Ordine internazionale e diritti umani
International Legal Order and Human Rights
Ordenamiento Jurìdico Internacional y Derechos Humanos
Ordre Juridique International et Droits de l'Homme
Diretta da Claudio Zanghì, Lina Panella, Carlo Curti Gialdino
EDITORIALE SCIENTIFICA

OSSERVATORIO SUI TRIBUNALI INTERNAZIONALI PENALI N. 4/2022

1. THE ICC PROSECUTOR'S DECISION TO CLOSE THE PRELIMINARY EXAMINATION OF THE SITUATION IN COLOMBIA: AN APPRAISAL

1. Introduction: The Prosecutor's decision

On 28 October 2021, the Prosecutor of the International Criminal Court (ICC) decided to close the preliminary examination of the situation in Colombia, the longest preliminary examination before the ICC. The decision was communicated with a public statement. According to the Prosecutor, Karim A. A. Khan QC, 'complementarity is working today in Colombia'. Moreover, in an unprecedented move, the Prosecutor signed a Cooperation Agreement with the Colombian Government with the aim of seeking assurances that it would cooperate fully with the existing Colombian judicial mechanisms, including those established as part of multiple transitional justice frameworks. According to Article 1 of the Agreement: 'the Government will continue: (i) safeguarding their established constitutional and legislative framework and structure; (ii) allocating the budget required for their implementation; and (iii) preventing any interference with their functions. The Government further commits to: (iv) ensuring the safety and security of judicial and prosecutorial personnel as well as participants appearing before the different accountability mechanisms, and (v) promoting full cooperation and coordination between the different State entities assigned with discharging duties with respect to accountability, in particular between the Attorney General's Office and the Special Jurisdiction for Peace'.

The decision of the Prosecutor baffled several civil society groups in Colombia. The former Americas Director for Human Rights Watch, José Miguel Vivanco, commented that the Prosecutor's decision was 'premature, mistaken, and counterproductive'. The International Federation for Human Rights (FIDH) and its member organisation in Colombia, the Lawyers' Collective José Alvear Restrepo (CAJAR), called upon the ICC to reconsider the decision of the Prosecutor. On 27 April 2022, FIDH and CAJAR filed a Request for review of the Prosecutor's decision of 28 October 2021 to close the preliminary examination of the situation in Colombia with the Pre-Trial Division. The Applicants argued that a Pre-Trial Chamber should (a) reverse the Prosecutor's decision to close the preliminary examination of the situation in Colombia or, (b) in the alternative, order the Prosecutor to justify his decision.

Pre-Trial Chamber I rejected the Applicants' first request, while accepting the second (Decision on the 'Request for review of the Prosecutor's decision of 28 October 2021 to

close the preliminary examination of the situation in Colombia' and related requests, Pre-Trial Chamber I, 22 July 2022 – hereinafter: *Colombia Pre-Trial Chamber Decision*). Beyond confirming the ICC's position on the Chambers' power to review prosecutorial considerations relating to the interest of justice in *proprio motu* situations (as set out in Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, *Situation in the Islamic Republic of Afghanistan*, Appeals Chamber, 5 March 2020, paras. 23-33 – hereinafter: *Afghanistan Appeals Decision*), the legal proceedings at hands raise important questions concerning the relationship between the Court and national jurisdictions. Most notably, the Prosecutor's decision signals a new approach to complementarity, one that is skewed toward 'positive complementarity' (see *E. ROGIER, The Ethos of "Positive Complementarity"*, in *EJIL: Talk!*, 11 December 2018). It has been noted that this new approach rewards states that are willing to cooperate by supporting them in their domestic accountability efforts (*K. AMBOS, The return of "positive complementarity"* in *EJIL:Talk!*, 3 November 2021), all together opening the doors to transitional justice mechanisms as acceptable forms of investigations and prosecutions under Article 17(1)(a) of the Rome Statute (S. VARGAS NIÑO, *When a Preliminary Examination Closes, a New Era Opens: The OTP's Innovative Support for Transitional Justice in Colombia*, in *OpinioJuris* , 2 December 2021).

This article appraises the Prosecutor's decision to close the preliminary examination in light of the most recent developments in the country. First, it outlines the complex transitional justice architecture set up through the 2016 Peace Agreement between the Colombian Government and the FARC-EP (*Fuerzas Armadas Revolucionarias de Colombia – Ejercito del Pueblo*), as well as prior transitional justice mechanisms. Second, it briefly summarises the reasons that underpin Pre-Trial Chamber I's decision on the Applicants' request. Third, it assesses the legal and policy implications of the Prosecutor's decision. It is worth emphasising that, while the Prosecutor's decision raises interesting issues regarding the complementarity regime that characterises the architecture of the ICC, this will not be the main focus of this commentary.

