Informal expert paper:

The principle of complementarity in practice

Contents

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Participants and terms of references

In April 2003, the then Director of Common Services of the International Criminal Court (ICC), Mr. Bruno Cathala, approved the suggestion from the start-up team of the Court's Office of the Prosecutor (OTP) that there be an expert consultation process on complementarity in practice for the benefit of the future Chief Prosecutor and the staff of his Office. Members of the group of experts (the Group) were invited in writing to participate in an "informal expert consultation on complementarity in practice" and to prepare a reflection paper on the potential legal, policy and management challenges which are likely to confront the OTP as a consequence of the complementarity regime of the Statute.

The Group met on 28 May 2003 and again on 31 October 2003 at the interim seat of the Court. The Group worked primarily and extensively by electronic mail, to discuss issues and refine drafts of the report over a six month period of consultation. The Group selected one of its members, Mr. Darryl Robinson, as the co-ordinator for its discussions and drafting. The independent work of the Group was aided from the side of the Court by Mr. Morten Bergsmo, Senior Legal Adviser in the ICC-OTP.

Experts participated in their individual capacity, and therefore the views reflected in this document do not necessarily reflect the views of their respective organisations. In no way do these views constitute a statement of any institution. Moreover, the Group operated in a collegial manner to try to develop a collective report, and hence the views reflected in this document do not necessarily reflect the views of each individual member.

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The Group also benefited from an examination of various papers, to which the contributions of Eric Manton, Gaston Gramajo Chapman and Julieta Solano McCausland are gratefully acknowledged. The Group welcomed the participation of Marieke Wierda and Paul Seils of the International Center for Transitional Justice at the October 31 meeting.

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I. Introduction

> *As a consequence of complementarity, the number of cases that reach the Court should not be a measure of its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.*
>
> Statement by Mr. Luis Moreno-Ocampo, June 16, 2003
> Ceremony for the Solemn Undertaking of the Chief Prosecutor

1. *Complementarity:* The principle of complementarity governs the exercise of the Court's jurisdiction. This distinguishes the Court in several significant ways from other known institutions, including the international criminal tribunals for the former Yugoslavia and Rwanda (the ICTY and the ICTR). The Statute recognizes that States have the first responsibility and right to prosecute international crimes. The ICC may only exercise jurisdiction where national legal systems fail to do so, including where they purport to act but in reality are unwilling or unable to genuinely carry out proceedings. The principle of complementarity is based both on respect for the primary jurisdiction of States and on considerations of efficiency and effectiveness, since States will generally have the best access to evidence and witnesses and the resources to carry out proceedings. Moreover, there are limits on the number of prosecutions the ICC, a single institution, can feasibly conduct.

2. *Objectives:* The statement above conveys a fundamental element of the philosophy and aspiration underlying the complementarity principle. The establishment of an international order wherein national institutions respond effectively to international crimes, thereby obviating the need for trials before the ICC, would indeed be a major success for the Court and the international community as a whole. Of course, it is expected that, in practice, trials before the ICC will remain very important. The sad reality is that national institutions have all too frequently proven unable or unwilling to address international crimes. The statement nonetheless usefully highlights that the Prosecutor's objective is not to "compete" with States for jurisdiction, but to help ensure that the most serious international crimes do not go unpunished and thereby to put an end to impunity. The complementarity regime serves as a mechanism to encourage and facilitate the compliance of States with their primary responsibility to investigate and prosecute core crimes. Where States fail to genuinely carry out proceedings, the Prosecutor must be ready to move decisively with ICC proceedings. Such proceedings will provide independent and impartial justice, demonstrate the determination of the international community to repress international crimes, and demonstrate the real prospect of ICC action, thus encouraging prosecution by States in the future.

3. *Guiding principles:* Accordingly, two "guiding principles" may inform the approach to complementarity: *partnership* and *vigilance*.

- *Partnership* highlights the fact that the relationship with States that are genuinely investigating and prosecuting can and should be a positive, constructive one. The Prosecutor can, acting within the mandate provided by the Statute, encourage the State concerned to initiate national proceedings, help

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develop cooperative anti-impunity strategies, and possibly provide advice and certain forms of assistance to facilitate national efforts. There may also be situations where the Office of the Prosecutor (OTP) and the State concerned agree that a consensual division of labour is in the best interests of justice; for example, where a conflict-torn State is unable to carry out effective proceedings against persons most responsible.

- *Vigilance* marks the converse principle that, at the same time, the ICC must diligently carry out its responsibilities under the Statute. The Prosecutor must be able to gather information in order to verify that national procedures are carried out genuinely. Cooperative States should generally benefit from a presumption of *bona fides* and baseline levels of scrutiny, but where there are indicia that a national process is not genuine, the Prosecutor must be poised to take follow-up steps, leading if necessary to an exercise of jurisdiction.

4. *Interaction:* Paradoxically, these twin aspects of the complementarity function (partnership and vigilance) are in tension and yet are inseparably related. For example, the advice and guidance of the partnership function may resolve potential shortcomings in the national proceedings and thus avoid any need to consider ICC exercise of jurisdiction under the vigilance function. Conversely, the mere existence of complementarity fact-finding activities will often encourage genuine and effective national proceedings.

5. *Stance of OTP:* A major goal of the Prosecutor, aided in particular by the External Relations and Complementarity Unit, would therefore be to contribute to the removal of the need for the other pillars of the OTP to be fully activated, by motivating genuine national proceedings on the basis of effective legislation. The commitment of resources and energy into these activities is expected to prove a sound and effective investment, by reducing the need for intensive investigations and prosecutions by the ICC. In carrying out its partnership and vigilance functions, the OTP must be active and effective in order to fulfill its vitally important mandate and demonstrate the value of the ICC. The OTP must also be principled, consistent and fair in order to fulfill its mandate and maintain and build international support.[1] The principle of objectivity (Article 54(1)) should be extended to admissibility fact-finding and analysis, so that willingness and ability are assessed in an objective, uniform and principled manner.

6. *Impact:* The principle of complementarity can magnify the effectiveness of the ICC beyond what it could achieve through its own prosecutions, as it prompts a network of over 90 States Parties and other States to carry out consistent and rigorous national proceedings. The ICC would have this effect:

-through its encouragement and co-operation;
-through the prospect of the ICC exercising jurisdiction;

[1] The Group referred at times to three different considerations in developing or recommending interpretations, policies and practices. These considerations might also be considered by the OTP. An overarching consideration was to identify the approaches best supported by objective interpretations of the Statute and international law. Another consideration was to minimize unnecessary obstacles for the OTP and to facilitate its work. Another was to seek credible, reasonable approaches that would maintain the support of the international community. All three considerations ultimately lead to increasing the Court's effectiveness.

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-through its own exemplary and standard-setting proceedings; and
-through its moral presence, which will shape perspectives and strengthen resolve on the need for accountability.

II. Partnership and dialogue with States[2]

a. Encouraging national action and promoting anti-impunity measures

7. *States:* Consistent with its mandate to help ensure that serious international crimes do not go unpunished, it should be a high priority for the Office of the Prosecutor[3] to actively remind States of their responsibility to adopt and implement effective legislation and to encourage them to carry out effective investigations and prosecutions. Such encouragement could be *general*, for example, in public statements; or *specific*, for example, in private bilateral meetings. Fact-finding contacts and inquiries to States may be accompanied by dissemination of information and exertion of a powerful reminder of the existence of the Court and the interest of the international community in well functioning national legal systems. At no point can there be any doubt, however, of the determination of the OTP to fulfil its mandate on the basis of objective criteria.

8. *International fora:* The Office of the Prosecutor has an appropriate role to play in relevant international fora, working not only with interested States, but also within the UN system[4] and other intergovernmental organisations, to promote consistent and decisive action in preventing and punishing crimes. The OTP will acquire valuable expertise and experience that should be made available to bodies negotiating resolutions on relevant topics, developing intergovernmental policies or administering a region. Advancing an anti-impunity "vision" and strategy in other fora will reduce the need for the ICC to exercise its jurisdiction.

9. *Judicial institutions:* While Article 17 requires ICC deference to investigations and prosecutions carried out genuinely by a "State", the OTP should as a policy matter be prepared to adopt a similar approach in respect of the ICTY, the ICTR, hybrid tribunals such as the Sierra Leone Special Court, courts and tribunals of UN administered territories, and other such courts. Thus, the same cooperative ties should be forged with such entities.

b. Providing direct assistance and advice

10. *Information and evidence:* To exchange information and evidence to facilitate a national investigation or prosecution will generally be consistent with the Prosecutor's

[2] This is a comparatively new and developing area, and therefore this report can only offer a few general suggestions. It should also be noted that it will be more difficult to measure the efficiency and impact of activities in the partnership/dialogue area, in comparison with other functions of an international criminal court or tribunal. The OTP may therefore need to try to establish objective benchmarks, objectives and management parameters in order to measure the effectiveness of these initiatives.
[3] It is recommended that this should be a priority not only for the OTP, but for all parts of the Court system. The organs of the Court and the Secretariat of the ASP may consider developing an action plan on implementing legislation as an essential foundation for an effective complementarity regime.
[4] Relevant agencies include, *inter alia*, the Office of the High Commissioner for Human Rights.

mandate.[5] This conclusion is reinforced by Article 93(10) of the Statute, which contemplates ICC assistance to national investigations and prosecutions. The prospect of such assistance, or continued assistance, should be used where possible as an incentive to encourage co-operation on the part of the State concerned. For example, information might be shared as part of a two-way agreement, or anti-impunity strategy, such that non-co-operation with ICC requests could lead to a withholding of ICC assistance flowing to the State. At the same time, the credibility of the Court requires a projection of and compliance with clear standards, not to compromise its legitimacy. Due diligence is required in order not to create or foment a perception that international assistance may be necessary for a State in order to comply with international legal obligations to prevent and suppress impunity for the worst international crimes. Anti-impunity strategies and international assistance would have to be based on sustained demonstration of good faith by the State concerned.

11. *Technical advice:* Providing technical advice would also be generally consistent with the Prosecutor's mandate.[6] With respect to international legal issues (crimes, defences, modes of liability, *etc*.), and practical issues of investigating and prosecuting mass crimes, the OTP will build up a unique and unparalleled in-house expertise. This may be shared on the same basis as described in the previous paragraph.

12. *Training:* The extent to which the OTP can provide training to countries is a sensitive question. The Group has only contemplated priorities at the early stages of the Court's existence, and does not pretend to preclude nor to address possible future roles. Generally speaking, the presumption is that the Court will need to move step by step in building up its capacity to deal with its mandate. The provision of training is not expressly contemplated in the Statute or the RPE. On the one hand, providing such training would advance the overall objective of building a network of States able to carry out effective prosecutions. On the other hand, there could be significant resource implications that are not directly linked to the core mandate of the OTP. It may be advisable to proceed gradually, assessing the views of the Assembly of States Parties, and in particular avoiding any perception of diverting resources from implementation of the mandate, whether in terms of financial or personnel resources. The OTP could identify the need for such training, indicate benchmarks, encourage others to address the matter and review progress reports.

