Cour Pénale Internationale

International Criminal Court

Fifth Judicial Seminar of the International Criminal Court:

ROLE OF NATIONAL COURTS IN THE INTERNATIONAL CRIMINAL JUSTICE SYSTEM

Friday, 20 January 2023, 11:45-15:00hrs CET

SUMMARY REPORT

The Fifth Judicial Seminar of the International Criminal Court (ICC, Court), titled "Role of National Courts in the International Criminal Justice System", was held on 20 January 2023 at the premises of the ICC in The Hague, the Netherlands. This was the first time the Court's Judicial Seminar was organised in a hybrid format, allowing for participation in person as well as online. The Seminar was highly successful with broad attendance,[1] active participation of the invitees, and rich and focused discussions. The concept note and programme of the Seminar are contained in Annex 1 and Annex 2, respectively.

As detailed in the concept note, the main impetus for the selection of the topic for this edition of the Judicial Seminar was to support effective implementation of the principle of complementarity, which calls for the domestic justice systems of each State to play an active role in addressing the crimes listed in the ICC's founding treaty, the Rome Statute: genocide, crimes against humanity, war crimes and the crime of aggression.

The Seminar sought to do this by promoting understanding of the ICC's legal framework and judicial practice in relation to the principle of complementarity as well as by facilitating networking between courts and by providing a platform for an exchange of experiences, practices and lessons learned from proceedings of serious international crimes. Finally, the many available sources of support for the capacity building of national jurisdictions were also highlighted.

The International Criminal Court is grateful to the European Commission for its financial support of the Judicial Seminar.

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In his opening remarks, the President of the ICC, Judge Piotr Hofmański, stated that in today's interconnected world, the international community must respond jointly to the challenge posed by the most atrocious crimes. All have to do their part to reduce the space for impunity,

[1] There were a total of ca. 50 participants, including numerous chief justices or presidents of supreme courts as well as presidents of international and regional courts. 27 national jurisdictions and 8 international, regional or hybrid courts were represented.

to advance accountability, to help victims obtain justice and redress, and to contribute to the prevention of the gravest crimes.

Discussions at the Seminar underlined that the purpose of the Rome Statute was never to create a super court which would deal with all cases of mass atrocity. The idea behind the principle of complementarity is to encourage States to take up their responsibilities and use their rights to do investigations and prosecutions first and foremost. It was noted that there has, to some extent, been an inversion of this philosophy in the public eye as the first question that is often asked in response to reports of atrocities is "what is the ICC doing about it?", whereas the question really should be, "what are the national justice authorities doing to address the crimes?".

The first working session of the Seminar began with a detailed presentation by Judge Marc Perrin de Brichambaut, President of the ICC's Appeals Division, of the ICC's legal framework and judicial practice concerning the relationship between national jurisdictions and the ICC's jurisdiction. He stated that in negotiating the Rome Statute, the primacy of jurisdiction enjoyed by the ad hoc tribunals for the former Yugoslavia and Rwanda, created by the United Nations Security Council, was seen by many as unacceptable for a permanent universal court established by treaty. Some States, on the other hand, wanted to give the Prosecutor broad jurisdiction from the outset to deal with any case involving the gravest international crimes. It was therefore necessary to find a compromise – and the principle of complementarity is a key part of it.

The central idea of complementarity is that the courts of each State Party to the Rome Statute have the primary responsibility to prosecute and try the major crimes defined in the Statute; at the same time, the ICC was created to address these crimes if States have not been able to do so. Complementarity is therefore an element of an overall system, the respect of which is guaranteed by several articles of the Rome Statute.

An overview was given of the key provisions of articles 17-20 of the Statute, which govern complementarity. It was recalled that a case is inadmissible before the ICC if that 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. This is the key test regulating complementarity under the Rome Statute. It was clarified that mere declared intentions of conducting national proceedings are not sufficient to fulfil the test of complementarity before the ICC – there have to be actual, concrete proceedings under way for the national jurisdiction to be able to assert primacy.

It was further explained that the judiciary of the ICC has applied the test of "same conduct, same person" to determine admissibility in specific cases – i.e. the Court's Chambers have ruled that if the national authorities are conducting genuine proceedings into the same alleged conduct by the same person, then the ICC has to halt its proceedings and step back. It was noted that the practical application of this test has been slightly relaxed over time, allowing some room for the recognition of the specific circumstances of each situation.

It was clarified that at the stage of a preliminary examination – the phase preceding investigation – the ICC Prosecutor's Office has broad discretion, *inter alia* to assesses available

information on national proceedings. At later stages, the role of the Court's judges becomes more prominent in this respect, and States as well as the defence have the opportunity to make submissions directly to the ICC's Chambers to challenge admissibility.

It was noted that, upon taking office, the third ICC Prosecutor, Karim Khan, had initiated an assessment of ongoing preliminary examinations and reduced their number, announcing his intention to focus the finite resources available to his office on building unassailable cases in the courtroom. He stated that the preliminary examination phase should only be a screening process.

There was discussion on whether complementarity should be seen as a vertical or a horizontal concept – or, in other words, whether the relationship of the ICC and national jurisdictions can be seen as one of burden-sharing rather than one of primacy and admissibility based on inaction, unwillingness or inability. Several speakers reflected the viewpoint that there can be said to be elements of burden-sharing, particularly when constructive dialogue – and possibly also collaboration – exists between the ICC (particularly it's Office of the Prosecutor) and national authorities.

