SECRETARIAT OF THE ASSEMBLY OF STATES PARTIES TO THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

THE HAGUE WORKING GROUP

22 February 2019

Informal consultations on complementarity

Summary

Representatives of the ad country co-focal points, Ms. Christina Hey-Nguyen (Australia) and Ms. Raluca Karassi (Romania), chaired the meeting.

1. Draft work programme

The focal points indicated that they had not received comments on the draft 2019 work programme, dated 14 February 2019, which they had conveyed to States and other stakeholders. They recalled that the work draft programme was a living document, intended to guide their work during the year and flexible enough to be adapted depending on developments and interests expressed.

They intended, in 2019, to continue to build on existing efforts undertaken within their mandate and to promote transparent and inclusive interaction with all relevant stakeholders, in order to achieve a fruitful and constructive dialogue, enable exchanges of information and avoid duplication of existing efforts.

2. Informal information session

The informal information session on judicial aspects of complementarity focused on the topic "Article 17 of the Rome Statute and issues of admissibility including an overview of jurisprudence and recent situations". The topic was chosen in response to the feedback received and the interest expressed by delegations in obtaining further information and clarity on this subject.

Mr. Rod Rastan, Legal Adviser, Office of the Prosecutor (OTP), recalled the distinction between complementarity as a technical admissibility question governing forum allocation on disputes over whether a particular case should be heard at the national level or before the ICC (complementarity as admissibility), and complementarity understood as international cooperation by States Parties, the Court and other stakeholders, in particular through rule of law development programmes aimed at enabling domestic jurisdictions to address war crimes, crimes against humanity and genocide (complementarity as cooperation).[1] The speaker provided an overview of the case law of the Court as well as the policies of the OTP in relation to the assessment of complementarity, recalling a number of topics that had been addressed during 2018 in previous meetings and consultations of The Hague Working Group on the issue of complementarity.[2]

Mr. Rastan recalled that the Appeals Chamber has held that the complementarity test under article 17 involves a two-step inquiry, involving determining first whether the national authorities are active in relation to the same case, and only if so, whether this activity is vitiated by a lack of genuineness:

[1] Report of the Bureau on complementarity, ICC-ASP/17/34, 29 November 2018, para.5.
[2] Ibid., para.7.

> [i]n considering whether a case is inadmissible under article 17 (1) (a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability. To do otherwise would be to put the cart before the horse. It follows that in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to article 17 (1) (d) of the Statute.[3]

Explaining the first limb of the test further, the Appeals Chamber has observed that there must be a conflict of jurisdictions (between the Court and a national jurisdiction) concerning the same case, otherwise there is no conflict.[4] In this context, the parameters of the 'case' that is the object of an admissibility determination is defined by the stage at which admissibility is challenged. He noted that the Appeals Chamber has distinguished between the relative vagueness of the contours of the likely cases at the article 15 and article 18 stages, contrasted with the admissibility of 'concrete cases' at the article 19 stage, which perforce must relate to cases defined by the warrant of arrest or summons to appear issued under article 58, or the charges brought by the Prosecutor and confirmed by the Pre-Trial Chamber under article 61.[5]

As to the level of specificity or sameness required at the article 19 stage, the Appeals Chamber has affirmed that "the national investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court";[6] while determining whether "substantially the same conduct" is being investigated, the Appeals Chamber has stated that "[w]hat is required is a judicial assessment of whether the case that the State is investigating sufficiently mirrors the one that the Prosecutor is investigating".[7]

The Appeals Chamber has further explained that a national investigation, for the purpose of article 17, must "signify the taking of steps directed at ascertaining whether *those suspects* are responsible for that conduct, for instance by interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses";[8] for which it must be established that "tangible, concrete and progressive investigative steps are being undertaken".[9]

As to the second step of the complementarity test, the speaker noted that there has been less judicial activity to date on the willingness or ability of States to carry out proceedings genuinely. Since part of the focus of the session was to also reflect OTP practice, the speaker

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[3] Appeals Chamber, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009, ICC-01/04-01/07-1497, para. 78.

[4] Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', Ruto et al. (ICC-01/09-01/11-307), Appeals Chamber, 30 August 2011 ('Ruto Admissibility Appeal Judgment'), para. 37 ("Consequently, under article 17 (1) (a), first alternative, the question is not merely a question of 'investigation' in the abstract, but is whether the *same case* is being investigated by both the Court and a national jurisdiction", emphasis in the original); Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', Muthaura et al. (ICC-01/09-02/11-274), Appeals Chamber, 30 August 2011 ('Muthaura Admissibility Appeal Judgment'), para. 36.