13. *Brokering other assistance:* In addition to assistance that may appropriately be provided by the OTP from its resources (for example, sharing of information and evidence), the OTP may also be able to act as an intermediary between States, facilitating situations where States may assist one another in carrying out national proceedings. Under such circumstances, it is important not to jeopardize or compromise any future role by the Court, should developments so require. The OTP may also be able to share its expertise in training activities organized by States and organisations.

[5] This assumes that the assistance does not jeopardize security of sources or preservation of evidence. The Prosecutor may also consider the appropriate extent of co-operation with national proceedings that contravene international human rights standards, or in which suspects face torture, inhuman treatment or the death penalty.

[6] Subject to the qualifications mentioned in the previous footnote.

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c. Relationship between roles (partnership/vigilance)

14. *Risks:* There is a potential tension between the two aspects of the complementarity function, i.e. the dialogue role and the monitoring role. There is a potential danger that if the OTP gets too closely involved in providing training, advice and assistance to a national proceeding, it may be difficult to extricate the OTP to credibly criticize and question the process if it subsequently proves to be a non-genuine proceeding. Nonetheless, in the abstract, the benefits of co-operation appear to be such that this is a worthwhile risk, provided that the above precaution be exercised. It is suggested that, consistent with the presumption of *bona fides* toward cooperative States, the OTP proceed with a positive, cooperative approach to assisting national efforts, where appropriate, albeit with some caution to avoid being exploited in efforts to legitimize or shield inadequate national efforts from criticism. The OTP can assess this approach over time in the light of experience and lessons learned.

15. *Multi-tasking:* There is also a question of whether the OTP should strictly separate the two functions (dialogue and monitoring) to reduce the risk of such conflicts, for example, by never including experts in the two functions on the same delegation. It is suggested that such a strict separation may not be necessary and may not always be possible in a context of limited resources. This requires, at the same time, clear guidelines to avoid perceptions of negotiation, which would be inconsistent with a future investigatory role. It is true that there is a tension between the roles, but they are also intertwined.

III. The vigilance function: fact-finding and analysis

a. Framework issues of article 17

16. This report does not attempt to provide a doctrinal analysis of the provisions of Article 17 (for ease of reference, that Article is reproduced in Annex 1). Nonetheless, the following three observations provide a useful context for the report's recommendations. It should be emphasized that this report focuses on the complementarity issues reflected in Articles 17(1)(a)-(c) and not the distinct issue of "sufficient gravity" reflected in Article 17(1)(d), an important issue which could form the basis of a separate inquiry.

1. "Inaction" versus "unwillingness" and "inability"

17. Although it is common to emphasize the "unwilling or unable" test in Article 17, the Article in fact deals with three logically distinct circumstances.

18. First, the most straightforward scenario is where no State has initiated any investigation (the inaction scenario). In such a scenario, none of the alternatives of Arts. 17(1)(a)-(c) are satisfied and there is no impediment to admissibility. Thus, there is no need to examine the factors of unwillingness or inability; the case is simply admissible under the clear terms of Article 17.

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19. Second, it is only where a State is investigating or prosecuting, or has already completed such a proceeding, that Articles 17(1)(a)-(c) are engaged.[7] In such circumstances, the case will be inadmissible, unless the exceptions in those provisions are established.

20. Third, this inadmissibility is displaced where it can be shown that the proceedings are not genuine, because the State is either unwilling or unable to carry out genuine proceedings. Thus, the issues of "unwilling", "unable" and "genuine" only arise where a State purports to be handling the matter, but there are reasons to believe that a genuine proceeding will not result.

2. "Genuine" proceedings

21. Some uncertainty has arisen at times about which term is modified by the adverb "genuinely"; *i.e.* whether it modifies "unable" (and possibly even "unwilling") or modifies "to carry out" and "to prosecute". The correct interpretation is the latter, *i.e.* that the term qualifies "to carry out the investigation or prosecution" and "to prosecute". This is made clear in Article 17(1)(b), where the terms are more clearly separated ("unwillingness or inability of the State genuinely to prosecute".) [8]

22. The term "genuinely" restricts the class of national proceedings that require deference from the ICC. Without such a qualifier, *any* national proceeding would preclude ICC action, even if the national proceeding were fraudulent or hopelessly inadequate. This balance was one of the key compromises of the Rome Statute, giving the ICC a certain scope to assess the objective quality of a national proceeding, but setting a standard no higher (but no lower) than that the proceedings be carried out "genuinely".[9]

23. The term "genuine" is defined, for example, in the Oxford dictionary, as "having the supposed character, not sham or feigned". The context of Article 17 affirms that the term must be interpreted in relation not only to "unwillingness" (sham, feigned) but also to "inability", and it therefore also connotes a certain basic level of objective quality. Thus, a country devastated by conflict and facing a collapse of its system might be *willing* to conduct proceedings, and yet be *unable* to genuinely carry out proceedings. It was extremely important to many States that proceedings cannot be found "non-genuine" simply because of a comparative lack of resources or because of a lack of full compliance with all human rights standards. The issue is whether the proceedings are so inadequate that they cannot be considered "genuine" proceedings. Of course, although the ICC is not a "human rights court", human rights standards

[7] See *infra* note 26 on the interpretation of Article 17(1)(b).

[8] This conclusion is also confirmed by reference to the drafting history. Earlier drafts ("to genuinely carry out", "to genuinely prosecute") were adjusted on purely technical grounds to avoid splitting the infinitive. It is also confirmed by the purpose of including the term "genuinely", *i.e.* to restrict the class of national proceedings warranting deference from the ICC (see next paragraph).

[9] Terms such as "effectively", proposed in earlier drafts, were unacceptable to several delegations, because of a concern that the ICC might "judge" a legal system against a perfectionist standard (for example, that the ICC might set aside proceedings because, in the Court's opinion, the prosecution might have chosen a more effective strategy.) While these concerns are legitimate, and the plain language must be respected, the Prosecutor should also avoid adopting standards of "genuineness" that are too permissive or conducive to impunity. In interpreting Article 17, the Prosecutor must also "have regard to principles of due process recognized under international law".

may still be of relevance and utility in assessing whether the proceedings are carried out genuinely.

3. Implications for admissibility of differing phases of ICC proceedings

24. Complementarity issues can arise in different ways at different phases in ICC proceedings. At some phases there will be a particular suspect and a particular case, whereas in earlier phases, the admissibility assessment must be more generalised.

25. Admissibility can arise as a factor for the Prosecutor to assess in determining whether to proceed with an investigation, either upon the referral of a "situation" by a States Party or by the Security Council or when determining whether to seek authorisation for an investigation in accordance with Article 15. At such points, admissibility is not an issue for litigation and judicial determination, but rather a matter for the OTP to consider and assess in reaching decisions.

26. When a determination of admissibility is explicitly required, however, for the purpose of the initiation of an investigation – by the Prosecutor in accordance with Article 53 (1) and Article 15 (3) as clarified by Rule 48, as well as by the Pre-Trial Chamber under Article 15 (4) – a greater degree of specificity regarding the object of the investigation is required. The same is true in order to allow the Prosecutor, the State in question (or the Security Council) and the Chamber to assess and determine issues of admissibility in proceedings that may follow immediately thereafter pursuant to Article 18 (2) or (3) and Article 53 (3). The Statute refers to "the admissibility of a case".[10]

[10] While a certain degree of specificity is required for admissibility determinations, the object of the investigation (defined in parameters which can be personal, territorial and temporal) cannot be too narrowly construed at this early stage of the proceedings when the Prosecutor has not yet or only just commenced the investigation. A particular suspect will not always be identified at this stage. Moreover, a prosecutorial strategy aiming at perpetrators in a leadership position could mean that the investigation covers many events.

The object of the investigation will often, but not always, be more concrete and confined than a "situation" which a State or the Security Council may refer to the Court (Articles 13 to 14). This means that an analytical process must take place in the OTP between the referral of a situation and the decision whether to commence one or more investigations (also underlined by the factors set forth in Article 53 (1)).

Once the investigation is initiated, the object of the investigation will be further concretized within the abovementioned parameters. The more specific case or cases would normally be the focus of subsequent admissibility determinations and challenges under Article 19 (2) (although nothing prevents a challenge under this provision immediately after the Article 18 proceedings).

Different views could be expressed as to the terminology and the specificity actually required at the stage of the commencement of an investigation. One view is that the term "case" should be used from this stage and onwards (which reflects the reference to "admissibility of the case" in the Statute) and that the "case" should be sufficiently specified with reference to events and possibly, but not necessarily, to a suspect. This is necessary in order to assess and determine the "admissibility of the case" (although "inability" seems to be a concept that, at least in part, deals with systemic features of the system, or parts of it, rather than the national action or inaction in the particular "case"). Avoiding assessments and scrutiny of a broader "situation" would also alleviate one of the major fears that some States had during the negotiations, namely that their entire legal systems would come under scrutiny. The identification of events could be, *inter alia*, the massacre in a certain village or a campaign in a particular geographic area during a particular time period.

Another view is that the object of the early proceedings should be referred to as a "situation" (on the assumption that the parameters of the investigation would often coincide with those of the re-

b. Power to conduct fact-finding and to secure co-operation

27. The Statute clearly contemplates that the OTP will gather facts and conduct analysis in order to form views (and if necessary, submit arguments) on admissibility, and hence, on whether national institutions are genuinely carrying out proceedings (Article 15, 17, 18, 19, 20, and 53). This section addresses the extent to which such efforts may be bolstered by obligations to co-operate.

28. It appears that the co-operation regime under Part 9 of the Statute is linked to an "investigation" (article 86) and so are the powers of the Prosecutor set forth in article 54. A formal "investigation" commences by either the Pre-Trial Chamber's authorisation in accordance with article 15(4) or the Prosecutor's decision to initiate an investigation under article 53(1) (i.e. following the referral of a situation). The expression "proceed with an investigation" in the English version of article 15(3)-(4) may lend itself to different interpretations. Other language versions are clearer, to the effect that an "investigation" cannot be initiated before the Pre-Trial Chamber has granted authorisation (e.g. "*ouvrir*" in French and "*abrir*" in Spanish). Hence, formal co-operation in accordance with Part 9 would not apply pre-authorisation (*proprio motu* 'triggered') or before the commencement of the investigation (referral 'triggered'). Thus, the better view appears to be that the powers of the Prosecutor to conduct "fact finding" prior to authorisation or upon the referral of a situation, but before the commencement of an investigation of a case, are those set forth in article 15(2) and rule 104. They would therefore have to be carried out in a non-compulsory manner.

