, 2017); UN Peacebuilding Commission, “Conclusions and recommendations of the second review of the statement of mutual commitments on peacebuilding in Guinea between the Government of Guinea and the Peacebuilding Commission,” PBC/8/GUI/2, November 12, 2014, http://www.un.org/ga/search/view_doc.asp?symbol=PBC/8/GUI/2, para. 2; UN Peacebuilding Commission, “Report of the first review of the Statement of Mutual Commitments between the Government of Guinea and the Peacebuilding Commission (September 2011 to March 2012),” PBC/6/GUI/3, June 19, 2012,

This appears to be due—at least in part—to the particular dedication of individual diplomats involved in the work, such as the chair of the Guinea configuration, the Luxembourg ambassador.³⁸⁵ Luxembourg’s status as an ICC state party also has helped ensure more sustained attention by the PBC to the need for accountability in Guinea.³⁸⁶ The OTP has been in regular contact with the PBC’s Guinea configuration. This has allowed for information exchange on progress in the investigation, the two entities to draw off the others’ experience in pressing for justice for the September 28, 2009 crimes, and to promote the continued attention of the PBC on the issue of accountability.³⁸⁷

The Office of the United Nations High Commissioner for Human Rights (OHCHR) has identified combating impunity in Guinea as a priority and has a field presence in Guinea that came about in response to the September 28 crimes; specifically, the international commission of inquiry on Guinea recommended that the OHCHR have a significant presence in monitoring the situation in Guinea to deter further violations.³⁸⁸

The OHCHR has contributed to supporting progress in the September 28, 2009 investigation by providing the panel with equipment and other material support in its early years, and hosting in their office the international expert provided by the Team of Experts within the Office of the Special Representative of the Secretary-General for Sexual Violence in Conflict.³⁸⁹

http://www.un.org/ga/search/view_doc.asp?symbol=PBC/6/GUI/3 (accessed November 15, 2017), paras. 66-67. See also UN Peacebuilding Commission, “Report of the second review of the Statement of Mutual Commitments between the Government of Guinea and the Peacebuilding Commission,” PBC/8/GUI/1, August 12, 2014, http://www.un.org/ga/search/view_doc.asp?symbol=PBC/8/GUI/1 (accessed November 15, 2017), paras. 10, 31; UN Peacebuilding Commission, “Conclusions and recommendations of the first review of the Statement of Mutual Commitments between the Government of Guinea and the Peacebuilding Commission,” PBC/6/GUI/2, June 8, 2012, http://www.un.org/ga/search/view_doc.asp?symbol=PBC/6/GUI/2 (accessed November 15, 2017), paras. 6, 16-17, 25; UN Peacebuilding Commission, “Statement of mutual commitments on peacebuilding in Guinea between the Government of Guinea and the Peacebuilding Commission,” PBC/5/GUI/2, September 23, 2011, http://www.un.org/ga/search/view_doc.asp?symbol=PBC/5/GUI/2 (accessed November 15, 2017), paras. 13, 17, 41-42.

³⁸⁵ Human Rights Watch telephone interview with diplomat, May 6, 2016.

³⁸⁶ *Ibid.*

³⁸⁷ *Ibid.*; Human Rights Watch interview with ICC staff, November 24, 2015.

³⁸⁸ OHCHR, “Report of the High Commissioner for Human Rights on the situation of human rights in Guinea,” A/HRC/16/26, February 25, 2011, http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A.HRC.16.26_en.pdf (accessed November 15, 2017), para. 54; “OHCHR and Guinea sign agreement for presence,” OHCHR news release, May 5, 2010, <http://www.ohchr.org/EN/NewsEvents/Pages/MOUOHCHRGuinea.aspx> (accessed November 15, 2017). Human Rights Watch interview with two UN staff, March 21, 2016.

³⁸⁹ Human Rights Watch interview with ICC staff, November 24, 2015; and email correspondence with UN staff, August 10, 2017. See also Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict, “Team of experts:

At the same time, the office has prioritized private diplomacy with the government on accountability for serious crimes over public pressure.³⁹⁰ As with the OTP's engagement with media, as discussed above, we believe that the UN offering public scrutiny of gaps in Guinean government support to the investigation could have been useful in resolving challenges or increasing the political cost for the government to continue this approach; local activists have also raised concern about the OHCHR's lack of focus on public pressure to advance accountability in Guinea.³⁹¹

Guinean and International Nongovernmental Organizations and Victims' Associations

Guinean and international nongovernmental organizations (NGOs), including victims' associations, have been active in promoting progress in investigation of the September 28 massacre, rapes, and other abuses, and are important allies for the ICC.

The *partie civile* action launched by FIDH, victims' associations, and their lawyers has facilitated the inclusion of extensive information by victims and their families in the investigation dossier and allowed victims to make the investigative judges more accountable on the investigation's progress through close scrutiny of action undertaken in the investigation.³⁹² Victims are also able to request that specific investigative steps be undertaken in the investigation, such as for the judges to interview particular witnesses.³⁹³

The OTP is in regular contact with victims' associations that are participating in the *partie civile* action and their lawyers.³⁹⁴ By talking with these players, the OTP can obtain more information about steps that have been taken or not in the investigation, and their

Rule of Law and Sexual Violence in Conflict Annual Report 2013," <http://www.undp.org/content/undp/en/home/librarypage/crisis-prevention-and-recovery/un-team-of-experts--rule-of-law-and-sexual-violence-in-conflict-.html>, p. 27.

³⁹⁰ Human Rights Watch, *Waiting for Justice*, pp. 52-43.

³⁹¹ See *ibid.*, pp. 52-53. Civil society activists have regularly raised this concern in informal discussions when Human Rights Watch staff are in the country for research, on average once a year since 2012.

³⁹² Participants in the *partie civile* have access to the dossier of the investigation. FIDH, "Victims' Rights Before the International Criminal Court: A Guide for Victims, their Legal Representatives and NGOs," http://www.fidh.org/IMG/pdf/4-CH-I_Background.pdf, pp. 10-11; see also FIDH-OGDH, Commemoration Note, http://www.fidh.org/IMG/pdf/note_guinee_28092011_en.pdf, p. 6.

³⁹³ Human Rights Watch interview with civil society representative, March 20, 2016. FIDH, "Victims' Rights Before the International Criminal Court: A Guide for Victims, their Legal Representatives and NGOs," http://www.fidh.org/IMG/pdf/4-CH-I_Background.pdf, p. 11.

³⁹⁴ Human Rights Watch separate interviews with ICC staff, November 24, 2015; and civil society representative, March 20, 2016.

perception of outstanding challenges or needed strategies to advance the investigation. This additional information can help the OTP to more effectively press for further advances, while also bolstering civil society calls for justice.³⁹⁵

Beyond the *partie civile* action, domestic and international NGOs, including FIDH, OGDH, AVIPA and Human Rights Watch, have consistently advocated for greater government support to the domestic investigation by issuing public statements and reports, and meeting Justice Ministry officials and Guinea’s diplomatic partners. Issues addressed include the need for greater security and financial support to the judges, and suspects to be placed on administrative leave from government posts pending investigation.³⁹⁶

The OTP often meets with civil society organizations when it conducts visits to Guinea.³⁹⁷ The OTP also maintains contact with Human Rights Watch—which does not have a presence on the ground in Guinea—through discussions in The Hague and by phone. This allows the ICC and civil society to reinforce each other’s efforts through information exchange on updates in the investigation and strategies to promote progress.

As discussed below, some local NGOs in Guinea expressed disappointment and frustration about the OTP’s role in Guinea, and the potential that it is legitimizing efforts that they believe will never lead to perpetrators facing justice. It is important for the OTP to maintain regular contact with civil society groups on concerns raised.³⁹⁸

The OTP’s role in Guinea has been relevant to Human Rights Watch’s efforts to press for justice at the national level in the country. We have cited the preliminary examination in

³⁹⁵ Human Rights Watch separate interviews with ICC staff, November 24, 2015; and justice practitioner, March 22, 2016.

³⁹⁶ Human Rights Watch separate interviews with two civil society representatives, Conakry, March 19 and 21, 2016; “General Mathurin Bangoura appointed governor of Conakry, a negative signal for the fight against impunity,” FIDH press release, <https://www.fidh.org/fr/regions/afrique/guinee-conakry/guinee-le-general-mathurin-bangoura-nomme-gouverneur-de-la-ville-de>.

³⁹⁷ Human Rights Watch group interview with civil society representatives, March 20, 2016. See also OTP, “Report on Preliminary Examination activities 2011,” <https://www.legal-tools.org/en/doc/4aad1d/>, para. 115; OTP, “Report on Preliminary Examination Activities 2015,” <http://www.legal-tools.org/doc/acoed2/>, para. 160.

³⁹⁸ Human Rights Watch group interview with civil society representatives, March 20, 2016; “Fight against impunity in Guinea, the home straight: victims can wait no more” (“Lutte contre l’impunité en Guinée, la dernière ligne droite : les victimes ne pourront pas attendre davantage”), FIDH press release, March 4, 2016, <https://www.fidh.org/fr/regions/afrique/guinee-conakry/lutte-contre-l-impunite-en-guinee-la-derniere-ligne-droite-le> (accessed November 15, 2017).

public reports, news releases, and in meetings with government officials to show the importance of Guinea moving ahead with accountability at the domestic level, because the ICC can otherwise open an investigation.³⁹⁹ In addition, the ICC has also given Human Rights Watch increased impetus to focus on this incident as one where progress on justice can be made. At the same time, Human Rights Watch, FIDH, and local groups have stressed the need for accountability for other grave crimes, particularly incidents of killings in 2007, 2010, and 2015.⁴⁰⁰ FIDH also is involved with a *partie civile* action for those events.⁴⁰¹

F. Conclusions

The OTP's preliminary examination and its targeted efforts to promote progress in accountability for the September 28, 2009 murder, rapes and other abuses in Guinea's domestic justice system offers important lessons for the Office of the Prosecutor. While progress in the domestic investigation has been slow and uneven, it has nevertheless been significant.

It is difficult to determine the extent to which such progress might have occurred in the absence of the ICC's active and targeted strategy of encouragement and close scrutiny, regular visits, benchmarking, and strategic alliances, and the engagement of other key players such as civil society groups and the Office of the UN Special Representative of the Secretary-General for Sexual Violence in Conflict.

But the lack of similar progress in accountability for other serious violations of international human rights before domestic courts and the obstacles the panel has overcome—including lack of response to inquiries to interview witnesses and inadequate

³⁹⁹ The existence of the preliminary examination is also regularly referred to by Guinean officials in their discussions with Human Rights Watch. For example, see group civil society meeting with justice minister, the panel of judges, the OHCHR head of Guinea office, and the UN expert to the panel of judges, March 14, 2016.

⁴⁰⁰ "Guinea: Security Force Excesses, Crimes," Human Rights Watch news release, <https://www.hrw.org/news/2015/07/30/guinea-security-force-excesses-crimes>; "Guinea: Use New Term to Boost Rule of Law," Human Rights Watch news release, December 12, 2015, <https://www.hrw.org/news/2015/12/12/guinea-use-new-term-boost-rule-law>; "Guinea: Intensify Attention to Human Rights Challenges," Human Rights Watch news release, December 21, 2011, <https://www.hrw.org/news/2011/12/21/guinea-intensify-attention-human-rights-challenges>; FIDH-OGDH, "The Fight Against Impunity in Guinea: Progress Observed, Actions Awaited," <https://www.fidh.org/IMG/pdf/rapguinee596ang.pdf>, pp. 11-15.

⁴⁰¹ See FIDH-OGDH, "Guinea: The time of justice?," https://www.fidh.org/IMG/pdf/guinee_rapport_le_temps_de_la_justice.pdf, pp. 7, 18, 23; "2010 torture case: Civil parties Demand that Sekou Resco Camara Be Placed under Judicial Supervision and that the Trial Be Held Rapidly," FIDH press release, April 25, 2014, <https://www.fidh.org/en/region/Africa/guinea-conakry/15466-2010-torture-case-civil-parties-demand-that-sekou-resco-camara-be-placed> (accessed November 15, 2017).

resources—suggests that the same scope of progress would not have been achieved. It also appears that the interventions of the ICC, NGOs, the UN, and to a lesser degree, donors, have been mutually reinforcing to create a strong climate of expectation for progress that has been beneficial to advances in the investigation.

While the case has yet to progress to trial, the ICC also will need to avoid inadvertently legitimizing impunity and should continue to assess whether the local efforts are not actually going to deliver justice, either due to a lack of willingness or ability on the part of the authorities.

Some civil society organizations in Guinea expressed disappointment and frustration even as recently as March 2016 that the investigation had not progressed further.⁴⁰² A few local activists even expressed concern that the ICC's engagement may be giving an imprimatur of legitimacy to an investigation that will never deliver justice.⁴⁰³ Some journalists also expressed frustration with the ICC in 2016. They suggested that the ICC has become a vehicle for public relations by the Guinean government to promote a narrative of progress when steps forward are actually quite minimal.

These are understandable concerns, but concrete action along the way that met a number of the benchmarks for progress—and the subsequent conclusion of the investigation by the judges—reinforces the appropriateness of the OTP's continued engagement on complementarity, rather than moving to open an ICC investigation.

The OTP can be expected to face a difficult balancing act across its situations to encourage domestic accountability without legitimizing impunity. The Guinea experience suggests two important lessons that can help to guide its efforts.

First, the OTP's appreciation of the country context is important. Development in Guinea—such as perceptions over insecurity around election periods—resulted in periods of inactivity but did not lead to the investigation being dropped. In addition, Guinea is encumbered with heavy bureaucracy and an overall weak justice system, which contributes to the belabored progress in investigations. To make decisions about the actual prospect for further national action, the OTP needs to be deeply familiar with that

⁴⁰² Human Rights Watch group interview with civil society representatives, March 20, 2016.

⁴⁰³ *Ibid.*

domestic context. It will be also important for the OTP to keep revisiting its assessment as to whether the national investigation will lead to prosecutions.

Second, the OTP needs to take steps to mitigate risk to its own legitimacy, for example, by making public its assessments of government action, so as to make clear why it continues to invest in the prospect of complementarity. Although the OTP did this to a certain extent in Guinea, the observations of NGOs and journalists above highlight the need for the OTP to offer more detailed explanations where possible to support its conclusion that adequate progress has continued, and to engage more regularly with concerned constituencies.

Some journalists and civil society representatives suggested as well that the OTP would have the chance to obtain a more accurate picture of progress and lack thereof in the domestic investigation if it increased its exchanges with independent voices, notably activists and journalists.⁴⁰⁴

Continued engagement by the ICC and other international and domestic actors will be important to promote further progress, while ongoing assessments of progress by the OTP will be important to accurately determine whether the OTP should continue to encourage domestic accountability. But the Guinean government remains ultimately responsible for whether the country seizes the opportunity to be a model for domestic accountability for grave crimes in holding perpetrators of the September 28, 2009 crimes to account.

⁴⁰⁴ Human Rights Watch group interview with journalists, March 20, 2016.

IV. United Kingdom

A. Overview

Between March 2003 and May 2009, British forces took part in the invasion, occupation, and governing of Iraq. During that time and after, information emerged indicating widespread, serious abuses of Iraqis in British detention, including assaults, torture, and deaths.

Some abuse allegations have been the focus of statutory public inquiries in the United Kingdom. Successive UK governments have agreed to financial settlements with Iraqi citizens related to the alleged conduct of British forces in the country. Various allegations have also been the focus of criminal investigations under the auspices of the Iraq Historic Allegations Team (IHAT), which British authorities established in 2010.

The IHAT process did not result in any prosecutions by the time it was effectively closed in 2017, with a few cases transferred to another residual entity for further investigation.⁴⁰⁵ To date, only one British soldier has received a prison sentence—of one year—for war crimes in Iraq. There has been no criminal accountability for senior British military and political figures in relation to abuses by UK forces in Iraq.⁴⁰⁶

Against this background, on May 13, 2014, the Office of the Prosecutor of the International Criminal Court (OTP) announced that it was reopening a preliminary examination, closed in

⁴⁰⁵ Iraq Historic Allegations Team (IHAT), “What is IHAT?,” undated, <https://www.gov.uk/government/groups/iraq-historic-allegations-team-ihat> (accessed December 20, 2017); UK Ministry of Defence, “Defence Secretary Announces IHAT to Close as Early as this Summer,” video clip, YouTube, February 10, 2017, <https://www.youtube.com/watch?v=VP5bvqF9nc> (accessed December 20, 2017); “Iraq Historic Allegations Team Starts Work,” Ministry of Defence & Sir Nick Harvey, news story, November 1, 2010, <https://www.gov.uk/government/news/iraq-historic-allegations-team-starts-work> (accessed December 20, 2017); “IHAT to Close at the End of June,” Defence Secretary Sir Michael Fallon, UK Ministry of Defence news story, April 5, 2017, <https://www.gov.uk/government/news/ihat-to-close-at-the-end-of-june> (accessed December 20, 2017).

⁴⁰⁶ See Clive Baldwin (Human Rights Watch), “Why the ICC Needed to Reopen the Iraq Abuse Case,” commentary, *Huffington Post UK*, May 19, 2014, <https://www.hrw.org/news/2014/05/19/why-icc-needed-reopen-iraq-abuse-case>; Clive Baldwin, “UK Still Needs to Account for Abuses in Iraq” commentary, Human Rights Watch Dispatch, December 14, 2014, <https://www.hrw.org/news/2014/12/17/dispatches-uk-still-needs-account-abuses-iraq>; “Human Rights Watch Response to Chilcot Iraq Report,” Human Rights Watch news release, July 6, 2016, <https://www.hrw.org/news/2016/07/06/human-rights-watch-response-chilcot-iraq-report>.

2006, into alleged British war crimes in Iraq.⁴⁰⁷ Though Iraq is not a member of the International Criminal Court (ICC), the court has jurisdiction over alleged serious crimes committed by the nationals of its member countries—in this case, UK citizens.⁴⁰⁸

On December 4, 2017, the OTP announced there was a reasonable basis to believe that members of the UK armed forces committed war crimes within the ICC’s jurisdiction in Iraq against people in their custody, including wilful killing/murder, torture and inhuman/cruel treatment, and rape or other forms of sexual violence. This conclusion reflected the OTP’s decision to officially move the UK/Iraq examination from Phase 2 (subject matter jurisdiction) to Phase 3 (admissibility).⁴⁰⁹

The research for this chapter focused on the period during which the examination was in Phase 2. The chapter first outlines the allegations of abuse against British forces and the government’s responses to them. It then highlights OTP activities in relation to possible UK abuses in Iraq to date and considers their impact on the UK government’s approach.

As discussed in Appendix I, under its now-consolidated practice, the OTP does not actively encourage domestic prosecutions until it has, at least, identified potential cases as falling within the ICC’s jurisdiction. During the research for this report, the OTP had yet to do so in the context of its UK/Iraq examination.

Overall, given this, it is unsurprising that our research suggests the OTP’s examination neither catalyzed national investigative activities in the UK, nor impacted the existing domestic structure established to address allegations of abuses by British armed forces in Iraq. However, by subjecting existing domestic efforts to added scrutiny, the OTP’s

⁴⁰⁷ “Prosecutor of the International Criminal Court, Fatou Bensouda, Re-Opens the Preliminary Examination of the Situation in Iraq,” Office of the Prosecutor (OTP) press release, May 13, 2014, <https://www.legal-tools.org/doc/d9d9c5/pdf/> (accessed December 20, 2017). In 2006, the then-prosecutor, Luis Moreno-Ocampo, had decided against an investigation into allegations of abuse of detainees by British troops in Iraq based on the information available to his office at the time. See “OTP response to communications received concerning Iraq,” February 9, 2006, <https://www.legal-tools.org/en/doc/5b8996/> (accessed December 20, 2017).

⁴⁰⁸ United Nations, Treaty Series: Treaties and International Agreements Registered or Filed and Recorded with the Secretariat of the United Nations, vol. 2187, (New York: United Nations Publications, 2004), <https://treaties.un.org/doc/Publication/UNTS/Volume%202187/v2187.pdf> (accessed December 20, 2017), p. 6; Rome Statute of the International Criminal Court (Rome Statute), A/CONF.183/9, July 17, 1998, No. 38544, entered into force July 1, 2002, <http://www.legal-tools.org/doc/7b9af9/>, (accessed December 20, 2017), art. 12(2)(b).

⁴⁰⁹ OTP, “Report on Preliminary Examination Activities 2017,” December 4, 2017, <https://www.legal-tools.org/en/doc/e50459/> (accessed December 20, 2017), pp. 43, 45.

examination may have had a positive role in constraining British authorities from stopping relevant inquiries into potential abuses, despite public pressure for them to do so. Since the report's focus was on the impact of OTP actions in the UK, we did not examine media, civil society, or public responses in Iraq to the ICC's preliminary examination.

B. Background and Alleged Crimes

The United Kingdom ratified the Rome Statute on October 4, 2001, giving the International Criminal Court jurisdiction over war crimes, crimes against humanity, and genocide committed on British territory or by British nationals as of July 1, 2002. Just before the UK joined the ICC it also passed the International Criminal Court Act, incorporating command responsibility into UK domestic law.⁴¹⁰

On March 20, 2003, nearly 19 months after the act came into force, British forces joined the US-led coalition that invaded Iraq and stayed there until combat operations were officially declared over. Most British troops left Iraq by July 2009.⁴¹¹ During these six years, the UK operated detention facilities in southern Iraq, through which thousands of detainees passed, and in which some were interrogated by British military or intelligence personnel.⁴¹²

Alarm bells sounded early on. Within two weeks of the invasion, the International Committee of the Red Cross informed British authorities of Iraqis being ill-treated and deprived of their liberty at one camp, Umm Qasr, including the use of hoods and flexi-

⁴¹⁰ International Criminal Court Act 2001, http://www.legislation.gov.uk/ukpga/2001/17/pdfs/ukpga_20010017_en.pdf (accessed December 20, 2017), art. 65.

⁴¹¹ "UK's Operation Telic mission in Iraq ends," BBC News Online, May 22, 2011, <http://www.bbc.com/news/uk-13488078> (accessed December 20, 2017); UK Ministry of Defence, "Operations in Iraq: About the UK mission in Iraq," undated, <http://webarchive.nationalarchives.gov.uk/20121203223308/http://www.mod.uk/DefenceInternet/FactSheets/OperationsFactsheets/OperationsInIraqAboutTheUkMissionInIraq.htm> (accessed December 20, 2017).