[5] Ruto Admissibility Appeal Judgment, para. 39-40; Muthaura Admissibility Appeal Judgment, paras. 38-39.

[6] Ruto Admissibility Appeal Judgment, para. 40; Muthaura Admissibility Appeal Judgment, para. 39.

[7] *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Judgment on the Appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled "Decision on the admissibility of the case against Saif Al-Islam Gaddafi", Appeals Chamber, ("Gaddafi Admissibility Appeal Judgement"), 21 May 2014, ICC-01/11-01/11-547-Red, para. 73.

[8] Ruto Admissibility Appeal Judgment, para. 41 (emphasis in original); Muthaura Admissibility Appeal Judgment, para. 40.

[9] *Prosecutor v Simone Gbagbo*, Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo, Pre-Trial Chamber I, ICC-02/11-01/12-47-Red, 11 December 2014, para. 65; *Prosecutor v Simone Gbagbo*, Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled "Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo", Appeals Chamber, ICC-02/11-01/12-75-Red, 27 May 2015, para. 122.

referred to the policies adopted by the Prosecutor, which set out, in relevant part, its understandings of how genuineness should be assessed – while stressing that these remained only the views at this stage of the OTP and had either yet to be judicially tested before the Court or were otherwise pending a judicial determination. In particular, the speaker gave an overview of paragraphs 48-57 of the OTP's Policy Paper on Preliminary Examinations, which is annexed to this report for ease of reference.[10]

Mr. Fabricio Guariglia, Director of Prosecutions, OTP, provided further illustrations of relevant judicial findings as well as examples of the OTP's approach to assessing complementarity in practice. In this context, he emphasized that the Court has focussed its approach towards complementarity on the Court's relationship with "national criminal jurisdictions", in line with the relevant references in the preamble of the Statute and article 1.[11] In the Burundi situation, nonetheless, both the OTP and the Pre-Trial Chamber considered as relevant to the article 17 analysis the activities of the various (technically non-criminal) national commissions of inquiry established by the Government of Burundi – given that these commissions had been established and staffed by judicial personnel and also had certain judicial and investigative powers, including the power to refer persons to the competent authorities for criminal proceedings.[12]

Mr. Guariglia also recalled that the complementarity assessment was a dynamic process which might evolve over time as a result of progressive national activities and judicial proceedings. As the Appeals Chamber had held, the admissibility assessment must be made on the basis of the underlying facts as they exist at the time,[13] and is subject to revision based on any change to those facts.[14]

The speaker discussed the ways the complementarity assessment had featured in a number of different situations whether at the preliminary examination stage or in the context of concrete cases before the Court, discussing examples from Colombia and Guinea, where the OTP had been able to contribute to progressive national efforts to tackle different categories of alleged criminality. He cited the OTP's 2012 Interim Report on Colombia, where the OTP articulated its conclusions on potential cases that satisfied the admissibility test and those that did not, and which served as the basis for the Office's subsequent engagement with the national authorities.[15] The domestic processes in Colombia and Guinea were contrasted with the situation in Burundi, where the OTP assessed that the national authorities, despite setting up some national mechanisms, had not undertaken any genuine national proceedings. In relation to Afghanistan, the speaker recalled the position taken by the OTP in its article 15 application, which was based on either the absence of substantiated evidence that the national authorities had addressed the relevant allegations, or on State inaction based on decisions to decline submitting allegations to criminal inquiry.

In relation to cases before the Court, reference was made to the Libya situation where one case, *Abdullah Al-Senussi*, was found to be inadmissible and was subsequently deferred to the national authorities,[16] contrasted with another case, *Saif Al-Islam Gaddafi*, where the case was

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[10] ICC-OTP, Policy Paper on Preliminary Examinations, November 2013.
[11] *Situation in the Republic of Burundi*, 'Public Redacted Version of "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi", ICC-01/17-X-9-US-Exp, 25 October 2017', Pre-Trial Chamber III, ICC-01/17-9-Red, 9 November 2017, para.152 (observing "[a]ccording to article 1 of the Statute, the fundamental purpose of the Court is to prosecute those responsible for the most serious crimes of international concern in a manner complementary 'to national criminal jurisdictions'. Therefore, on the basis of this wording, national investigations that are not designed to result in criminal prosecutions do not meet the admissibility requirements under article 17(1) of the Statute").
[12] *Ibid*., para 153.
[13] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, 25 September 2009, para. 56.
[14] *Ibid. See also Prosecutor v. Joseph Kony et al.*, Decision on the admissibility of the case under article 19(1) of the Statute, ICC-02/04-01/05-377, 10 March 2009, para. 28.
[15] ICC-OTP, Situation in Colombia, *Interim Report*, November 2012.
[16] *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, 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, ICC-01/11-01/11-565, 24 July 2014.