29. A broader interpretation could also be advanced, construing Part 9 co-operation as also applying to phase prior to investigation, but such an argument would need to rely on the scheme of the Rome Statute and the general duties of States to combat impunity.

30. As a practical matter, it is expected that States Parties and other supportive States will choose to co-operate voluntarily with the OTP, and will likely respond to reasonable requests for information. Co-operation might also be further encouraged by courteously making States aware of the possibility that reasonable inferences might of necessity be drawn if information cannot be collected because of non-co-operation. In exceptional cases, other interested States may be able to intervene to help resolve any impasses.

31. Arguably, the Pre-Trial Chamber should take into account the limited powers of the Prosecutor at the preliminary stage when setting its standards for authorisation.

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ferred "situation"), and that first the object of proceedings under Article 19 (2) would constitute a "case", *i.e.* a "case" would require a higher degree of specificity than in accordance with the other view and normally that the suspect has been identified and would occur later into the criminal investigation (Art. 54 *et seq*.). This approach is based on the view of Articles 15, 18 and 53(1), (3) and (4) as an autonomous procedure (triggering procedure) directed to the determination of the temporal, territorial and/or personal parameters over which the Court is going to exercise its jurisdiction (e.g. crimes committed by Rwandan nationals in the territory of Rwanda and neighbouring states between April and June of 1994). In accordance with this view, limiting *de facto* the personal jurisdiction of the Court to the leaders involved in the crimes committed in a given situation ("most responsible persons") would avoid the risks of scrutinizing entire legal systems as a result of assessments of admissibility carried out during the triggering procedure.

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32. Once an investigation has been formally initiated, facts relevant for determination of admissibility should be seen as forming part of the "investigation" and co-operation in accordance with Part 9 is available. Importantly, Part 9 would also apply during proceedings under article 18.[11] Article 18(5) also creates an obligation for States Parties (and an invitation for non-States parties) to provide periodic progress reports, which should also be helpful for admissibility fact-finding.

c. Methodology of fact-finding and analysis

33. *Multidisciplinary:* An admissibility assessment is a multidisciplinary undertaking, which will have *normative* dimensions – requiring an understanding of legislation, jurisprudence, procedures and norms – and *empirical* dimensions – involving an assessment of the context and the actual handling of the relevant case or cases.

34. *Graduated measures:* The best way to satisfy both the partnership and vigilance principles would be for the OTP to pursue a "*graduated measures"* approach. Where a State is open and cooperative, and there is every sign of a genuine, good faith process, the OTP verification may be minimal, relying on open sources and periodic checks. Where warning signs arise, the OTP should immediately follow up, with more active efforts – for instance, to independently gather information on the context and the handling of proceedings. This would escalate to a full-scale collection of information for a possible admissibility hearing where circumstances warrant.[12] Moreover, as noted above (paragraphs 18 and 19), a survey of unwillingness and inability is not necessary where there are no national investigations or prosecutions, as admissibility is clear in such circumstances.

35. *Inferences from general context:* While Article 17 requires a focus on the handling of a particular case (or, in earlier stages, the likely handling of an anticipated set of possible cases against persons most responsible), it will almost inevitably be necessary to consider the broader context, laws, procedures, practices and standards of the State concerned. One may credibly draw inferences from the general to the particular.[13] Where a system is shown to be independent, impartial and meeting standards of genuineness, this may contribute to an inference of genuineness in the particular case. Conversely, where a system shown to be plagued with political interference, scripted trials, and unwillingness to pursue certain groups of offenders or offences, this may contribute to an inference of a lack of genuineness in the particular case. Nonetheless, caution should be exercised, since the admissibility assessment is not intended to "judge" a national legal system as a whole, but simply to assess the handling of the matter in question.

[11] In line with this, the Prosecutor should argue that the co-operation regime under Part 9 applies also in respect off such exceptional "investigative steps" as may be authorised by the Pre-Trial Chamber (PTC) according to Article 18(6).

[12] In order to further demonstrate the OTP's fair and standardized approach to states, the OTP may wish to develop objective categories describing the level of co-operation provided (for example: responsive, partially responsive and unresponsive). The OTP might increase its activity in gathering information and its reliance on alternative sources depending on the degree of co-operation and the presence of indicia warranting further follow-up.

[13] This is supported by Rule 51 of the RPE, which allows States to bring information about their legal system to the attention of the Court.

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36. *Types of evidence:* Relevant evidence may include official documents (legislation, transcripts, reports, dossiers, judgments), other documents (reports on the political and legal system, reports of observers and monitors), testimony of observers, monitors, and insiders, and expert opinion on the political and legal system and on the handling of the relevant case or cases. Circumstantial evidence will likely be extremely important, particularly in assessing Awillingness@ to carry out genuine proceedings.

37. *Diversity of sources*: The OTP will likely have to engage in active monitoring (conducting interviews, sending observers) and passive monitoring (receiving reports, transcripts, media) of national proceedings. An admissibility assessment will require a diversity of interlocutors and a diversity of sources, with information coming from the prosecuting State, other actors (media, NGOs, experts, other States, international organisations), and information gathered directly by the OTP. Information should be assessed with an awareness of possible biases or weaknesses, and cross-checked against multiple independent sources, so as to evaluate its reliability and credibility. An internal system of source assessment, and possibly semi-structured protocols of source assessment may prove useful and appropriate in handling multiple sources.

38. *Official sources:* An appropriate starting point would likely be to obtain information from the prosecuting State about the proceedings.[14] Within a government, there may be a variety of useful interlocutors, including different branches of government and authorities of sub-entities. The OTP should not necessarily deal with only one channel of communication, particularly where governmental institutions have differing interests and perspectives. Interlocutors may include:

- Investigative/police/intelligence services (knowledge of investigative efforts, challenges faced);
- Prosecution services (knowledge of prosecution efforts, procedures, challenges);
- Ministry of justice (knowledge of legal system);
- Ministry of defense (if the armed forces were allegedly involved, or if military plays a role in collecting evidence and providing security);
- Ministry of foreign affairs (external interlocutor, often more sensitive to international obligations and perspectives); and
- Human rights commissions, commissions of inquiry, *ad hoc* truth commissions, ombudspersons (perspective, possible reports and statistics).

39. *Other sources:* In order to fulfill its duties (particularly the principle of vigilance), the OTP cannot rely only on official sources, and must gather information from other sources to develop a complete picture. Such information would be collected on a voluntary basis and sources could include:

- Political parties;

[14] This approach is useful (i) to show respect for the State, (ii) for reasons of fairness (since the national efforts are being "scrutinized"), and (iii) for practical efficiency reasons, since the State has pertinent information and is a useful starting point. This general approach may need adjustment where there is a risk of jeopardizing future investigations, and possibly the security of victims and witnesses, in cases of disclosing information to authorities who appear to be implicated in the reported crimes, or unable to protect sensitive information.

- Open media sources;
- NGOs;
- Academics and leading experts in relevant fields (law, politics, administration of justice, social sciences, history);
- Journalists;
- International organisations (UN, regional organisations); and
- Bar associations.

Reliance on other sources may at times lead to diplomatic challenges (for example, where a State resents consultation with groups with conflicting agendas). Nonetheless, the effort to acquire information from diverse sources is needed to make an objective assessment. Unless circumstances indicate otherwise, the OTP should advise the government that it is gathering information of this nature and explain its approach, to avoid any misunderstandings.

40. *Observers/monitors:* The OTP should develop a means of deploying on-site observers or trial monitors. Monitors could be arranged with the consent of the State (which should hardly be difficult where trials are open to the public). Refusal to allow monitors should give rise to adverse inferences. Monitors may be persons contracted and trained by the OTP, or the OTP might rely on expert reports from other bodies. (The OTP should issue guidelines on procedures and content for such reports to be as useful as possible for ICC proceedings; such guidelines should be developed in consultation with entities with experience in the field, including NGOs, IGOs an diplomatic missions.)

41. *Open sources*: Systematic evaluation of information available in the public domain, including internet resources, should be a priority. Specialised electronic tools and systematic collection plans are necessary, as well as personnel able to utilize these sources in their original language. The OTP may develop in-house expertise, contract the services of private providers, subscribe to digests or bulletins, or rely on summaries provided by others.

42. *Secondary analysis*: The OTP may analyse primary sources gathered by other organisations. Reliance should not be such as to amount to "investigation by proxy", the material would have to be assessed for reliability and credibility, as part of a broader effort to gather information.

d. Criteria for assessing national proceedings

1. Contextual information

43. As noted above (paragraphs 18, 19 and 34), the extent of fact-finding will depend on the circumstances, including the presence or absence of national proceedings, and whether there are any indicia of non-genuineness warranting further scrutiny. Where circumstances warrant significant fact-finding, there is certain background contextual information that may be gathered in order to inform an admissibility assessment under either the "unwillingness" or "inability" branches. Such information may relate to the legislative framework, the powers attributed to institutions of the criminal justice system, degrees of independence, jurisdictional territorial divisions and so on. A list of relevant indicators is included in Annex 4. Statistical analyses may be of relevance in early stages, when assessing the likelihood that a potential situation will be addressed

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by national institutions, but will be less relevant in later stages when the issue is the handling of particular cases.

2. Unwillingness

44. *General:* To demonstrate "unwillingness" may be technically difficult (likely involving inferences and circumstantial evidence) and politically sensitive (amounting to an accusation against the authorities). It is possible that a regime may employ sophisticated schemes to cover up involvement and to whitewash crimes, so information and analytic tools are needed to penetrate such tactics. Article 17(2) specifies certain factors that the Court "shall consider" in making its determination, namely:

- purpose of shielding the person from criminal responsibility;
- unjustified delay inconsistent with an intent to bring the person to justice;
- lack of independence and impartiality, inconsistent with intent to bring to justice.

45. *Intra-State divergences in willingness:* The OTP should be alert to the possibility of differing degrees of willingness and internal differences within a State. For example, the judiciary may be "willing", whereas the executive is not. Investigators may be willing but an "unwilling" military may frustrate and hinder investigative efforts. Unwillingness in one branch of government may create "inability" in another branch attempting sincerely to investigate or prosecute. There is also a possibility of selective "willingness": authorities may be eager to investigate crimes by rebel groups but be reticent with respect to government forces.

46. *Process, not outcome:* The unwillingness test cannot be based on the *outcome* of proceedings, for example, from the acquittal of an obviously guilty person. At first glance, it may seem attractive to suggest a test such as "no reasonable tribunal could acquit the person on the evidence". However, such a test would create grave complications and is likely inconsistent with the Rome Statute. For example, where a PTC had determined as a preliminary procedural matter that no reasonable tribunal could acquit the person, this would undermine the accused's right to be presumed innocent at trial once before the ICC. Therefore, the admissibility assessment should be based on *procedural* and *institutional* factors, not the substantive outcome.

