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OTP – NGO Roundtable Meeting

Update on Judicial Proceedings

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English Version

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Lubanga

- In January, the hearings in the Lubanga case re-commenced.
 - Three victims gave evidence in person before the Trial Chamber.
 - Two expert witnesses called by the Chamber also gave their evidence.
 - The Defence commenced their presentation of evidence, on 27 January 2010.
- Prior to this, in mid-2009 the legal representatives of victims requested that sexual slavery and cruel and inhumane treatment charges be added to Lubanga's indictment.
 - Office of the Prosecutor selects its charges based on the evidence collected. We have a policy of bringing focussed cases: both to promote efficient and expeditious investigations and proceedings; and to minimise the risk to victims and witnesses. We try when possible to present a sample of the criminality.
 - In the *Lubanga* case, based on the evidence collected the OTP brought charges of enlisting and conscripting children under 15 and using them to participate actively in hostilities.
- The full range of harm that these children suffered as a result of these crimes – including cruel treatment and sexual and gender violence – is an integral part of the case. The Prosecution made clear from the outset that it considered that the harm inflicted on the children and the full scale of their suffering will warrant an appropriately severe sentence.
 - “harm caused to the victims and their families” is explicitly included as an aggravating factor for sentencing, Rule 145(1)(c).

- The Majority of the Trial Chamber initially included these additional charges, however the Appeals Chamber ruled that the case is limited to the “facts and circumstances described in the charges”, and that the Trial Chamber could not include additional facts which the Prosecution had not pleaded.
- Given the focus of the Prosecution case on the recruitment and use of the children in hostilities, the Trial Chamber ultimately did not change the legal characterisation to include the additional crimes of cruel treatment and sexual slavery.
 - The Appeal Judgment, and subsequent decision of the Trial Chamber, is consistent with the language of the Statute and the Regulation.
 - However, the Prosecution emphasises (as it did to the Trial Chamber) that the inclusion of additional crimes at this point in the trial was not necessary for the Trial Chamber to consider the full scale of the victimisation that the children suffered in this case.

Katanga

- The Prosecution case opened on 24 November 2009, and the Prosecution resumed its presentation of evidence on 26 January 2010.
- Last year, Katanga challenged the admissibility of the case, under the complementarity principle in Article 17 of the Rome Statute.
 - The admissibility provision of the Statute provides that “a case is inadmissible where the case is being investigated or prosecuted by a State”.

- Both the Trial Chamber and the Appeals Chamber confirmed that the case is admissible.
- After the Trial Chamber's ruling that the case was admissible, Katanga filed a separate application to stay proceedings based on alleged abuse of process.
- The Trial Chamber also rejected this request. However Katanga has recently been granted leave to appeal this issue, and that appeal is currently pending before the Appeals Chamber. This appeal has not delayed the conduct of the trial, however.

If discussing why the Appeals Chamber confirmed admissibility

- In ruling that the case against Katanga is admissible, the Appeals Chamber applied the plain language of the Statute. It confirmed that admissibility is a two-stage procedure:
 - first the Court must consider whether there are ongoing investigations or prosecutions (or whether there were investigations and the State decided not to prosecute);
 - if the answer to this is yes, then the Court will have to examine questions of unwillingness or inability;
 - but if there are no ongoing investigations or prosecutions (i.e. a case of inaction) at the time of an admissibility challenge (and there has been no "decision not to prosecute"), then the case is admissible (subject to *ne bis in idem* and gravity). The question of unwillingness or inability of the State does not arise.
- The DRC authorities repeatedly confirmed that they were not investigating Germain Katanga for the attack on Bogoro, which forms the basis of the case before the ICC.

- The DRC authorities also confirmed that any proceedings against Katanga were closed when he was transferred to the Court.
 - Given that there were no national proceedings, the Appeals Chamber found the case to be inadmissible.
- While the Prosecution encourages States to conduct genuine domestic proceedings, the Court cannot force a State to investigate or prosecute a case, and it cannot create national proceedings where there are none.
 - The Statute does not render a case inadmissible because a State could have or should have investigated or prosecuted; only where the State is investigating or prosecuting or has investigated the case.
- If a State does not act – does not investigate or prosecute a case – the Court must be able to proceed. Otherwise this would defeat the object and purpose of the Statute, which is to put an end to impunity and to ensure that the most serious crimes of concern to the international community as a whole do not go unpunished.

Bemba

- The trial in the Bemba case is currently scheduled to commence in late April 2010. As you know, the case against Bemba is the first in an international tribunal in which allegations of sexual and gender crimes outnumber killings. It can also have a tremendous preventative impact by reminding commanders of their responsibility for the conduct of their subordinates.
- Recently, Bemba has lodged a challenge to the admissibility of the case against him.

- The Prosecution is currently preparing its response to this challenge.
- The Prosecution had also sought an extension of time to disclose further evidence, which it was gathering in part due to the fact that the Pre-Trial Chamber changed the mode of liability in its confirmation hearing.
 - While the Trial Chamber did not grant the initial Prosecution request, it made it clear that the Prosecution could file a specific request if relevant evidence is obtained and new facts or developments merit it.
 - One such application is currently before the Trial Chamber.
- In addition, the Trial Chamber is currently reviewing the detention of Bemba.
 - Between August 2008 and April 2009, the Pre-Trial Chamber issued three separate decisions upholding the detention of Bemba.
 - The first of these decisions was challenged by Bemba on appeal, and the Appeals Chamber confirmed the decision to detain him.
- In order to modify a ruling on detention, a Pre-Trial Chamber must be satisfied that changed circumstances mean that detention is no longer necessary.
- The Appeals Chamber's decision to overturn the conditional release of Bemba was based primarily on the fact that nothing had changed since these earlier decisions.
- The Appeals Chamber carefully examined each of the factors which the Single Judge of the Pre-Trial Chamber considered as warranting release. It concluded that the Single Judge had misappreciated and disregarded relevant facts.