2. Transitional justice in Colombia

Following four-year-long negotiations, between 2012 and 2016, the Colombian Government and the FARC-EP, one of the main guerrilla groups in Colombia, signed a historic Peace Agreement on 12 November 2016 in Havana to put an end to a more-than-fifty-year-long armed conflict. Part Five of the Agreement engineered an ambitious architecture aimed at ensuring truth, justice, reparation, and non-repetition for the victims of the armed conflict. This included the establishment of a Truth Commission (*Comisión para el esclarecimiento de la verdad, la convivencia y la no repetición* – CEV), a Search Unit for missing persons (*Unidad especial para la búsqueda de personas dadas por desaparecidas en el contexto y en razón del conflicto armado* UBPD) and a Special Jurisdiction for Peace (*Jurisdicción Especial para la Paz* – JEP).

Previous transitional justice efforts were pursued in 2005 with the so-called 'Justice and Peace Law' (*Ley de Justicia y Paz*), which sought to disarm, demobilise and reintegrate in particular paramilitary groups – even though Article 1 of the Law refers to 'members of armed groups operating outside the law' (*miembros de grupos armados al margen de la ley*) more generally. The Law set up a mechanism within the National Prosecutor's Office specifically tasked with conducting investigations and prosecutions, as well as with determining reparations for victims, the 'Unit for Justice and Peace' (*Unidad Nacional de Fiscalías para la*

Justicia y la Paz). This was later transformed into the 'National Specialised Directorate for Transitional Justice' (*Dirección de Fiscalía Nacional Especializada de Justicia Transicional*) (for an early appraisal of the Justice and Peace Law and the Unit for Justice and Peace in light of the ICC's complementarity regime, see K. AMBOS, *The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court*, 2010).

Despite a generally hostile political environment, transitional justice in Colombia has advanced steadily over the past five years. On 28 June 2022, the CEV published its report. As of today, more than 13,000 individuals have accepted the jurisdiction of the JEP, which has identified ten macro-cases representative of the most serious violations perpetrated in the course of the armed conflict. The UBPD has identified more than 99,000 cases of disappeared persons and has received information from more than 1,000 individuals.

The election of the first left-wing government in the history of Colombia on 19 June 2022 marked a shift in the public discourse surrounding transitional justice and its institutions in Colombia. Newly elected President Gustavo Petro has repeatedly affirmed his commitment to the implementation of the Peace Agreement, including by supporting the institutions created through the Agreement.

Nonetheless, several commentators remain sceptical about the prospects of success of the transitional justice mechanisms established through the Agreement, in particular the JEP. Some note that not only the progresses made by the JEP are still quite modest, but there are also significant challenges in terms of jurisdictional scope, prosecutorial strategy and professionalisation of the JEP staff (see *A. MORALES, The rocky road to peace II: additional challenges at the Special Jurisdiction for Peace in Colombia*, in *EJIL: Talk!*, 12 May 2022). Others have highlighted the JEP's slow pace in investigating and prosecuting sexual and gender-based violence (see *J. PAPPIER, L. EVENSON, ICC Starts Next Chapter in Colombia, But Will It Lead to Justice?*, in *EJIL: Talk!*, 15 December 2021; A. BERMÚDEZ LIÉVANO, *La Corte Penal Internacional Respalda el Modelo de Justicia Transicional de Colombia*, in *Justiceinfo.net*, 9 November 2021; and A. K. KREFT, *"This Patriarchal, Machista and Unequal Culture of Ours": Obstacles to Confronting Conflict-Related Sexual Violence*, in *Social Politics: International Studies in Gender, State & Society*, 16 June 2022, pp. 11-16). Others yet have criticised the JEP's broad interpretation of the provisions defining the scope of its personal jurisdiction, which would risk benefitting perpetrators – namely, paramilitaries – who should be subjected to the jurisdictional regime established under the 'Justice and Peace Law' (*S. VARGAS NIÑO, Colombia's Special Jurisdiction for Peace Bends the Law to Dub Paramilitaries as State Officials: The Time For Critique is Now*, in *OpinioJuris*, 16 September 2022).

