



## Judicial Seminar:

# Complementarity and Cooperation of Courts in an Interconnected Global Justice System

International Criminal Court (ICC)  
18 January 2018, The Hague, Netherlands

### Summary of seminar proceedings<sup>1</sup>

#### Welcoming remarks by Judge Silvia Fernández de Gurmendi, ICC President<sup>2</sup>

President Fernández welcomed all participants, noting that the Court was honoured by the presence of so many senior judges from national, regional and international jurisdictions at this first event of its kind organised by the International Criminal Court (ICC, Court), which would hopefully become a regular exchange among judges of the world. She explained that the topics of the working sessions were intentionally designed to be wide, in order not to restrict discussions at this first seminar, from which future conversations could be built on more specific topics.

Despite their distinct mandates and jurisdictions, all courts share a unique and same goal, which is to ensure accountability and solve conflicts through justice. Many of the challenges courts confront are the same and they have thus much to learn from each other's experience.

One of the central challenges is the efficiency and quality of judicial proceedings. President Fernández noted that much progress had been made by the ICC to expedite and enhance proceedings through reforms resulting from a process of collective and constructive dialogue among the judges. She hoped that today's event, followed by others in the future, would provide a useful platform for such exchanges to expand beyond the confines of individual courts, facilitating dialogue on how to best solve common challenges.

President Fernández noted that in an increasingly globalized world, justice is interconnected. International and national jurisdictions influence each other at a normative level. But not only ideas and norms trespass national borders; so do suspects, witnesses and evidence. Cross-border judicial cooperation and regional collaboration are essential to effectively tackle crime in a shrinking world. She hoped that this seminar would help strengthen the joint commitment to end impunity for the gravest international crimes.

<sup>1</sup> This summary reflects the overall flow of the discussion and not necessarily the views of any individual speaker.

<sup>2</sup> The full remarks of President Fernández are available at <https://www.icc-cpi.int/itemsDocuments/180118-pres-stat-ENG.pdf>.

## Session 1 – Complementarity

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**Moderator: Judge Chile Eboe-Osuji**

**Discussant: Judge Robert Fremr**

The working session on complementarity provided a platform for a broad discussion on the roles of and connections between different courts and jurisdictions in a global justice system, with a particular focus on addressing the gravest crimes under international law. The session was structured around five topics:

- 1. Primacy of national jurisdictions enshrined in the Rome Statute and the complementary nature of the ICC as a court of last resort; ICC jurisprudence on admissibility (articles 17-19 of the Rome Statute)**
- 2. Experiences of national courts in addressing Rome Statute crimes**
- 3. Role of regional courts**
- 4. Relationship/convergence of criminal courts and human rights courts**
- 5. How to strengthen global respect for the rule of law**

The system of complementarity lies at the heart of the Rome Statute system. The way in which complementarity is implemented has a significant impact on how the Court is perceived. Complementarity is also not interpreted only by judges at the ICC – the Office of the Prosecutor (OTP) must consider the admissibility of potential cases when conducting preliminary examinations. Despite being a cornerstone of the ICC framework, the application of the complementarity principle continues to be subject to extensive debate given the balancing of state sovereignty and the interests of international justice. Exchanges between the Court and States are helpful in understanding these different interests and finding common ground.

The ICC's statutory framework and jurisprudence on admissibility was summarised. Even after 15 years of the ICC and the efforts to interpret the complementarity framework to date, many aspects of this framework remain in need of further interpretation. This clarity is needed in order to make admissibility decisions predictable and to avoid concerns over politically motivated decision making. For instance, there may be situations where states might have difficulties in prosecuting certain individuals because doing so may be perceived as preventing national reconciliation. The application of complementarity in such contexts may be particularly sensitive.

In order to assert their primary jurisdiction, States must create the necessary framework to be able to investigate and prosecute crimes within the jurisdiction of the Court. Some flexibility is warranted - complementarity assessments must not focus on the legal characterisations national jurisdictions use, but rather the conduct being investigated or prosecuted. But the precise extent to which the conduct investigated in the national case must mirror the ICC case is an issue that



will require further exploration in the Court's jurisprudence. However, the concern was voiced that this model does not necessarily respond to larger concerns frequently raised by victims, i.e. the need for crimes to be characterised or labelled accurately. This in turn may create a potential disconnect between the ICC, the complementarity regime and victims' expectations.