47. *Indicia:* An assessment of unwillingness will involve a search for *indicia* of a purpose of shielding the person from criminal responsibility or a lack of an intent to bring the person to justice. This may be inferred from:

- direct or indirect proof of political interference or deliberate obstruction and delay;
- general institutional deficiencies (political subordination of investigative, prosecutorial or judicial branch);
- procedural irregularities indicating a lack of willingness to genuinely investigate or prosecute; or
- a combination of these factors.

A detailed list of potential indicators of unwillingness is included in Annex 4.

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3. Inability

48. *General:* An "inability" assessment is likely to be less complex than an "unwillingness" assessment, as the evidence sought is more readily available, there is no need to infer hidden motives, and the authorities are not being accused of deception. Nonetheless, there may be an implication that the authorities are incorrect in believing that they are able to genuinely carry out proceedings, so significant sensitivities remain.

49. *Standard:* The standard for showing inability should be a stringent one, as the ICC is not a human rights monitoring body, and its role is not to ensure perfect procedures and compliance with all international standards. The focus of the complementarity regime is on the more basic question of whether the State is unable to genuinely carry out a proceeding. Article 17(3) specifies certain considerations in reaching the inability determination. The wording of Article 17(3) indicates that there are two cumulative sets of considerations; first, "collapse" or "unavailability" of the national judicial system,[15] and second, whether the State is unable to obtain the accused, or the evidence and testimony, or otherwise unable to carry out proceedings.

50. *Relevant facts and evidence*: The following facts and evidence may be relevant to the first set of considerations (total or substantial collapse or unavailability of national judicial system) (see also Annex 4):

- lack of necessary personnel, judges, investigators, prosecutor;
- lack of judicial infrastructure;
- lack of substantive or procedural penal legislation rendering system "unavailable";
- lack of access rendering system "unavailable";
- obstruction by uncontrolled elements rendering system unavailable;
- amnesties, immunities rendering system "unavailable".

e. Evidentiary considerations

1. Applicable rules of evidence

51. Although the Statute provisions on evidence appear in Part 6 (The Trial), the Rules of Procedure and Evidence make clear that the general provisions on evidence apply to all phases of ICC proceedings.[16] Thus, the general rules of evidence are the point of departure for any analysis. However, if evidentiary difficulties were to arise, a case could be made for a comparatively flexible approach to normal rules of evidence in admissibility assessments, since the dispute does not pertain to the guilt or innocence of the person, but simply to deciding the appropriate forum. On the other hand, the determination is nonetheless an important procedural decision, so evidence must at least be reasonable and reliable. Standards to ensure a fair trial, to respect privileges, and to ensure compliance with the Statute (Article 69(4)(5) and (7)) apply at all stages of proceedings.

[15] It is suggested that the term "unavailability" should be given a broad interpretation, so as to cover the various "inability" scenarios in the latter part of Article 17(3) and to cover typical cases of inability.
[16] Article 69 is worded generally and not restricted to trials. In the RPE, evidence is addressed in Chapter 4, "Provisions relating to various stages of the proceedings". Rule 63 further affirms the general application of those rules.

2. The standard of proof

52. As the issue in complementarity is one of admissibility before a particular forum, rather than the objective and subjective elements of a particular crime, the appropriate burden is the simple balance of probabilities, rather than any higher standard such as "proof beyond a reasonable doubt". The ICC will intervene despite national proceedings only in clear cases of unwillingness or inability to genuinely prosecute. The standard for assessing "genuineness" should reflect appropriate deference to national systems as well as the fact that the ICC is not an international court of appeal, nor is it a human rights body designed to monitor all imperfections of legal systems.

3. Allocation of the burden of proof

53. The Rome Statute does not expressly allocate burdens of proof for admissibility determinations, so this must be developed in the practice and jurisprudence of the Court.[17] The following are suggestions for positions of the OTP.

54. *Investigation/prosecution:* In accordance with normal principles for assigning burdens of proof, the initial burden of proving the existence or non-existence of an investigation or prosecution would be on the party raising the issue (for example, by seeking authorisation or bringing a challenge). Thus, the burden can fall on the Prosecutor: for example, in a request for authorisation for investigation (Art 15(3)); application to proceed despite State notification (Art. 18(2) or (3)); or request for review of inadmissibility decision (Art 19(10)). The burden can also fall on the accused or person sought, or on interested States, where they are the ones raising the issue, for example under Art. 19(2), or on appeal from an admissibility ruling (Art. 18(4) or 19(6)).[18]

55. *Genuineness:* With respect to the issue of "genuineness" (i.e. the unwillingness or inability to genuinely carry out proceedings), there are several reasons to conclude that the *initial* burden is on the party arguing for admissibility. (This will almost always be the Prosecutor, except under Article 53(3), where a referring State or the Security Council seeks reconsideration of a determination of inadmissibility by the Prosecutor.) This assignment of the burden is suggested by the structure of Article 17, which calls for a determination of inadmissibility "*unless*" non-genuineness is shown. The term "unless" suggests a distinct issue, one that logically must fall on the

[17] There are various accepted principles for allocating the burden of proof. The general principle is *onus probandi actori incumbit,* or "he who alleges must prove": the party raising an issue has the burden of proving the requirements. However, other relevant principles can place the burden on the party seeking to change the *status quo*; the party making a disfavoured contention (i.e. alleging bad faith); or the party with particular or sole knowledge of the facts. This is further discussed in Annex 5.

[18] The Statute does not specify who carries the burden where a referring state or the Security Council requests reconsideration of a Prosecutor decision under Art 53(3) not to proceed. The burden presumably is on referring State or the Council, as they are requesting reconsideration. A more complex issue arises where the PTC raises admissibility on its own motion. In such a case, the Prosecutor may be required to bring information, evidence, or an explanation, in order to show that the decision was reasoned. However, if that decision is to be set aside, the burden should fall on some other interested party to make out the case for setting aside the decision, as a corollary of respect for prosecutorial discretion. Thus, this may be a situation where the burden of bringing evidence (at least at the outset) and the burden of persuasion fall on different parties.

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party arguing for admissibility. This conclusion is further bolstered by a policy of giving the benefit of the doubt to States exercising jurisdiction and assuming that they are acting in good faith. In addition, it is an evidentiary principle that a party alleging bad faith generally carries the burden.

56. *Shifting the burden of proof:* While the initial burden of proof will be on the Prosecutor in many situations (particularly with respect to the "genuineness" issue), there are various principles that can shift the burden.[19] (As a cautionary note, it is important to avoid the confusion in some literature that refers too readily to a "shifting" of burdens, whereas such shifts as a matter of law are comparatively rare.[20]) Some prospects that bear consideration:

- *Prior determination:* Where there has already been a specific finding of admissibility in relation to the particular case, any subsequent challenger should carry the burden of displacing that earlier finding. Thus, for example, if the Prosecutor has already proven the non-genuineness of a national proceeding (for example, under Article 18(2)), then in a subsequent challenge (for example, by the accused under Article 19(2)), the burden should be on the accused to establish that the proceedings are indeed genuine.

- *Exclusive or superior access to necessary information:* Various authorities, including in the context of international law, have allowed a shift of the burden of proof where the State has exclusive or superior access to the necessary information, and therefore is in the best position to know the state of affairs and provide evidence.[21] This principle may be particularly useful in shifting the burden on the "genuineness" issue to the State claiming to genuinely carry out proceedings. This will arise primarily where the State is being uncooperative and successfully prevents the OTP from gathering information, which certainly raises grave doubts about the State's intent. It may also arise in cases of non-public trials.[22]

57. *Facilitating satisfaction of the burden:* Other principles may facilitate the work of the Prosecutor by making it easier to satisfy the burden of proof. For example, proof of obstruction or other suspicious circumstances may enable adverse inferences to be drawn, although additional supplementing information may still be required to complete a persuasive case.

[19] Additional material is provided in Annex 5, *Materials on the Burden of Proof*.
[20] It is common to hear, for example, that after a party introduces particular circumstantial evidence, that the burden "shifts" to the other party. However, in most cases, there is no *legal* shift of the burden; what has happened is that the party has presented a persuasive *prima facie* case, such that *as a practical matter* the other party had better introduce contrary evidence or else lose on that point. There is a difference between this practical shift (i.e. the need for the responding party to introduce evidence in response to compelling evidence) and formal rules that actually shift the *legal* burden to the other party.
[21] This is further explored in Annex 5. Such an approach is supported in decisions of international bodies, such as *Bleier v. Uruguay* (decision of the Human Rights Committee); and *Avsar v. Turkey* and *Salman v. Turkey* (judgments of the European Court of Human Rights), discussed in Annex 5.
[22] There may of course be a sound explanation for non-public trials – for example, reasons of security – but the State should at least be expected to provide an explanation, and provide some information, since the Court's capacity to verify genuineness would otherwise be frustrated.

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- *Proving a negative:* It was indicated above that in some cases the Prosecutor may have to establish that no national investigations or prosecutions are taking place. There is of course a philosophical difficulty in "proving a negative". As a practical matter, such burdens may be satisfied in a legal context by demonstrating the reasonable steps taken to determine whether any national investigation or prosecution was undertaken. Prior to the Article 18 process, the OTP might refer to its contacts with relevant governments and other efforts to identify whether national proceedings were underway. After the Article 18 process, where the OTP has notified all States Parties and all States that would normally exercise jurisdiction over the crimes concerned, and has not received any notification from States, this fact alone should be sufficient to establish *prima facie* the absence of national proceedings. At this point, it would be incumbent on the party alleging that there were such proceedings to introduce evidence demonstrating this.

- *Non-co-operation*: The OTP should argue that, where a State Party is not being cooperative in furnishing information about its proceedings, the Court may draw an adverse inference.[23] Such a lack of co-operation undermines the presumption of good faith that is otherwise granted to States, thus reducing the rationale for placing the burden on the Prosecutor. Adopting this rule is also sound legal policy, as it will help encourage co-operation.

58. *Practical need to gather evidence:* Finally, as a practical matter, however the burdens are allocated -- i.e. even where the burden falls upon a challenger -- it will be incumbent on the Prosecutor to gather the necessary information and evidence in order to build a persuasive admissibility case in response.