- Indeed, the Prosecution had argued that the main change of circumstance since the last decision that Bemba should be detained was that the charges against him had been confirmed, and this only increased the risk that he would attempt to flee and therefore the need for detention. The Appeals Chamber agreed that the PTC should have analysed the factors against this heightened risk.
- The Appeals Chamber also focussed on the procedure for granting conditional release. It recognised that according to the Rules, the Court must seek views of the relevant States before imposing conditions on release.
 - As a result, the Appeals Chamber confirmed the Chamber considering release should identify a State which is willing and able to accept the person before deciding to grant conditional release.

Al Bashir

- The Pre-Trial Chamber issued a warrant of arrest against President Al Bashir for crimes against humanity and war crimes, but did not initially issue the arrest warrant for genocide
 - The Prosecution maintains that President Al Bashir's intention is to destroy the fur, Masalit and Zagawa. Hunger and rape are his weapons.
 - The Prosecution therefore appealed this decision. This appeal related to a particular legal issue: the test for drawing inferences in

order to establish “reasonable grounds to believe” for issuing an arrest warrant.

- The Prosecution argued that the Majority of the Pre-Trial Chamber used the wrong test: they required that the Prosecution prove that the inference of reasonable ground is the only reasonable inference available.
 - The requirement of “only *reasonable* inference” is the standard applied at trial, and is a result of the requirement that guilt be proven “beyond *reasonable* doubt”.
 - As a result, the Majority Decision imposed an evidentiary burden that is inappropriate for this procedural stage.
 - As Judge Usacka recognised in her dissent, at the stage of issuing an arrest warrant, it may be that more than one inference can reasonably be drawn from the summary information presented by the Prosecutor. All that is required to establish “reasonable grounds to believe” is that the inference is reasonable; the Prosecution does not need to prove that other possibilities are unreasonable.
- The Appeals Chamber made its decision on 3 February 2010. The Pre-Trial Chamber had used the wrong test, and it was a legal error to reject the genocide charges against President Al Bashir.
- The Appeals Chamber sent this matter back to the Pre-Trial Chamber to make its decision on whether to include genocide in the arrest warrant according to the correct standard.
 - The Prosecution considers that based on the correct standard, the factual findings that the Pre-Trial Chamber made do establish reasonable grounds to believe that President Al-Bashir acted with genocidal intent.

- The Prosecution will also present new evidence.

Abu Garda

- The Pre-Trial Chamber issued its decision on the confirmation of charges against Abu Garda on 8 February 2010.
- The Prosecution considers this case to be a very serious one: it does not base the gravity of the case on the number of casualties, but on the fact that the targets of this attack were peacekeepers.
 - The crime of attacking peacekeepers is viewed by the international community as exceptionally serious crimes of international concern as they are “committed against persons who represent the international community and risk their lives to protect its fundamental interest in maintaining the international peace and security of mankind”.¹
 - They are, in effect, directed against the international community and strike at the heart of the system established for the purpose of maintaining international peace and security through collective security measures. Given the fragile situations in which peacekeepers are often deployed and the effect of this type of attack on their ability to carry out their mandate, these attacks affect the ability of the UN to effectively perform its central role in maintaining international peace and security

¹ International Law Commission, Draft Code of Crimes against the Peace and Security of Mankind (1996), Commentary to Article 19, Yearbook of The International Law Commission, 1996, Volume II, Part Two, Report of the Commission to the General Assembly on the work of its forty-eighth session, A/CN.4/SER.A/1996/Add.1 (Part 2), p. 51.

- In addition, the gravity of this case is linked to the directing of the attack – which was a large scale attack involving 1,000 rebel combatants – not just the deaths that it caused.
- The Pre-Trial Chamber confirmed that the AMIS base at Haskanita was entitled to protection, and that the attack against had been a crime.
- However, the Pre-Trial Chamber did not confirm the charges against Abu Garda as it did not consider the evidence to demonstrate that he had been part of a plan beforehand to launch the attack.
- The Prosecution considers that there are a number of problems with the Pre-Trial Chamber's analysis and reasoning.
 - At this stage, there are a number of avenues open to the Prosecution. We will seek leave to appeal the decision, and we will also consider presenting additional evidence to the Pre-Trial Chamber under Article 61(8) of the Statute.

Kenya

- On 26 November 2009, the Prosecutor for the first time filed a request before the Pre-Trial Chamber for authorisation to open an investigation proprio motu, under Article 15 of the Statute.
 - This request concerns the post-election violence in the Republic of Kenya in 2007-2008.
 - The Prosecution presented information received by it to the Chamber, which provides a reasonable basis to believe that a number of crimes were committed as part of a widespread or systematic attack against the civilian population – including

murder, rape and other forms of sexual violence, forcible transfer of civilian population, and other inhuman acts. Such acts could constitute crimes against humanity under the Statute.

- The Pre-Trial Chamber is currently considering the Prosecution's request.
 - On 18 February 2010, the Pre-Trial Chamber requested specific clarifications and additional information from the Prosecution.
 - The Prosecution is filing today or tomorrow its response to the Pre-Trial Chamber's request.