found admissible before the ICC,[17] and for which a new admissibility determination is now pending (decision was since handed down on 5 April). In relation to the *Al-Senussi* case, where issues of due process rights of the suspect had been pleaded, the Appeals Chamber held that "the Court was not established to be an international court of human rights, sitting in judgment over domestic legal systems to ensure that they are compliant with international standards of human rights" and that "article 17 was not designed to make principles of human rights per se determinative of admissibility", but noted that "[h]owever, there may be circumstances, depending on the facts of the individual case, whereby violations of the rights of the suspect are so egregious that the proceedings can no longer be regarded as being capable of providing any genuine form of justice to the suspect so that they should be deemed, in those circumstances, to be 'inconsistent with an intent to bring that person to justice'."[18] The speaker further recalled the admissibility challenges brought in relation to the Kenya cases, where the Court held that the challenges had been brought prematurely since the authorities had not instituted cases against the same persons or for the same conduct as in those cases which were pending before the ICC.[19]

Mr. Guariglia further noted that the admissibility assessment may be protracted, given the need to give due regard to progressive developments in specific domestic cases. There was a risk, however, that evidence which might be relevant to a future ICC investigation might become degraded or lost, were a case to be later found admissible. In this respect, the OTP has taken efforts in recent years, within the scope of its powers under article 15 of the Statute, to make relevant requests to relevant authorities to take measures to preserve relevant information or evidence or to receive written or oral testimony at the seat of the Court.[20]

In response to questions from the floor on 'the same person/substantially the same conduct' test, the speakers clarified that the test had been interpreted as not requiring the same legal qualification of the conduct: i.e. the Appeals Chamber had clarified that there was no legal requirement that a State charge the underlying conduct as an international crime (e.g. war crime, crimes against humanity or genocide) as opposed to an ordinary crime (e.g. murder), as long as the underlying conduct before the ICC was sufficiently mirrored in the national case.[21] In response to a question how this assessment is undertaken at the preliminary examination stage, it was recalled that the OTP focusses at the preliminary examination stage on 'potential cases' which are likely to arise from an OTP investigation of the situation: the parameters of which might form the focus of the OTP's interaction with the national authorities.[22]

As to the sources that the OTP relies upon, the speakers referred to article 15(2) which provides that the Prosecutor might seek information from "States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate", while stressing that interaction with the national authorities will be often be critical given their unique access to relevant information. Another question asked whether trials *in absentia* were relevant to article 17, for which the speakers gave as an example the OTP's position on the *in absentia* convictions against members of the FARC and ELN in Colombia, which the OTP had in principle accepted rendered those cases inadmissible subject to the enforcement of relevant sentences.[23]

In response to a question whether the Court's legal framework lacks for want of inclusion of the notion of 'conspiracy', reference was made to the contrasting legal systems and views of States during the drafting history of the Statute, and the ultimate concurrence of the

[17] *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi', Appeals Chamber, ICC-01/11-01/11-547-Red, 21 May 2014.
[18] Al-Senussi Admissibility Appeal Judgment, paras 219 and 230.
[19] Ruto Admissibility Appeal Judgment, paras. 41-47, 100; Muthaura Admissibility Appeal Judgment, paras. 40-46, 98.
[20] Article 15(2), ICC Statute.
[21] Al-Senussi Admissibility Appeal Judgment, para.119.
[22] See e.g. ICC-OTP, Situation in Colombia, *Interim Report*, November 2012.
[23] *Ibid*., paras. 160-161.

drafters to instead include the notion of common purpose liability, which also reflected the notion included in the 1997 Terrorist Bombings Convention.

As regards how the OTP integrated staff from its various divisions throughout its core activities pursuant to the OTP Strategic Plan, the speakers indicated that the OTP integrated teams included investigators, prosecutors, analysts and cooperation advisors under the leadership of the Senior Trial Lawyer responsible for the case.

A view was expressed from the floor that greater focus sometimes appeared to be placed in ICC judgments on the rights of the Defence than on those of the victims of the crimes, and that some of the Court's practice has made securing convictions in complex criminal cases increasingly improbable.

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