IV. Special issues

a. Uncontested admissibility and consensual sharing of labour

59. *Uncontested admissibility:* The foregoing sections have focused on scenarios where admissibility is contested, on the grounds that a genuine national investigation or prosecution is apparently underway. There may be other scenarios where admissibility is not contested. Of course, in the absence of a challenge from a State that would normally exercise jurisdiction, admissibility issues may still be raised by the accused or person sought (Article 19(2)(a)), by the Prosecutor (Article 19(3)), or by the Court on its own motion (Article 19(1)). However, in cases where no State has initiated an investigation, it will be clear on the facts that none of the criteria of Article 17(1)(a)-(c) are satisfied, and that the case is admissible. Thus, even if a challenge were raised, the outcome would be clear. There may even be situations where the admissibility issue is further simplified, because the State in question is prepared to expressly acknowledge that it is not carrying out an investigation or prosecution.

60. *Preventing an overburdening of the Court:* The effective and efficient operation of the Court presumes that States will carry the main burden of investigating and

[23] This principle is closely related to the "superior access to information" principle, since non-co-operation may frustrate the Prosecutor's ability to gather information. However, adverse inferences might appropriately be drawn even where the OTP manages to obtain significant amounts of information.

prosecuting international crimes. It is important to ensure that the Court does not become overburdened as a result of States shirking their responsibilities to help end impunity. The Prosecutor may use the following techniques to deter a mass and unnecessary influx of cases:

- bilateral discussions to encourage States to carry out their own prosecutions
- overt public pressure to urge States to carry out their own prosecutions
- prosecutorial policy focusing on persons most responsible
- determination that action is "not in the interests of justice" (Art. 53(1)(c) and (2)(c))
- determination that a matter is "not of sufficient gravity" (Art 17(1)(d))
- determination that there is "not a sufficient legal or factual basis" (Art 53(2)(a))

61. *Appropriate circumstances for burden-sharing:* There may also be situations where the appropriate course of action is for a State concerned not to exercise jurisdiction, in order to facilitate admissibility before the ICC. Voluntary acceptance of ICC admissibility does not necessarily presuppose or entail a loss of national credibility nor a lack of commitment to the fight against impunity.[24]

- For example, in cases where the ICC has accumulated strong evidence against a leadership group, and one of the suspects flees to a third State, the third State is not compelled to compete with the ICC for jurisdiction. All interested parties may agree that the ICC has developed superior evidence, witnesses and expertise relating to that situation, making the ICC the more effective forum. Where the third State has not investigated, there is simply no obstacle to admissibility under Article 17, and no need to label the State as "unwilling" or "unable" before it can co-operate with the Court by surrendering the suspect.

- Similarly, the ICC and a territorial State incapacitated by mass crimes may agree that a consensual division of labour is the most logical and effective approach. Alternatively, groups bitterly divided by conflict may oppose prosecutions at each other's hands (fearing biased proceedings) and yet agree to leadership prosecution by a Court seen as neutral and impartial. In such cases, declining to exercise primary jurisdiction in order to facilitate international jurisdiction is not a sign of apathy or lack of commitment. Such a scenario demonstrates the value and utility of the ICC and ensures that justice is effectively done. Article 17 does

[24] Article 17 specifies the consequences for admissibility where a state is investigating or prosecuting, but does not expressly oblige states to act. However, paragraph 6 of the preamble refers to the "duty" of States to exercise criminal jurisdiction. While the preamble does not as such create legal obligations, the provisions of the Statute may be interpreted in the light of the preamble. The duty to "exercise criminal jurisdiction" should be read in a manner consistent with the customary obligation *aut dedere aut judicaire*, and is therefore satisfied by extradition and surrender, since those are criminal proceedings that result in prosecution. However, as noted above, the reference to a duty also reflects the *spirit* of the Statute that States are intended to carry the main burden of investigating and prosecuting. This is necessary for the effective operation of the ICC. In the types of situations described here, to decline to exercise jurisdiction in favour of prosecution before the ICC is a step taken to *enhance* the delivery of effective justice, and is thus consistent with both the letter and the spirit of the Rome Statute and other international obligations with respect to core crimes. This is distinguishable from a failure to prosecute out of apathy or a desire to protect perpetrators, which may properly be criticized as inconsistent with the fight against impunity.

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not require any branding of the State as "unable", since there would be an absence of investigations and thus clear admissibility under Article 17.

62. *Acknowledgement of non-exercise of jurisdiction:* In these types of situations, it may be appropriate for the State concerned to simplify the admissibility proceedings by expressly acknowledging that it is not investigating or prosecuting particular cases, in favour of ICC jurisdiction. This does not entail any re-writing or alteration of the jurisdictional and admissibility regime of the Statute.[25] Article 17 clearly provides for admissibility where a State is not investigating or prosecuting,[26] and the express acknowledgement of the State merely simplifies the factual determination. Of course, such an acknowledgement cannot prejudice the principle of *ne bis in idem*.

63. *Other States not bound:* It goes without saying that a State's acknowledgement that it is not investigating or prosecuting does not affect the primacy of any other State that wishes to investigate or prosecute. Thus, for example, even if a territorial State agreed to non-exercise of jurisdiction over certain crimes in favour of ICC prosecution, other States would remain entitled to investigate and prosecute on other jurisdictional bases (active nationality, passive nationality, universal jurisdiction) and admissibility could accordingly be challenged by such States or by the accused. It will therefore be prudent to consult with interested States before forming such arrangements.

64. *Rights of the accused:* For greater clarity, it may be reiterated that such arrangements do not purport to remove the procedural right of the accused to raise challenges to admissibility. However, in the clear absence of any investigation or prosecution by a State, an admissibility challenge on the grounds of complementarity would not have any merit. It is also worth noting that the ICC would not be "bound" by an acknowledgement of non-prosecution where there was evidence that the State was in fact or had in fact carried out proceedings.

65. *Other obligations*: Such an acknowledgment does not remove any pre-existing obligations under customary or conventional international law to investigate and to prosecute or extradite with respect to crimes that are not addressed by the ICC.

66. *Form of acknowledgement:* Where the State concerned and the Prosecutor have agreed that the ICC would be the most appropriate forum for at least some of the cases in question, it would be preferable for the OTP to seek express and written confirmation from that State. The OTP should consider developing a form wherein the State

[25] The Statute does not require any finding that the State is "unwilling" or "unable" to genuinely prosecute in such scenarios. As noted above (Framework Issues of Article 17), those terms only apply in cases where a state *purports* to exercise jurisdiction.

[26] Where the State has in fact initiated an investigation, but wishes to agree to ICC exercise of jurisdiction, it is less clear how such a situation is best analyzed under Article 17. One possibility is that Article 17(1)(b) applies only where an investigation has been completed and there was a decision not to prosecute, and therefore that scenarios where an investigation has been suspended without ongoing action fall outside of Article 17(1)(b) as a simple "inaction" scenario. Another possibility is that the term "decision not to prosecute" should be interpreted purposively, and therefore excludes scenarios where the State decides to prosecute or to facilitate prosecution elsewhere through extradition or surrender. A third possibility is that such scenarios must be assessed under the "unwilling or unable to genuinely prosecute" test, in which case the Prosecutor could mitigate the "stigmatization" of such a finding by expressly acknowledging the good faith of the State concerned in agreeing to an ICC exercise of jurisdiction.

acknowledges non-exercise of jurisdiction in favour of ICC jurisdiction and pledges its co-operation with the ICC investigation and prosecution.[27] This is particularly important where the State concerned is a non-State Party (see for analogy Article 12(3), allowing assumption of the obligations of Part 9). Such arrangements could also be coupled with a declaration of acceptance of jurisdiction under Article 12(3). For States Parties, such arrangements can effectively bolster or make more effective compliance with obligations of Part 9. Arrangements with States Parties and non-States Parties could also be coupled with a referral of the situation to the ICC.

b. Security Council referrals

67. *Significance of Chapter Seven:* A Security Council referral under article 13 (b) of the Statute presupposes action taken under Chapter VII of the Charter of the United Nations, which may only be taken after the Security Council has determined the existence of a threat to the peace. The action is taken to maintain or restore international peace and security, in conformity with article 39 of the Charter. According to article 48 of the Charter, the action required to carry out decisions of the Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine. Such action may be taken by the Members concerned directly and through their action in the appropriate international agencies of which they are members.

68. *Complementarity regime applies:* As a matter of principle, the complementarity regime applies even in the event of a Security Council referral. Articles 17 and 19 do not indicate any exception for Security Council referrals. Although the Security Council has enforcement powers under the UN Charter when acting under Chapter VII (Articles 25, 41, 103), these powers relate primarily to States, and not directly to international institutions such as the ICC. Moreover, the Statute explicitly contemplates and addresses the interaction of ICC procedures and Security Council actions, including the extent to which procedures are affected by a Security Council action (Article 13, 16, 18). For example, the Statute specifies that the Article 18 notification procedure does not apply for Security Council referrals, whereas no such suspension is stipulated for Articles 17 and 19, raising a clear *e contrario* inference.

69. *Order to States to facilitate admissibility*: While the Security Council may not be able to alter the principles of the Statute, it clearly can issue binding orders to States. All members of the Group agreed that the Security Council has the power to issue orders to States to comply with requests from the ICC. [28] The Group also discussed whether the Security Council could go further and, in a given case, acting under Chapter VII, order all or some UN Member States to yield to the Court, by declining to exercise their primary jurisdiction with respect to crimes investigated and prose-

[27] Such arrangements would have a firm legal basis in the Statute, see for example Article 54(3)(c) and (d), as well as Article 4(1) (legal capacity).

[28] In this connection, the OTP should be ready, once the international climate is conducive, to forge co-operative ties with the Council, in order to report on ICC activities and to provide objective information that might under appropriate circumstances inspire the Council to refer a situation. The OTP may also have general information which in given contexts might prove useful or indeed important for the Security Council in the exercise of its functions. In the meantime, nothing prevents the OTP from informing or alerting the UN Secretary General of developments which may be important for the Organization, which the Secretary-General may in turn choose to bring to the attention of the Security Council under Article 99 of the UN Charter.

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cuted by the ICC. Under such an approach, the complementarity principle would still apply,[29] but admissibility would be upheld by the Court, given the resulting absence of competing national proceedings as a result of compliance with the order of the Council. As an autonomous body, the ICC would remain free to make an independent and final determination of issues of jurisdiction and admissibility. It is important not to overstate the powers of the Council, and in particular it was emphasized that the Council would not be ordering non-action with a view to enabling impunity, but rather non-action in order to facilitate prosecution by the ICC. It was also emphasized that the Council is bound by the UN Charter and may only act in accordance with it.

70. *Assessment:* The Group was divided in its assessment of the proposition that the Council could issue such orders to facilitate admissibility. On the one hand, some members believed that it was legally sound and offered significant benefits.[30] On the other hand, some members did not believe that the Security Council had the power to issue such orders, [31] and some members had policy concerns about the wisdom of exercising such a power.[32]

c. Amnesties and approaches other than prosecution

71. The stance of the OTP with respect to alternative forms of justice should probably be framed, conceptually, under Article 53(1)(c) and (2)(c), *i.e.,* the prosecutorial discretion not to proceed where it is not in the "interests of justice" to do so. Nonetheless, the issue is still noteworthy in a report on complementarity, as it relates to the proper relationship between the ICC and national efforts.