3. The Pre-Trial Chamber's decision

On 22 July 2022, Pre-Trial Chamber I handed down its decision on FIDH and CAJAR's request for review of the Prosecutor's decision to close the preliminary examination into the situation in Colombia (*Colombia Pre-Trial Chamber Decision*). The Applicants had argued that, despite the wording of the Prosecutor's statement and the Cooperation Agreement between the Prosecutor and the Colombian Government, the decision was based solely on the 'interest of justice'. A Pre-Trial Chamber – continue the Applicants – should be authorised to review such decision pursuant to Article 53(3)(b) of the Rome Statute, and the Chamber should in fact review the decision because opening an investigation into the situation in Colombia 'would indeed be in the interests of justice, taking into account in particular the interests of victims' (Request for review of the Prosecutor's decision of 28

October 2021 to close the preliminary examination of the situation in Colombia, *Situation in Colombia*, FIDH and CAJAR, 27 April 2022, para. 6(c) – hereinafter: *FIDH and CAJAR Request*). Moreover, the Applicants argued that a public statement is not sufficient to meet the Prosecutor's 'duty to provide a public and reasoned explanation of the grounds for the closure of [a] preliminary examination' pursuant to Articles 53(1)(c) and 15(6) of the Rome Statute, and Rule 49 of the Rules of Procedure and Evidence (*FIDH and CAJAR Request*, para. 76).

The Chamber found that the Prosecutor's decision to close the preliminary examination could not be reviewed by the Court because it referred to an investigation initiated *proprio motu* by the Prosecutor pursuant to Article 15 of the Rome Statute. Recalling the *Afghanistan Appeals Decision*, the Pre-Trial Chamber reaffirmed that the procedural regimes defined in Articles 15 and 53 of the Statute apply to different contexts. In particular, Article 53, which authorises the Pre-Trial Chamber to review the Prosecutor's decision not to proceed with an investigation if requested to do so or on its own motion provided that the decision was based solely on the interest of justice, only applies to situations that were referred to the Court by a state or the Security Council. Conversely, the Prosecutor's decision in relation to a preliminary examination initiated *proprio motu* by the Prosecutor falls within the scope of Article 15 of the Rome Statute, which does not provide for the reviewability by the Pre-Trial Chamber of a decision not to open an investigation. Subjecting the Prosecutor's decision to close a preliminary examination to the scrutiny of the Pre-Trial Chamber – argued the judges – would be at odds with the discretionary nature of the Prosecutor's power pursuant to Article 15 of the Statute (*Colombia Pre-Trial Chamber Decision*, paras 6-7).

At the same time, the Chamber found that the Prosecutor's statement and the Cooperation Agreement, as well as further subsequent communications, do 'not constitute sufficient information with respect to article 15(6) of the Statute, particularly in light of the length of the preliminary examination and the expectations it may have raised for those who provided information prior to, or during the preliminary examination', and therefore urged the Prosecutor to provide any relevant party with additional information of the reasons for his decision (*Colombia Pre-Trial Chamber Decision*, paras. 10-11).

4. An assessment of the Prosecutor's decision

It is against this context that the significance of the Prosecutor's decision to close the preliminary examination into the situation in Colombia should be assessed.

While concerns about the Colombian Government's commitment to supporting domestic transitional justice efforts were largely justified under the previous administration, the recently elected left-wing government has pledged to support the JEP and to implement fully the recommendations of the Truth Commission. The national budget allocation proposed by the new president, Gustavo Petro, for the JEP for 2023, for example, stretches to more than 558 billion Colombian pesos. If approved, this would mark an increase by almost 200 billion Colombian pesos of the 2022 allocated budget of little less than 375 billion Colombian pesos. Moreover, as soon as Petro took office, the *Clan del Golfo*, one of the largest neo-paramilitary organisations in Colombia, announced a unilateral ceasefire as a good will gesture in response to what they seem to see as a more peace-conducive political environment. In addition, Petro himself announced in September 2022 his plan to propose a multilateral ceasefire to all illegal armed groups in the country. It would seem that the current political scenario, coupled with the efforts of the Colombian transitional justice

mechanisms towards ensuring truth and justice for the victims of the armed conflict, may strengthen the reasons that had led the ICC Prosecutor to close the preliminary examination into the situation in Colombia.