⁴¹² The Rt Hon Sir William Gage (Chairman), "The Report of the Baha Mousa Inquiry," vol. 2, September 8, 2011, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/279209/1452_ii.pdf (accessed December 20, 2017), p. 880; Intelligence and Security Committee, "The Handling of Detainees by UK Intelligence Personnel in Afghanistan, Guantanamo Bay and Iraq," March 1, 2005, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/224699/isc_handling_detainees.pdf (accessed December 20, 2017), pp. 21-26; The Secretary of State for Defence Mr. John Hutton, "Records of Detention (Review Conclusions)," February 26, 2009, House of Commons Hansard Column 394-95, <https://publications.parliament.uk/pa/cm200809/cmhansrd/cm090226/debtext/90226-0008.htm> (accessed December 20, 2017).

cuffs.⁴¹³ At the same time, a senior British military legal advisor in Iraq, Nicholas Mercer, and other senior military personnel raised concerns with commanders about the treatment of prisoners, including the legality of certain interrogation techniques that the British government had banned over three decades earlier.⁴¹⁴

During the UK's presence in Iraq and in the following years, NGOs such as Amnesty International and REDRESS, various legal challenges in British courts, official public inquiries, and other inquests indicated that British troops had committed a range of abuses in the country.⁴¹⁵

In January 2014, the now-dissolved British law firm Public Interest Lawyers (PIL), and the European Center for Constitutional and Human Rights (ECCHR), a Berlin-based nongovernmental organization, submitted a lengthy communication to the ICC prosecutor related to alleged ill-treatment of Iraqi detainees and unlawful killings by British forces in Iraq from 2003-2008.⁴¹⁶ This included the possible responsibility of senior British military

⁴¹³ International Committee of the Red Cross (ICRC), "Report of the ICRC on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq during Arrest, Internment, and Interrogation," February 2004, http://www.informationclearinghouse.info/pdf/icrc_iraq.pdf (accessed December 20, 2017), p. 15.

⁴¹⁴ UK House of Commons, Defence Sub-Committee, "Written Evidence Submitted by Reverend Nicholas Justin Mercer," June 6, 2016, <http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Defence%20Sub%20Committee/MoD%20support%20for%20former%20and%20serving%20personnel%20subject%20to%20judicial%20processes/written/34405.html> (accessed December 20, 2017), paras. 4-5, 24-25, 28, link available in UK House of Commons, Defence Sub-Committee, "Who Guards the Guardians? MoD Support for Former and Serving Personnel: Sixth Report of Session 2016-17," February 10, 2017, HC 109 <https://www.publications.parliament.uk/pa/cm201617/cmselect/cmdfence/109/109.pdf> (accessed December 20, 2017), p. 49.

⁴¹⁵ Amnesty International, "Iraq: One Year on the Human Rights Situation Remains Dire," March 18, 2004, <https://www.amnesty.org/en/documents/MDE14/006/2004/en> (accessed December 20, 2017), pp. 5, 9-12; Amnesty International, "Beyond Abu Ghraib: Detention and Torture in Iraq," March 2006, http://www.amnestyinternational.be/IMG/pdf/MDE140012006_IRAK.pdf (accessed December 20, 2017); REDRESS, "UK Army in Iraq: Time to Come Clean on Civilian Torture," October 2007, <https://redress.org/publication/uk-army-in-iraq-time-to-come-clean-on-civilian-torture/> (accessed March 8, 2017); Amnesty International, "Iraq: A Decade of Abuses," March 2013, <https://www.amnestyusa.org/sites/default/files/mde140012013en.pdf> (accessed December 20, 2017), pp. 66-69; Baha Mousa Inquiry and the Rt Hon Sir William Gage (Chairman), "The Report of the Baha Mousa Inquiry," vol. 3, HC 1452-III, 2011, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/279192/1452_iii.pdf (accessed December 20, 2017); Al-Sweady Inquiry and Sir Thayne Forbes, "The Report of the Al Sweady Inquiry: Executive Summary," December 17, 2014, HC 819, <http://webarchive.nationalarchives.gov.uk/20150115114702/http://www.alsweadyinquiry.org/> (accessed December 20, 2017); Iraq Fatalities Investigations and Sir George Newman, "Concluded Cases," 2015-2017, <http://www.iraq-judicial-investigations.org/index.aspx> (accessed December 20, 2017).

⁴¹⁶ "Communication to the Office of the Prosecutor of the International Criminal Court: The Responsibility of Officials of the United Kingdom for War Crimes Involving Systematic Detainee Abuse in Iraq from 2003-2008," European Center for Constitutional and Human Rights (ECCHR) and Public Interest Lawyers (PIL), January 10, 2014, https://www.ecchr.eu/en/our_work/international-crimes-and-accountability/united-

and political figures in alleged abuse by British troops of detainees in different UK-controlled facilities in Iraq.⁴¹⁷ The communication triggered the reopening of the preliminary examination.

According to the OTP, between January 2014-June 2016, PIL provided 1,390 victim accounts, of which 1,071 related to alleged ill-treatment of detainees and 319 to alleged unlawful killings.⁴¹⁸ The alleged crimes took place in “military detention facilities and other locations under the control of UK Services personnel in southern Iraq, including in temporary detention/processing facilities and in longer-term detention and internment facilities.”⁴¹⁹

C. UK Response to Alleged Crimes

Starting in 2004—and continuing after UK forces left Iraq—Iraqis who alleged that British troops had unlawfully killed, detained, or abused them or their relatives pursued various legal remedies in the United Kingdom.

The response of British authorities to these legal actions has been piecemeal, ad-hoc, and almost exclusively driven by the efforts of individual victims, their families, and legal representatives. This led to considerable interrelated litigation—some of it still ongoing—that has spanned over a decade and reached the highest levels of British courts, and even the European Court of Human Rights.⁴²⁰ Several of these initiatives are discussed below.

kingdom.html?file=tl_files/Dokumente/Universelle%2520Justiz/UKICC-Communication-2014-01-10_public.pdf (accessed December 20, 2017).

⁴¹⁷ Ibid.

⁴¹⁸ OTP, “Report on Preliminary Examination Activities 2016,” November 14, 2016, <http://www.legal-tools.org/doc/f30a53/> (accessed December 20, 2017), p. 20.

⁴¹⁹ Ibid.

⁴²⁰ See, for example, Clive Baldwin, “UK Judge Finds British Soldiers Responsible for Abuses in Iraq,” commentary, Human Rights Watch Dispatch, December 15, 2017, <https://www.hrw.org/news/2017/12/15/uk-judge-finds-british-soldiers-responsible-abuses-iraq>; *Alseran & Ors v. Ministry of Defence*, [2017] EWHC 3289 (QB), <http://www.bailii.org/ew/cases/EWHC/QB/2017/3289.html> (accessed December 20, 2017); Ian Cobain, “British Troops Breached Geneva Conventions in Iraq, High Court Rules,” *Guardian*, December 14, 2017, <https://www.theguardian.com/world/2017/dec/14/british-troops-breached-geneva-conventions-in-iraq-high-court-rules> (accessed December 20, 2017).

1. Public Inquiries

Years of litigation using the UK Human Rights Act compelled the British government to conduct two public inquiries related to allegations of ill-treatment and unlawful killing by British troops in Iraq.⁴²¹

The first public inquiry in 2008 concerned Baha Mousa, a hotel receptionist whom an inquiry found had died in British custody in the southern Iraqi city of Basra in September 2003 after days of serious abuse.⁴²² British troops had detained Baha Mousa at a base in Basra, where for 36 hours he and other detainees were subject to abuse that included being kicked, slapped, beaten, deprived of sleep, and forced into stress positions.⁴²³ A post-mortem showed that Baha Mousa had suffered 93 separate injuries.⁴²⁴

Published in September 2011, the Baha Mousa Inquiry report identified “corporate failure” by the British Army to prevent the use of banned interrogation techniques.⁴²⁵ Only one soldier, Cpl. Donald Payne, was convicted five years earlier of crimes related to the abuse under the UK’s International Criminal Court Act and was sentenced to one year in prison.⁴²⁶

In November 2009, the UK government launched a second public inquiry to investigate allegations of torture and unlawful killing of Iraqis following a gunfight between British troops and fighters for the Mahdi Army in 2004.⁴²⁷ The Al-Sweady Inquiry, which published

⁴²¹ Human Rights Act 1998, Chapter 42, http://www.legislation.gov.uk/ukpga/1998/42/pdfs/ukpga_19980042_en.pdf (accessed December 20, 2017), arts. 6-7; Inquiries Act 2005, Chapter 12, http://www.legislation.gov.uk/ukpga/2005/12/pdfs/ukpga_20050012_en.pdf (accessed December 20, 2017), arts. 1, 26. See, for example, Matthew Weaver, “Human Rights Law Applies in Iraq Killing, Lords Rule,” *Guardian*, June 13, 2002, <https://www.theguardian.com/uk/2007/jun/13/iraq.iraq?DCMP=EMC-thewrapo8> (accessed December 20, 2017).

⁴²² Baha Mousa Inquiry and the Rt Hon Sir William Gage (Chairman), “The Report of the Baha Mousa Inquiry,” vol. 3, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/279192/1452_iii.pdf, p. 1287, para. 1.

⁴²³ *Ibid.*, pp. 1290-1308.

⁴²⁴ *Ibid.*, p. 1287, para. 1.

⁴²⁵ Baha Mousa Inquiry and the Rt Hon Sir William Gage (Chairman), “The Report of the Baha Mousa Inquiry,” vol. 1, HC 1452-I, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/279190/1452_i.pdf (accessed December 20, 2017), p. 372.

⁴²⁶ *R v. Donald Payne*, General Court Martial at Military Court Centre Bulford, H DEP 2007/411, <http://www.internationalcrimesdatabase.org/Case/811> (accessed December 20, 2017).

⁴²⁷ The Al-Sweady Inquiry was launched to investigate allegations of torture and unlawful killing made in another judicial review proceeding after judges held that the defence secretary’s approach to the disclosure of documents in the case had been “lamentable.” See *Al-Sweady and Others v. Secretary of State for the Defence*, [2009] EWHC 2387 (Admin), <http://www.bailii.org/ew/cases/EWHC/Admin/2009/2387.html> (accessed December 20, 2017), paras. 8, 13; The Secretary

its findings in December 2014, rejected the most serious allegations of murder of Iraqi detainees as being “wholly without foundation and entirely the product of deliberate lies, reckless speculation and ingrained hostility.”⁴²⁸

But it did find evidence of mistreatment of Iraqi detainees, including the deliberate deprivation of food and sleep for the purposes of interrogation—two of the “five techniques” that the British government announced it had banned in 1972 and which the European Court of Human Rights subsequently found constituted cruel, inhuman or degrading treatment.⁴²⁹ The inquiry chairman described these findings to be “relatively minor when compared with the original very serious allegations.”⁴³⁰

The abuse findings in the Baha Mousa and Al-Sweady inquiries did not lead to new prosecutions.

In February 2010, Public Interest Lawyers, acting for a group of claimants that eventually included over 100 Iraqis, set in motion legal proceedings in a UK court seeking a single public inquiry into allegations that British armed forces tortured or otherwise ill-treated them in detention facilities in Iraq between 2003-2008.⁴³¹

of State for Defence Mr. Bob Ainsworth, “Written Ministerial Statements: Al-Sweady Inquiry,” November 25, 2009, House of Commons Hansard Column 82WS, <http://www.publications.parliament.uk/pa/cm200910/cmhansrd/cm091125/wmstext/91125m0001.htm> (accessed December 20, 2017).

⁴²⁸ Al-Sweady Inquiry and Sir Thayne Forbes (Chairman), Statement by Sir Thayne Forbes on the Report of the Al-Sweady Inquiry, December 17, 2014, <http://webarchive.nationalarchives.gov.uk/20150115114831/http://www.alsweadyinquiry.org/linkedfiles/alsweadyinquiry/heal-sweadyinquiryreport-transcriptofchairmansstatement.pdf> (accessed December 20, 2017), p. 3.

⁴²⁹ The Parker Committee’s Report, “Statement by the Prime Minister Mr. Edward Heath on Interrogation Techniques used (Parker’s Committee Report),” March 2, 1972, House of Commons Debates, series 5, vol. 832, cc 743-9, http://hansard.millbanksystems.com/commons/1972/mar/02/interrogation-techniques-parker#S5CV0832Po_19720302_HOC_173 (accessed December 20, 2017); European Court of Human Rights, *Ireland v. United Kingdom*, Judgment of January 18, 1978, no. 5310/71, <http://hudoc.echr.coe.int/eng?i=001-57506> (accessed December 20, 2017), paras. 96, 167-168; European Court of Human Rights, *Selmouni v. France*, Judgment of July 28, 1999, no. 25803/94, <http://hudoc.echr.coe.int/eng?i=001-58287> (accessed December 20, 2017), paras. 96, 105-106.

⁴³⁰ Al-Sweady Inquiry and Sir Thayne Forbes (Chairman), Statement by Sir Thayne Forbes on the Report of the Al-Sweady Inquiry, <http://webarchive.nationalarchives.gov.uk/20150115114831/http://www.alsweadyinquiry.org/linkedfiles/alsweadyinquiry/heal-sweadyinquiryreport-transcriptofchairmansstatement.pdf>, p. 3; Al-Sweady Inquiry and Sir Thayne Forbes, “The Report of the Al Sweady Inquiry: Executive Summary,” <http://webarchive.nationalarchives.gov.uk/20150115114702/http://www.alsweadyinquiry.org/>, paras. 455, 460, 480, 737.

⁴³¹ The claimants argued that the inquiry should consist of “a comprehensive and single public inquiry that will cover the UK’s detention policy in South East Iraq, examining in particular the systemic use of coercive interrogation techniques which

Claimants in the proceedings—eventually known by the name of the lead claimant, Ali Zaki Mousa—argued that the ill-treatment amounted to “systemic abuse,” and that the government must establish an overarching inquiry in order to discharge the UK’s obligation under article 3 of the European Convention on Human Rights, which forbids torture or inhuman or degrading treatment or punishment and requires the state to set up an effective inquiry into credible allegations of torture by state forces.⁴³²

However, rather than set up a full public inquiry, the government in March 2010 established the Iraq Historic Allegations Team. In December 2010, a British court rejected the claimants’ application in the Ali Zaki Mousa litigation to review the government’s decision not to order an overarching inquiry.⁴³³ Instead, it endorsed the government’s decision to “wait and see” if another public inquiry into abuse of Iraqi detainees was necessary, pending the outcome of the IHAT investigations and the Baha Mousa and Al-Sweady inquiries, which at that point had yet to publish their findings.⁴³⁴ The Iraqi claimants would later argue that the IHAT was not sufficiently independent to investigate the allegations (see below).

In 2011, at the end of a separate string of proceedings which began in 2004 in UK courts, named after an applicant, Mazin Jum'Aa Gatteh Al-Skeini, judges at the European Court of Human Rights ultimately rejected the British government’s argument that the European Convention on Human Rights did not extend to the UK’s conduct in Iraq.⁴³⁵ The court found

resulted in the Claimants’ ill-treatment and which makes it possible to learn lessons for the future action of the British military.” Included among the claimants were those whose cases were the subject of the Baha Mousa Inquiry and the Al-Sweady Inquiry. Some of the claimants in the Ali Zaki Mousa judicial review proceeding also simultaneously pursued civil suits for damages. See *Mousa v. Secretary of State for Defence and Anor*, [2010]

EWHC 3304 (Admin), <http://www.bailii.org/ew/cases/EWHC/Admin/2010/3304.html> (accessed December 20, 2017), paras. 2, 8, 128.

⁴³² *Mousa and Others v. Secretary of State for Defence*, [2010] EWHC 1823 (Admin), <http://www.bailii.org/ew/cases/EWHC/Admin/2010/1823.html> (accessed December 20, 2017), paras. 7, 23; *Mousa v. Secretary of State for Defence and Anor*, [2010] EWHC 3304 (Admin), <http://www.bailii.org/ew/cases/EWHC/Admin/2010/3304.html>, paras. 2, 5, 12-13; European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222, entered into force September 3, 1953, http://www.echr.coe.int/Documents/Convention_ENG.pdf (accessed December 20, 2017), art. 3.

⁴³³ *Mousa v. Secretary of State for Defence and Anor*, [2010] EWHC 3304 (Admin), <http://www.bailii.org/ew/cases/EWHC/Admin/2010/3304.html>, paras. 2-3, 86.

⁴³⁴ *Ibid.*, paras. 117, 133.

⁴³⁵ European Court of Human Rights, *Al-Skeini and Others v. United Kingdom*, Judgment of 7 July 2011, no. 55721/07, [https://hudoc.echr.coe.int/eng#{\"itemid\":\[\"001-105606\"\]}](https://hudoc.echr.coe.int/eng#{\) (accessed December 20, 2017), paras. 149-150, 162-164, 171, 177. The ECHR held that the provisions in the European Convention for Human Rights were capable of binding the UK outside its

the UK had violated the right to life because its system of military investigations into alleged unlawful deaths by UK forces was not institutionally independent of the military chain of command.

2. Iraq Historic Allegations Team (IHAT)

On March 1, 2010, the government announced the establishment of the Iraq Historic Allegations Team. The IHAT was mandated to “investigate as expeditiously as possible those allegations of criminal conduct by [UK] Forces in Iraq ... in order to ensure that all those allegations are, or have been, investigated appropriately.”⁴³⁶ The minister of state for the armed forces noted the difficulties of investigating the claims and emphasized that the IHAT’s establishment did not represent an admission of fault. Characterizing many of the allegations as “sketchy and incomplete,” he said the government believed the IHAT would establish that most British forces had acted professionally and responsibly in Iraq.⁴³⁷

By November 2010, the IHAT had become operational and was expected to complete its investigation in two years.⁴³⁸

The IHAT was exclusively responsible for managing and conducting investigations related to death or ill-treatment by British armed forces in Iraq between 2003-2009 and making determinations whether individual cases should be referred to the UK Service Prosecuting Authority (SPA) for the director of service prosecutions (DSP) to determine, first, if a

national territory where UK troops assumed some of the public powers normally exercised by a sovereign government or exercised authority and control over an individual. The court further found that the UK’s human rights obligations apply to its acts in Iraq, and that the UK had violated the European Convention on Human Rights in the failure to adequately investigate the killings of five Iraqis by its forces there.

⁴³⁶ UK Attorney General’s Office, Ministry of Defence and Sir David Calvert-Smith, “Review of the Iraq Historic Allegations Team,” September 15, 2016,

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/553195/Flag_A_-_IHAT_Review_for_Attorney_General_final_12_September.pdf (accessed December 20, 2017), p.4.

⁴³⁷ The Minister of State for the Armed Forces Mr. Bill Rammell, “Written Ministerial Statements: Iraq Historic Allegations Team,” March 1, 2010, House of Commons Hansard Column 94WS,

<https://publications.parliament.uk/pa/cm200910/cmhansrd/cm100301/wmstext/100301m0001.htm> (accessed December 20, 2017).

⁴³⁸ The Minister of State for the Armed Forces Mr. Nick Harvey, “Written Ministerial Statements: Iraq Historic Allegations Team,” November 1, 2010, House of Commons Hansard Column 28WS,

<https://publications.parliament.uk/pa/cm201011/cmhansrd/cm101101/wmstext/101101m0001.htm> (accessed December 20, 2017).

prosecution was appropriate based on realistic prospect of conviction, and second, whether it was in the public and service interest to bring charges.⁴³⁹

The IHAT also played a reporting function, releasing its investigative reports to the Ministry of Defence's Systemic Issues Working Group, a body "responsible for identifying systemic issues and ensuring that effective corrective action is taken."⁴⁴⁰ The working group has

⁴³⁹ Armed Forces Act 2006, Chapter 52, http://www.legislation.gov.uk/ukpga/2006/52/pdfs/ukpga_20060052_en.pdf (accessed December 20, 2017), arts. 119-122; IHAT, "What is IHAT?," <https://www.gov.uk/government/groups/iraq-historic-allegations-team-ihat>; Iraq Fatality Investigations and Sir George Newman (Inspector), Statement by Sir George Newman in the matter of the Investigation into the Death of Mr. Muhammad Salim, October 14, 2015, <http://www.iraq-judicial-investigations.org/linkedfiles/latest/publicstatementdated14october2015.pdf> (accessed December 20, 2017), p. 3; *Al-Saadoon and Others v. Secretary of State for Defence*, [2015] EWHC 1769 (Admin), <http://www.bailii.org/ew/cases/EWHC/Admin/2015/1769.html> (accessed December 20, 2017), para. 21. The DSP is independent from the chain of command and is independent from the Ministry of Defence in the exercise of prosecutorial functions. See: Service Prosecuting Authority, Ministry of Defence, "Service Prosecuting Authority (SPA)," undated, <http://spa.independent.gov.uk/index.htm> (accessed December 20, 2017). Andrew Cayley was appointed as the director of service prosecutions on December 3, 2013. See "Mr. Andrew Cayley CMG QC is appointed as the Director Service Prosecutions with effect from 3 Dec 2013," Service Prosecuting Authority, UK Ministry of Defence news story, undated, <http://spa.independent.gov.uk/test/director/index.htm> (accessed December 20, 2016). Cayley, previously a co-prosecutor at the Extraordinary Chambers in the Courts of Cambodia, was also a senior prosecuting counsel at both the ICC Office of the Prosecutor and the International Criminal Tribunal for the former Yugoslavia. Service Prosecuting Authority, Ministry of Defence, "MR ANDREW CAYLEY CMG GC," undated, http://spa.independent.gov.uk/test/director/dsp_biography.htm (accessed December 20, 2017). See also UK Attorney General's Office, Ministry of Defence and Sir David Calvert-Smith, "Review of the Iraq Historic Allegations Team," https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/553195/Flag_A_-_IHAT_Review_for_Attorney_General_final_12_September.pdf, p. 10, in which Calvert-Smith notes that "[f]ortunately the DSP has a highly relevant background drawn from his previous service at the International Criminal Court (by which a preliminary investigation into possible war crimes by British Forces has been launched)."