72. Mechanisms other than prosecution for dealing with past abuses, including alternative forms of justice, may raise difficult questions for the OTP in interpreting its role and mandate. In certain circumstances, such mechanisms can supplement criminal justice, but difficulties arise when they result in non-prosecution of ICC crimes.

[29] The procedural right of the accused to challenge admissibility would remain intact, but in practice, such challenges would not succeed on the merits (apart from challenges based on the principle *of ne bis in idem* pursuant to Articles 17(1)(c) and 20(3) where the accused had previously been convicted or acquitted and insufficient gravity pursuant to Article 17(1)(d)) given that States concerned would have declined to investigate or prosecute as per the Security Council order.

[30] These members noted that the Security Council already has the power to create Tribunals with primary jurisdiction (see Article 9(2) ICTY Statute and Article 8(2) ICTR Statute), and felt that it would be retrogressive and inconsistent with the purposes of the UN Charter if the ICC could not be placed in a comparable situation. These members felt that Security Council referrals of this nature can render the ICC more effective in difficult situations.

[31] These members noted that the Security Council does not have the power to order Member States directly not to investigate or prosecute genocide, crimes against humanity or war crimes, crimes which violate *jus cogens* prohibitions over which States have *erga omnes* obligations to repress. These members also thought that the exercise of any such power would alter the balance of the proper relationship between the Security Council and the ICC as reflected in the Rome Statute and in the draft Relationship Agreement. Instead, the Security Council simply had the power under the UN Charter to require Member States to comply with requests to defer to the ICC's concurrent jurisdiction and to co-operate with the ICC.

[32] These members felt that it would not be prudent to advocate exercise of such a power, particularly in the current international climate, where the Security Council has not always been exemplary in the battle against impunity. Exercise of such a power could easily be open to abuse.

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On the one hand, alternative approaches should not be summarily dismissed.[33] On the other hand, the ICC is entrusted with a specific Statute mandate to help ensure that the most serious crimes do not go unpunished.

73. Critical factors that might guide the OTP include:

- *Persons most responsible:* Are conditional amnesties/alternative measures made available only to lower-ranked offenders? Or, are they available to the persons most responsible (PMR)? There may be logistical, moral, and legal grounds to treat lesser offenders through alternative measures -- particularly following mass crimes where the number of offenders is overwhelming -- but it is more problematic where PMR obtain lenient treatment. The ICC may properly focus on the PMR and be more prepared to insist on prosecution, and yet have less reason to intervene in the handling of lesser offences by recovering societies.

- *International legitimation:* Has the international community, for example through competent organs of the United Nations such as the Security Council, endorsed the mechanism or otherwise signified that it constitutes a contribution to international peace and security, justice or other main purposes of the United Nations? The fact that the international community is supportive of national efforts in this context may have a bearing on the prosecutorial discretion not to proceed in the interests of justice.

- *Self-amnesty:* Are the more lenient alternative measures granted by a regime to itself, or are they granted by the society as a whole, in a democratic process? Have the perpetrators remained in power?

- *Bringing to justice:* Does the alternative justice mechanism lead to some form of punishment, or does it result in complete exoneration and amnesty?

- *Quality of measures:* Various other factors may also be relevant:

    - Compatibility with international duties to bring perpetrators to justice?
    - Severity of circumstances of necessity justifying departure?
    - Is there a full and effective investigation into the facts?
    - Is the commission or body independent and impartial?
    - Is the commission or body effective, equipped with the necessary resources and powers to carry out its mandate?
    - Does the procedure provide a sense of justice for victims?
    - Is the procedure an attempt to shield perpetrators from justice?

- *General considerations:*
    -

[33] Two members emphasized however that amnesties for genocide, crimes against humanity or war crimes are prohibited under international law (one suggested that this bar applied in all cases and the other suggested that it applied at least for the most responsible persons), and that this should be a decisive consideration for the Prosecutor's exercise of discretion. They also emphasized that even if they were permitted under international law that it would not be wise for the Prosecutor to announce that he was considering criteria for determining which national amnesties would be acceptable.

- Gravity and severity of crimes; international community interest in repression of such crimes;
- Rights and interests of individual victims and groups of victims, as communicated by themselves or their representatives;
- Interest of the affected society, as communicated by its political representatives; and
- Consistency in ICC prosecutorial policy.

74. In the view of the majority of the Group,[34] it would be preferable for the OTP to avoid promulgating too precise a position on the issue, until some experience is acquired in actual situations. Past experience demonstrates that it would be arduous to attempt to develop a general doctrine on how to assess such situations. One must be alert to different contexts, including political, cultural, security-related and other factors. A proactive stance will however be necessary if, for example, the OTP is consulted by a State Party developing an alternative justice mechanism.

d. Role of non-territorial states

75. Jurisdictional bases other than territory, such as active nationality as well as passive nationality and universal jurisdiction, can also play an important role in the fight against impunity. Under the complementarity principle, a genuine investigation by such third States would preclude the ICC from exercising jurisdiction, provided they are indeed able to secure the surrender of offenders and obtain access to evidence. The non-exercise of jurisdiction by a territorial State does not alter the primacy of other States *vis-à-vis* the ICC.[35]

76. In addition to encouraging prosecution by territorial States, the Prosecute may strengthen the complementarity regime by actively encouraging non-territorial States to exercise jurisdiction. The guiding principle in doing so should be to actively encourage those States that provide the most promising prospect for an effective investigation and prosecution. The availability of and access to witnesses, the presence of the alleged perpetrator on a State's territory, and the independence and impartiality of the judiciary are important elements in determining that prospect.

77. Non-territorial States may also be encouraged to provide political, technical and logistical assistance to facilitate investigation efforts and prosecution efforts, whether by another State or by the ICC.

[34] Two members of the group expressed the view that the Office of the Prosecutor should take a proactive stance, and should establish, publicize and consistently apply, clear criteria regarding Truth Commissions and amnesty laws as soon as practicable. In accordance with this view, this would increase transparency and certainty in the action of the OTP, avoid potential criticisms of arbitrariness, facilitate the decision-making process of States thinking of establishing Truth Commissions and/or passing amnesty laws, and enhance the *auctoritas* of the Office within the international community.

[35] In fact, the procedures under Articles 18 and 19 clarify that non-territorial States are included in the process of preliminary rulings and challenges to admissibility. Article 18(1) requires the Prosecutor to notify "all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned" and "any such State may inform the Court that it is investigating or has investigated "its nationals or others within its jurisdiction" (Article 18(2)). Likewise, Article 19(2)(b) and (c) are clear as to providing not only the territorial State with the possibility of challenging admissibility, but also the State of active nationality and "a State which has jurisdiction over a case" provided the latter "is investigating or prosecuting the case or has investigated or prosecuted".

Annex 1: Article 17 of the Rome Statute

For ease of reference, Article 17 of the Rome Statute is reproduced here.

Issues of admissibility

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

    (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
    (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
    (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
    (d) The case is not of sufficient gravity to justify further action by the Court.

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

    (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
    (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
    (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

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Annex 2: Rules of interpretation

The established principles of treaty interpretation should govern the interpretation of Article 17.

An important starting point under the ICC Statute is Article 21, which sets out the law to be applied by the Court, and thereby also indicates a hierarchy of sources that may be used by the Court. [36] Thus, the complementarity provisions of the Statute may be interpreted in the light of the Rules and Elements (Art 21(1)(a)); applicable treaties and the principles and rules of international law (Art 21(1)(b)); and general principles of law derived from national laws of legal systems of the world (Art 21(1)(c)).

Textual construction should be guided by general customary law rules of interpretation, such as those reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLOT). Treaties should be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose (see, *e.g.* Article 31(1) VCLOT). Regard should be had to subsequent agreements or subsequent practice on the interpretation or application of terms, as well as special meanings established as intended by the parties (see, *e.g.* Article 31(3) VCLOT). Recourse may also be made to supplementary means of interpretation, such as *travaux préparatoires*, for confirmation or for clarification where terms otherwise appear obscure, vague or unreasonable (Art 32 VCLOT).

Taking into account that the negotiating history is not determinative and is only a supplementary means of interpretation, reference to the negotiating history may be useful to establish special meanings, to confirm interpretations, and to provide clarification of obscure terms.[37] The negotiating history is also a useful guidepost to the ongoing sensitivities and perceptions of states, which may be borne in mind when developing policies.

With respect to the constituent instrument of an international organization, several authorities indicate that the general rules should be applied with particular emphasis on object and purpose, *i.e.* the principle of effectiveness.[38] The teleological principle is a sound compass point when applying Article 17, although one must also be sure to apply the terms of the Statute in a credible and even-handed manner.

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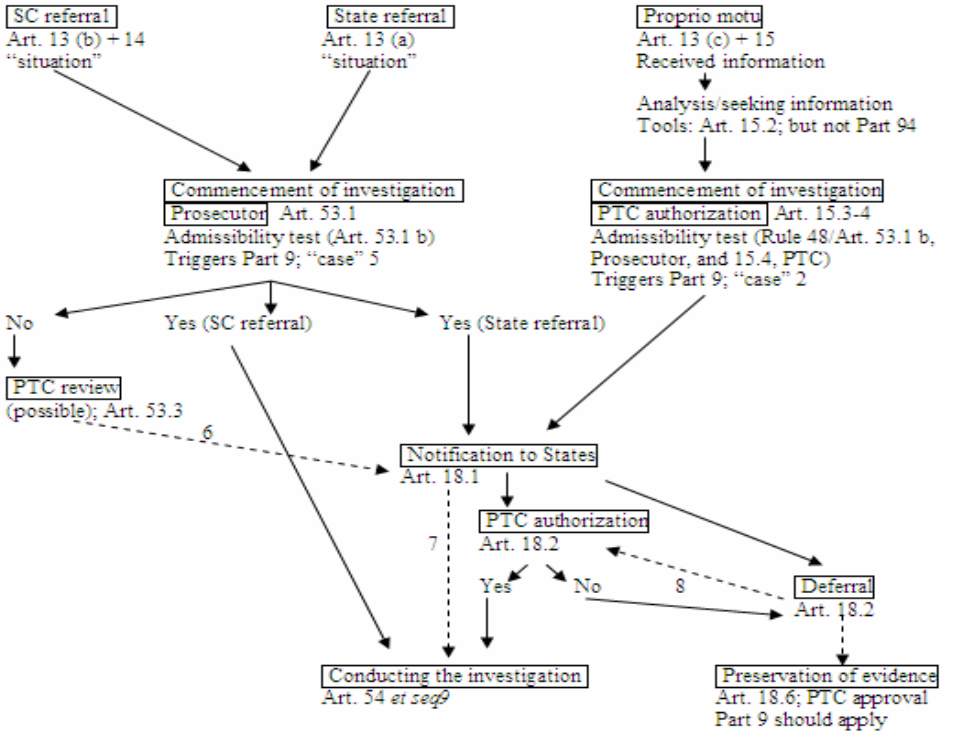
[36] Further discussion of Article 21 is available, *inter alia*, in Margaret McAuliffe de Guzman, "Article 21", Otto Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court: observers' notes, article by article* (Baden-Baden: Nomos, 1999) and in Alain Pellet, "Applicable Law", in Cassese *et al*., eds., *The Rome Statute of the International Criminal Court: A Commentary*, (Oxford: Oxford UP, 2002).