Nonetheless, the Prosecutor's decision appears to overlook two important and interrelated issues. First, it seems to neglect the interest of the victims in failing to take into account their views and to justify properly the decision to close the preliminary examination. Second, it contradicts the OTP's commitment to ensuring that any such decision would be made in light of measurable indicators and, as such, it risks weakening the domestic accountability efforts. I shall unpack each set of arguments in turn.

a) The significance of the Prosecutor's decision for victims in light of the Rome Statute

In relation to Colombian victims and more generally civil society, the Prosecutor's decision is wanting in at least two ways, both of which have been noted by Pre-Trial Chamber I in its decision of 22 July 2022. On the one hand, the press statement detailing the Prosecutor's decision, coupled with the Cooperation Agreement signed with the Colombian Government, does not even mention civil society or the victims of the potential crimes that constituted the material scope of the preliminary examination. On the other hand, the Prosecutor failed to provide the detailed reasons that justified his decision to close the preliminary examination, thus violating his obligations under Article 15(6) of the Rome Statute to 'inform those who provided the information' and Rule 49(1) of the ICC Rules of Procedure and Evidence, which requires such notice to include the 'reasons for his or her decision'. While the Chamber appears to have conflated these two issues by urging the Prosecutor to provide all relevant parties, in particular 'those who provided information prior to, or during the preliminary examination' (*Colombia Pre-Trial Decision*, para. 10), with a reasoned explanation for his decision, I shall separate them.

In relation to the first issue, it should be noted that the previous Prosecutor, Fatou Bensouda, had initiated a consultation with all relevant stakeholders to identify benchmarks and indicators that could guide the Office of the Prosecutor (OTP) in determining whether to open an investigation or close the preliminary examination of the situation in Colombia. Khan's decision to close the preliminary examination came less than a month after the deadline for the consultation. Despite the consultation, neither the Prosecutor's statement nor the Cooperation Agreement signed with the Colombian Government made reference to information submitted by civil society groups or victims.

In particular, civil society groups that provided the OTP with their benchmark and indicator proposals felt that their contributions were not reflected in the Prosecutor's decision (A. BERMÚDEZ LIÉVANO, *La Corte Penal Internacional respalda el modelo de justicia transicional de Colombia*, in *Justiceinfo.net*, 9 November 2021). This marks a shift in the OTP's approach, one that no doubt fails to live up to the standard of inclusiveness set out in Bensouda's statement concerning the consultation process.

In relation to the second issue, as found by Pre-Trial Chamber I, the Prosecutor's decision to close the preliminary examination of the situation in Colombia was not comprehensively motivated.

In a document published on 15 June 2021, the OTP drew a roadmap for the above-mentioned consultation identifying potential benchmark categories for further discussion with the relevant stakeholders. These included (a) the domestic legislative framework; (b) domestic proceedings; and (c) the enforcement of sentences. It further noted that 'public

articulation of relevant benchmarks and indicators might more concretely contribute to galvanising the competent domestic authorities to prioritise meeting certain objectives while, conversely, clarifying the conditions under which the ICC might proceed to undertake investigations'.

The identification of these benchmark categories and the acknowledgement of the importance to hold a transparent consultation process around the specific indicators against which the OTP could measure the performance of Colombian authorities would justify an expectation that any decision by the OTP, whether to open an investigation or close the preliminary examination, be accompanied by the specific reasons that led to such decision. Neither the Prosecutor's statement nor the Cooperation Agreement make reference to any such benchmark or indicator. On the contrary, the Prosecutor simply stated that he was 'satisfied that complementarity is working today in Colombia'.

In its response to FIDH and CAJAR requests, the Prosecutor submitted that his 'assessment and conclusion was made against the backdrop of the assessment previously conducted and documented in detail by the Office in its situation-specific and annual reports, in its submissions before the Colombian Constitutional Court as well as in key statements setting out the Office's position' (para.24). However, in its decision of 22 July 2022, Pre-Trial Chamber I noted that 'this reporting is not apt to constitute, by itself and without more, the reasons for his determination that there is no "reasonable basis for an investigation" as required by article 15(6) of the Statute and rule 49 of the Rules' (*Colombia Pre-Trial Chamber Decision*, para. 10).

