Complementarity and a Potential Settlements Case: A Response to the OTP’s Report on its Preliminary Examination of the Situation in Palestine

March 14, 2019

By Steven Kay and Joshua Kern

Opinio Juris

<http://opiniojuris.org/2019/03/14/complementarity-and-a-potential-settlements-case-a-response-to-the-otps-report-on-its-preliminary-examination-of-the-situation-in-palestine/>

In December 2018, the OTP published its annual report on Preliminary Examination Activities for 2018 (the “Report”). With respect to the Situation in Palestine (the “Situation”), the Report discloses that it intends to complete its preliminary examination as early as possible. The Situation is now considered to be in “Phase 3” where admissibility, i.e. complementarity and gravity, issues are considered. The OTP may thereafter consider whether an investigation would or would not be in the interests of justice during a “Phase 4”.

The Report appears to suggest that inactivity at the national level may render a potential settlements case admissible before the ICC. In what must be construed as an indication of Israel’s perceived inaction or unwillingness to investigate and prosecute, the OTP asserts that the HCJ “has held that the issue of the Government’s settlement policy was non-justiciable“. Moreover, the Report asserts that the Israeli government’s position is that settlement activity is not unlawful. Nonetheless, the OTP has “considered a number of decisions rendered by the HCJ pertaining to the legality of certain governmental actions connected to settlement activities“: Report, para. 277. This raises two questions, firstly whether these factual findings are correct and secondly, if they are not, whether the OTP’s findings should be revisited.

This contribution argues the OTP should pay a qualified deference to decisions of Israel’s Supreme Court sitting as the High Court of Justice (“HCJ”) when conducting complementarity analysis with respect to a potential settlements case. We argue that this position is consistent with a textual interpretation of the Rome Statute, the Court’s jurisprudence to date, and sound policy reasons too.

Complementarity and the Rome system of justice

The Rome Statute contemplates a system of justice which is essentially based on two pillars. The first is the duty of “every State” (i.e. including non-states parties) to investigate and prosecute “international crimes”. The second is the corresponding responsibility of the Court. The Rome Statute does not prescribe a system of mandatory prosecution for all crimes within its jurisdiction, but instead outlines specific duties in relation to the investigation and prosecution of core crimes. This distinction between states’ duties apart from the OTP’s extraordinary powers may guide the OTP when considering whether exercising its jurisdiction is reasonable in a given case. The complementarity principle is integral to this analysis and it rests on a core idea, namely the existence or absence of genuine national proceedings. Pursuant to Article 17(1)(b) of the Rome Statute, a case is inadmissible where the Court determines that it has in fact been investigated by a state that has jurisdiction over it and the state has decided not to prosecute the person concerned. However, a decision not to prosecute will render a case admissible if it is one which aims at evading justice.

Complementarity at the Preliminary Examination stage

At the Preliminary Examination stage, assessment of admissibility will consider “potential cases” that may be identified in light of the information that is available and that which would likely arise: see OTP Policy Paper on Preliminary Examinations, para. 46. A flexible approach is warranted. To require that a national investigation cover precisely the same acts as the preliminary examination would make the national investigators’ task impossible and, as a result, the complementarity principle would become redundant.

This is not least because prior to the “case” stage (i.e. prior to the issuance of arrest warrants or summonses) “the contours of the likely cases will often be relatively vague because the investigations of the Prosecutor are at their initial stages… Often, no individual suspects will have been identified at this stage, nor will the exact conduct nor its legal classification be clear”: see e.g. Muthaura et al Appeals Chamber Decision, 30 August 2011, para. 38. It follows that the “same person, same conduct” test developed by the Court cannot be applied in the same way at the “situation” and “case” stages.

The OTP’s admissibility assessment is not foreclosed by an absence of implementing legislation

A question arises whether a national “investigation” would, in the absence of national legislation implementing Rome Statute crimes, necessarily be inadequate to establish activity for the purposes of the first limb of the admissibility assessment or a state’s ability to investigate and prosecute for the purposes of the second limb. Article 17 does not provide an obligation on states parties (still less, non-states parties) to pass implementing legislation. On the contrary, states parties have agreed that the Court’s jurisdiction over the crimes referred to in the Rome Statute shall be complementary to their national criminal jurisdictions.

It follows that the essence of complementarity analysis is an accommodation between legitimate differences; the process should allow for pluralism and diversity of legal systems. It does not require uniformity but at most a certain degree of equivalence between international and domestic justice approaches. Adoption of such a pluralist approach would suggest that the existence of ICC implementing legislation at the national level is not determinative of admissibility. The fundamental question is whether the state is carrying out (or has carried out) proceedings genuinely.

Has the HCJ held that the issue of the Government’s settlement policy is non-justiciable?

Although the Report asserts that the HCJ has held that “the issue of the Government’s settlements policy is non-justiciable,” the HCJ has ruled on the legality of settlements, including settlements policies, in landmark judgments in the past.

Further analysis of the HCJ’s jurisprudence in settlements cases shows that where the property rights of an individual are engaged, the HCJ will find settlements policy to be justiciable. In Dweikat, where the petition addressed the legality of establishing a civilian settlement on the outskirts of Nablus on land privately owned by Arab residents, state counsel argued that as the general question of civilian settlement was non-justiciable the HCJ should refrain from dealing with a petition that challenged a government decision to requisition uncultivated land for settlement. The HCJ rejected the argument and held that because the petition claimed that the authorities had acted illegally in taking the land of a specific individual it would examine the argument on its merits.