[37] The *travaux préparatoires* of the Rome Conference are now available (United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June – 17 July 1998, Official Records, Vol. I-III, A/CONF.183/13). With respect to other sources on the negotiating history, such as commentaries, it is important to bear in mind the difficulties in reconstructing the history, given the complexity of the Statute, the paucity of formal records, and the large amount of drafting that took place in informal meetings.

[38] See for example the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* case, ICJ Rep (1996) para 19 and Malcolm Shaw, *International Law,* 4th Ed, (Cambridge: Cambridge UP, 1997) at 914-15.

Annex 3: ICC procedures and complementarity



- Chamber "may" try admissibility on its own motion (Art. 19.1);
- Prosecutor should, when motivated, re-assess admissibility on his own motion during the investigation (in the spirit of Art. 54.1 a, and shall do so when deciding whether to prosecute (Art. 53.2 b);
- State may challenge admissibility (Art. 19.2 b-c; Art. 18.7 may apply);
- Accused and person subject to arrest warrant/summoned to appear may challenge admissibility (Art. 19.2 a);
- Prosecutor may seek ruling on admissibility (Art. 19.3; *e.g.* for Art. 90).

[39] According to one view, however, Part 9 could be applicable also at this preliminary stage.
[40] Another view is that Arts. 15, 18 and 53 constitute an autonomous procedure (triggering procedure) whose object are "situations", and that one or more "case(s)" consisting of specific events and identified suspects will occur only later as a result of conducting criminal investigation (Art. 54 *et seq*.). See main text of the report, Section 3, paragraph 26, note 10.
[41] The result of a PTC review under Art. 53.3 may be that an investigation commences (upon the Prosecutor's reconsideration or otherwise).
[42] The result if no State upon notification seeks deferral (Art. 18).
[43] The result if a deferral is 'withdrawn' upon review (Art. 18.3), which seems to apply only in case the Prosecutor has deferred the case (not when this is the result of a denied authorisation under Art. 18.2). Although not explicitly spelled out, the Prosecutor is probably required to seek PTC authorisation before an investigation can start subsequent to a deferral.
[44] See *supra*, footnote 2.

Annex 4: List of indicia of unwillingness or inability to genuinely carry out proceedings

The following are suggestions as to factors that may be relevant in determining the unwillingness or inability of a State to genuinely carry out proceedings. The OTP may wish to consider these indicia further and to organise them into a structured, systematised format.

1. Contextual information

As noted in the Report, where circumstances warrant significant fact-finding, there are certain background context issues that may be gathered in order to inform an admissibility assessment under either the "unwillingness" or "inability" branches. These include:

- Constitutional role, separation of powers, and powers attributed to institutions of the criminal justice system;
- Legislative framework (offences, jurisdiction, procedures, defences);
- Parameters of prosecuting powers and discretion;
- Degree of *de jure* and *de facto* independence of judiciary, prosecutors, investigating agencies;
- Jurisdictional territorial divisions; special jurisdictional regimes (military tribunals);
- Privileges and immunities of State authorities;
- Creation of extrajudicial commissions of enquiry, truth commissions, *etc*.;
- Granting of amnesties, pardons, enforcement of sentences, parole regimes;
- Legal regime of access to evidence;
- Legal regime of extradition, asylum, *etc*.;
- Legal regime of due process standards, rights of accused, procedures;
- Conditions of security for witnesses and investigators, access to scene of crime;
- Integrity/corruptability of staff and institutions;
- Resources invested and ability of State institutions to cope with scale of crime; and
- Identify key ministries and other points of contact

2. Unwillingness

As noted in the Report, proof of unwillingness may arise from a variety of factors relating to the aspects of Article 17(2). Some examples of relevant facts and evidence that may be gathered:

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Purpose of shielding

- It is always possible that one may obtain direct evidence of a purpose of shielding, for example, through testimony of an "insider";
- Evidence of shielding may exist in documentary form, including legislation, orders, amnesty decrees, instructions and correspondence;[45]

- Proof of shielding may also be sought through expert witnesses on the politicised nature of a national system;

- Many factors listed below (delay, lack of impartiality, longstanding knowledge of crimes without action) will also help establish "shielding".

Delay

- Delay in various stages of the proceedings (both investigative and prosecutorial) should be examined, for example, in comparison with normal delays in that national system for cases of similar complexity.

- Where there is delay, are there justifications for that delay?

- Where there is unjustified delay, is it inconsistent with an intent to bring the person concerned to justice?

Independence

- Degree of independence of judiciary, of prosecutors of investigating agencies; procedures of appointment and dismissal; nature of governing body;

- Patterns of political interference in investigation and prosecution; and

- Patterns of trials reaching preordained outcomes.

Impartiality

- Commonality of purpose between suspected perpetrators and state authorities involved in investigation, prosecution or adjudication. This constitutes circumstantial evidence for an inference of non-genuineness. This can include:

    - political objectives of state authority, dominant political party; and
    - coincidence or dissonance in objectives and crime (political gains, territorial goals, subjugation of group).

[45] For an example of an explicit order, see the Barabarossa Jurisdiction Order issued by the German High Command in May 1941, which established that for "crimes committed against inhabitants by the Wehrmacht and its auxiliaries ... prosecution is not obligatory@ and would take place only if necessary for the maintenance of discipline or the security of the Forces": See *The German High Command Trial, Law Reports of Trials of War Criminals* (New York: Howard Ferting, 1994) (reproduction of original publication of 1949) at 29-31.

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- Rapport between authorities and suspected perpetrators (this applies only in situations where the investigative, prosecutorial or judicial authorities are not independent of other authorities):

    - official statements (condemning or praising actions);
    - awards or sanctions, promotion or demotion;
    - financial support; and
    - deployment or withdrawal of law enforcement, inhibiting or supporting investigation.

- Linkages between perpetrators and judges; and

- Dismissal, reprisals against investigating staff for diligence or lack thereof.

Other indicators that may relate to "shielding", "intent", "impartiality", and to "manner" of conducting proceedings

The following indicators may not be sufficient proof of unwillingness on their own, but may be relevant when considered in context along with other indicators:

- Longstanding knowledge of crimes without action, and investigation launched only when ICC took action;

- Number of investigations opened (in proportion to number of crimes, resources);

- Resources allocated to investigation and prosecution;

- Pacing and development of investigation;

- Uncharacteristic hastiness may also be an indication of a desire to whitewash as quickly as possible;

- Overall investigative steps manifestly insufficient in the light of the available steps;

- Evidence gathered was manifestly insufficient in the light of evidence the OTP can show is available;

- Hierarchical level: how high up the scale of authority did investigations and prosecutions reach?

- Adequacy of charges and modes of liability vis-à-vis the gravity and evidence;

- Were special tribunals, special processes or special investigators with lenient approaches established specifically for the perpetrators? Were special judges, prosecutors or jury members selected for the trial, in deviation from normal processes?

- Did investigators, judges or prosecutors deviate from established practices and procedures in a manner suggesting a deliberate lack of diligence?

- Was the evidence introduced manifestly insufficient in the light of evidence collected?

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- Was inculpatory evidence ignored and downplayed? Was the overall situation consistently characterized in a misleading way (eg. avoiding obvious proof of state involvement, describing a one-sided genocide as civil unrest, etc)? Was exculpatory evidence exaggerated?

- Were victims and witnesses intimidated or discouraged from participating? Were reasonable steps taken to protect witnesses from being intimidated by third parties?

- Obvious departures from normal procedures, showing unusual lenience and deference to accused;

- Were findings rendered that were irreconcilable with the evidence tendered? Were findings markedly slanted in one direction?

- Were unusual rulings of law made in departure from previous practice and to the benefit of accused? Was substantive law (offences, defences) generally compatible with international standards, or where there significant departures that raise concerns about "genuineness"?

- Were amnesties, pardons, or grossly inadequate sentences issued after the proceeding, in a manner that brings into question the genuineness of the proceedings as a whole?

- Refusal to allow observers or trial monitors (unless justification shown); and

- Refusal to co-operate with the ICC by a State Party or a State otherwise accepting an obligation to co-operate.

3. Inability

The following facts and evidence may be relevant to the first set of considerations in the inability test (total or substantial collapse or unavailability of national judicial system):

- lack of necessary personnel, judges, investigators, prosecutor;

- lack of judicial infrastructure;

- lack of substantive or procedural penal legislation rendering system "unavailable";

- lack of access rendering system "unavailable";

- obstruction by uncontrolled elements rendering system "unavailable"; and

- amnesties, immunities rendering system "unavailable".

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Annex 5: Materials on the burden of proof

The following texts are suggested as possible sources for further research on the burden of proof:

- Mojtaba Kazazi, *Burden of Proof and Related Issues: A study on Evidence before International Tribunals* (Kluwer Law International: London, 1995).
- Richard B. Lillich, ed., *Fact-Finding Before International Tribunals* (Transnational Publishers, Inc.: New York, 1990).
- Durward V. Sandifer, *Evidence Before International Tribunals* (University Press of Virginia Charlottesville: USA, 1975).
- Sir Rupert Cross and Colin Tapper, *Cross on Evidence*, 7th Ed (Butterworths: London, 1990).
- CD Heydon, *Cases and Materials on Evidence* (1975).
- Ron Delisle and Don Stuart, *Evidence: Principles and Problems*, 6th ed., (Carswell: Toronto, 2001).

International law as well as domestic laws, in both civil and common law systems, generally require that the party alleging a claim bears the burden of proof as to the support of that claim.[46]

There are various authorities indicating that that burden of proof can be shifted in some circumstances, such as where another party has the best access to the relevant information. In this connection, there are international law precedents that may be of particular interest. The *Bleier v. Uruguay* decision of the Human Rights Committee, held at para. 13.3.:

> "With regard to the burden of proof, this cannot rest alone on the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to relevant information. It is implicit in article 4 (2) of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities, especially when such allegations are corroborated by evidence submitted by the author of the communication, and to furnish to

[46] *Onus probandi actori incumbit* "is the basic rule of the burden of proof. According to this rule, the party who makes allegations regarding a disputed fact or issue bears the burden of proving such fact or issue. This rule places the brunt of the burden of proof on the claimant. This is a principle which is generally recognized and accepted in different legal systems [civil and common law alike] and in international law." (See Mojtaba Kazazi at 369)

The "normal rule of evidence and burden of proof that has been adopted in the practice of the [ICJ] is the simplest of all formulations: that a party seeking to assert a claim should bear the burden of proof as to the facts necessary to support that claim" (see Lillich at 34).