Preliminary examinations have no doubt become a powerful policy tool for the ICC to exert pressure on national authorities, and in this sense they can generate expectations among victims of international crimes and, more generally, civil society actors (see C. STAHN, *Damned If You Do, Damned If You Don't: Challenges and Critiques of Preliminary Examinations at the ICC*, in *Journal of International Criminal Justice*, Vol. 15, Issue 3, 2017, p. 416). However, wielding such power comes with responsibilities. The decision to open or close a preliminary examination, or to escalate it to a full-fledged investigation, may have significant repercussions on existing domestic proceedings to ensure accountability. It can bolster or weaken civil society's efforts to exact justice from domestic authorities. Ultimately, it may jeopardise, or conversely strengthen, the legitimacy of the ICC in the eyes of states, perpetrators, victims, and other relevant stakeholders. Transparency should therefore be an essential guiding principle at any stage of the proceedings before the Court. One that informs the Court's accountability to states, perpetrators, victims and civil society (on transparency, see R. GREY, S. WHARTON, *Lifting the Curtain. Opening a Preliminary Examination at the International Criminal Court*, in *Journal of International Criminal Justice*, Vol. 16, Issue 3, 2018, pp. 593-621).

b) The significance of the Prosecutor's decision in light of the ongoing conflict in Colombia

Having determined that the Prosecutor's decision to close the preliminary examination of the situation in Colombia falls short of the procedural requirement to inform those who provided information about the decision and the reasons that justify it, pursuant to Article 15(6) of the Rome Statute and Rule 49 of the Rules of Procedure and Evidence, I can now turn to the substance of the Prosecutor's decision. It is worth noting that, while Pre-Trial Chamber I urged the Prosecutor to provide the interested parties with relevant information that justified his decision to close the preliminary examination, it did not order

the Prosecutor to reverse such decision. As explained above, the Chamber found that it had no power to review the Prosecutor's decision to close a preliminary examination initiated *proprio motu*. This, however, should not refrain us from asking whether the decision was indeed justified and what the effects of this decision may be on the domestic proceedings – bearing in mind that parts of these reflections may lead us into uncharted, and potentially speculative, territories.

While in his statement informing about the decision to close the preliminary examination of the situation in Colombia the Prosecutor cursorily stated that complementarity is working in the country, the benchmarking consultation document published in June 2021 (hereinafter: *Benchmarking consultation*), just a few months before the Prosecutor's decision, depicted a somewhat different situation. In particular, the Prosecutor noted that 'there are, and remain, *today*, potential cases for which the Office's admissibility assessment remains pending, and which could in principle be the focus of ICC investigations if judicial authorisation was sought' (*Benchmarking consultation*, para. 12). Furthermore, in the same document, the OTP recalled how, in its Interim Report on the Situation in Colombia of November 2012, it had noted the shortfalls of the domestic proceedings in relation to specific categories of persons or crimes, in particular the expansion of paramilitary groups, cases of forced displacement, sexual crimes, and the so-called *falsos positivos* (the killing of civilians subsequently reported as guerrilla killed in combat by the army to bolster the latter's performance) (*Benchmarking consultation*, para. 3).

Many of these issues are being comprehensively addressed by the Colombian judicial institutions established as part of the transitional justice framework, in particular the JEP. However, as noted by some commentators, significant challenges remain within both the JEP and the ordinary justice system in relation to the investigation and prosecution of sexual crimes and cases of forced displacement (A. BERMÚDEZ LIÉVANO, *La Corte Penal Internacional respalda el modelo de justicia transicional de Colombia*, in *Justiceinfo.net*, 9 November 2021). Indeed, in the OTP's benchmarking consultation document of June 2021, former Prosecutor Fatou Bensouda proposed to consider 'manifest gaps in the prosecutorial programme in relation to… proceedings relating to forced displacement; proceedings relating to sexual crimes' as one of the indicators articulating the domestic proceedings benchmark category (see *Benchmarking consultation*, para. 40). Such concerns should have, as a minimum, triggered a more stringent requirement on the part of the Prosecutor to justify his decision to close the preliminary examination.

Other concerns were raised by the then Prosecutor in relation to specific domestic criminal law provisions, including for example modes of liabilities – in particular the definition of command responsibility or the notion of 'active or determinative' participation –, sentencing – in particular the execution of sentences –, and prioritisation criteria for cases heard before the JEP. While these concerns were recalled in the benchmarking consultation document of June 2021, no specific reference was made in either Prosecutor Khan's press statement informing about the decision to close the preliminary examination or the Cooperation Agreement signed by the Colombian Government (on command responsibility, see C. TERAN, *Emerging Voices: What Colombia's FARC Peace Deal Teaches the ICC About Its Complementarity System*, in *Opinio Juris*, 21 August 2019; on prioritisation, see A. MORALES, *The rocky road to peace: current challenges at the Special Jurisdiction for Peace in Colombia*, in *EJIL: Talk!*, 3 May 2021).