The OTP’s conclusion that the HCJ has found the issue of settlements policy to be non-justiciable is therefore misleading and should be revisited. In a potential settlements case, a finding of legality by the HCJ results from an “investigation” (Article 17(1)) arising from “proceedings” (Article 17(2)). There is no express requirement under the Rome Statute or in the Court’s jurisprudence which requires an ‘investigation’ for the purposes of Article 17(1) or ‘proceedings’ for the purposes of Article 17(2) to be undertaken by national prosecuting authorities. Indeed, given the nature of the allegations in a potential settlements case, where property i.e. land law rights are engaged, it is reasonable for the OTP to consider how those same property rights have been determined by civil courts with jurisdiction. If there have been findings of legality in civil proceedings, these might logically preclude a criminal investigation or prosecution for the same conduct. With respect to complementarity, it would make little sense for a criminal law proceeding (investigation or prosecution) to follow a civil finding of legality, provided that the finding resulted from a genuine proceeding. On the other hand, if the civil court were to determine that there has been an administrative law violation, this finding might logically form the predicate for an investigation of the unlawful conduct under the criminal law.

A decision not to prosecute which results from such an investigation will render a potential settlements case inadmissible unless the decision resulted from an unwillingness or inability genuinely to prosecute (Article 17(1)(b)). It is on this terrain that the admissibility of a potential settlements case will properly be argued.

Does the Israeli government consider all settlement activity to be lawful?

It is incorrect to assert that the Israeli government considers all settlements activity to be lawful. Firstly, settlement construction is subject to judicial challenge. Where a petitioner’s individual rights are affected, the HCJ will assume jurisdiction and will ask itself in each case whether an interference “represents a proportional balance between the security-military need and the rights of the local population”: Mara’abe & ors, para. 74. Secondly, the HCJ has independently determined that certain settlements activity is lawful and other activity is unlawful. It approaches the situation on a case by case basis. Thirdly, at the level of municipal law, anyone who carries out construction work requiring a permit without receiving one is liable to a fine or two-year prison sentence. It is potentially misleading to assert that the Israeli government “has consistently maintained that settlements-related activities are not unlawful,” without recognising the illegality of unauthorised construction under local law.

HCJ proceedings are complementary to a potential settlements case

Through its jurisprudence, the HCJ has investigated settlements activity which the Report identifies as framing the parameters of a potential settlements case. Specifically, the HCJ has addressed the legality of appropriation of land and construction of settlements, the demolition of Palestinian property and eviction of Palestinian residents from homes, plans to relocate Bedouin and other herder communities present in and around E1 area, the regularisation of construction, and unauthorised outposts. These are typologies of settlements activity which the Report discloses currently are the subject of the OTP’s preliminary examination: Report, paras. 269-270. For so long as the HCJ has made genuine factual and legal determinations with respect to such conduct, there is a reduction in the number of potential settlements cases that are admissible before the ICC, even were there – arguendo – any reasonable basis to believe that crimes within the jurisdiction of the Court had been committed. Although this contribution considers specific issues of complementarity (as opposed to gravity), this reduction may arguably render a potential settlements case insufficiently grave to warrant an OTP investigation.

‘Fake justice’?

B’tselem, an NGO, published a report in February 2019 suggesting that the HCJ’s justices may bear criminal responsibility for the role which they allegedly play in legitimising demolition of Palestinian homes as well as dispossession of Palestinians. However, the NGO’s own research shows that access to the HCJ for Palestinian petitioners is increasing; this is not suggestive of a Court delivering “fake justice” which does not conduct genuine proceedings. NGO reports and commentary which suggest that the HCJ is either unable or unwilling to investigate settlements cases must be scrutinised carefully before it can properly be argued that the presumption of good faith to be afforded to states should be displaced.

Burden of proof

The burden and standard of proof in complementarity analysis is based upon the principle that states should be treated according to equal or similar standards. It follows that the burden falls on the OTP to rebut the presumption of good faith which is otherwise to be afforded to states during the Court’s assessment of “unwillingness” under Article 17.

There is in Israel a functioning, independent, institutional framework which permits investigation of conduct falling within the parameters of a potential settlements case. The OTP should accordingly accept prima facie the validity and effect of decisions of domestic courts unless presented with compelling evidence indicating otherwise. The burden of proof must fall on the OTP to displace the presumption of good faith to be afforded to the HCJ’s decisions in its assessment of unwillingness and inability.

Conclusion

Where there is a dispute which engages individual petitioners’ rights under international humanitarian, human rights, and national administrative law, affected communities have a right of civil and public law redress in Israel. These are principally public law and land law related disputes and the civil courts are the appropriate forum to investigate and determine them prior to a criminal investigation. The HCJ has demonstrated that it is able and willing genuinely to carry out such an investigation. It will determine whether, in a specific case, claimants have suffered a violation of their rights under Israeli law which encompass rights under customary humanitarian law granted to protected persons as well as under international human rights law. Where Israeli statute law conflicts with custom the legislation takes precedence, but even in these circumstances it is subject to judicial review by the HCJ. The HCJ’s Decision on the Regularisation Law is anticipated partly for this reason, as advocates for Israel argue not only that the ICC does not have jurisdiction over a potential settlements case, but also the complementarity principle renders a potential settlements case inadmissible.