⁴⁴⁰ UK Ministry of Defence, "Systemic Issues Identified from Investigations into Military Operations Overseas: July 2015," July 31, 2015, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/450319/20150727-mod-annual-report-systemic-issues-july-2015.pdf (accessed December 20, 2017), p.1; Arabella Lang, "Iraq Historic Allegations Team," Commons Briefing Papers 7478, January 22, 2016, <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7478#fullreport> (accessed December 20, 2017), p. 6; *Mousa and Others v. Secretary of State for Defence*, [2013] EWHC 1412 (Admin), <http://www.bailii.org/ew/cases/EWHC/Admin/2013/1412.html> (accessed December 20, 2017), paras. 35-37, 86-88; UK Ministry of Defence, "Systemic Issues Identified from Investigations into Military Operations Overseas: July 2014," July 7, 2014, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/327180/Systemic_Issues_identified_from_investigations_into_military_operations_overseas.pdf (accessed December 20, 2017). According to the Systemic Issues Working Group (SIWG) July 2015 report, the SIWG is "the principal [Ministry of Defence] body responsible for identifying systemic issues and ensuring that effective corrective action is taken. It does not possess its own investigative capabilities, and is largely reliant on the Service Police or judicial proceedings (e.g. public inquiries) to obtain the evidence base necessary to determine what happened and why. However, the SIWG will make or commission appropriate inquiries (through subject-matter experts across Defence) to ascertain how identified systemic issues were able to occur and how they have been, or should be, remedied."

published three annual reports explaining what the Ministry of Defence has done to address systemic issues identified from its review of the IHAT investigations.⁴⁴¹

The IHAT process did not lead to a single prosecution. By June 30, 2017, the IHAT reported receiving allegations of crimes relating to 3,405 victims. Of these, 1,668 were not pursued after an initial assessment, while 40 still had to undergo preliminary evaluation. Of the remaining allegations relating to 1,697 potential victims, 325 related to allegations of unlawful killing and 1,372 to other forms of alleged ill-treatment. The IHAT reported 34 ongoing investigations involving 108 victims, and that it had closed, or was closing, 700 allegations.⁴⁴²

In December 2016, UK Secretary of State for Defence Michael Fallon told a parliamentary subcommittee that the number of claims on the IHAT docket would fall to 250 by January 2017 and to 60 by mid-2017.⁴⁴³ In a June 2017 submission to the OTP, ECCHR expressed concern about the IHAT's decision to discontinue "investigations in hundreds of cases for reasons that are less than transparent."⁴⁴⁴

According to the IHAT's final quarterly update, two soldiers had been referred to the DSP, which declined to pursue prosecution in both cases. Another soldier was referred to his commanding officer for disciplinary action and fined £3,000, while two other cases were

⁴⁴¹ Ministry of Defence, "Review of Systemic Issues Arising from Military Operations Overseas: Index," June 13, 2017, <https://www.gov.uk/government/collections/review-of-systemic-issues-arising-from-military-operations-overseas-index> (accessed December 20, 2017).

⁴⁴² Iraq Historic Allegations Team, "The Iraq Historic Allegations Team (IHAT) Quarterly Update," July 27, 2017, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/644256/20170809-Quarterly_Update_website_Jun17_1_.pdf (accessed December 20, 2017), pp. 2-3.

⁴⁴³ UK House of Commons, Defence Sub-Committee, "Oral Evidence: Examination of Sir Michael Fallon MP, Air Marshal Sir Stuart Peach and Director of Judicial Engagement Policy Peter Ryan," December 14, 2016, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/defence-subcommittee/mod-support-for-former-and-serving-personnel-subject-to-judicial-processes/oral/44527.html> (accessed December 20, 2017), question 516, link available in UK House of Commons, Defence Sub-Committee, "Who Guards the Guardians? MoD Support for Former and Serving Personnel: Sixth Report of Session 2016-17," February 10, 2017, <https://www.publications.parliament.uk/pa/cm201617/cmselect/cmdfence/109/109.pdf>, p. 48.

⁴⁴⁴ Letter from ECCHR to Information and Evidence Unit, Office of the Prosecutor, June 29, 2017, https://www.ecchr.eu/en/our_work/international-crimes-and-accountability/united-kingdom.html (accessed December 20, 2017), p. 7.

sent to the Royal Air Force police for further investigation.⁴⁴⁵ The update indicated that one case involving an unlawful killing had been referred to the SPA to consider prosecution.⁴⁴⁶ Despite early projections that the IHAT would complete its work by 2012, the target date for finishing its investigations was eventually extended to December 2019.⁴⁴⁷

From the outset, there were questions as to whether the IHAT was appropriately structured and sufficiently independent.

The IHAT was initially staffed by a combination of Royal Military Police (RMP) and civilian staff, and led by a civilian who reported to the provost marshal of the army (head of the RMP).⁴⁴⁸ The RMP's involvement became the focus of the continuing Ali Zaki Mousa litigation, with a court of appeal in November 2011 holding that the IHAT was not sufficiently independent to satisfy the UK's obligation under the ECHR.⁴⁴⁹

Rather than order a full public inquiry as the Iraqi claimants sought, the minister of state for armed forces responded to the ruling by replacing, in April 2012, the RMP's responsibilities with the Royal Navy Police, headed by the provost marshal (navy).⁴⁵⁰ The minister also announced the IHAT would follow up on the Baha Mousa Inquiry report and the European Court of Human Rights' Al-Skeini judgment.⁴⁵¹ The IHAT eventually consisted of around 145 staff, made up of Royal Navy Police and civilians, and headed by a retired senior civilian police detective, Mark Warwick.⁴⁵²

⁴⁴⁵ Iraq Historic Allegations Team, "The Iraq Historic Allegations Team (IHAT) Quarterly Update," https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/644256/20170809-Quarterly_Update_website_Jun17_1_.pdf, p. 3.

⁴⁴⁶ *Ibid.*, p. 2.

⁴⁴⁷ UK Attorney General's Office, Ministry of Defence and Sir David Calvert-Smith, "Review of the Iraq Historic Allegations Team," https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/553195/Flag_A_-_IHAT_Review_for_Attorney_General_final_12_September.pdf, p. 5.

⁴⁴⁸ *Mousa v. Secretary of State for Defence and ANR*, [2011] EWCA Civ 1334, <http://www.bailii.org/ew/cases/EWCA/Civ/2011/1334.html> (accessed December 20, 2017), para. 14.

⁴⁴⁹ *Ibid.*, paras. 34-38.

⁴⁵⁰ *Mousa and Others v. Secretary of State for Defence*, [2013] EWHC 1412 (Admin), <http://www.bailii.org/ew/cases/EWHC/Admin/2013/1412.html>, para. 24.

⁴⁵¹ *Ibid.*, para. 26.

⁴⁵² Arabella Lang, "Iraq Historic Allegations Team," Commons Briefing Papers 7478, <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7478#fullreport>, p. 7; IHAT, "What is IHAT?," <https://www.gov.uk/government/groups/iraq-historic-allegations-team-ihat>.

A further judicial review was brought in 2012 seeking an overarching public inquiry. Though the claimants argued that the IHAT continued to fall short despite the recent reconfiguration, a high court held the team was sufficiently independent to undertake investigations to fulfill the UK's obligations under the European Convention.

At the same time, it decided that a procedure similar to a coroner's inquest—now known as the Iraq Fatality Investigations (IFI), chaired by former judge Sir George Newman—should be set up to meet the UK's article 2 obligation under the European Convention to investigate cases of Iraqis who had died in the custody of British forces.⁴⁵³ The IFI had concluded five cases at time of writing.⁴⁵⁴

The court also later appointed a high court judge, Justice George Leggatt, to oversee the different claims made with respect to alleged abuse by British troops in Iraq.⁴⁵⁵ According to UK authorities, he provided “oversight of the timeliness and effectiveness of all parts of the processes that the Secretary of State [of Defence] has established to discharge the UK's investigative duties under the ECHR, and can require the Secretary of State and DSP to provide evidence of the progress being made.”⁴⁵⁶ Justice Leggatt held a number of case management hearings between 2014-2017 to this end.⁴⁵⁷

⁴⁵³ *Mousa and Others v. Secretary of State for Defence*, [2013] EWHC 1412 (Admin), <http://www.bailii.org/ew/cases/EWHC/Admin/2013/1412.html>, paras. 27-29, 198-199, 211, 225; UK Attorney General's Office, Ministry of Defence and Sir David Calvert-Smith, “Review of the Iraq Historic Allegations Team,” https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/553195/Flag_A_-_IHAT_Review_for_Attorney_General_final_12_September.pdf, pp. 5-6.

⁴⁵⁴ Part 1 of a report involving a sixth case into the circumstances surrounding the death of a child, 15-year-old Ahmed Jabbar Kareem Ali, was also published by the IFI on September 15, 2016. The report concluded that British soldiers forced Ali “into the water and failed to go to his assistance when he floundered, thereby causing his death.” Part 2 of the report “will examine the wider circumstances surrounding Mr Ali's death” including considering whether the “practice of placing looters into water as a deterrent or punishment was known about and/or sanctioned by the military chain of command.” On September 25, 2017, Sir George Newman released a statement on a seventh case involving the death of “Tariq Sabri Mahmud,” though the exact name of the deceased was to be confirmed. See Iraq Fatality Investigations, “Home Page,” “Latest News,” “Current Cases,” undated, <http://www.iraq-judicial-investigations.org/> (accessed December 20, 2017).

⁴⁵⁵ *Mousa and Others v. Secretary of State for Defence*, [2013] EWHC 2941 (Admin), <http://www.bailii.org/ew/cases/EWHC/Admin/2013/2941.html> (accessed December 20, 2017), paras. 4-6.

⁴⁵⁶ Council of Europe, Secretariat of the Committee of Ministers, “Communication from the United Kingdom Concerning the Case of Al-Skeini and Others Against United Kingdom (Application No. 55721/07),” October 4, 2016, DH-DD (2016)1072, <https://rm.coe.int/16806aa9bf> (accessed December 20, 2017), p. 5.

⁴⁵⁷ *Al-Saadoon and Others v. Secretary of State for Defence*, [2015] EWHC 1769 (Admin), <http://www.bailii.org/ew/cases/EWHC/Admin/2015/1769.html>, paras. 1, 11, 68, 78-80; UK Attorney General's Office, Ministry of Defence and Sir David Calvert-Smith, “Review of the Iraq Historic Allegations Team,” https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/553195/Flag_A_-_IHAT_Review_for_Attorney_General_final_12_September.pdf, p. 1. Justice Leggatt was appointed by the Divisional Court

The IHAT's slow pace of work and its limited output, combined with mounting accusations in the wake of the Al-Sweady Inquiry report that the law firms bringing claims linked to abuses in Iraq are representative of "an industry of vexatious allegations," generated criticism from government ministers, parliamentarians, other officials, and the public, putting increased pressure on the IHAT to expedite its work.⁴⁵⁸

In April 2016, the attorney general directed Sir David Calvert-Smith, a retired judge and former director of public prosecutions, to conduct an independent review of the IHAT "prompted by continuing concerns as to the length and expense of the process."⁴⁵⁹ Calvert-Smith's final report, published in September 2016, concluded the IHAT would be able to finish its work by the end of 2019 if the report's recommendations were implemented and if there was "no further surge of new applications."⁴⁶⁰

The same month in April 2016, the British House of Commons Defence Committee tasked a subcommittee chaired by a member of parliament and former British army officer, Johnny Mercer, to examine the support the Ministry of Defence gave to former and serving armed forces personnel subject to judicial processes, in particular through the IHAT.⁴⁶¹

On February 10, 2017, the subcommittee recommended that, due to loss of confidence, IHAT's work be expedited with a view towards it shutting down and its remaining cases transferred to the service police with the support of civilian police.⁴⁶² The same day,

"primarily to ensure that the risks of delay and a lack of direction were minimised, but also to ensure all applications would be to a single judge familiar with the overall issues." See *Mousa and Others v. Secretary of State for Defence*, [2013] EWHC 2941 (Admin), <http://www.bailii.org/ew/cases/EWHC/Admin/2013/2941.html>, paras. 4-6.

⁴⁵⁸ See, for example, Jessica Elgot, "Theresa May Will Oppose Vexatious Allegations Against Iraq UK Troops," *Guardian*, September 21, 2016, <https://www.theguardian.com/world/2016/sep/21/theresa-may-will-oppose-vexatious-allegations-against-iraq-uk-troops> (accessed December 20, 2017).

⁴⁵⁹ UK Attorney General's Office, Ministry of Defence and Sir David Calvert-Smith, "Review of the Iraq Historic Allegations Team," https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/553195/Flag_A_-_IHAT_Review_for_Attorney_General_final_12_September.pdf, p. 1.

⁴⁶⁰ *Ibid.*, p. 4. Calvert-Smith noted that between November 2014 and April 2015 there has been a "vast expansion in the IHAT's caseload."

⁴⁶¹ The Defence Committee is appointed by the House of Commons to examine the expenditure, administration, and policy of the Ministry of Defence and its associated public bodies. For this inquiry, the chair of the sub-Committee was Johnny Mercer MP. The members of the sub-Committee were James Gray MP, Madeleine Moon MP, and Rt Hon John Spellar MP. See UK House of Commons, Defence Sub-Committee, "Who Guards the Guardians? MoD Support for Former and Serving Personnel: Sixth Report of Session 2016-17," <https://www.publications.parliament.uk/pa/cm201617/cmselect/cmdfence/109/109.pdf>, p. 5.

⁴⁶² *Ibid.*, p. 13.

Defence Secretary Michael Fallon announced that the IHAT would close by the summer of 2017.⁴⁶³ Fallon's announcement and the subcommittee's report came days after the Solicitors Disciplinary Tribunal (SDT), the UK body tasked with adjudicating alleged breaches of professional ethics applicable to lawyers, struck off PIL's principal lawyer, Phil Shiner, barring him from practicing law.⁴⁶⁴

According to the UK government, the IHAT had taken "immediate steps to assess the impact" of the SDT decision disbaring Shiner on its work, including through consultations with the director of service prosecutions, and determined on February 8 that "a large number of cases, whose credibility had been tainted by the Shiner revelations, could be closed."⁴⁶⁵ This led the defence secretary "to conclude that the work of IHAT as a separate entity could end" due to the fall in caseload, and that "the unit could be reintegrated into the Service Police system."⁴⁶⁶

Both Public Interest Lawyers and another law firm, Leigh Day, came under the British Solicitors Regulatory Authority's (the body responsible for supervising the legal profession in the UK) review some time in 2014 in connection with the Al-Sweady Inquiry.⁴⁶⁷ The UK defence secretary noted that he had directed the Ministry of Defence to submit evidence of Shiner's wrongdoing to the Solicitors Regulatory Authority in 2015, and the case against Leigh Day was reportedly brought after pressure from Ministry of Defence.⁴⁶⁸

⁴⁶³ UK Ministry of Defence, "Defence Secretary Announces IHAT to Close as Early as This Summer," <https://www.youtube.com/watch?v=VP5bvqF9nc&feature=youtu.be>.

⁴⁶⁴ *Solicitors Regulation Authority v Philip Joseph Shiner*, Solicitors Disciplinary Tribunal, 11510-2016, <http://www.solicitortribunal.org.uk/sites/default/files-sdt/11510.2016.Philip%20Joseph%20Shiner.pdf> (accessed December 20, 2017), pp. 76-77.

⁴⁶⁵ UK House of Commons, Defence Sub-Committee, "Who Guards the Guardians? MoD Support for Former and Serving Personnel: Government Response to the Committee's Sixth Report: Ninth Special Report of Session 2016-17," April 21, 2017, <https://publications.parliament.uk/pa/cm201617/cmselect/cmdfence/1149/1149.pdf> (accessed December 20, 2017), pp. 5, 9.

⁴⁶⁶ *Ibid.*, p. 5.

⁴⁶⁷ "Al-Sweady Inquiry," Solicitors Regulation Authority news release, January 12, 2015, <https://www.sra.org.uk/sra/news/press/al-sweady-inquiry-statement.page> (accessed December 20, 2017).

⁴⁶⁸ "IHAT to Close at the End of June," Defence Secretary Sir Michael Fallon, UK Ministry of Defence news story, <https://www.gov.uk/government/news/ihat-to-close-at-the-end-of-june>; Owen Bowcott, "Michael Fallon Accused of Influencing Prosecution of Law Firm," *Guardian*, February 10, 2017, <https://www.theguardian.com/politics/2017/feb/10/michael-fallon-defence-secretary-accused-influencing-prosecution-leigh-day-law-firm-iraqi-torture-misconduct> (accessed December 20, 2017).

The SRA referred both firms and some of their lawyers to the Solicitors Disciplinary Tribunal in January 2016 and April 2016 respectively.⁴⁶⁹ Leigh Day denied wrongdoing and the SDT cleared its three lawyers of all charges in June 2017.⁴⁷⁰ In August 2016, PIL closed after being stripped of its legal aid funding for breach of contract.⁴⁷¹ In December 2016, Shiner admitted to charges of misconduct. He was removed from the roll of solicitors two months later.⁴⁷²

On April 5, 2017, Fallon confirmed that the IHAT would officially close on June 30, 2017, with any remaining cases—anticipated to be around 20—transferred to the service police (a combination of Royal Navy Police and Royal Air Force Police) for investigation.⁴⁷³ This effort, called the “Service Police Legacy Investigations” (SPLI), is led by a senior royal navy

⁴⁶⁹ “Al-Sweady Inquiry, Statement, January 2016,” Solicitors Regulation Authority news release, January 6, 2016, <https://www.sra.org.uk/sra/news/press/al-sweady-statement-january-2016.page> (accessed December 20, 2017); “Al-Sweady Inquiry – Statement,” Solicitors Regulation Authority news release, April 7, 2016, <http://www.sra.org.uk/sra/news/press/al-sweady-statement-april-2016.page> (accessed December 20, 2017); John Hyde, “Public Interest Lawyers Plans ‘Robust Defence’ After Referral to SDT,” *Law Society Gazette*, April 7, 2016, <https://www.lawgazette.co.uk/practice/public-interest-lawyers-plans-robust-defence-after-referral-to-sdt/5054599.article> (accessed December 20, 2017).

⁴⁷⁰ “Statement from the Partners at Leigh Day Regarding the SDT Hearing,” Leigh Day, April 24, 2017, <https://www.leighday.co.uk/News/News-2017/April-2017/Statement-from-the-partners-at-Leigh-Day-regarding> (accessed December 20, 2017); Solicitors Disciplinary Tribunal, Press Summary of *Solicitors Regulation Authority v Martin Jeremy Day (1), Sapna Malik (2), Anna Jennifer Crowther (3), and Leigh Day (4)*, June 9, 2017, http://www.solicitortribunal.org.uk/sites/default/files-sdt/SDT%20Press%20Release%20-%202017%20June%202017_o.pdf (accessed December 20, 2017), pp. 1, 4-17.

⁴⁷¹ “Contract Termination for Public Interest Lawyers,” Legal Aid Agency news story, April 2, 2016, <https://www.gov.uk/government/news/civil-news-contract-termination-for-public-interest-lawyers> (accessed December 20, 2017); “Iraq War: Public Interest Lawyers Closes Down,” BBC News Online, August 15, 2016, <http://www.bbc.com/news/uk-37084030> (accessed December 20, 2017).

⁴⁷² *Solicitors Regulation Authority v Philip Joseph Shiner*, Solicitors Disciplinary Tribunal, 11510-2016, <http://www.solicitortribunal.org.uk/sites/default/files-sdt/11510.2016.Philip%20Joseph%20Shiner.pdf>; “Phil Shiner: Iraq Human Rights Lawyer Struck Off Over Misconduct,” *Guardian*, February 2, 2017, <https://www.theguardian.com/law/2017/feb/02/iraq-human-rights-lawyer-phil-shiner-disqualified-for-professional-misconduct> (accessed December 20, 2017).

⁴⁷³ “IHAT to Close at the End of June,” Defence Secretary Sir Michael Fallon, UK Ministry of Defence news story, <https://www.gov.uk/government/news/ihat-to-close-at-the-end-of-june>; Ministry of Defence, “Guidance: Service Policy Legacy Investigations,” August 8, 2017, <https://www.gov.uk/guidance/service-police-legacy-investigations> (accessed December 20, 2017); UK House of Commons, Defence Sub-Committee, “Who Guards the Guardians? MoD Support for Former and Serving Personnel: Government Response to the Committee’s Sixth Report: Ninth Special Report of Session 2016–17,” <https://publications.parliament.uk/pa/cm201617/cmselect/cmdfence/1149/1149.pdf>. According to the UK government, the Royal Navy and Air Force Police would also be “supported by a small number of contractors who will perform back-room functions and will have no contact with UK suspects or witnesses.” It argued that this support was “necessary to provide specialist functions, expertise and, importantly, continuity, in order to bring the Iraq investigations to as rapid a conclusion as possible.” See House of Commons Defence Committee, “Who Guards the Guardians? MoD Support for Former and Serving Personnel: Government Response to the Committee’s Sixth Report: Ninth Special Report of Session 2016–17,” <https://publications.parliament.uk/pa/cm201617/cmselect/cmdfence/1149/1149.pdf>, p. 6.

police officer, though no public information is available about the SPLI's exact structure, staffing, and working modalities.

The Ministry of Defence news release announcing the IHAT's closure stated the "exposure of the dishonesty of Mr Shiner meant that many of the allegations that his now defunct firm, Public Interest Lawyers, had brought forward were discredited and enabled the Defence Secretary to decide to close IHAT."⁴⁷⁴ A separate ministry planning document said that Shiner's unauthorised payments to claimants had led IHAT to conclude that most cases would be "unprosecutable."⁴⁷⁵

A few months earlier, the attorney general told the parliamentary subcommittee evaluating the IHAT that it had not been demonstrated that "every single one of the cases that Mr Shiner brought to the IHAT process was not a genuine case." He stated that despite the SDT's consideration of Shiner's case an investigation was still necessary to sort through the allegations and emphasized that not all the claims had originated from PIL.⁴⁷⁶

In a September 2017 submission to the OTP, ECCHR made the case that the "UK Government's assertions that the proceedings against Phil Shiner render false all allegations concerning abuse in Iraq, must be rejected," given that numerous other

⁴⁷⁴ "IHAT to close at the end of June," Defence Secretary Sir Michael Fallon, UK Ministry of Defence news story, <https://www.gov.uk/government/news/ihat-to-close-at-the-end-of-june>.

⁴⁷⁵ UK Ministry of Defence, "Single Departmental Plan: 2015-2020," March 20, 2017, <https://www.gov.uk/government/publications/mod-single-departmental-plan-2015-to-2020/single-departmental-plan-2015-to-2020> (accessed December 20, 2017).

⁴⁷⁶ UK House of Commons, Defence Sub-Committee, "Oral Evidence: Examination of Sir David Calvert-Smith QC and Attorney General Jeremy Wright," October 19, 2016,

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/defence-subcommittee/mod-support-for-former-and-serving-personnel-subject-to-judicial-processes/oral/41503.html> (accessed February 1, 2018), questions 214-217, link available in UK House of Commons, Defence Sub-Committee, "Who Guards the Guardians? MoD Support for Former and Serving Personnel: Sixth Report of Session 2016-17,"

<https://www.publications.parliament.uk/pa/cm201617/cmselect/cmdfence/109/109.pdf>, p. 48. For a breakdown of the sources of the allegations brought to the IHAT, see UK House of Commons, Defence Sub-Committee, "Further Supplementary Written Evidence Submitted by Ministry of Defence,"

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/defence-subcommittee/mod-support-for-former-and-serving-personnel-subject-to-judicial-processes/written/44364.html> (accessed December 20, 2017), link available in UK House of Commons, Defence Sub-Committee, "Who Guards the Guardians? MoD Support for Former and Serving Personnel: Sixth Report of Session 2016-17,"

<https://www.publications.parliament.uk/pa/cm201617/cmselect/cmdfence/109/109.pdf>, p. 48.

sources “exist to corroborate the allegations.”⁴⁷⁷ As such, it urged the OTP “to reject efforts by the Ministry of Defence to use the proceedings against Phil Shiner as a means to characterize all claims relating to detainee abuse in Iraq as ‘spurious’ or ‘vexatious.’”⁴⁷⁸

D. OTP’s Preliminary Examination Activities

The OTP first began to receive communications related to alleged abuses in Iraq within the court’s first year of operation.⁴⁷⁹ However, in 2006, then-prosecutor, Luis Moreno-Ocampo, decided not to open a formal investigation, stating that although there was reasonable basis to believe that war crimes of wilful killing and inhuman treatment were committed, the numbers were not sufficient to warrant ICC involvement.⁴⁸⁰ After receiving a further, fuller communication from Public Interest Lawyers and ECCHR eight years later in January 2014, the OTP announced in May that year that it was reopening the preliminary examination.⁴⁸¹

⁴⁷⁷ Letter from ECCHR to Prosecutor Fatou Bensouda, September 1, 2017, https://www.ecchr.eu/en/our_work/international-crimes-and-accountability/united-kingdom.html (accessed December 20, 2017), p. 5.