Efforts should be made to investigate where national implementing legislation is lacking and how to address whatever obstacles to the adoption of such legislation may exist. Positive complementarity was also emphasised, whereby the Court assists national jurisdictions in justice efforts. It was observed that the Court is not in a rivalry with national jurisdictions, but it was also noted that resource limitations affect the extent to which the Court can facilitate such capacity building. It was highlighted that the continuous dialogue that the OTP engages in with States, particularly at the preliminary examination stage, should not be forgotten. States are encouraged to engage in domestic prosecutions whenever feasible.

At the national level, governments have special, centralised mechanisms for the receipt and processing of international requests. The decisions of such mechanisms can be subject to review. It was emphasised that governments receiving international cooperation requests must process them independently and impartially. However, the way national governments and national jurists perceive the application of complementarity may not necessarily be the same. Judges may understand the relevant framework and application of the complementarity principle, but the necessary tools to cooperate and enhance the efficiency of justice (police, investigative resources, etc.) come from governments and not the courts themselves. The need for international courts to be independent was also discussed, noting that the ICC is dependent upon funding and judicial candidates from states.

Some participants shared the experiences of prosecuting international crimes and ensuring protection of the rights of victims by national and regional courts.

It was highlighted, nonetheless, that certain individuals (particularly judges and prosecutors) in domestic jurisdictions still lack relevant expertise in order to be able to conduct a trial dealing with crimes of this nature. The need for educational outreach to establish relevant competencies was emphasised. It was suggested that ICC judges might be able to assist domestic courts in conducting trials of this nature. The importance of strengthening local respect for rule of law and complementarity was also noted. It was further noted that the ICC is developing jurisprudence regarding admissibility assessments in relation States not party to the Rome Statute in addition to States Parties in cases where this is relevant.

The role of regional courts within the framework of the Rome Statute was discussed. The UN Charter, for example, contemplates and encourages regional arrangements to deal with international peace and security. This may encourage States to pool together sovereignties to solve problems which cannot be resolved individually. This is deemed to be a particularly important issue given the Rome Statute's silence on regional jurisdictions. The ICC judges refer frequently to decisions of regional courts (notably human rights courts) in their decisions, fostering a positive relationship between the judicial bodies.



## Session 2 – Cooperation

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**Moderator: Judge Howard Morrison**

**Discussant: Judge Chang-ho Chung**

At the outset, it was noted that the ICC has a unique system in terms of cooperation, as distinct from the Chapter VII powers facilitating cooperation with the *ad hoc* tribunals, and it was observed that there are 17 articles in Part 9 of the Rome Statute regulating cooperation. The first of these is Article 86, which concerns the general obligation of states to cooperate, and upon which the success of the ICC depends in large measure. A shared endeavour to facilitate cooperation with states, and to extend the goals of cooperation beyond the judicial sphere, is currently underway.

The following points were discussed in an introductory presentation by the discussant:

1. **Prospects of cooperation and exchange of expertise between courts**, including raising awareness about the work of the Court and organising seminars on a regular basis;
2. **Challenges faced by courts in relation to judicial assistance in criminal matters**, including the arrest and surrender of suspects, the identifying and freezing of assets, and national implementing legislation;
3. **Resource-related challenges of courts**, which necessitate, *inter alia*, enhancing the predictability of processes by developing practices to optimise the planning of the conduct of proceedings, and an objective assessment of workload;
4. **Challenges of perception and legitimacy and the relationship between justice and politics**, including generating political and diplomatic support for cooperation and engaging in continuous outreach activities; and
5. **The question of whether cross-jurisdictional dialogue may assist in addressing shared challenges of courts**, including promotion of cross-jurisdictional dialogue to assist in resolving common legal issues, and promoting capacity-building in national courts.

Upon discussion being opened to the floor, it was noted that knowledge of the ICC and of attendant cooperation legislation and processes by practitioners is an important factor in fostering support for cooperation requests. It was further suggested that, in order to ensure respect for cooperation requests and for the cooperation regime under the Rome Statute more generally, this wave of influence should extend beyond lawyers and judges to those in society at large. It was also noted that appreciation for international law is a collective responsibility and that a greater emphasis could be placed on international law within legal and judicial educational curricula.