In addition to the problems identified so far, significant challenges persist in relation to the ongoing armed conflict in Colombia. According to the organisation *indepaz*, almost a

thousand civilians have been killed in 266 massacres since January 2020 in the country (a massacre is defined by *indepaz* as the simultaneous murder of at least three defenceless persons protected by international humanitarian law, under the same time and geographical circumstances and with the same modalities). According to the same organisation, only in 2022, 128 social leaders and human rights defenders, and 34 former FARC members have been killed. According to the UN High Commissioner for Refugees, between January and June 2022, more than 30,000 people have been the victims of 79 massive forced displacements. There is no doubt that the levels of violence in Colombia continue to be very high. Against this backdrop, it is worth asking whether the ICC preliminary examination exerted any influence over the parties to the armed conflict and whether its closure might result in an intensification of violence on civilians. Such an appraisal is inevitably speculative, but there are empirical studies that have sought to determine the catalysing effect of the ICC on the behaviour of the parties to an armed conflict.

The literature on the topic is not unanimous. Some authors argue that the ICC preliminary examination exerted a certain degree of social deterrence on conflict actors (see, for example, H. JO, B. A. SIMMONS, M. RADTKE, *Conflict Actors and the International Criminal Court in Colombia*, in *Journal of International Criminal Justice*, Vol. 19, Issue 4, 2021, pp. 959-977; H. JO, B. A. SIMMONS, *Can the International Criminal Court Deter Atrocity?*, in *International Organization*, Vol. 70, Issue 3, 2016, p. 449). Other authors are more cautious and claim that the influence exerted by the ICC on state or non-state conflict actors should be assessed contextually, that is by taking into account other potential factors of influence and the conditions that enhance or hinder deterrence (see, for example, G. DANCY, *Searching for Deterrence at the International Criminal Court*, in *International Criminal Law Review*, Vol. 17, Issue 4, 2017, pp. 625-655). However, there seems to be some consensus around the fact that the ICC did indeed alter the conflict actors' behaviour. Whether the closure of the preliminary examination will result in increased levels of violence is a matter for future observation. However, it seems fair to speculate that many conflict actors may see the apparent disengagement of the OTP as a relief.

4. Concluding remarks

The decision of the ICC Prosecutor to close the preliminary examination of the situation in Colombia constitutes an endorsement of the transitional justice architecture designed through the Peace Agreement signed in 2016 by the Colombian Government and the FARC-EP. While the decision was made under the administration of Iván Duque, whose government was generally unsupportive of the Colombian transitional justice institutions, the pledges of the newly elected first left-wing government in the history of Colombia represents a ray of hope for truth, justice, reparation, and non-repetition in the country, and thus it may strengthen the reasons that underpinned the Prosecutor's decision to close the preliminary examination.

Nonetheless, there remain significant procedural and substantive challenges that may hinder or slow down the accountability processes in motion in the country. Depending on how issues such as the investigation and prosecution of cases of forced displacement and sexual violence, or even the treatment reserved to paramilitaries will be dealt with by the ordinary and transitional justice institutions, the willingness and genuineness of the domestic proceedings may be questioned. Moreover, the levels of violence in the country remain high and, while many former FARC-EP members have now demobilised, a plethora of armed

actors continue to operate in the country. Against this backdrop, it would seem that the Prosecutor's decision may have come too early in the road towards justice for victims of international crimes in Colombia. It certainly was not comprehensively motivated, which may have a negative effect on the local perceptions of the ICC as an institution.

Nonetheless, it should be noted that the Prosecutor's decision to close the preliminary examination is not irreversible. As set out in Article 15(6) of the Rome Statute, and emphasised by the Prosecutor himself, the decision to close a preliminary examination 'does not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence'. The Cooperation Agreement that Khan and the Colombian Government signed emphasises that '[i]n line with the Rome Statute, the Office of the Prosecutor may reconsider its assessment of complementarity in light of any significant change in circumstances, including any measures that might significantly hamper the progress and/or genuineness of relevant proceedings and the enforcement of effective and proportionate penal sanctions of a retributive and restorative nature; initiatives resulting in major obstructions to the mandate and/or proper functioning of relevant jurisdictions; or any suspension or revision of the judicial scheme set forth in the peace agreement in a manner that might delay or obstruct the conduct of genuine national proceedings'. To this end, the Agreement underlines that channels of communication between the OTP and the Colombian Government will remain open and that the OTP will continue supporting the accountability efforts in the country.

PIERGIUSEPPE PARISI