⁴⁷⁸ *Ibid.*, p. 14.

⁴⁷⁹ “Communications Received by the Office of the Prosecutor of the ICC,” OTP press release, July 16, 2003, https://www.icc-cpi.int/NR/rdonlyres/F5470312-25C8-4432-81C4-8Fo8353BB5E5/277680/16_july__english1.pdf (accessed December 20, 2017), p.2.

⁴⁸⁰ “OTP response to communications received concerning Iraq,” OTP statement, February 9, 2006, <https://www.legal-tools.org/en/doc/5b8996/> (accessed December 20, 2017), pp. 1, 7-9. Some commentators have suggested that Ocampo’s decision not to pursue an investigation may have also been driven by a desire to avoid strained relations with some countries. In a 2014 blog post, academic Mark Kersten stated that “[s]ome believe, however, that the Prosecutor was guided by a desire not to ruffle the feathers of Western states, particularly the US.” See Mark Kersten, “The ICC and Iraq: ‘A Pinochet Moment?’” post to “Justice in Conflict” (blog), January 13, 2014, <https://justiceinconflict.org/2014/01/13/the-icc-and-iraq-a-pinochet-moment/> (accessed December 20, 2017). A Wikileaks cable referenced in Kersten’s blog reported that “[p]rivately, Ocampo has said that he wishes to dispose of Iraq issues (i.e., not investigate them)...”; “ICC: A Cautious Beginning with Mixed Signals from the Prosecutor,” WikiLeaks, July 15, 2013, https://www.wikileaks.org/plusd/cables/03THEHAGUE1806_a.html (accessed December 20, 2017).

⁴⁸¹ “Prosecutor of the International Criminal Court, Fatou Bensouda, Re-Opens the Preliminary Examination of the Situation in Iraq,” OTP press release,

<https://www.legal-tools.org/doc/d9d9c5/pdf/>. On September 29, 2015, PIL submitted a second formal communication that the OTP described as “adding substantively” to the allegations contained in the January 2014 communication submitted jointly by PIL and ECCHR. The OTP also indicated that PIL provided “additional information in support of the allegations on several occasions” on top of their formal communications. OTP, “Report on Preliminary Examination Activities 2015,” November 12, 2015, <http://www.legal-tools.org/doc/acoed2/> (accessed December 20, 2017), p. 7. Overall, the ICC prosecutor’s office has reported receiving “a total of 32 communications or additional submissions pursuant to article 15 in relation to the situation in Iraq/UK.” OTP, “Report on Preliminary Examination Activities 2017,” <https://www.legal-tools.org/en/doc/e50459/>, p. 40. See “Second Communication to the Office of the Prosecutor of the International Criminal Court: The Responsibility of Officials of the United Kingdom for War Crimes Involving Systematic Detainee Abuse in Iraq from 2003-2008,” Public Interest Lawyers (International) (PIL INT), June 15, 2015, unpublished document on file with Human Rights Watch.

Between May 2014-December 2017, the OTP focused on assessing whether the ICC had subject matter jurisdiction over the crimes alleged during the UK's engagement in Iraq—that is, its analysis remained in Phase 2.⁴⁸² Consistent with the phased approach, the OTP received and considered information on the progress of ongoing relevant national proceedings during this period, but did not assess whether these proceedings were genuine such that they would be a bar to its jurisdiction.⁴⁸³

Over those three years, the OTP held several meetings with a number of British authorities as well as the senders of the communication in either The Hague or the United Kingdom, including the IHAT director, the director of service prosecutions, and Foreign & Commonwealth Office officials.⁴⁸⁴ The office engaged in limited outreach to NGOs working on human rights in the UK.⁴⁸⁵

The OTP's meetings with UK authorities covered a range of subjects, including the OTP's preliminary examination process and the scope and methodology of national

⁴⁸² OTP, "Report on Preliminary Examinations Activities 2014," December 2, 2014, <https://www.icc-cpi.int/iccdocs/otp/OTP-Pre-Exam-2014.pdf> (accessed December 20, 2017), pp. 11-13; OTP, "Report on Preliminary Examination Activities 2015," <https://www.legal-tools.org/en/doc/acoed2/> (accessed December 20, 2017), p. 10; OTP, "Report on Preliminary Examination Activities 2016," <http://www.legal-tools.org/doc/f30a53/>, pp. 22-24.

⁴⁸³ See OTP, "Report on Preliminary Examination Activities 2015," <https://www.legal-tools.org/en/doc/acoed2/>, p. 10; OTP, "Report on Preliminary Examination Activities 2016," <http://www.legal-tools.org/doc/f30a53/>, p. 23. OTP staff told Human Rights Watch that any information generated by national proceedings and gathered during Phase 2 of the preliminary examination could also inform the office's subject matter jurisdiction analysis. Human Rights Watch interview with ICC staff, The Hague, October 2, 2015.

⁴⁸⁴ UK House of Commons, Defence Sub-Committee, "Further Supplementary Written Evidence Submitted by Ministry of Defence," <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/defence-subcommittee/mod-support-for-former-and-serving-personnel-subject-to-judicial-processes/written/44364.html>, question 15; Human Rights Watch interview with ICC staff, October 2, 2015. The OTP was also contacted by the chair of the Iraq Fatalities Investigation requesting that the ICC prosecutor extend British soldiers protection from self-incrimination arising from evidence they might give in the course of the IFI's inquiries into specific cases. The ICC prosecutor has given assurances to this effect in response to this request. See, for example, Iraq Fatalities Investigations and Sir George Newman, "Consolidated Report Into the Death of Nadheem Abdullah and the Death of Hassan Abbas Said," March 2015, http://www.iraq-judicial-investigations.org/linkedfiles/press_media/consolidatedreportintothedeathsofnadheemabdullahandhassansaid.pdf (accessed December 20, 2017), pp. 12-14, 22, 115-116.

⁴⁸⁵ Human Rights Watch interview with ICC staff, October 2, 2015; and group interview with ICC staff, The Hague, March 30, 2017; OTP, "Report on Preliminary Examination Activities 2016," <http://www.legal-tools.org/doc/f30a53/>, p. 22.

proceedings.⁴⁸⁶ British authorities also gave the OTP information during meetings with staff, and in writing at least four times between 2014-2016, though none of these submissions have been disclosed to others, including the senders of the Article 15 communications.⁴⁸⁷ The OTP has said that relevant stakeholders, including the British government, cooperated fully during the examination.⁴⁸⁸

As its examination progressed, the OTP focused on conducting an “evaluation of the reliability of sources and credibility of information received on alleged crimes”—including by visiting PIL’s offices in October 2015 to screen “supporting material relating to the claims,” and an unspecified third country for “source evaluation.”⁴⁸⁹ In its November 2016 annual preliminary examination report, the OTP noted it was tracking “issues affecting in particular the reliability of the providers of information,” and in December 2017, specified it had “examined all relevant circumstances bearing impact on the trustworthiness” of PIL, including the SDT findings against Phil Shiner.⁴⁹⁰

⁴⁸⁶ In a witness statement submitted to the designated judge, the head of the IHAT explained: “A delegation from the OTP visited the IHAT in Upavon on 26 June 2014, and the Service Prosecuting Authority at RAF Northolt the following day. The IHAT investigative processes were explained to the OTP in some detail, with positive verbal feedback received from the delegates. They stated that the systematic way in which the IHAT was approaching the investigations, conducting strategic analysis of the allegations and considering linked cases in order to assess the potential criminal culpability of individuals higher up the chain of command, met with their expectations.” See First witness statement of Director of the IHAT Mark Warwick, submitted in advance of a hearing on April 27, 2015, Exhibit MW 1-4, April 13, 2015, unpublished document on file with Human Rights Watch, p. 3; See also UK House of Commons, Defence Sub-Committee, “Further Supplementary Written Evidence Submitted by Ministry of Defence,” <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/defence-subcommittee/mod-support-for-former-and-serving-personnel-subject-to-judicial-processes/written/44364.html>, question 15; OTP, “Report on Preliminary Examination Activities 2014,” <https://www.icc-cpi.int/iccdocs/otp/OTP-Pre-Exam-2014.pdf>, p. 13; OTP, “Report on Preliminary Examination Activities 2015,” <https://www.legal-tools.org/en/doc/acoed2/>, pp. 9-10.

⁴⁸⁷ UK House of Commons, Defence Sub-Committee, “Further Supplementary Written Evidence Submitted by Ministry of Defence,” <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/defence-subcommittee/mod-support-for-former-and-serving-personnel-subject-to-judicial-processes/written/44364.html>, question 15; UK House of Commons, Defence Sub-Committee, “Oral Evidence: Examination of Sir David Calvert-Smith QC and Attorney General Jeremy Wright,” <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/defence-subcommittee/mod-support-for-former-and-serving-personnel-subject-to-judicial-processes/oral/41503.html>, question 265; Human Rights Watch interview with lawyer, London, December 2, 2015. Though one of the British government’s formal responses to the PIL/ECCHR communication is referenced in the OTP 2015 annual report on preliminary examinations, the document itself has not been made public. See OTP, “Report on Preliminary Examination Activities 2015,” <http://www.legal-tools.org/doc/acoed2/>, p. 7.

⁴⁸⁸ See OTP, “Report on Preliminary Examination Activities 2016,” <http://www.legal-tools.org/doc/f30a53/>, p. 22.

⁴⁸⁹ OTP, “Report on Preliminary Examination Activities 2015,” <https://www.legal-tools.org/en/doc/acoed2/>, p. 10; interview with ICC staff, October 2, 2015.

⁴⁹⁰ OTP, “Report on Preliminary Examination Activities 2016,” <http://www.legal-tools.org/doc/f30a53/>, p. 23; OTP, “Report on Preliminary Examination Activities 2017,” OTP, <https://www.legal-tools.org/en/doc/e50459/>, p. 42.

The OTP's public engagement around its United Kingdom examination has been limited. ICC Prosecutor Fatou Bensouda has visited the United Kingdom on at least two occasions since May 2014. However, these visits were not publicized as being linked to the OTP's ongoing analysis of alleged abuses by British troops in Iraq.⁴⁹¹ UK-based individuals who closely follow the court's work, and the UK/Iraq examination in particular, told Human Rights Watch that they were not aware of the prosecutor's presence in the UK during these visits.⁴⁹²

During one trip to London in December 2015, Bensouda spoke at two events, but did not proactively raise the UK/Iraq preliminary examination at either.⁴⁹³

The OTP has not issued any press releases after its visits to the United Kingdom and explained that it does not typically do so after working-level missions.⁴⁹⁴ Indeed, apart from correcting assertions in an article published by *The Telegraph* in July 2016, the OTP has not issued any standalone public statements regarding the UK/Iraq examination since May 2014.⁴⁹⁵

⁴⁹¹ See House of Lords, Select Committee on Sexual Violence in Conflict, Examination of Fatou Bensouda, Chief Prosecutor, International Criminal Court, Inquiry on Sexual Violence in Conflict, December 1, 2015, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/sexual-violence-in-conflict-committee/sexual-violence-in-conflict/oral/25625.html> (accessed December 20, 2017); "International Crime – Saturday Evening Lecture on 5th March," University of Dundee news release, February 22, 2016, <https://www.dundee.ac.uk/news/2016/international-crime--saturday-evening-lecture-on-5th-march.php> (accessed December 20, 2017).

⁴⁹² Human Rights Watch separate interviews with journalist, London, March 9, 2016 and civil society representative, London, March 10, 2016; group interview with lawyers, London, March 10, 2016.

⁴⁹³ See "ODI in Conversation with ICC Prosecutor Fatou Bensouda," Overseas Development Institute news release, undated, https://www.odi.org/events/4306-justice-africa-international-criminal-court-fatou-bensouda?utm_source=ODI_Update&utm_medium=feed (accessed December 20, 2017); House of Lords, Select Committee on Sexual Violence in Conflict, Examination of Fatou Bensouda, chief prosecutor International Criminal Court, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/sexual-violence-in-conflict-committee/sexual-violence-in-conflict/oral/25625.html>. In response to a question regarding the UK/Iraq investigation at an event sponsored by the Overseas Development Institute, the prosecutor made note of the UK's commitment to cooperate with her office and indicated that the examination process was aimed at encouraging national prosecutions. Fatou Bensouda, response to a question posed by a Human Rights Watch staff member regarding the UK/Iraq investigation during an ODI event "In Conversation with ICC Prosecutor Fatou Bensouda," Overseas Development Institute, December 1, 2015, transcript unavailable.

⁴⁹⁴ Human Rights Watch interview with ICC staff, October 2, 2015.

⁴⁹⁵ See OTP, "Iraq/UK Preliminary Examination," <https://www.icc-cpi.int/iraq> (accessed December 20, 2017); "Prosecutor of the International Criminal Court, Fatou Bensouda, Re-Opens the Preliminary Examination of the Situation in Iraq," OTP press release, <https://www.legal-tools.org/doc/d9d9c5/pdf/>; "Statement of the Prosecutor Correcting Assertions Contained in Article Published by The Telegraph," OTP statement, July 4, 2016, <http://www.legal-tools.org/doc/74578d/> (accessed December 20, 2017).

According to OTP staff, publicity is a means of leverage it has not utilized as part of its UK/Iraq examination since British authorities were cooperating with the court.⁴⁹⁶ In addition, OTP staff said the office had purposely kept a low public profile since it had yet to reach a conclusion on subject matter jurisdiction. The OTP noted there was no need for greater publicity in Iraq to induce additional allegations since it already had received and was processing many from PIL.⁴⁹⁷

E. Impact of OTP Preliminary Examination on National Justice Efforts

With varied domestic processes already in place prior to May 2014, the OTP's most recent engagement cannot be said to have been a catalyst for national justice efforts in the UK. However, the office can encourage action simply by interacting with domestic authorities.⁴⁹⁸

The following section looks at reaction to date to the OTP's reopened preliminary examination within the UK government, domestic prosecuting authorities, media, and civil society to assess the extent to which the ICC's examination may have helped to advance national justice efforts.

1. Government Reactions

The OTP's reopened preliminary examination has led British authorities to cooperate with the OTP in various ways, provoked several public statements, and influenced the UK government's participation in official meetings about the ICC.

The OTP's reopened preliminary examination compelled various British authorities to respond through direct cooperation with the OTP, including by sharing information or meeting with the prosecutor's staff.

It also triggered public statements. Even before the examination reopened, when PIL/ECCHR advertised their first communication to the court in January 2014, a Defence Ministry spokesperson underlined that they would "explain [to the office of the prosecutor] the very

⁴⁹⁶ Human Rights Watch interview with ICC staff, October 2, 2015; and group interview with ICC staff, March 30, 2017.

⁴⁹⁷ Ibid.

⁴⁹⁸ Ibid.

extensive work under way to deal with historic allegations of abuse” should the ICC become involved.⁴⁹⁹ In the same vein, then-Foreign Secretary William Hague said that the “allegations are either under investigation or have been dealt with in a variety of ways.”⁵⁰⁰

Once Bensouda announced her decision to reopen the UK/Iraq preliminary examination, a move one lawyer described as a “significant ruffling of the government’s feathers,”⁵⁰¹ British authorities were quick to take to the press. For example, Dominic Grieve, the attorney general at the time, issued a public statement underlining that “[w]here allegations have been made ... they are being comprehensively investigated [in the UK].” He added that he would give the OTP “whatever is necessary to demonstrate that British justice is following its proper course.”⁵⁰²

The government has also been careful to proactively address the preliminary examination in its public diplomacy. At the 2015 ICC Assembly of States Parties meeting, the government’s statement asserted that the UK had shown the ICC prosecutor that “these matters are being thoroughly dealt with at national level—a clear demonstration of complementarity in action.”⁵⁰³

2. Effect on the IHAT

There are indications that IHAT staff, the DSP and other government officials were relatively mindful of the reopened examination, and that the ICC’s involvement seemed to have some impact on the backing the IHAT’s work received domestically.

One interlocutor was told that the hiring of new IHAT and SPA staff dedicated exclusively to liaising with the ICC was due to the reopened preliminary examination, suggesting, in this

⁴⁹⁹ “British Politicians and Generals Targeted in Iraq Abuse Case,” *Guardian*, January 11, 2014, <https://www.theguardian.com/law/2014/jan/12/iraq-war-crimes> (accessed December 20, 2017).

⁵⁰⁰ “William Hague Rejects Iraq ‘Abuse’ Complaint to ICC,” BBC News Online, January 12, 2014, <http://www.bbc.com/news/uk-25703723> (accessed December 20, 2017).

⁵⁰¹ Human Rights Watch group telephone interview with lawyers, London, December 1, 2015.

⁵⁰² UK Attorney General’s Office and The Rt Hon. Dominic Grieve QC, “Statement on ICC preliminary examination into Iraq allegations,” May 13, 2014, <https://www.gov.uk/government/news/statement-on-icc-preliminary-examination-into-iraq-allegations> (accessed on December 20, 2017).

⁵⁰³ Catherine Adams, legal director for the Foreign and Commonwealth Office, statement of the United Kingdom of Great Britain and Northern Ireland to the ASP Fourteenth Session, The Hague, November 18, 2015, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP14/GenDeb/ASP14-GenDeb-UK-ENG.pdf (accessed December 20, 2017), p. 4.

interlocutor's view, "anxiety about the ICC's involvement."⁵⁰⁴ Similarly, the IHAT reached out to Nicolas Mercer for a witness statement only after the OTP reopened its examination. Mercer noted in testimony to the parliamentary subcommittee reviewing the IHAT's work: "over a five-year period I had three visits from the IHAT before my complaints were formally recorded in a statement. Why did it take five years?"⁵⁰⁵ Mercer believed the ICC examination had prompted the IHAT's outreach at last.⁵⁰⁶

In another instance, the DSP drew the ICC's examination to the designated judge's attention in his consideration of the interaction between the IHAT and IFI processes, arguing "he would not wish to create any possible doubt about the willingness of the United Kingdom to investigate and prosecute cases by improperly abridging the criminal investigative process."⁵⁰⁷

According to the OTP, some of the IHAT's working methods may have changed due to OTP queries about its operations. In particular, it was suggested that the IHAT's sorting of ill-treatment allegations into "problem profiles" with a view to identifying patterns and groups of allegations that can be investigated together could be partly attributed to ICC involvement and the OTP probing the team's consideration of systemic issues.⁵⁰⁸

⁵⁰⁴ Human Rights Watch interview with lawyer, London, April 14, 2016.

⁵⁰⁵ UK House of Commons, Defence Sub-Committee, "Oral Evidence: Examination of Solicitor Lewis Cherry, Reverend Nicholas Mercer and Solicitor Hilary Meredith," June 8, 2016, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/defence-subcommittee/mod-support-for-former-and-serving-personnel-subject-to-judicial-processes/oral/34267.html> (accessed December 20, 2017), question 10, link available in UK House of Commons, Defence Sub-Committee, "Who Guards the Guardians? MoD Support for Former and Serving Personnel: Sixth Report of Session 2016-17," <https://www.publications.parliament.uk/pa/cm201617/cmselect/cmdfence/109/109.pdf>, p. 48.

⁵⁰⁶ *Ibid.*, question 11.

⁵⁰⁷ *Al-Saadoon and Others v. Secretary of State for Defence*, [2016] EWHC 773 (Admin), <http://www.bailii.org/ew/cases/EWHC/Admin/2016/773.html> (accessed December 20, 2017), paras. 267-268.

⁵⁰⁸ Human Rights Watch group interview with ICC staff, March 30, 2017; *Al-Saadoon and Others v. Secretary of State for Defence*, [2015] EWHC 1769 (Admin), <http://www.bailii.org/ew/cases/EWHC/Admin/2015/1769.html>, para. 28. In his review of the IHAT, Calvert-Smith described a "problem profile" as "a concentration of allegations within a particular unit or site, or a series of allegations of ill treatment in which the same individual is shown to have been present." He noted that "[w]hether or not there are prosecutions based on the problem profiles and whether or not any prosecution results in convictions the problem profile issue will of course bring into sharp focus the UK's duty not only to investigate possible individual crimes but to identify and then take steps to rectify systematic issues which may have been identified." See UK Attorney General's Office, Ministry of Defence and Sir David Calvert-Smith, "Review of the Iraq Historic Allegations Team," https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/553195/Flag_A_-_IHAT_Review_for_Attorney_General_final_12_September.pdf, pp. 14, 29.

There is also some indication that, at least initially, the reopened examination bolstered support by government officials to the IHAT work. In fact, defence officials and the attorney general argued that the OTP's ongoing examination and the possibility of a formal ICC investigation necessitated the IHAT's continued work. They maintained that the IHAT was a key element in demonstrating to the ICC that allegations were being handled properly at the domestic level and that its intervention was unnecessary; conversely, shutting down the IHAT could risk the ICC stepping in.⁵⁰⁹ In December 2016, Defence Secretary Fallon stressed that the UK had to show the Iraq allegations were being properly investigated, and that he was "not prepared to see [the UK] dragged in front of the International Criminal Court like some dictatorship."⁵¹⁰

Finally, the Calvert-Smith review of the IHAT could also be seen as a positive effect of the ICC's intervention. In other words, the British government's aim in convincing the OTP that ongoing UK proceedings were a bar to the ICC's jurisdiction may have contributed to domestic efforts to expedite the IHAT's work.

At the same time, there are real limits as to how strong an impact the preliminary examination likely had overall, whether in structure, staffing, resourcing, or timelines related to the IHAT's work.