It was further noted that appreciation and respect for the cooperation regime in the Rome Statute could be fostered through training and organising seminars on relevant topics, with the caveat that such training may be constrained by the limited resources available and must involve results-based evaluation and follow-up. It was observed that such training can extend



beyond the legal / judicial sphere to members of the public through appropriate media, such as through community radio in Africa. The role of civil society was noted in terms of promoting the work of the ICC, with appreciation being expressed for the work done by non-governmental organisations in this regard. It was also suggested that exchanges with other domestic and regional courts may promote understanding of the work of the ICC and its concomitant regime on cooperation.

It was further noted that one hurdle to requests for cooperation may be presented in situations where members of the leadership body in a particular country are themselves the subject of investigation. It was proposed that cooperation requests be directed through a central authority, given that, in some systems, cooperation requests may be subject to executive oversight and therefore their successful execution may be difficult. Other participants suggested that cooperation requests may be most efficiently executed if directed judge-to-judge.

It was noted that full cooperation by governments with the ICC was not always readily forthcoming and could not be taken for granted. It was observed that states parties must foster support for the concept of justice, and that encouraging dialogue between judges of different jurisdictions may also be useful. It was also noted that the Assembly of States Parties has a role in relation to cooperation in stepping in to place pressure on fellow member states to adhere to the conditions in Part 9 of the Statute.

It was noted further that cooperation is not only about supporting the concept of justice, but is also dependent on having the appropriate legal mechanisms, including effective implementing legislation and attendant processes, as required under Article 88 of the Rome Statute. It was noted in this regard that the bureaucracy of states affected by conflict may not always be well-functioning, and that ICC judges should bear this in mind in their approach to states parties subject to cooperation requests. Discussions in relation to cooperation of non-states parties may also be advisable, in order to negotiate *ad hoc* agreements on discrete or broader issues of cooperation.

It was also suggested that the ICC may draw upon existing mechanisms relating to mutual legal assistance and well-established practices in terms of search and seizure, freezing of assets, mutual recognition of confiscation orders, protective measures and financial penalties, in order to enhance existing cooperation processes. It was noted in this regard that there are many existing tools available that may be harnessed by states parties themselves (such as model laws for implementing Part 9 of the Rome Statute) and that judges may encourage the use of such tools in their own states, while it was also commented that the impartiality and independence of judges is the cornerstone of the rule of law, and such action should take the form of judicial diplomacy only.

The issue of resources was also discussed, both in terms of financial resources and the legal and administrative tools required to facilitate the work of the ICC, including in relation to its cooperation regime.





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## Closing remarks by Judge Joyce Aluoch, First Vice-President of the ICC

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Vice-President Aluoch thanked all those present for their participation in the rich debates of the day, and recognised the role played by the moderators and discussants. She also thanked the European Commission for its financial support, which had made the event possible.

The interaction during the seminar had been a rare and fruitful opportunity for judges from different courts to exchange with each other. Such discussion was healthy, and everyone would take something valuable back from the dialogue that had taken place. New friends and connections had also been made on this occasion.

As one of the six ICC judges whose mandates would end on 10 March 2018, Vice-President Aluoch viewed the judicial seminar as something that the outgoing judges would leave behind, hopefully to be continued, now that the initiative had been put in motion.

The Vice-President urged all those present to use the outcomes of the discussions held on complementarity and cooperation for the benefit of international criminal justice, using the considerable influence that they possess as senior judges in their respective jurisdictions. They all had a role to play in spearheading the development of international justice.

It came out very clearly during the discussions that the ICC was not created to compete with national jurisdictions, which must take precedence, while the ICC is a court of last resort. Dedicated units for the investigation and adjudication of Rome Statute crimes had been created in some jurisdictions, and several interesting examples of proceedings in national or regional courts had been brought up during the seminar.

The Vice-President recalled that the importance of national implementation of the Rome Statute had been highlighted during the seminar, and she urged all participants to follow up on this once they return home. This would help ensure that the proceedings of the judicial seminar would be turned into concrete results in furtherance of international justice.