The burden of proof principles of specific countries of various legal systems also provide support for this general proposition. For example, the "general rule" in England is that "the legal burden of proving facts lies on him who asserts them" (see Heydon at 14). Canada and the U.S. generally also subscribe to this principle. With respect to civil law countries, it is also the case that the party that seeks to alter an existing or acquired situation by establishing a proposition bears the burden of proof (see for example France and Belgium) (see Kazazi at 60-61).

> the Committee the information available to it. In cases where the author has submitted to the Committee allegations supported by substantial witness testimony, as in this case, and where further clarification of the case depends on information exclusively in the hands of the State party, the Committee may consider such allegations as substantiated in the absence of satisfactory evidence and explanations to the contrary submitted by the State party. "

Judgments of the European Court of Human Rights may also be of interest. For example, the Court held in *Avsar v. Turkey*:

> "Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (see *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII; *Çakıcı v. Turkey* [GC], no. 23657/94, § 85, ECHR 1999-IV; *Ertak v. Turkey,* no. 20764/92, § 32, ECHR 2000-V, and *Timurtaş v. Turkey,* no. 23531/94, § 82, ECHR 2000-VI)."

Similarly, in *Salman v. Turkey*, the Court held:

> "(…) such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during such detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation."

In the *Corfu Channel Case*, the International Court of Justice "considering the difficulties to be faced by a victim of a breach of international law in finding direct proof of facts in the territory of another State, recognized the admissibility of inferences and circumstantial evidence. According to the Court, 'such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence.'" (Kazaki at 261).

Commentators also note that adverse inferences may be drawn by international tribunals from a party's refusal to produce evidence known or presumed to be in its position, and that tribunals have given judgment based on the application of such a rule (see, *e.g.*, Sandifer at 147-153 and Lillich at 209).

It was agreed that further research was needed to determine the circumstances when the burden of proof falls on the party with control of the information and when adverse inferences may be drawn if a party with information fails to produce it, with a view to preparing a litigation strategy for each stage of the proceedings when admissibility may be at issue.

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Annex 6: Materials on norms of due process

International principles and standards related to due process and impunity

There are many sources on international principles and standards related to due process and impunity. The following documents may be of interest. In addition, there are significant cases on the matter that should be examined (see, *e.g.*, Annex 7).

- UN Guidelines on the Role of Prosecutors (1990)
- UN Basic Principles on the Independence of the Judiciary (1985)
- UN Basic Principles on the Role of Lawyers (1990)
- UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985)
- UN Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2000)
- UN Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity (1973)
- UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
- UN Standard Minimum Rules for the Treatment of Prisoners
- Final Report of the Special Rapporteur on Impunity (1996)
- UN Commission on Human Rights Resolution 2002/79 on "Impunity"
- HRC General Comment 3, "Implementation at the national level" (Obligation to ensure rights), Article 2, Thirteenth session (1981)
- HRC General Comment 8, "Right to liberty and security of persons", Article 9, Sixteenth session (1982)
- HRC General Comment 13, "Equality before the courts and the right to a fair and public hearing by an independent court established by law", Article 14, Twenty-first session (1984)
- HRC General Comment 20, "Concerning prohibition of torture and cruel treatment or punishment", Article 7, Forty-fourth session (1992)
- CoE Recommendation No. R (94) 12 of the Committee Of Ministers To Member States On The Independence, Efficiency And Role Of Judges (1994)
- CoE Recommendation Rec (2000) 19 of the Committee of Ministers to member states on the role of public prosecution in the criminal justice system (2000)
- CoE Recommendation Rec (2000) 21 of the Committee of Ministers to member states on the freedom of exercise of the profession of lawyer (2000)

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Annex 7: Selected human rights jurisprudence of possible relevance to admissibility

The following authorities may be of interest, although one must bear in mind that the standard for admissibility is distinct from these human rights standards, and moreover that the available jurisprudence is not entirely consistent.

Unwillingness or inability:

Horvath v. *Secretary of State for the Home Department*, House of Lords, 6 July 2000

Obligation to Investigate and Prosecute: [47]

Bleier Quinteros v.*Uruguay*, UN Human Rights Committee, 17 September 1981

Bautista de Arellana v. *Colombia,* UN Human Rights Committee, 27 October 1995

Mahmut Kaya v. *Turkey*, European Court of Human Rights, 28 March 2000

Cyprus v. *Turkey*, European Court of Human Rights, 10 May 2001

Selmouni v. *France*, European Court of Human Rights, 28 July 1999

Assenov v. *Bulgaria*, European Court of Human Rights, Application No. 00024760/94

Aksoy v. *Turkey*, European Court of Human Rights, 18 December 1996

Kiliç v. *Turkey*, European Court of Human Rights, 28 March 2000

Orhan v. Turkey, European Court of Human Rights, 18 June 2002

Godinez Cruz v. Honduras, Inter-American Commission for Human Rights, 18 April l986

Blake case, Inter-American Commission for Human Rights, 24 January 1998

Guy Malary case, Inter-American Commission for Human Rights, Case 11.335, report n. 78/02.

Velasquez Rodriguez case, Inter-American Court for Human Rights, 29 July 1988

Barrios Altos case, Inter-American Court for Human Rights, 14 May 2001

[47] In the context of determining whether local remedies had to be exhausted because they were effective, see also the following jurisprudence from the Human Rights Committee, *Dermit Barbato* v. *Uruguay*, Communication 84/81; the European Court for Human Rights, *Öcalan* v. *Turkey*, 12 March 2003 and *Akdivar and others* v. *Turkey*, 16 September 1996; the Inter-American Court of Human Rights, *Velásquez Rodríguez* case, Preliminary Objections, 26 June 1987, *Godínez Cruz* case, January 20, *Fairén Garbi* and *Solís Corrales* case, March 15, Advisory Opinion of 10 August 1990 on "Exceptions to the Exhaustion of Domestic Remedies", Advisory Opinion OC-11/90, August 10, 1990, Inter-Am. Ct. H.R. (Ser. A) No. 11 (1990); and on relevant jurisprudence of the African Commission on Human and Peoples' Rights, see N. J. Udombana, 'So far, so fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights', 97 AJIL (2003), pp. 1-37, pp. 21-34.

Shielding:

Genie-Lacayo v. *Nicaragua*, Inter-American Court for Human Rights, 29 January 1997 (also unjustified delay and lack of independent and impartial)

Villagrán Morales et al., Inter-American Court for Human Rights, 19 November 1999.

Ignacio Ellacuria, Inter-American Commission for Human Rights, Case 10.488, report n. 136/99.

Unjustified Delay:

European Court of Human Rights, Italian group case on undue delay [violation of Art. 6(1)] of 2 February 1991: *Manzoni, Pugliese (I), Alimena, Frau, Ficara, Viezzer, Angelucci, Maj, Girolami, Ferraro*

Abdoella v. *The Netherlands*, European Court of Human Rights, 25 November 1992

Dobbertin v. *France*, European Court of Human Rights, 25 February 1993

M'Boissona v. *Central African Republic*, UN Human Rights Committee, 7 April 1994

Taylor (Desmond) v. *Jamaica*, UN Human Rights Committee, 2 April 1998

Finn v Jamaica, UN Human Rights Committee, 31 July 1998

Other Jamaican cases: *Little, Lewis, McLawrence, Steadman, Taylor, Thomas, Walker and Richards, Williams*

Genie Lacayo case, Inter-American Court for Human Rights, 29 January 1997, series A no. 30

Guy Malary case, Inter-American Commission for Human Rights, Case 11.335, report n. 78/02

Independent and impartial:

Bahamonde v. *Equatorial Guinea*, UN Human Rights Committee, 20 October 1993
Constitutional Rights Project (in respect of Akamu, Adega and Ors) v. *Nigeria*, African Commission for Human and Peoples Rights, 2 October 1995

Coyne v. *U.K.*, European Court of Human Rights, 24 Sept. 1997

Ciraklar v. *Turkey*, European Court of Human Rights, 28 October 1998

Villagrán Morales et al., Inter-American Court for Human Rights, 19 November 1999

General Comment 13 on Article 14 of the ICCPR, Human Rights Committee (1984)

General Comment 29 on States of Emergency (article 4), Human Rights Committee (2001) (paras. 3, 9, 11, 12, 16 on states of emergency and the extent to which Article 14 applies in such situations)

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Annex 8: Bibliography and sources for further study

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B. Broomhall, "The International Criminal Court: A Checklist for National Implementation" in *ICC Ratification and National Implementing Legislation*, Nouvelles Etudes Penales, (Eres 1999) at 113.

M.S. Ellis, "The International Criminal Court and its Implication for Domestic Law and National Capacity Building", 15 Fla. J. Int'l L. 215 (2002).

C.K. Hall, "Challenges to the Jurisdiction of the Court or the Admissibility of a Case", in Triffter (ed.) *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article*, (Baden-Baden 1999).

J. T. Holmes, "Jurisdiction and Admissibility", in Lee (ed.), *International Criminal Court: Elements of Crimes & Rules of Procedure*, (Transnational Publishers 2001), at 321-348.

J. T. Holmes, "The Principle of Complementarity", in Lee (ed.), *The International Criminal Court: The Making Of The Rome Statute Issues, Negotiations, Results* (Transnational Publishers 1999), at 41-78.

J.T. Holmes, "Complementarity: National Courts *versus* the ICC", in Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, (Oxford 2002), at 667-686.

J. Kleffner, "The Impact of Complementarity on National Implementation of Substantive International Criminal Law", 1 *Journal of International Criminal Justice* (2003) at 86-113.

Hector Olásolo, "The Prosecutor of the ICC before the Initiation of an Investigation: A Quasi-jurisdictional or a Political Body?", 3 *Int. Criminal Law Review* (2003) 87-150.

Hector Olásolo, "Corte Penal Internacional: ¿Dónde Investigar? Especial Referencia a la Fiscalía en el Proceso de Activación ", Tirant lo Blanch/Centro de Derecho Internacional Humanitario (Cruz Roja Española), Valencia (October 2003).

S. Williams, "Issues of Admissibility", in Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article*, (Baden-Baden 1999).

A. Zimmermann, "The Creation of a Permanent International Criminal Court", Max Planck Yearbook of United Nations Law 1998, at 169-237.

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