As detailed above, the IHAT had already been the subject of a great deal of judicial scrutiny in British courts pre-dating the OTP's May 2014 intervention, leading to changes in its staffing and processes. Most interlocutors Human Rights Watch spoke with believed that,

⁵⁰⁹ Penny Mordaunt, "Westminster Hall Debate on the Iraq Historic Allegations Team (IHAT)," post to "Defence in the Media" (blog) by the Ministry of Defence, January 27, 2016, <https://modmedia.blog.gov.uk/2016/01/27/westminster-hall-debate-on-the-iraq-historic-allegations-team/> (accessed February 2, 2018); UK House of Commons, Defence Sub-Committee, "Who Guards the Guardians? MoD Support for Former and Serving Personnel: Sixth Report of Session 2016-17," <https://www.publications.parliament.uk/pa/cm201617/cmselect/cmdfence/109/109.pdf>, pp. 31-32; UK House of Commons, Defence Sub-Committee, "Oral Evidence: Examination of Sir David Calvert-Smith QC and Attorney General Jeremy Wright," October 19, 2016, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/defence-subcommittee/mod-support-for-former-and-serving-personnel-subject-to-judicial-processes/oral/41503.html>, questions 186, 261, link available in UK House of Commons, Defence Sub-Committee, "Who Guards the Guardians? MoD Support for Former and Serving Personnel: Sixth Report of Session 2016-17," <https://www.publications.parliament.uk/pa/cm201617/cmselect/cmdfence/109/109.pdf>, p. 48.

⁵¹⁰ UK House of Commons, Defence Sub-Committee, "Oral Evidence: Examination of Sir Michael Fallon MP, Air Marshal Sir Stuart Peach and Director of Judicial Engagement Policy for the Ministry of Defence Peter Ryan," <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/defence-subcommittee/mod-support-for-former-and-serving-personnel-subject-to-judicial-processes/oral/44527.html>, question 572.

to the extent that there had been changes to the IHAT infrastructure or practices, it could be attributed to domestic judicial scrutiny. The IHAT procedures were “well-established” when the ICC reopened its examination in 2014.⁵¹¹

Several individuals interviewed for this report described a palpable confidence on the part of British authorities vis-à-vis the limited likelihood of a formal ICC probe, which may have limited the concrete effects of the reopened examination. These individuals—a lawyer, a journalist, and an NGO representative—indicated that many officials believe that the prospect of prosecution in The Hague was “very far-fetched” and that the ICC’s engagement would not likely escalate into a formal investigation.⁵¹² Representatives of one NGO argued further that British authorities seemed “more concerned about negative domestic court judgments rather than the ICC.”⁵¹³

This view that the OTP would not ultimately open a formal probe is confirmed by statements of former and current government or judicial authorities. A Ministry of Defence representative told a British court in April 2015 that he was “confident” that the UK government would be able to demonstrate to the OTP that it was making genuine efforts to investigate and prosecute the allegations of abuse in Iraq.⁵¹⁴ Sir David Calvert-Smith also said in his review of the IHAT that its process “would certainly satisfy the requirements of civilian investigation and prosecution organizations in England and Wales, and would be very surprised therefore if an international tribunal were to take a different view.”⁵¹⁵

⁵¹¹ Human Rights Watch interview with government official, London, November 18, 2016. Nonetheless, it is interesting to note that official materials describing the IHAT’s work reference the UK’s obligations under the Rome Statute. A Ministry of Defence question and answer guide states, for example, that without the IHAT, British armed forces “would be open to referral to the International Criminal Court” and that that was something the government was determined to avoid. See MOD News Team, “IHAT: What it is and what it Does,” post to “Defence in the Media” (blog) by the Ministry of Defence, January 13, 2016, <https://modmedia.blog.gov.uk/2016/01/13/ihat-what-it-is-and-what-it-does/> (accessed December 20, 2017).

⁵¹² Human Rights Watch separate interviews with two journalists, London, March 9 and April 5, 2016; and group interview with civil society representatives, April 14, 2016.

⁵¹³ Human Rights Watch group interview with civil society representatives, April 14, 2016.

⁵¹⁴ See First witness statement of Director of Judicial Engagement Policy for the Ministry of Defence Peter Ryan, submitted in advance of a hearing on April 13, 2015, unpublished document on file with Human Rights Watch, para. 7.

⁵¹⁵ UK Attorney General’s Office, Ministry of Defence and Sir David Calvert-Smith, “Review of the Iraq Historic Allegations Team,” https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/553195/Flag_A_-_IHAT_Review_for_Attorney_General_final_12_September.pdf, p. 37.

The closure of Public Interest Lawyers in August 2016, and the disbaring of its head, Phil Shiner, in February 2017 for professional misconduct, seemed to further embolden this sentiment. The same month that news broke of Shiner’s disqualification, the House of Commons Defence subcommittee published its report recommending that the IHAT be closed and its remaining caseload handed to service police. In a press release, the committee said the IHAT had “become a seemingly unstoppable self-perpetuating machine, deaf to the concerns of the armed forces, blind to their needs, and profligate with its own resources.”⁵¹⁶

With respect to the OTP’s preliminary examination, the subcommittee noted it was “not convinced that the International Criminal Court would commit to investigate such a large case load which is based, to a great extent on discredited evidence.” It recommended that the Ministry of Defence instead present “a robust case to the ICC that the remaining cases would be disposed of more quickly and with no less rigour through service law rather than IHAT.”⁵¹⁷

The subcommittee further determined that “[t]he focus has been on satisfying perceived *international obligations and outside bodies*, with far too little regard for those who have fought under the UK’s flag” [emphasis added].⁵¹⁸ The UK defence secretary’s announcement on the IHAT’s closure similarly cited Shiner’s misconduct as discrediting most of the allegations pending before it, but without any mention of the ICC.⁵¹⁹

It appears that while British officials seemed to be mindful of the OTP’s examination, they were principally concerned with the scrutiny their work was subject to domestically.⁵²⁰

⁵¹⁶ “Close IHAT This Year and Immediately Dismiss Remaining Weak Cases,” UK Commons Select Committee press statement, February 10, 2017, <https://www.parliament.uk/business/committees/committees-a-z/commons-select/defence-committee/defencesubcommittee/news/mod-support-report-published-16-17/> (December 20, 2017).

⁵¹⁷ UK House of Commons, Defence Sub-Committee, “Who Guards the Guardians? MoD Support for Former and Serving Personnel: Sixth Report of Session 2016-17,” <https://www.publications.parliament.uk/pa/cm201617/cmselect/cmdfence/109/109.pdf>, p.32.

⁵¹⁸ *Ibid.*, p. 4.

⁵¹⁹ UK Ministry of Defence, “Defence Secretary Announces IHAT to Close as Early as this Summer,” <https://www.youtube.com/watch?v=VP5bvqF9nc&feature=youtu.be>; “IHAT to Close at the End of June,” Defence Secretary Sir Michael Fallon, UK Ministry of Defence news story, <https://www.gov.uk/government/news/ihat-to-close-at-the-end-of-june>.

⁵²⁰ Human Rights Watch separate interviews with civil society representative, March 10, 2016; and government official, November 18, 2016.

Director of Judicial Engagement Policy at the Ministry of Defence, Peter Ryan, said that the work dedicated to establishing a process to address the Iraq allegations had been done to ensure “compliance with the UK’s investigative duties under the ECHR and with the judgements and orders of the Court.”⁵²¹ Attorney General Jeremy Wright also made clear in October 2016 that “[e]ven if the ICC decided to no longer take an interest in this, [the UK] would still have those obligations and need to meet them.”⁵²²

Concern with the IHAT’s procedures and the pace of its work persisted even after the ICC prosecutor reopened the UK/Iraq examination in May 2014, culminating in Calvert-Smith’s 2016 review.⁵²³ In one such example, Calvert-Smith notes that IHAT’s investigation was “being conducted by investigators with no experience of policing the Army and ... unfamiliar with the concept of a ‘war crime.’”⁵²⁴

3. Publicity and the Role of Media

As indicated above, the OTP has not proactively engaged with media in the UK. However, our research suggests that this was unlikely a missed opportunity to exert more leverage on the government given media hostility to the investigation of military personnel and the relationship between print media and public opinion in the UK.

The OTP had reopened its preliminary examination some few months before the publication of the Al-Sweady inquiry report in 2014. While the examination has received less press attention than any domestic legal activity relating to the Iraq allegations, the

⁵²¹ See First witness statement of Director of Judicial Engagement Policy for the Ministry of Defence Peter Ryan, submitted in advance of a hearing on April 13, 2015, unpublished document on file with Human Rights Watch, para. 4.

⁵²² House of Commons, Defence Sub-Committee, “Oral Evidence: MoD Support for Former and Serving Personnel Subject to Judicial Processes, HC 109,”

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/defence-subcommittee/mod-support-for-former-and-serving-personnel-subject-to-judicial-processes/oral/41503.html>, question 262.

⁵²³ Human Rights Watch group interview with lawyers, November 16, 2016.

⁵²⁴ UK Attorney General’s Office, Ministry of Defence and Sir David Calvert-Smith, “Review of the Iraq Historic Allegations Team,” https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/553195/Flag_A_-_IHAT_Review_for_Attorney_General_final_12_September.pdf, p. 3.

ICC's role has enjoyed some bursts of coverage⁵²⁵ –for example, a flurry of press reporting surrounding the filing of the PIL/ECCHR communication to the OTP in January 2014.⁵²⁶ But given the OTP's policy not to publicize article 15 communications because it considers them confidential unless the sender takes steps to make them public, it seems that any press stories on that development were attributable to the coordinated media releases, press conferences and strategic campaigning of PIL and ECCHR.⁵²⁷ When the OTP reopened its examination in May, a series of British outlets covered the story on the day it was officially announced by the prosecutor.⁵²⁸

⁵²⁵ According to a Human Rights Watch review of British media articles about the Iraq allegations between January 2014 and November 2017 conducted using Factiva, only 39 news reports centered on the ICC, with bursts of coverage in January 2014 (following the PIL/ECCHR communication to the OTP), May 2014 (after the OTP re-opened its preliminary examination), and July 2016 (upon publication of the Chilcot public inquiry report into the UK's role in the Iraq war). A public inquiry, chaired by Sir John Chilcot, was officially launched on July 30, 2009 to consider and identify lessons learned from the UK's involvement in Iraq. The report was published on July 6, 2016. See: "The Report of the Iraq Inquiry," vol. 1, July 6, 2016, http://www.iraqinquiry.org.uk/media/247882/the-report-of-the-iraq-inquiry_introduction.pdf (accessed December 20, 2017), p. 3.

⁵²⁶ See, for example, Jonathan Owen, "Exclusive: Devastating Dossier on 'Abuse' by UK Forces in Iraq Goes to International Criminal Court," *Independent*, January 12, 2014, <http://www.independent.co.uk/news/uk/politics/exclusive-devastating-dossier-on-abuse-by-uk-forces-in-iraq-goes-to-international-criminal-court-9053735.html>; "British Politicians and Generals Targeted in Iraq Abuse Case," *Guardian*, January 11, 2014, <https://www.theguardian.com/law/2014/jan/12/iraq-war-crimes> (accessed December 20, 2017); "William Hague Rejects Iraq 'Abuse' Complaint in ICC," BBC News Online, <http://www.bbc.com/news/uk-25703723>; "Senior Ministers in Blair's Government Face Crime Probe Over Iraq 'War Crimes,'" *Huffington Post UK*, January 12, 2014, http://www.huffingtonpost.co.uk/2014/01/12/iraq-war-crimes-uk-blair_n_4583610.html (accessed December 20, 2017).

⁵²⁷ PIL and ECCHR convened two public events in London and Berlin on January 14 and 15, 2014, respectively, to present and discuss their article 15 communication. See "The International Criminal Court Must Investigate UK Military Abuses Against Iraqi Detainees from 2003 to 2008 as War Crimes," European Center for Constitutional and Human Rights and Public Interest Lawyers press release, January 10, 2014, https://www.ecchr.eu/en/our_work/international-crimes-and-accountability/united-kingdom.html (accessed December 20, 2017); see also Estelle Shirbon, "Campaigners Ask ICC to Investigate Alleged UK War Crimes in Iraq," Reuters, January 12, 2014, <http://uk.reuters.com/article/uk-britain-iraq-icc-idUKBREAOBo8R20140112> (accessed on December 20, 2017); Sam Jones, "Lawyers Call for Prosecutions over Iraq Abuse," *Financial Times*, January 12, 2014, <https://www.ft.com/content/ed2a9632-7b8c-11e3-84af-00144feabdco> (accessed December 20, 2017); "Iraq War Crimes Allegations 'Go Right to the Top,'" *Telegraph*, January 12, 2014, <http://www.telegraph.co.uk/news/uknews/defence/10566794/iraq-war-crimes-allegations-go-right-to-the-top.html> (accessed December 20, 2017).

⁵²⁸ See, for example, "ICC to Investigate Claims of Abuse by UK Forces in Iraq," BBC News Online, May 13, 2014, <http://www.bbc.com/news/uk-27397695> (accessed December 20, 2017); Ian Cobain, "ICC to Examine Claims that British Troops Carried Out War Crimes in Iraq," *Guardian*, May 13, 2014, <https://www.theguardian.com/law/2014/may/13/icc-to-investigate-alleged-british-war-crimes-iraq> (accessed December 20, 2017); Ben Farmer, "Hague Investigation into British 'War Crimes' in Iraq," *Telegraph*, May 13, 2014, <http://www.telegraph.co.uk/news/uknews/defence/10828393/Hague-probe-into-British-war-crimes-in-Iraq.html> (accessed December 20, 2017); Jonathan Owen, "Iraq Inquiry: International Criminal Court Will Investigate 'Abuse' by UK Troops," *Independent*, May 13, 2014, <http://www.independent.co.uk/news/uk/politics/icc-will-investigate-abuse-by-uk-troops-in-iraq-9364931.html> (accessed December 20, 2017); Jill Reilly and Iain Drury, "British Soldiers to be Investigated by International Criminal Court Over Claims They Committed War Crimes in Iraq," *Daily Mail*, May 13, 2014, <http://www.dailymail.co.uk/news/article-2627228/BREAKING-NEWS-British-soldiers-investigated-International-Criminal-Court-claims-committed-war-crimes-Iraq.html> (accessed December 20, 2017).

One journalist indicated that most of the press is not aware of the fact or nature of the ICC's involvement; while there is general familiarity with the "The Hague," most British reporters neither understand the ICC's authority nor believe that the examination could lead to actual prosecutions abroad.⁵²⁹ Another journalist said news editors were generally uninterested in the ICC angle because they could not discern any concrete steps the ICC had taken since the examination reopened.⁵³⁰ One British official told Human Rights Watch that the government has received very few press inquiries about the ICC's preliminary examination in relation to the issue of the Iraq allegations more broadly.⁵³¹

Starting in 2015, some press appeared to become increasingly hostile toward possible legal action against British troops.⁵³² In 2016, there was a surge of media interest in the IHAT after Mark Warwick stated that there was "significant evidence to be obtained to put a strong case before the Service Prosecuting Authority to prosecute and charge."⁵³³ Soon after, some outlets spotlighted politicians' and military families' reactions describing the lawyers behind the Iraq allegations as "ambulance-chasing."⁵³⁴

Then-Prime Minister David Cameron was picked up in the press calling for "stamp[ing] out" the legal "industry trying to profit from spurious claims lodged against our brave servicemen and women."⁵³⁵ *The Sun* even launched a personal attack against the IHAT's

⁵²⁹ Human Rights Watch separate interviews with two journalists, London, April 5 and 12, 2016.

⁵³⁰ Human Rights Watch interview with journalist, March 9, 2016.

⁵³¹ Human Rights Watch Skype interview with government official, London, December 3, 2015.

⁵³² Tim Ross, "Defence Secretary Michael Fallon: Suspend the Human Rights Act to Protect Our Troops," *Telegraph*, December 26, 2015, <http://www.telegraph.co.uk/news/politics/12070235/Defence-secretary-Michael-Fallon-suspend-the-human-rights-act-to-protect-our-troops.html> (accessed December 20, 2017); Tim Ross, "£150m Legal Bill for Troops Just Doing Their Duty," *Telegraph*, October 17, 2015, <http://www.telegraph.co.uk/news/uknews/defence/11938476/150m-legal-bill-for-troops-just-doing-their-duty.html> (accessed December 20, 2017).

⁵³³ Jonathan Owen, "British Soldiers Could Face Prosecution for Crimes Committed During Iraq Conflict, Investigators Confirm," *Independent*, January 1, 2016, <http://www.independent.co.uk/news/uk/home-news/british-soldiers-could-face-prosecution-for-crimes-committed-during-iraq-conflict-investigators-a6793271.html> (accessed December 20, 2017).

⁵³⁴ Larisa Brown and Jack Doyle, "End Witch-Hunt of Our Soldiers: Fury as 'Ambulance-Chasing' Lawyers Try to Prosecute UK's Iraq Heroes - and are Handed Taxpayers' Millions to Do It," *Daily Mail*, January 3, 2016, <http://www.dailymail.co.uk/news/article-3383135/End-witch-hunt-soldiers-Fury-ambulance-chasing-lawyers-try-prosecute-UK-s-Iraq-heroes-handed-taxpayers-millions-it.html> (accessed December 20, 2017).

⁵³⁵ Owen Bowcott and Ian Cobain, "UK Government Looks to Stop 'Spurious' Legal Claims Against Soldiers," *Guardian*, January 22, 2016, <https://www.theguardian.com/uk-news/2016/jan/22/uk-government-considers-plans-stop-claims-against-soldiers-iraq-war-allegations-abuse> (accessed December 20, 2017); Jonathan Owen, "David Cameron's Attack on War Crimes 'Industry' Rejected by Lawyers," *Independent*, January 22, 2016, <http://www.independent.co.uk/news/uk/politics/david-camersons-attack-on-war-crimes-industry-rejected-by-lawyers-a6828476.html> (accessed December 20, 2017).

director and called the solicitors bringing the claims “legal jihadi” lawyers,⁵³⁶ while *The Daily Mail* published numerous articles about the “merciless hounding of our soldiers over spurious allegations.”⁵³⁷ Some press attention also focused on the costs of the IHAT investigations for taxpayers.⁵³⁸ A few months before the decision to close the IHAT, several outlets covered Prime Minister Theresa May’s pronouncement at a Tory party conference that she would not allow “activist left wing human rights lawyers” to “harangue and harass the bravest of the brave.”⁵³⁹

Despite emphasis on the IHAT’s work and the misconduct allegations against the lawyers bringing the Iraq claims, the ICC did not feature heavily in the coverage. What British media reporting there was of the OTP’s preliminary examination was usually prompted by events external to the examination. For example, at the beginning of 2017, references to the ICC again appeared in the British press in the context of the parliamentary subcommittee inquiry into the IHAT, the Ministry of Defence’s decision to shut the IHAT down, and the striking-off of PIL’s head, Phil Shiner.⁵⁴⁰

⁵³⁶ David Willetts, “Iraq Lawyers ‘Legal Jihadis’: Basic Checks Proved Brit Troop Cases Were Nonsense,” *Sun*, February 4, 2016, <https://www.thesun.co.uk/archives/news/34002/iraq-lawyers-legal-jihadis-basic-checks-proved-brit-troop-cases-were-nonsense/> (accessed December 20, 2017); Oliver Harvey and David Willetts, “Top Cat Lawyer Pouncing on Brave Lions: The Millionaire High Life of the Boss Probing Our Boys,” *Sun*, January 8, 2016, <https://www.thesun.co.uk/archives/news/63534/top-cat-lawyer-pouncing-on-brave-lions-the-millionaire-high-life-of-the-boss-probing-our-boys/> (accessed December 20, 2017).

⁵³⁷ Daily Mail Comment, “Grasping Lawyers and a Grotesque Betrayal,” *Daily Mail*, January 10, 2016, <http://www.dailymail.co.uk/debate/article-3393262/DAILY-MAIL-COMMENT-Grasping-lawyers-grotesque-betrayal.html> (accessed December 20, 2017); Sam Greenhill, “Five Years of Lawyers Sifting Through Abuse Claims... And ONE Guilty Soldier: Allegations Team has Completed Just 18 Cases,” *Daily Mail*, January 10, 2016, <http://www.dailymail.co.uk/news/article-3393193/Five-years-lawyers-sifting-abuse-claims-ONE-guilty-soldier-Allegations-team-completed-just-18-cases.html> (accessed December 20, 2017); Larisa Brown, “No End to the Witch-Hunt: Now Solicitors Hounding Heroes Plan 1,100 Iraq War Damages Claims with Troops Facing up to FIVE Grueling Legal Probes Over a Single Allegation,” *Daily Mail*, January 10, 2016, <http://www.dailymail.co.uk/news/article-3393168/No-end-witch-hunt-solicitors-hounding-heroes-plan-1-100-Iraq-War-damages-claims-troops-facing-FIVE-gruelling-legal-probes-single-allegation.html> (accessed December 20, 2017).

⁵³⁸ Larisa Brown, “Ex-Cops on £33 An Hour to Probe Claims: Former Officers Among Team of 145 Filtering Through Evidence and Questioning Soldiers About Their Actions,” *Daily Mail*, January 4, 2016, <http://www.dailymail.co.uk/news/article-3384744/Ex-cops-33-hour-probe-claims.html> (accessed December 20, 2017).

⁵³⁹ Samuel Osborne, “Theresa May Speech: Tory Conference Erupts in Applause as PM Attacks ‘Activist Left Wing Human Rights Lawyers,’” *Independent*, October 5, 2016, <http://www.independent.co.uk/news/uk/politics/theresa-may-tory-conference-speech-applause-attacks-activist-left-wing-human-rights-lawyers-a7346216.html> (accessed December 20, 2017).

⁵⁴⁰ See, for example, “IHAT Closure: Sgt Brian Wood Says Iraq Abuse Inquiry Should Have Ended Sooner,” BBC News Online, February 11, 2017, <http://www.bbc.com/news/uk-38942622> (accessed December 20, 2017); Sam Lister, “Investigation Into Historic Allegations Against British Troops in Iraq to End Following ‘Scathing’ Report,” *Independent*, February 10, 2017, <http://www.independent.co.uk/news/uk/home-news/ihat-investigation-historic-mod-uk-troops-in-iraq-ends-scathing-report-a7574021.html> (accessed December 20, 2017); Robert Mendick, “Revealed: MPs to Demand End to Witch Hunt of British Troops in Iraq After 10-Month Inquiry,” *Telegraph*, February 3, 2017,

Given the negative tenor of the coverage around the Iraq allegations, several interlocutors with whom Human Rights Watch spoke believed an engaged media strategy by the OTP might have been counterproductive. In their view, it risked criticism by some powerful sectors of the press with limited knowledge of the court and its mandate. Some argued that media savvy and public relations expertise would be necessary if the OTP wanted to avoid falling prey to the power of the British tabloids—skills, one interlocutor argued, the court currently lacked.⁵⁴¹

4. Role of Civil Society/Public

Historically, civil society engagement on the issue of accountability for abuses in Iraq has generally focused on bringing allegations of abuse to light,⁵⁴² interventions in litigation related to the allegations,⁵⁴³ and advocacy tied to public inquiries.⁵⁴⁴

<http://www.telegraph.co.uk/news/2017/02/04/revealed-mps-demand-end-witch-hunt-british-troops-iraq-10-month> (accessed December 20, 2017); Robert Mendick, “Unanswered Questions Behind the Failed Witch Hunt of Iraq Veterans,” *Telegraph*, February 11, 2017, <http://www.telegraph.co.uk/news/2017/02/11/unanswered-questions-behind-failed-witch-hunt-iraq-veterans> (accessed December 20, 2017).

⁵⁴¹ Human Rights Watch interview with lawyer, April 14, 2016.

⁵⁴² Amnesty International, “Beyond Abu Ghraib: Detention and Torture in Iraq,” http://www.amnestyinternational.be/IMG/pdf/MDE140012006_IRAK.pdf; REDRESS, “UK Army in Iraq: Time to Come Clean on Civilian Torture,” <https://redress.org/publication/uk-army-in-iraq-time-to-come-clean-on-civilian-torture/>; Amnesty International, “Iraq: A Decade of Abuses,” <https://www.amnestyusa.org/sites/default/files/mde140012013en.pdf>.

⁵⁴³ For example, a number of organizations intervened at the House of Lords as well as before the European Court of Human Rights in the *Al-Skeini* case. See Intervention before the House of Lords in the cases of *Al-Skeini and Others v. Secretary of State for Defence*, March 26, 2007, <http://www.refworld.org/docid/4a79b2742b.html> (accessed December 20, 2017); ECHR, *Al-Skeini and Others v. United Kingdom*, Judgment of 7 July 2011, [https://hudoc.echr.coe.int/eng#{"itemid":\["001-105606"\]}](https://hudoc.echr.coe.int/eng#{), para. 6.

⁵⁴⁴ See, for example, REDRESS, “Memorandum to the UK Ministry of Defence on the Aitken Report: An Investigation Into Cases of Deliberate Abuse and Unlawful Killing in Iraq 2003 and 2004,” January 31, 2008, <http://www.redress.org/downloads/publications/Memo%20on%20Aitken%20Report%2031%20Jan%2008.pdf> (accessed February 21, 2017); REDRESS, “Submission to Baha Mousa Public Inquiry,” May 2009, http://www.redress.org/downloads/publications/REDRESS_Submission_To_Baha_Mousa_Public_Inquiry_MAY_2009.pdf (accessed February 21, 2017); REDRESS, “Submission to Baha Mousa Public Inquiry on Recommendations for the Future,” Module 4, September 13, 2010, http://www.redress.org/downloads/publications/Submission_for_Baha_Mousa_Inquiry_13_September2010.pdf (accessed February 21, 2017); “UK: Amnesty International’s Response to Chilcot Report on Iraq War,” Amnesty International news release, July 6, 2016, <https://www.amnesty.org/en/latest/news/2016/07/uk-amnesty-international-response-to-chilcot-report-on-iraq-war/> (accessed December 20, 2017); Clive Baldwin (Human Rights Watch), “Chilcot Report: We Need to See Senior Figures Held Criminally Responsible for War Crimes,” commentary, *International Business Times*, July 6, 2016, <https://www.hrw.org/news/2016/07/06/chilcot-report-we-need-see-senior-figures-held-criminally-responsible-iraq-war>.

By the time the OTP reopened its preliminary examination in May 2014, focused advocacy surrounding the allegations of abuse in Iraq seemed to have more or less subsided.⁵⁴⁵

OTP staff told Human Rights Watch the office would be particularly interested in the views of civil society groups and others on the UK's domestic justice system if and when the preliminary examination were to reach Phase 3.⁵⁴⁶ As with media, however, it is unclear whether its limited engagement to date represents a missed opportunity to have stimulated broader interest and movement at the domestic level with respect to the allegations at issue.

NGOs in the UK seem to have not greatly emphasized the ICC's role vis-à-vis the Iraq allegations. With few exceptions, human rights groups have not generally sought to use the OTP's reopened preliminary examination or the potential for a formal probe as leverage in advocacy.⁵⁴⁷

Since the ICC prosecutor reopened her preliminary examination in May 2014, a number of organizations have addressed reported plans by British authorities to derogate from the ECHR in future military operations abroad, criticized attacks against lawyers involved in claims tied to the Iraq allegations, responded to public inquiry findings related to Iraq, and

⁵⁴⁵ Upon a literature review via Google news, there was little to no publicity of civil society actors' engagement.

⁵⁴⁶ Human Rights Watch interview with ICC staff, October 2, 2015.

⁵⁴⁷ "Accountability Still Needed for Alleged Detainee Abuse by UK Troops in Iraq," REDRESS press release, May 13, 2014, <http://www.redress.org/downloads/icciraqpressrelease130513.pdf>? (accessed February 28, 2017); Jonathan Owen, "No Justice in Sight for Iraqi Victims of Alleged Murder, Rape, and Torture," *Independent*, November 18, 2014, <http://www.independent.co.uk/news/world/middle-east/no-justice-in-sight-for-iraqi-victims-of-alleged-murder-rape-and-torture-9849305.html> (accessed December 20, 2017).

publicly commented on the government’s decision to shut the IHAT down.⁵⁴⁸ But the OTP’s examination was not a central feature of this advocacy.

In one notable exception, seven human rights groups, including Human Rights Watch, wrote to then-Prime Minister David Cameron in January 2016 to condemn as damaging to the work of the IHAT a statement he and Defence Secretary Michael Fallon made about lawyers involved in bringing claims related to allegations of abuse by British forces in Iraq.⁵⁴⁹ The groups also pointed to the ICC prosecutor’s ongoing preliminary examination. Significantly, the Ministry of Defence addressed the ICC’s examination in its response to the groups, saying that the “[g]overnment is mindful of the Preliminary Examination” and that it was “confident that [the ICC prosecutor] will conclude that the UK is meeting its obligations to conduct genuine investigations into credible allegations.”⁵⁵⁰

⁵⁴⁸ Owen Bowcott and Ian Cobain, “UK Government Looks to Stop ‘Spurious’ Legal Claims Against Soldiers,” *Guardian*, <https://www.theguardian.com/uk-news/2016/jan/22/uk-government-considers-plans-stop-claims-against-soldiers-iraq-war-allegations-abuse>; “UK: Amnesty International’s Response to Chilcot Report on Iraq War,” Amnesty International news release, <https://www.amnesty.org/en/latest/news/2016/07/uk-amnesty-international-response-to-chilcot-report-on-iraq-war/>; “Government to Protect Armed Forces From Persistent Legal Claims in Future Overseas Operations,” Defence Secretary Sir Michael Fallon, UK Ministry of Defence news story, October 4, 2016, <https://www.gov.uk/government/news/government-to-protect-armed-forces-from-persistent-legal-claims-in-future-overseas-operations> (accessed December 20, 2017); Peter Walker, “Iraq War Claims Unit to be Shut Down,” Says UK Defence Secretary,” *Guardian*, February 10, 2017, <https://www.theguardian.com/world/2017/feb/10/iraq-war-claims-unit-to-be-shut-down-says-uk-defence-secretary> (accessed December 20, 2017); REDRESS, “IHAT Closure Threatens Proper Investigation Into Allegations of Torture by UK Soldiers in Iraq,” February 10, 2017, <http://www.redress.org/downloads/redressihat-pr.pdf> (accessed February 21, 2017); Tom Newton Dunn, “David Cameron: I Want Iraq War Crimes Probe to End,” *Sun*, January 12, 2016, <https://www.thesun.co.uk/archives/politics/101275/david-cameron-i-want-iraq-war-crimes-probe-to-end/> (accessed December 20, 2017).

⁵⁴⁹ Open letter from FIDH, Freedom from Torture, Human Rights Watch, International Commission of Jurists, Legal Action Worldwide, REDRESS and Rights Watch UK to The Rt Hon David Cameron MP, January 29, 2016, <https://www.fidh.org/en/region/north-africa-middle-east/iraq/ngos-warn-of-uk-political-interference-in-ongoing-investigations-on> (accessed December 20, 2017); Jonathan Owen, “David Cameron Accused of ‘Ill-Judged’ Attacks on Iraq War Crime Investigators,” *Independent*, January 29, 2016, <http://www.independent.co.uk/news/uk/politics/david-cameron-accused-of-ill-judged-attacks-on-iraq-war-crime-investigators-a6840541.html> (accessed December 20, 2017).

⁵⁵⁰ Letter from Penny Mordaunt MP, UK minister of state for the armed forces to Carla Ferstman, director of REDRESS, February 22, 2016, unpublished document on file with Human Rights Watch.

Other limited NGO activities relating to the OTP's examination took the form of a small number of public statements by REDRESS and Human Rights Watch.⁵⁵¹ The only other more substantive engagement between civil society groups and the ICC Office of the Prosecutor appears to be the research Human Rights Watch conducted in the context of this report.

In addition to timing, one possible reason for the limited extent of civil society engagement around the OTP's examination may relate to the more general absence of a public constituency in the UK for justice for the alleged crimes.

One journalist surmised that the British public sympathizes with army soldiers, in contrast to its limited sympathy for Iraqis, and even more limited sympathy for Iraqi detainees.⁵⁵² Similarly, there seems to be general sentiment to see accountability for politicians, including former Prime Minister Tony Blair, for their decision to go to war and the ensuing aftermath, but not necessarily military officials and rank-and-file soldiers. This no doubt creates a difficult environment within which to make use of the ICC, with its jurisdictional peculiarities, to advocate for accountability, particularly in a climate that is now also hostile to international institutions.

F. Conclusions

The OTP reopened its preliminary examination during a dynamic and charged period concerning the broader allegations of abuse by British forces in Iraq.

Against this background, our research indicates that the ICC's involvement so far has not per se instigated or influenced national proceedings in significant ways. Instead, to the

⁵⁵¹ Carla Ferstman, "Why the ICC Examination Into Torture and Other Abuses by UK Soldiers in Iraq Must Continue," openDemocracy, <https://www.opendemocracy.net/uk/carla-ferstman/why-icc-examination-into-torture-and-other-abuses-by-uk-soldiers-in-iraq-must-cont> (accessed December 20, 2017); "Accountability Still Needed for Alleged Detainee Abuse by UK Troops in Iraq," REDRESS press release, <http://www.redress.org/downloads/icciraqpressrelease130513.pdf?>; Jonathan Owen, "No Justice in Sight for Iraqi Victims of Alleged Murder, Rape, and Torture," *Independent*, <http://www.independent.co.uk/news/world/middle-east/no-justice-in-sight-for-iraqi-victims-of-alleged-murder-rape-and-torture-9849305.html>; Clive Baldwin (Human Rights Watch), "Why the ICC Needed to Reopen the Iraq Abuse Case," commentary, *The Huffington Post UK*, <https://www.hrw.org/news/2014/05/19/why-icc-needed-reopen-iraq-abuse-case>; Clive Baldwin (Human Rights Watch), "Time to Properly Investigate UK War Crimes in Iraq," commentary, *Independent*, <https://www.hrw.org/news/2014/01/16/time-properly-investigate-uk-war-crimes-iraq>; "Human Rights Watch Response to Chilcot Iraq Report," Human Rights Watch news release, <https://www.hrw.org/news/2016/07/06/human-rights-watch-response-chilcot-iraq-report>; Clive Baldwin, "UK Still Needs to Account for Abuses in Iraq," commentary, Human Rights Watch Dispatch, <https://www.hrw.org/news/2014/12/17/dispatches-uk-still-needs-account-abuses-iraq>.

⁵⁵² Human Rights Watch interview with journalist, April 5, 2016.

extent there has been progress in criminal investigations, it is largely attributable to domestic litigation that predated the ICC examination.

As the OTP begins to undertake its admissibility assessment and to consider whether an active approach to encouraging national prosecutions is feasible, the political climate in the UK, especially hostility towards the prosecution of members of its armed forces, lack of understanding about the court among the media and the public, and little to no public demand for accountability in the UK for crimes in Iraq could prove to be a difficult terrain in which to operate.

On the other hand, the ICC prosecutor's preliminary examination seems to have been a factor in ensuring that domestic structures that were set up before the OTP's 2014 intervention remained in place and worked to more efficiently address the various allegations of abuse by UK forces against Iraqi nationals. However, the ultimate effect of the OTP's examination remains uncertain given the questions that remain around the IHAT's closure and in what manner any remaining cases will be taken up by another authority. One lawyer described the OTP as a "peripheral player," but one that was "potentially important."⁵⁵³

Several lessons can be learned from the OTP's engagement in the United Kingdom to date.

First, though the OTP did not implement an active approach to positive complementarity in Phase 2 of its reopened examination, it seems it was still able to exert some pressure on British authorities' approach to the Iraq allegations. In particular, the UK's concerted public diplomacy to showcase ongoing domestic efforts suggests a government concerned with its public image, and by extension receptive to quiet engagement. Thus, the OTP's behind-the-scenes approach with a cooperative government can have a limited, positive effect; an observation that may have relevance in other situations under analysis.

Second, and notwithstanding the OTP's adherence to a phased approach to its preliminary examinations, it seems detailed questions about existing domestic proceedings could lead to valuable results, as appears might have been the case for the IHAT's working methods.

⁵⁵³ Human Rights Watch interview with lawyer, April 14, 2016.

Third, reporting on the ICC has prompted on-the-record responses by various UK government officials asserting that any allegations of abuse are being addressed domestically, making evident the potential power of the press.⁵⁵⁴ And, in general, public officials in the UK are compelled to address issues under media scrutiny.

At the same time, given the complex and polarized nature of the British media market, and hostility in some media sectors to the investigation of military personnel, Human Rights Watch's interlocutors overall were skeptical that the lack of a more proactive posture by the OTP towards media was a missed opportunity. Nonetheless, targeted and strategic press outreach might be helpful in raising general awareness about the ICC and its role, improving attention to the importance of accountability. To do so, the OTP would need specialized expertise, and to consider working with other organs of the court, including its Registry, which could play a role in conducting neutral public information campaigns.

Similarly, by largely limiting its interactions to direct participants (in particular, British authorities and the senders of the article 15 communications), the OTP may have stunted its ability to familiarize itself with a multi-faceted legal landscape developed over many years. Given limited OTP resources, the office may therefore benefit from greater engagement with civil society groups and other interested parties who have been deeply involved in the Iraq allegations to better understand the relevant intricacies.

Finally, the OTP should consider formalizing the procedure with which it engages with the senders of the communications. This could include providing them with a sense of responses received from relevant government bodies and identifying to them information that the OTP needs for the next phase of its analysis.

⁵⁵⁴ See, for example, "William Hague Rejects Iraq 'Abuse' Complaint in ICC," BBC News Online, <http://www.bbc.com/news/uk-25703723>; UK Attorney General's Office and The Rt Hon Dominic Grieve QC, "Statement on ICC Preliminary Examination Into Iraq Allegations," <https://www.gov.uk/government/news/statement-on-icc-preliminary-examination-into-iraq-allegations>; "ICC to Investigate Claims of Abuse by UK Forces in Iraq," BBC News Online, <http://www.bbc.com/news/uk-27397695>.

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Appendix I: Positive Complementarity in Preliminary Examinations

The International Criminal Court (ICC) is a court of last resort. Under the principle of “complementarity,” cases are only admissible before the ICC where national authorities have not conducted genuine, domestic proceedings. Where states have an interest in avoiding the ICC’s intervention, they can do so by conducting national proceedings. This means that the Office of the Prosecutor’s leverage over national authorities to press for domestic proceedings can be significant.⁵⁵⁵

The ICC Office of the Prosecutor (OTP) has recognized this opportunity by committing, where feasible, to encouraging national proceedings into crimes falling within the ICC’s jurisdiction in situations under preliminary examination by the office, that is, in situations where the OTP is considering whether or not to seek to open an ICC investigation.⁵⁵⁶ This policy commitment during preliminary examinations to what is known as “positive complementarity” holds out significant potential to meet victims’ rights to justice for

⁵⁵⁵ In a 2011 briefing paper, Human Rights Watch described both the opportunities and challenges presented during the preliminary examination phase with regard to the Office of the Prosecutor’s (OTP) ability to catalyze national prosecutions. This report builds on the analysis and recommendations contained in that paper, not all of which is repeated in this report. Human Rights Watch, *Course Correction: Recommendations to the Prosecutor for a More Effective Approach to “Situations under Analysis*, June 16, 2011, <https://www.hrw.org/news/2011/06/16/icc-course-correction>.

⁵⁵⁶ See OTP, “Policy Paper on Preliminary Examinations,” November 2013, <http://www.legal-tools.org/doc/acb906/> (accessed November 21, 2017), paras. 100-103. The OTP’s policy statements also have included a commitment to positive complementarity in situations under investigation. See OTP, “Paper on some policy issues before the Office of the Prosecutor,” September 2003, <http://www.legal-tools.org/doc/f53870/> (accessed November 21, 2017), p. 5; OTP, “Report on Prosecutorial Strategy,” September 14, 2006, <http://www.legal-tools.org/doc/6e3bf4/> (accessed November 21, 2017), p. 5; OTP, “ICC Prosecutorial Strategy 2009-2012,” February 1, 2010, <http://www.legal-tools.org/doc/6ed914/> (accessed November 21, 2017); pp. 4-5. While “complementarity” remained a goal, the OTP’s 2012-2015 strategic plan contained more measured language regarding encouraging national proceedings. In the 2016-2018 strategic plan, the OTP has reframed positive complementarity activities as “develop[ing] with partners a coordinated investigative and prosecutorial strategy to close the impunity gap.” See OTP, “Strategic Plan, June 2012-2015,” October 11, 2013, <http://www.legal-tools.org/doc/954beb/> (accessed November 21, 2017), pp. 28-29; OTP, “Strategic Plan, 2016-2018,” July 6, 2015, <http://www.legal-tools.org/doc/7ae957/> (accessed November 21, 2017), pp. 31-33. In practice, the OTP’s commitment to positive complementarity has been more evident in situations under analysis. While the OTP, and the court more broadly, should revisit the importance of positive complementarity strategies in situations under investigation—where the court’s contributions are likely to be substantial—this report deals only with situations under preliminary examination.

human rights crimes, amplify the impact of the ICC on national justice efforts, and limit the need for the ICC to take up its own investigations.⁵⁵⁷

In seeking to influence national justice efforts, the OTP needs to have strategies addressed to both bolstering a government's political will to support independent investigations and bridging capacity gaps, or, in the language of the Rome Statute, overcoming "unwillingness" and "inability," terms which have increasingly come to be used as shorthand for two pillars of positive complementarity activities.⁵⁵⁸ Human Rights Watch's

⁵⁵⁷ Early references to positive complementarity were primarily to the role of the court. See OTP, "Paper on some policy issues before the Office of the Prosecutor," <http://www.legal-tools.org/doc/f53870/>, p. 5; Silvana Arbia, "The Three Year Plans & Strategies of the Registry in Respect of Complementarity for an Effective Rome Statute System of International Criminal Justice" (discussion paper presented at the Consultative Conference on International Criminal Justice, New York, September 9-11, 2009), <http://reliefweb.int/sites/reliefweb.int/files/resources/98D627F381ED3412C1257634004960AC-intlcriminaljustice-session2.pdf> (accessed November 21, 2017). The term "positive complementarity" has since evolved, particularly leading up to and after the 2010 International Criminal Court (ICC) review conference in Kampala, Uganda. While momentum has been difficult to sustain since Kampala, the term has come to encompass initiatives by a range of actors to encourage national prosecutions of international crimes, ranging from legislative assistance to capacity building to political dialogue to counter obstruction. The OTP is only one actor in this landscape, which also includes assistance between states, international organizations, and civil society. See discussion in Morten Bergsmo, Olympia Bekou, and Annika Jones, "Complementarity After Kampala: Capacity Building and the ICC's Legal Tools," *Goettingen Journal of International Law*, vol. 2 (2010), http://www.gojil.eu/issues/22/22_article_bergsmo_bekou_jones.pdf (accessed November 21, 2017), pp. 793-803; Olympia Bekou, "The ICC and Capacity Building at the National Level," in Carsten Stahn, ed., *The Law and Practice of the International Criminal Court* (Oxford: Oxford University Press, 2015), pp. 1252-54; See also Assembly of States Parties (ASP), "Report of the Bureau on stocktaking: Complementarity," ICC-ASP/8/51, March 18, 2010, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP8R/ICC-ASP-8-51-ENG.pdf (accessed February 7, 2018).

⁵⁵⁸ The definitions or indicia of "unwillingness" and "inability" contained in Rome Statute article 17(2)-(3) and elaborated on in the OTP's policy on preliminary examinations, paras. 50-57, are there to guide the prosecutor and court's exercise of jurisdiction, that is, to determine which cases remain admissible before the ICC, and which, because of genuine national activity, are inadmissible. Difficulties encountered or imposed by national authorities and which may need to be addressed to ensure credible justice may go beyond the Rome Statute definitions of "unwillingness" and "inability." The judges have taken a narrow approach to their assessment of the "genuineness" of proceedings, seeking to ensure that proceedings are not undertaken to shield perpetrators from justice, rather than a concern for protecting the fair trial rights of defendants, in all but the most egregious circumstances. See, for example, *Prosecutor v. Saif Al-Islam and Abdullah Al-Senussi*, ICC, Case No. ICC-01/11-01/11, Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled "Decision on the admissibility of the case against Abdullah Al-Senussi" (Appeals Chamber), July 24, 2014, <http://www.legal-tools.org/doc/ef20c7/> (accessed November 21, 2017), para. 230. Whether the OTP ought to consider increasing its focus on the quality of these proceedings as a matter of policy is an important question, but not one which our research for this report attempts to answer. In addition, admissibility before the ICC is case-specific; the existence of national proceedings that could cut off the ICC's jurisdiction is determined by reference to an actual (or, at the situation phase, potential) case, defined by the person charged (or groups of persons who could be charged) and the conduct charged (or the kinds of conduct that may be charged). Admissibility assessments before the ICC are "not a judgement or reflection on the national justice system as a whole." OTP, "Policy Paper on Preliminary Examinations," <http://www.legal-tools.org/doc/acb906/>, para. 46. Nonetheless, the concepts of "unwillingness" and "inability" contained in the Rome Statute have been useful to broader efforts to map and address obstacles to national justice. See, for example, Open Society Justice Initiative, *International Crimes, Local Justice: A Handbook for Rule-of-Law Policymakers, Donors, and Implementers* (New York: Open Society Foundations, 2011), <https://www.opensocietyfoundations.org/sites/default/files/international-crimes-local-justice-20111128.pdf> (accessed November 21, 2017); High Representative of the European Union for Foreign Affairs and Security Policy and European Commission, "Joint Staff Working Document on Advancing the Principle of

previous reporting and ongoing monitoring of situations under analysis, as well as its broader work on complementarity suggest a number of possible strategies. These include:

- Focusing public debate through media and within civil society groups on the need for accountability;
- Serving as a source of sustained pressure on domestic authorities to show results in domestic proceedings;
- Highlighting to international partners the importance of including accountability in political dialogue with domestic authorities;
- Equipping human rights activists with information derived from the OTP’s analysis, strengthening advocacy around justice; and
- Identifying weaknesses in domestic proceedings, to prompt increased efforts by government authorities and assistance, where relevant, by international partners.⁵⁵⁹

A. Consolidating Policy and Practice

The OTP’s approach to the preliminary examination process, in general, and to positive complementarity in the context of preliminary examinations, has been consolidated over a number of years; its current approach dates to 2013, when the OTP issued a revised policy on preliminary examinations. The OTP divides its analysis into four phases (see graphic); the preliminary examinations are conducted by its Situation Analysis Section (SAS).⁵⁶⁰

Complementarity: Toolkit for Bridging the gap between international and national justice,” SWD(2013)26final, January 31, 2013, https://ec.europa.eu/europeaid/sites/devco/files/joint-staff-working-document-on-advancing-the-principle-of-complementarity-2013_en_12.pdf (accessed November 21, 2017).

⁵⁵⁹ Other authors have also addressed strategies available to the OTP to advance positive complementarity. See note 1 above.

⁵⁶⁰ The ICC’s jurisdiction can be triggered in one of three ways: ICC member states or the Security Council can refer a specific set of events—known as a situation—to the ICC prosecutor or the ICC prosecutor can seek to open an investigation on their own initiative (“*proprio motu*”) with the authorization of an ICC pre-trial chamber. See Rome Statute of the International Criminal Court (Rome Statute), U.N. Doc. A/CONF.183/9, July 17, 1998, entered into force July 1, 2002, <http://www.legal-tools.org/doc/7b9af9/> (accessed November 22, 2017), art. 13. Regardless of how the court’s jurisdiction is triggered, however, the OTP first analyzes the information it has before it regarding a situation to determine whether there is a reasonable basis for initiating a formal investigation. This process is known as a “preliminary examination.” Information about possible crimes falling within the ICC’s jurisdiction first comes to the OTP through one of two channels: communications or referrals. These channels relate to the three mechanisms that can trigger ICC jurisdiction—*proprio motu* investigations (Rome Statute, articles 13(c) and 15), Security Council referrals (article 13(b)), and state party referrals (article 13(a)). “Communications” are information received by the OTP under article 15 of the Rome Statute, which permits the

FOUR-PHASE APPROACH TO PRELIMINARY EXAMINATIONS

PHASE 1

OTP filters out information regarding crimes manifestly outside of the court's jurisdiction.

PHASE 2

Formal start of a preliminary examination and when such situations are publicly announced. OTP analysis focuses on whether there is "a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed" (article 53(1)(a)).

PHASE 3

OTP analysis focuses on whether "the case is or would be admissible under article 17" assessing complementarity and gravity regarding potential cases (article 53(1)(b)).

PHASE 4

OTP analysis focuses on whether "taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice" (article 53(1)(c)).

During the course of its preliminary examinations, the OTP is committed to pursuing a "positive approach to complementarity." By a "positive approach to complementarity," the OTP means that it views, in a positive manner, the prospect that national authorities could exercise their primary responsibility to investigate and prosecute crimes within the ICC's jurisdiction.⁵⁶¹

prosecutor to open an investigation proprio motu ("on his own initiative") with the authorization of a pre-trial chamber of judges. Not all such communications, however, will lead to a preliminary examination. Instead, and consistent with article 15(2)'s instruction that the prosecutor "analyze the seriousness of information received," the OTP first filters out information regarding crimes manifestly outside the ICC's jurisdiction. This is known as Phase 1. Situations that survive this initial filter then enter Phase 2 and become formally "situations under analysis." OTP, "Policy Paper on Preliminary Examinations," para. 80. By contrast, situations referred to the ICC prosecutor by the Security Council or a state party are automatically considered to be situations under analysis and directly enter Phase 2. In addition, the prosecutor has indicated that situations directly enter Phase 2 when a declaration has been lodged under article 12(3), which permits a state to temporarily accept the jurisdiction of the ICC. Ibid.

⁵⁶¹ Human Rights Watch interview with ICC staff, The Hague, June 10, 2016. Although the term "positive complementarity" appears in the OTP's 2013 "Policy on Preliminary Examinations," the OTP prefers to avoid using the term "positive complementarity strategies" to describe its activities to encourage national proceedings within the context of preliminary examinations. In its view, the term could be interpreted to indicate that the OTP applies this as a "policy" in every situation or that it has earmarked funds to support such activities. Human Rights Watch email correspondence with ICC staff, The Hague, September 13, 2016. It could also, in the view of the OTP, imply a flexible burden-sharing, that it is up to the OTP to decide whether or not to take a case or leave it to national authorities. Human Rights Watch interview with ICC staff, June 10,

The OTP's approach, generally, is to defer to domestic authorities for a certain amount of time where it determines that genuine proceedings are or can be conducted.⁵⁶² To that end, "[w]here potential cases falling within the jurisdiction of the Court have been identified, the Office will seek to encourage, where feasible, genuine national investigations and prosecutions by the States concerned in relation to these crimes."⁵⁶³

The OTP's practice is to intensify positive complementarity activities during Phase 3 and, therefore, only after the OTP has concluded that a reasonable basis exists to believe that crimes within the ICC's jurisdiction have been committed.⁵⁶⁴ An exception to this might be where there are already significant national proceedings, such that even at Phase 2 the OTP has the opportunity to engage with authorities regarding these proceedings.⁵⁶⁵

The OTP's efforts to encourage national proceedings unfold in one of two circumstances: either where national proceedings have already been opened, or, even where there are no national proceedings, if a government states its intention to investigate. In the latter case, the OTP will take the government at its word and encourage domestic authorities, while then going on to assess their progress.⁵⁶⁶ But in both cases, the extent to which the OTP takes a fully active approach, or even simply defers action to afford national authorities an

2016. Instead, the OTP considers that, under the Rome Statute, it is required to open a situation where other jurisdictional requirements are met and national authorities do not conduct genuine national proceedings. By contrast, once a situation is opened, it considers itself to have broad discretion in the selection of individual cases for investigation and prosecution. Compare OTP, "Policy Paper on Preliminary Examinations," <http://www.legal-tools.org/doc/acb906/>, para. 2, with OTP, "Policy Paper on Case Selection and Prioritisation," September 15, 2016, <http://www.legal-tools.org/doc/182205/> (accessed November 22, 2017), para. 4. In this report, we nonetheless use terms including "positive complementarity," "positive complementarity strategies," "positive complementarity activities," "strategy for positive complementarity," and "efforts to encourage national proceedings" interchangeably to describe the OTP's efforts to spur domestic proceedings.

⁵⁶² Human Rights Watch interviews with ICC staff, The Hague, October 2, 2015 and June 10, 2016.

⁵⁶³ OTP, "Policy Paper on Preliminary Examinations," <http://www.legal-tools.org/doc/acb906/>, para. 101.

⁵⁶⁴ Human Rights Watch interview with ICC staff, October 2, 2015; see also OTP, "Strategic Plan 2016-2018," <http://www.legal-tools.org/doc/7ae957/>, annex I, para. 18. The OTP generally does not put in place a strategy for positive complementarity at the preliminary examination phase when it comes to self-referrals by states parties under article 13. While the OTP may still seek to carry out assessments as to domestic capacity for the purposes of encouraging national proceedings to complement those of the ICC once investigations are opened, it generally takes self-referrals as confirmation that authorities will not proceed domestically. Human Rights Watch interview with ICC staff, October 2, 2015.

⁵⁶⁵ Human Rights Watch interview with ICC staff, October 2, 2015.

⁵⁶⁶ *Ibid.* The OTP's policy paper indicates that engagement with national authorities is contingent on avoiding the "risk [of] tainting any possible future admissibility proceedings." It further states that "[a]ny interaction between the Office and the national authorities cannot be construed as a validation of the national proceedings, which will be subject to independent examination by the Office taking into account all of the relevant factors and information." OTP, "Policy Paper on Preliminary Examinations," <http://www.legal-tools.org/doc/acb906/>, para. 102. We discuss below some of the challenges posed by conducting positive complementarity activities in the shadow of the Rome Statute's admissibility regime.

opportunity to show results domestically will depend on its rolling assessment of the government’s intention and capacity.⁵⁶⁷

Context matters to this assessment, and that context can include whether the OTP has identified other partners—in civil society or in the international community—that can assist in efforts to bring about national proceedings.⁵⁶⁸ In other words, even where there are national proceedings or a stated intent to proceed nationally, the OTP may consider that prospects for genuine domestic proceedings are so limited that an active, engaged encouragement of such proceedings is not warranted.

This current statement of policy and practice reflects an evolution in the OTP’s approach, part of its overall consolidated practice in situations under analysis, memorialized in its 2013 “Policy on Preliminary Examinations.”

In the past, the OTP sometimes initiated positive complementarity activities almost from the outset of the opening of a situation under preliminary examination. Now, the OTP considers that it can more effectively engage national authorities around specific potential cases it identifies following its Phase 2 analysis, and has observed that identifying these cases to authorities has led to concrete progress in national proceedings.⁵⁶⁹

Because of these changes, the OTP’s policy statements on positive complementarity in preliminary examinations have become more qualified.⁵⁷⁰ These changes in approach also explain some of the inconsistencies in the case studies in this report. In Guinea, opened in 2009, for example, the OTP began positive complementarity activities almost immediately; in the United Kingdom, re-opened in 2014, and still in Phase 2 during the course of this research, they had yet to do so.

⁵⁶⁷ Human Rights Watch interview with ICC staff, October 2, 2015.

⁵⁶⁸ Ibid.

⁵⁶⁹ Human Rights Watch telephone interview with ICC staff, The Hague, April 15, 2016; and interview with ICC staff, June 10, 2016.

⁵⁷⁰ By way of comparison, the 2010 draft of its preliminary examinations policy contained a commitment “[a]t all phases of its preliminary examination activities, consistent with its policy of positive complementarity, ... to encourage where feasible genuine national investigations and prosecutions by the State(s) concerned and to cooperate with and provide assistance to such State(s) pursuant to article 93(10) of the Statute.” OTP, “Policy Paper on Preliminary Examinations (DRAFT),” October 4, 2010, on file with Human Rights Watch, para. 94 (emphasis added).

Where it does seek to encourage national proceedings, the OTP has identified a number of different forms of engagement: “report[ing] on its monitoring activities, send[ing] in-country missions, request[ing] information on proceedings, hold[ing] consultations with national authorities as well as with intergovernmental and non-governmental organisations, participat[ing] in awareness-raising activities on the ICC, exchang[ing] lessons learned and best practices to support domestic investigative and prosecutorial strategies, and assist[ing] relevant stakeholders to identify pending impunity gaps and the scope for possible remedial measures.”⁵⁷¹

B. Maintaining Leverage and the Use of Publicity

While the fact that a situation may come before the ICC can initially provide an incentive for national authorities to start their own investigations, that leverage is likely to wane with time. Authorities can become desensitized to impending ICC action, as appears to have been the case in Colombia and Georgia.

And with a number of pending situations being analyzed simultaneously by the OTP, with limited resources (see below), national authorities may judge that the chances a situation will be selected for investigation do not warrant changes in behavior. This requires the OTP to consider how best to maintain leverage with national authorities, including through targeted and creative use of publicity to increase pressure for action.

From 2008-2011, the OTP sought to heighten the profile of its preliminary examinations. Its communication activities at the time, however, did not reflect a sufficiently strategic approach to the use of publicity.

OTP statements generated significant attention in situations under analysis, as well as globally. But given limited awareness or understanding of the ICC and the preliminary

⁵⁷¹ OTP, “Policy Paper on Preliminary Examinations,” <http://www.legal-tools.org/doc/acb906/>, para. 102. A number of the OTP’s activities during the preliminary examination highlighted above—in particular, collecting information and consultations with national authorities and other stakeholders with an informed perspective on the commission of crimes or the status of national proceedings—also relate to the primary aim of the preliminary examination, that is, the determination as to whether or not an ICC investigation in a given situation is warranted. Regular reporting also leads to increased transparency, which serves an important end, regardless of the impact on national justice: responding to interests of affected communities in knowing the status and eventual outcome of the OTP’s preliminary examination. Increased public understanding of the criteria guiding the OTP’s decision-making process also should help combat accusations of selectivity or bias in the court’s investigations.

examination process, they raised expectations of immediate ICC action. Repeated public statements but no apparent action on investigations gave rise to perceptions of the ICC as a paper tiger, lessening the weight of future statements.

Increased publicity in the absence of more information about the preliminary examination process also prompts questions as to why the OTP's approach across situations was inconsistent, with certain situations appearing to receive considerable public attention or public missions by the OTP, and others comparatively little.⁵⁷²

The OTP, particularly since 2011, has taken steps to change its approach to publicity in preliminary examinations.

First, while the OTP issued a draft policy on preliminary examinations in 2010, it finalized the policy in 2013, setting out in detail the principles and processes governing situations under analysis. It also now publicly identifies on the ICC's website and in other public materials where a situation falls in the four-phased approach—also explained in the policy paper.

Second, it has also increased substantive reporting on its preliminary examinations, having identified improving communications around preliminary examinations as a goal in its 2012-2015 Strategic Plan.⁵⁷³ In December 2011, the OTP issued its first annual report spanning all preliminary examination activities over the previous year. These annual reports have become increasingly more detailed with each year.

⁵⁷² At the time, Human Rights Watch made a number of recommendations related to the OTP's communication activities in preliminary examinations. First, we recommended that the OTP should increase its regular reporting on its substantive assessment of the article 53(1) factors—including admissibility—in pending situations under analysis. Among other things, we thought this would help demonstrate more credibly that the OTP is actually proceeding with the analysis, and could have helped counteract perceptions of what appeared at that time to be an inconsistent treatment of different situations, with some receiving considerable public attention or public missions by the OTP, and others comparatively little. Second, we recommended that public statements provide additional context about the preliminary examination process, and not go beyond where the OTP's own examination stands, in order to inform and manage expectations as to the prospects of ICC action. Third, we also recommended that the OTP take care to avoid improperly publicizing aspects of a possible investigation—such as the names of possible perpetrators—in a manner that could undermine the due process rights of potential accused or the reputation of others and call into question the impartiality of any subsequent investigation. We also noted that there were limits to the resources the OTP had available, and therefore it needed to strike a proper balance between the primary aim of reaching a decision as to whether or not to open an investigation, and efforts, including increased publicity aimed at positive complementarity. See Human Rights Watch, *Course Correction*, part IV. As discussed here, the OTP's current approach to publicity in preliminary examinations has since changed, and incorporates some of these recommendations.

⁵⁷³ OTP, "Strategic Plan, June 2012-2015," <http://www.legal-tools.org/doc/954beb/>, paras. 16-17.

In 2012, the OTP also issued a lengthy “interim report” on Colombia, covering both subject matter and admissibility issues. Since 2013, the OTP has also made public an internal article 5 report when moving from one phase to the next (Nigeria, Phase 2 to Phase 3), as well as what were previously internal-only reports regarding decisions to open investigations (Mali and Central African Republic II), and decisions to close preliminary examinations without opening investigations (Republic of Korea, Honduras, and Comoros).

Third, while it continues to engage with local press during missions to situations under analysis, and sometimes holds press conferences during missions, it has scaled back on press statements. It considers its annual report to be a substitute for more frequent press releases⁵⁷⁴; it generally only issues press releases regarding missions to situations under analysis where the prosecutor or another high-level OTP representative leads them.⁵⁷⁵

The latter appears to be driven by a more ambivalent approach to the value of publicity. On the one hand, the OTP continues to view publicity as a means to amplify its leverage with government authorities. On the other hand, it considers that it can damage communication channels with these authorities, on which it depends for information to proceed in its examinations.

C. Resources

Another important shift in OTP practice relates to the resources available to the SAS. Although the SAS has only 13 current staff members, this is a significant boost in resources from the court’s earliest years. Until 2011, the SAS had five to six staff members, but several of these were actually assigned to active situations under investigation, reflecting the then-lean staffing across the OTP. The OTP estimates that at least half of the work of the section prior to 2011 was taken up by situations under investigation, leaving minimal resources for work on the preliminary examinations.⁵⁷⁶

The OTP’s preliminary examination practice, including inconsistencies in approach and strategy, needs to be considered in this light. All but one of the case studies examined in

⁵⁷⁴ Human Rights Watch interview with ICC staff, June 10, 2016.

⁵⁷⁵ Human Rights Watch interview with ICC staff, October 2, 2015.

⁵⁷⁶ Human Rights Watch interview with ICC staff, June 10, 2016.

this report were initiated prior to the consolidation of the OTP's practice in its 2013 policy paper and the SAS's current boost in resources.

At the same time, this boost in resources is still less than the workload requires. As of January 2018, there are 13 staff members within the Situation Analysis Section. Of these 13 positions, two are at the P-1 level, six are at the P-2 level, four are at the P-3 level, and one position is at the P-5 level.⁵⁷⁷ This staffing size falls below the 17 staff members the OTP has indicated should be the "basic size" of the SAS.⁵⁷⁸

But even with 17 staff members, under the OTP's current division of labor, by the OTP's calculations this would translate into an average of 1.5 full-time P-2 or P-3 analysts to work on each situation, assuming an average of nine preliminary examinations at any given point of time. These 1.5 staff members, with support from P-1 analysts and under the supervision of the P-5 head of section, are responsible for a wide range of activities in their assigned situations, including analysis necessary to support determinations regarding investigations, public information, efforts to deter crimes or encourage national proceedings, along with the associated field missions, consultations, and other activities necessary to support these functions.⁵⁷⁹

Clearly, particularly in preliminary examinations with widespread allegations of crimes extending over a long time, or significant national proceedings under way, the OTP's resources are highly limited as compared to the quantity of needed analysis, let alone the steps that may be necessary to engage national authorities in a way that can catalyze national prosecutions. These resources are also limited as compared to the resources that some governments are likely to allocate to engage with the OTP.

These limited resources should give some pause in considering what strategies the OTP can reasonably be expected to pursue on positive complementarity. It is worth bearing in

⁵⁷⁷ Human Rights Watch email correspondence with ICC staff, January 26, 2018.

⁵⁷⁸ ASP, "Report of the Court on the Basic Size of the Office of the Prosecutor," ICC-ASP/14/21, September 17, 2015, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP14/ICC-ASP-14-21-ENG.pdf (accessed November 29, 2017), p. 41. The "basic size" of the OTP, presented to ICC member countries in 2015, is the size it considers necessary "not only [to] ensure that the Office attains a staffing size which is stable for the foreseeable future, but also one with sufficient depth to absorb new demands without having to continue the present unsustainable practice of repeatedly postponing new investigations which must be pursued in accordance with the Office's mandate, or constantly stripping ongoing activities of critical resources so as to staff the highest prioritised activities." *Ibid.*, p. 3.

⁵⁷⁹ *Ibid.*, pp. 40-43.

mind that these strategies are, appropriately, only secondary to the SAS's primary role of reaching decisions regarding whether to open ICC investigations.

Appendix II: Key Developments in Case Studies

A. Colombia

2002-2008: Under pressure from superiors to show “positive” results and boost body counts in their decades-long war against guerrillas, army soldiers and officers abduct civilians or lure them to remote locations under false pretenses and kill them, placing weapons on their bodies and reporting them as enemy combatants killed in action.

June 2004: The Office of the Prosecutor of the International Criminal Court (OTP) opens a preliminary examination of crimes against humanity committed in Colombia since November 2002, when Colombia became a state party.

July 2005: Colombian Congress passes the Justice and Peace Law that allowed paramilitary death squads to receive reduced sentences in exchange for confessions.

2006: The OTP’s preliminary examination is made public.

2007: National investigations on “false positive” killings begin.

October 2007: OTP mission to Colombia.

August 2008: OTP mission to Colombia.

September 2008: “False positive” killings halted following the Soacha scandal, when it became publicly known that at least 16 young men from Soacha, a low-income suburb of Bogota, were victims of army killings.

2009: First convictions on “false positive” killings of low-ranking soldiers are handed down.

October 2009: OTP mission to Colombia.

November 1, 2009: The jurisdiction of the International Criminal Court (ICC) over war crimes begins, following a seven-year delay declared by then-President Andrés Pastrana upon ratification of the Rome Statute.

2011: Colombian government introduces the first of many bills designed to transfer investigations on “false positives” to the military jurisdiction.

July 2012: To pave the way for peace negotiations with the FARC, Colombian congress passes the Legal Framework for Peace, a constitutional amendment that includes a range of benefits for those responsible for human rights abuses. The scope of the amendment included soldiers responsible for “false positive” killings.

October 2012: Peace talks between the Colombian government and the FARC guerrillas formally begin.

October 2012: The Attorney General’s Office develops a prioritization strategy to prosecute abuses and creates a special unit, the Unit of Analysis and Contexts (UNAC), to carry out pattern-based analysis on the structure of the groups and identify those most responsible.

November 2012: OTP released its interim report on the situation in Colombia, which identifies priority areas as an effort to overcome a lack of adequate prosecutorial strategy domestically, including in relation to false positive cases.

April 2013: OTP mission to Colombia.

June 2013: OTP mission to Colombia.

July-August 2013: OTP sent letters to Colombian authorities on the inconsistencies of the Legal Framework for Peace and the Rome Statute.

August 2013: Colombian Constitutional Court fixes shortcomings in the Legal Framework for Peace.

September 2013: Prosecutor Bensouda meets President Santos.

November 2013: OTP mission to Colombia.

2014: UNAC stops directly investigating “false positive” cases, focusing instead on crimes committed by the ELN and FARC guerillas.

February 2015: OTP mission to Colombia.

May 2015: OTP mission to Colombia.

June 2015: Colombian government drops the most problematic language from a constitutional amendment that would have transferred investigations on “false positive” killings to the military jurisdiction.

July 2015: The Attorney General’s Office, for the first time, interviews generals for their alleged role in “false positives” cases.

December 2015: The Colombian government and the FARC announce a justice accord, replacing the July 2012 Legal Framework for Peace.

March-August 2016: National authorities charge and indict General Torres Escalante in relation to “false positives” incidents, the first army general to be targeted.

March 2016: The Attorney General’s Office announces it will charge General Montoya for his role in killings when he commanded the army (as of writing, he had yet to be charged).

November 2016: Peace talks between the Colombian government and the FARC guerrillas end with the signing of the peace accord.

September 2017: OTP mission to Colombia.

B. Georgia

August 7, 2008: After months of escalating tensions between Russia and Georgia and following skirmishes between Georgian and South Ossetian forces, Georgian forces launch an artillery assault on Tskhinvali, South Ossetia's capital, and outlying villages. Assaults by Georgian ground and air forces follow.

August 8, 2008: Russia begins its military response, with the declared purpose of protecting Russian peacekeepers stationed in South Ossetia and residents who had become Russian citizens in previous years. Russian ground forces cross into South Ossetia and Russian artillery and aircraft hit targets in South Ossetia and undisputed Georgian territory.

August 10, 2008: Georgian commanders order their troops to withdraw from South Ossetia. Two days later Russian forces move into and occupy various key cities in undisputed Georgian territory. South Ossetian forces also participate in the fighting.

August 14, 2008: The OTP announces that it is opening a preliminary examination into the situation in Georgia, days after the Georgian authorities open a criminal investigation into crimes committed during the conflict.

August 15, 2008: The French European Union presidency brokers a ceasefire agreement between Russia and Georgia. Despite the ceasefire, however, looting and torching of ethnic Georgian villages in the conflict zone continues intermittently through September, and in some cases through October and November.

October 10, 2008: Russian forces complete their withdrawal from undisputed Georgian territory, although remain in Perevi and Akhagori, previously under Georgian control.

November 2008: The OTP visits Georgia for the first time.

September 2009: EU-funded fact-finding mission launched in December 2008 on the "origins and the course of the conflict" concludes that "despite a long period of increasing tensions, provocations and incidents," open hostilities began by the shelling of Tskhinvali by Georgian armed forces during the night of August 7, 2008. The report also concludes

that “evidence of systematic looting and destruction of ethnic Georgian villages” suggests that “ethnic cleansing was indeed practiced against ethnic Georgians in South Ossetia.”

March 8-10, 2010: The OTP conducts its first visit to Russia.

June 22-24, 2010: The OTP visits Georgia for the second time.

February 2-4, 2011: The OTP visits Russia for the second time. The Russian authorities report on the status of the Russian investigations into crimes allegedly committed in the context of the armed conflict in Georgia in August 2008.

October 18, 2011: In response to the OTP’s September 2011 request to Georgia and Russia for details on progress in investigations, Russia replies that its investigation faced difficulties resulting from the lack of legal assistance from Georgian authorities, and the fact that senior Georgian officials enjoy immunity from prosecution in Russia.

December 12, 2011: The Georgian government tells the OTP that it still needs “certain verifications and corroborations [...] to attain charges [on South Ossetian suspects],” without providing further details about the timeframe.

April 24, 2012: A network of international and Georgian NGOs submits an open letter to the ICC Prosecutor criticizing Georgian and Russian authorities for not making available any information regarding investigations to victims. The network recommends that, if the OTP’s preliminary examination confirms that genuine national investigations are not being undertaken, the prosecutor should open an investigation into the crimes.

June 18, 2012: Russian authorities inform the OTP that they will continue to investigate the armed conflict in Georgia despite the persisting issues of immunity and the lack of legal assistance from Georgia.

October 2012: President Saakashvili’s political party is defeated during parliamentary elections, and the opposition party forms a new government, including a new chief prosecutor, who restructures and reorganizes the office, causing delays in the investigation. By the end of 2012, the General Prosecutor’s Office informs the ICC that its investigation into acts allegedly committed by the Georgian military were hindered by the

lack of access to the crime scene—since there was no access to South Ossetia—and lack of cooperation from Russia and South Ossetia.

November 2012: The OTP releases its second Report on Preliminary Examination Activities, noting that both Russian and Georgian authorities still seemed to undertake investigative steps regarding alleged crimes committed in Georgia during the armed conflict in 2008.

March 25-28, 2013: The OTP visits Georgia for the third time.

May 15, 2013: The chief prosecutor of Georgia announces that his office would relaunch investigations into alleged crimes committed by all sides during the August 2008 conflict.

September 22-26, 2013: The OTP visits Georgia for the fourth time.

November 2013 - January 2014: The Georgian government replaces the chief prosecutor twice, stunting progress in the investigation.

January 22-24, 2014: The OTP visits Russia for the third time.

April 29-May 1, 2014: The OTP visits Georgia for the fifth time.

June 6, 2014: The OTP tells the Georgian authorities to provide “concrete, tangible and pertinent evidence” about genuine national proceedings against those bearing the greatest responsibility for crimes, or else the office would seek authorization from the ICC’s judges to open an investigation.

December 2, 2014: In its fourth annual Report on Preliminary Examination Activities, the OTP notes that the national investigations in both Georgia and Russia have not yielded specific results, more than six years after the armed conflict in Georgia.

January 21-23, 2015: The OTP conducts its sixth mission to Georgia to assess the status of relevant national proceedings.

March 17, 2015: The Georgian government informs the OTP that further progress has been halted due to “a fragile security situation in the occupied territories in Georgia” and fears that prosecutions could trigger “aggressive and unlawful reactions by the occupying forces.”

October 13, 2015: The prosecutor requests authorization to open an investigation into the situation in Georgia covering the period from July 1, 2008, to October 10, 2008, for war crimes and crimes against humanity allegedly committed in and around South Ossetia.

January 27, 2016: Pre-Trial Chamber I grants the prosecutor's request to open an investigation proprio motu in the situation in Georgia.

C. Guinea

September 28, 2009: More than 150 peaceful protesters are massacred, hundreds more wounded, and dozens of women are raped by security forces during an opposition rally at a Conakry stadium. Security forces continue to commit abuses for several days in neighborhoods largely inhabited by people supporting the opposition, including pillage, physical abuse, and rape.

September 29, 2009: President Captain Moussa Dadis Camara announces a National Commission of Inquiry on the September 28, 2009 events.

October 14, 2009: The ICC prosecutor announces a preliminary examination into the situation in Guinea.

October 16, 2009: The UN secretary-general announces an International Commission of Inquiry to investigate the events of September 28, 2009, and their aftermath in Guinea.

October 20, 2009: The Guinean foreign minister travels to The Hague and informs the OTP that Guinea is able and willing to investigate the crimes.

December 3, 2009: President Dadis Camara is shot and gravely injured by Lieutenant Abubakar “Toumba” Diakité, Camara’s former aide-de-camp and head of his personal security. Diakité flees, and Camara seeks medical treatment in Burkina Faso.

December 18, 2009: The International Commission of Inquiry issues its report, finding that former President Dadis Camara and other high-level officials are allegedly implicated in the September 28, 2009 crimes.

February 2, 2010: The National Commission of Inquiry issues its report, which confirms that enforced disappearances, killings, and rapes were committed, but determines that the death toll was less than that found by the International Commission of Inquiry, and that former President Cpt. Moussa Dadis Camara was not likely implicated in crimes.

February 8, 2010: A domestic panel of investigative judges is appointed to investigate the crimes committed on and immediately after September 28, 2009.

February 2010: The OTP visits Guinea for the first time.

February 2010: Abubakar “Toumba” Diakité, is charged, but his whereabouts are unknown.

May 2010: The OTP visits Guinea for the second time.

May 2010: The International Federation for Human Rights and the Guinean Organisation for Human Rights initiate a *partie civile* action on behalf of victims’ associations and individual victims of the September 28, 2009 crimes.

November 2010: The OTP visits Guinea for the third time.

March-April 2011: The OTP visits Guinea for the fourth time.

October 2011: The OTP visits Guinea for the fifth time.

November 22, 2011: The Government of Guinea and the UN sign a joint communiqué welcoming assistance from the Team of Experts of the Office of the Special Representative for Sexual Violence in Conflict in the September 28, 2009 investigation.

December 13, 2011: The OTP releases its first annual Report on Preliminary Examinations. The OTP notes that the ICC has jurisdiction in Guinea and that crimes against humanity were likely committed during the September 28 events, but also notes Guinea’s stated ability and willingness to conduct a criminal investigation.

February 1, 2012: Moussa Tiégboro Camara, minister in charge of fighting drug trafficking and organized crime, is charged with crimes committed in connection with the September 28, 2009 stadium massacre, rapes, and other abuses.

April 2012: The OTP visits Guinea for the sixth time.

September 13, 2012: Colonel and medical doctor Abdoulaye Chérif Diaby, former minister of health, is charged with crimes committed in connection with the September 28, 2009 stadium massacre, rapes, and other abuses.

November 22, 2012: In its second annual Report on Preliminary Examinations, the OTP indicates that although the investigation has been slow, significant progress had been made. More than 200 victims have been interviewed and 6 individuals charged.

December 2012: UN Team of Experts deploys Ahmedou Tidjane Bal as a judicial expert to support the panel of judges.

January-February 2013: The OTP visits Guinea for the seventh time.

June 2013: The OTP visits Guinea for the eighth time.

June 27, 2013: Lt. Col. Claude “Coplan” Pivi, minister for presidential security, is charged with crimes committed in connection with the September 28, 2009 stadium massacre, rapes, and other abuses.

November 25, 2013: The OTP notes in its third annual Report on Preliminary Examinations that the national investigation has been slowed by the elections and security concerns, but progress has been made. Over 370 victims have been heard and 8 individuals have been charged.

January 20, 2014: Cheick Sako is appointed minister of justice.

February 2014: The OTP visits Guinea for the ninth time.

February 28, 2014: Judicial authorities in Burkina Faso, where former President Cpt. Moussa Dadis Camara has been in exile, interview the former president as a witness.

December 2, 2014: In its fourth annual Report on Preliminary Examinations, the OTP indicates that administrative challenges faced by the panel of judges, as well as concerns for the security of judges and victims, led to a slowdown in the domestic investigation.

May 2015: The OTP visits Guinea for the tenth time.

July 2015: The OTP visits Guinea for the eleventh time.

July 8, 2015: Former President Cpt. Moussa Dadis Camara is questioned in Burkina Faso by the Guinean panel of investigative judges and charged.

November 12, 2015: In its fifth annual Report on Preliminary Examinations, the OTP indicates that the pace of the investigation has improved, with increased support by the government. Some 400 victims have been heard by the panel of judges, and 14 individuals have been charged.

February 2016: The OTP visits Guinea for the twelfth time.

June-July 2016: The OTP visits Guinea for the thirteenth time.

November 14, 2016: In its sixth annual Report on Preliminary Examinations, the OTP indicates that since November 2015, the panel has interviewed more witnesses and approximately five high-level officials in the Guinean army.

December 16, 2016: Senegalese authorities arrest Abubakar “Toumba” Diakité in Dakar on an arrest warrant issued by Guinean authorities.

March 12, 2017: Senegal extradites Abubakar “Toumba” Diakité to Guinea.

March 2017: The OTP visits Guinea for the fourteenth time.

November 9, 2017: The justice minister announces that the judges have concluded their investigation and handed the dossier over to the prosecutor for review.

December 29, 2017: The justice minister announces that the investigation is complete has been referred for trial at a court of first instance in Conakry.

D. United Kingdom

September 1, 2001: The United Kingdom International Criminal Court Act enters into force.

October 4, 2001: The UK ratifies the ICC Rome Statute, giving the court jurisdiction over war crimes, crimes against humanity, and genocide committed on British territory or by British nationals as of July 1, 2002.

July 1, 2002: The Rome Statute enters into force.

March 20, 2003: British forces join in the US-led invasion of Iraq.

July 16, 2003: OTP reports it has received communications related to alleged abuses in Iraq.

September 15, 2003: Baha Mousa, an Iraqi hotel receptionist, dies while in British custody in the southern Iraqi city of Basra.

July 19, 2005: Seven British soldiers, including Cpl. Donald Payne, face various charges—including under the UK International Criminal Court Act for crimes related to the ill-treatment of Iraqi citizens held in their custody, including Baha Mousa.

February 9, 2006: ICC prosecutor Luis Moreno Ocampo closes the OTP's first preliminary examination into alleged abuses by British forces in Iraq, stating that although there was reasonable basis to believe that war crimes of wilful killing and inhuman treatment were committed, the numbers were not sufficient to warrant ICC involvement. He leaves open the possibility that the decision "be reconsidered in the light of new facts or evidence."

September 19, 2006: Cpl. Donald Payne pleads guilty to a war crime under the UK's International Criminal Court Act for his role in the death of Baha Mousa. He is sentenced to one year in prison on April 30, 2007. Payne pleaded guilty to inhuman treatment. On February 14, 2007, charges were dropped against four of the six other soldiers, while the remaining two soldiers were acquitted on March 13, 2007.

August 2, 2008: A public inquiry is established to investigate and report on the death in British custody of Baha Mousa and the treatment of those Iraqi civilians detained with him. The inquiry is triggered by judicial review proceedings initiated by Baha Mousa's father, who sought a public inquiry into the death of his son.

July 30, 2009: A public inquiry, chaired by Sir John Chilcot, is officially launched to consider and identify lessons learned from the UK's involvement in Iraq.

November 29, 2009: The UK government launches the Al-Sweady inquiry to investigate allegations of torture and unlawful killing of Iraqis following a gunfight between British troops and fighters for the Mahdi Army in 2004. The inquiry is launched to investigate allegations made in another judicial review proceeding after judges held that the defence secretary's approach to the disclosure of documents in the case had been "lamentable." Sir Thayne Forbes is chosen to chair the inquiry.

February 2010: Public Interest Lawyers (PIL), acting for a group of claimants that eventually included over 100 Iraqis, sets in motion legal proceedings in a UK court seeking a single public inquiry into allegations that British armed forces tortured or otherwise ill-treated them in detention facilities in Iraq between 2003-2008. The proceedings would eventually be known by the name of the lead claimant, Ali Zaki Mousa.

March 1, 2010: In response to the Ali Zaki Mousa litigation, rather than setting up a full public inquiry, the British government establishes the Iraq Historic Allegations Team (IHAT). The IHAT becomes operational in November 2010.

December 21, 2010: A British court rejects the claimants' application in the Ali Zaki Mousa litigation to review the government's decision not to order an overarching inquiry. Instead, it endorses the government's decision to "wait and see" if another public inquiry into abuse of Iraqi detainees is necessary, pending the outcome of IHAT investigations and the Baha Mousa and Al-Sweady inquiries.

May 22, 2011: Last British troops withdraw from Iraq.

July 7, 2011: Judges ruling in the Al-Skeini case at the European Court of Human Rights reject the British government's argument that the European Convention on Human Rights (ECHR) does not extend to the UK's conduct in Iraq. This case followed proceedings initiated in the UK in 2004 and concluded in 2007 with a decision by the House of Lords. They find that British investigations into possible unlawful killings in Iraq by members of the UK armed forces violated the right to life, as those conducting the investigations were not independent (i.e., outside the military chain of command) of those being investigated.

September 8, 2011: The Baha Mousa Inquiry report is published. It identifies "corporate failure" by the British Army to prevent the use of banned interrogation techniques.

November 22, 2011: Following allegations by claimants in the Ali Zaki Mousa litigation disputing the IHAT's independence, a court of appeals holds that the IHAT is not sufficiently independent to satisfy the UK's obligation under the ECHR because of the involvement of members of the Royal Military Police.

April 1, 2012: The IHAT is reorganized from under the Royal Military Police to under the Royal Navy Police to respond to a court's ruling that it is not sufficiently independent. It is tasked to follow up on the Baha Mousa Inquiry report and the European Court of Human Rights Al-Skeini judgment.

October 23, 2012: The Ministry of Defence's Systemic Issues Working Group starts overseeing the Ministry of Defence's Directorate of Judicial Engagement Policy in its review of systemic issues and the IHAT's reports on the subject.

October 2, 2013: Justice Leggatt is appointed as "Designated Judge" to oversee the different claims made with respect to alleged abuse by British troops in Iraq.

October 10, 2013: Following a further judicial review brought by the Ali Zaki Mousa claimants seeking an overarching public inquiry, a high court holds that the IHAT is sufficiently independent to undertake investigations to fulfill the UK's obligations under the ECHR. At the same time, it decides that a procedure similar to a coroner's inquest—now known as the Iraq Fatality Investigations (IFI)—should be set up to meet the UK's obligation to investigate cases of Iraqis who had died in the custody of British forces.

January 10, 2014: The European Center for Constitutional and Human Rights (ECCHR) and PIL submit a lengthy communication to the ICC prosecutor related to alleged ill-treatment of Iraqi detainees and unlawful killings by British forces in Iraq from 2003-2008.

May 13, 2014: OTP announces the reopening of its preliminary examination related to alleged abuses by British forces in Iraq.

June 5, 2014: The chair of the new Iraq Fatalities Investigations, Sir George Newman, gives his opening statement.

June 24-26, 2014: OTP conducts a first mission to the UK and meets with the IHAT and the Service Prosecuting Authority (SPA).

December 17, 2014: The Al-Sweady Inquiry report is published, rejecting the most serious allegations of unlawful killing of Iraqi detainees but finding evidence of ill-treatment of Iraq detainees by British forces.

January 12, 2015: Following the release of the Al-Sweady report, the Solicitors Regulation Authority (SRA) announces professional misconduct investigations involving PIL and Leigh Day.

April 7, 2015: UK authorities submit a response to the allegations contained in PIL and ECCHR's January 2014 communication.

May 7, 2015: IHAT, SPA and Foreign and Commonwealth Office (FCO) officials meet OTP staff in The Hague. During this meeting, the UK delegation provides oral answers to written questions received from the OTP.

October 1-2, 2015: The OTP conducts a mission to PIL's offices in the UK to screen the supporting material relating to their claims.

October 5, 2015: In one of her first major speeches as British prime minister, Theresa May says "we will never again in any future conflict let those activist left-wing human rights lawyers harangue and harass the bravest of the brave: the men and women of our armed forces."

October 23, 2015: IHAT and FCO officials have a further meeting with the OTP in The Hague.

January 1, 2016: IHAT head Mark Warwick states in a media interview that there was "significant evidence to be obtained to put a strong case before the Service Prosecuting Authority to prosecute and charge."

January 6, 2016: The SRA refers Leigh Day to the Solicitors Disciplinary Tribunal.

April 2016: The attorney general directs retired judge and former director of public prosecutions, Sir David Calvert-Smith, to conduct an independent review of the IHAT.

April 7, 2016: The SRA refers PIL to the Solicitors Disciplinary Tribunal.

April 28, 2016: The British House of Commons Defence Committee tasks a subcommittee chaired by an MP and former British army officer, Johnny Mercer, to examine the support

the Ministry of Defence gave to former and serving armed forces personnel subject to judicial processes, in particular through the IHAT.

July 4, 2016: OTP publishes a statement correcting assertions in an article published by *The Telegraph*.

July 6, 2016: The Chilcot inquiry report is published. Though the inquiry considered examining possible systemic issues relating to the detention and treatment of detainees in Iraq, it ultimately decided against doing so, citing potential duplication and prejudice of other processes.

August 31, 2016: PIL shuts down after being stripped of its legal aid funding.

September 15, 2016: Sir David Calvert-Smith publishes his report reviewing the IHAT.

December 14, 2016: Defence Secretary Michael Fallon tells parliamentary defence subcommittee that the number of claims on the IHAT docket would fall to 250 by January 2017 and to 60 by mid-2017.

February 2, 2017: The Solicitors Disciplinary Tribunal strikes Phil Shiner off the register of solicitors, barring him from practicing law.

February 10, 2017: The House of Commons Defence Committee publishes a report on the IHAT recommending its closure after the number of cases on its docket is reduced to 60.

February 10, 2017: Defence Secretary Michael Fallon announces that the IHAT will close by the summer of 2017.

February 13-14, 2017: The OTP conducts its third mission to the United Kingdom.

April 5, 2017: Defence Secretary Michael Fallon confirms that the IHAT will officially close on June 30, 2017 with any remaining cases—anticipated to be around 20—transferred to the service police for investigation.

April 21, 2017: The UK government submits its response to the Defence Committee report on the IHAT.

June 9, 2017: The Solicitors Disciplinary Tribunal clears Leigh Day of the allegations of professional misconduct.

June 29, 2017: ECCHR sends a letter to the OTP expressing concerns about the IHAT's decision to discontinue investigations in hundreds of cases.

June 30, 2017: The IHAT ceases to investigate allegations of abuse of Iraqi civilians by British armed forces between 2003-2009. The remaining investigations are reintegrated back into the service police system through the Service Police Legacy Investigations.

September 1, 2017: ECCHR sends a letter to the OTP urging the office to open a formal investigation.

September 13, 2017: The UK Ministry of Defence posts the two last quarterly updates on the IHAT's work.

December 4, 2017: On December 4, 2017, OTP announces there was a reasonable basis to believe that members of the UK armed forces committed war crimes within the ICC's jurisdiction in Iraq against persons in their custody, including wilful killing/murder, torture and inhuman/cruel treatment, and rape or other forms of sexual violence. This conclusion reflects the OTP's decision to officially move the UK/Iraq examination to Phase 3.

PRESSURE POINT: THE ICC'S IMPACT ON NATIONAL JUSTICE

Lessons from Colombia, Georgia, Guinea, and the United Kingdom

The International Criminal Court (ICC) is a court of last resort, stepping in only where national authorities do not prosecute serious international crimes. Governments seeking to avoid ICC intervention can do so by showing the ICC prosecutor that they are conducting genuine investigations. This can give the ICC prosecutor significant leverage with these authorities, serving as a pressure point for justice. Making the most of this influence to bring about genuine national proceedings is crucial for expanding the fight against impunity for these crimes and increasing the ICC's impact. Effective domestic prosecutions are all the more important given the alarming number of international crimes and the ICC's limited resources.

The ICC Office of the Prosecutor has recognized this opportunity in certain cases in which it is considering whether to open a full investigation, a process known as a "preliminary examination." *Pressure Point: The ICC's Impact on National Justice* details court practice in four such examinations (Colombia, Georgia, Guinea, and the United Kingdom/Iraq) and explores the extent to which the ICC can play a role in catalyzing national cases.

The report finds that the ICC's impact is highly dependent on context and that steep challenges, such as a lack of political will at the national level to support domestic prosecutions, may be real constraints. But the report also finds that the court can make important contributions, as the Guinea case study shows. The ICC prosecutor's strong engagement with national authorities and civil society, faster timelines, and more transparency, along with greater support from other international actors may improve the odds for success.



Georgians hold candles during a remembrance ceremony in Gori, west of Georgia's capital, Tbilisi, a year after the August 2008 war between Georgia and Russia over the breakaway region of South Ossetia.

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Relatives hold pictures of their beloved during a March 6, 2009 march in Bogota against the "false positive" killings and enforced disappearances allegedly carried out by Colombian authorities between 2002 and 2008.

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Daoud Mousa, father of Baha Mousa who died in 2003 at the age of 26 while in the custody of British soldiers in Iraq, shows photographs of his son and family to the media as he arrives at a July 28, 2004 London court hearing on human rights violations in Iraq.

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People hold a banner reading "We will never forget the dead, the missing, the wounded and the raped women of September 28, 2009" in Guinea's capital, Conakry on September 28, 2016, marking the seventh

anniversary of the Guinean security forces attack on a peaceful demonstration at a stadium that left 150 people dead and dozens of women raped.

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The headquarters of the International Criminal Court in The Hague.

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