In a similar vein, it was suggested that the implementation of the principle of complementarity is evolving from verticality to horizontality, whereby the ICC would increasingly take part in a network of investigations and prosecutions, coordinated across jurisdictions. The ICC Prosecutor's participation in joint investigative teams with other jurisdictions in respect of the situation in Ukraine could be said to reflect this emerging trend.

It was stated that while States do not have, strictly speaking, a legal obligation stemming from the Rome Statute to exercise their jurisdiction over the crimes listed in the Statute, it can be argued that the treaty *implies* such an obligation, and at the very least provides strong encouragement for States to exercise jurisdiction. Furthermore, it was noted that other sources of international law – treaties as well as customary law – may oblige States to prosecute certain crimes contained in the Statute.

In a similar vein, it was clarified that the failure of a State to exercise their jurisdiction over concrete instances of crimes listed in the Rome Statute would not constitute a breach of the Statute – rather, under the provisions of the Statute, the failure to do so does open the door for the ICC to intervene and conduct its own proceedings.

ICC Judge Kimberly Prost gave a presentation about the benefits and challenges of incorporating Rome Statute crimes, modes of liability and general principles in national law.

While not as such an obligation arising out of the Statute, it was stressed that criminalising the Rome Statute offences under national law is, naturally, a fundamental precondition to each State's ability to exercise their primary jurisdiction over those crimes in accordance with the principle of complementarity. On this point, discussions underlined the *jus cogens* nature of the incrimination of atrocious crimes entailing grave violations of human rights.

How the inclusion of the Rome Statute crimes in national law is done is up to each State and depends largely on the legal system in place. As such, the legislative solutions can vary greatly from jurisdiction to jurisdiction. Two common methods were mentioned, one being a cross

reference in national law to the definitions in the Rome Statute, which has the advantage that when the Statute is amended, such updates automatically become part of national law as well. Another legislative technique that has been used is to rely on customary international law, which again allows for the evolution of the crimes in national legislation.

An important question that arises in connection with internalising the Rome Statute crimes is what kind of jurisdiction will be given for those crimes. Again, a range of solutions is found around the world. At the one end of the spectrum are those States that simply mirror the jurisdictional provisions for ordinary crimes, most commonly based on the principle of territoriality. However, in light of the special nature of the crimes in question, many States have opted for some kind of universal jurisdiction – if not complete universality, then at least applicable in circumstances where the suspected or accused person is present in the country, or there is another kind of link to the jurisdictional State.

When it comes to modes of criminal liability, it is not considered necessary to copy the provisions of the Rome Statute, as long as the different forms of committing a crime – such as direct commission, ordering, aiding and abetting, and commission as part of a group – are covered one way or another. An exception is the responsibility of superiors, in respect of which it is recommendable to mirror the language of article 28 of the Rome Statute as far as possible.

Immunities and the irrelevance of official capacity is another area which States should carefully consider with respect to their domestic ability to prosecute Rome Statute crimes. It was stressed that this question is separate from the clear obligation that States Parties to the Rome Statute have to arrest and surrender any person if requested by the ICC, including a Head of State.

In the broader context of incorporating the Rome Statute in national law, it was recalled that the strict obligation States undertake by ratifying the Statute is to have national procedures available that enable the State to arrest suspects and surrender them to the Court, to assist with evidence gathering, and to be able to enforce fines, forfeitures, reparation orders etc. The national implementation of the cooperation obligations as well as the inclusion of the crimes in national law remains a huge challenge, in particular due to the very limited legislative capacity in many States. In this connection, it was highlighted that assistance for national implementation is available from several sources, including multilateral organisations, specialised civil society organisations, and the Assembly of States Parties to the Rome Statute.

It was underlined that the effective prosecution of serious crimes requires the establishment of specialised teams with the legal basis and material means to investigate and build cases in this challenging area of criminal justice.

ICC Chambers Legal Officer Ania Salinas gave a presentation of the ICC's Case Law Database (CLD), which is an easily searchable database providing free access to the entire case-law of the ICC's public decisions in English, including separate and dissenting opinions, and to a growing number of translations in French and Spanish. In addition to the full-text search within judicial decisions, the CLD provides substantive analysis by indicating when decisions contain "Legal Findings", which are selected extracts from the Court's case law with

jurisprudential value. Every Legal Finding is furthermore indexed with a level of importance, indicating its relative jurisprudential value, and is linked to one or more keywords. These features elevate the CLD's value far above a mere word-searchable repository of judgments and decisions.

The English version of the CLD, launched in March 2021, currently contains more than 8,000 Legal Findings, which have been extracted from around 10,000 judicial decisions. The French and Spanish language versions, which were formally launched on the day of the Seminar, contain all officially translated decisions in these languages and a selection of non-official translations of the Legal Findings. The CLD is a result of several years of work by legal officers as well as visiting professionals and interns at ICC Chambers, and it is financially supported by the European Commission.

The second working session started with a presentation by Miguel de Serpa Soares, United Nations (UN) Legal Counsel and Under-Secretary-General for Legal Affairs, on United Nations' support to national jurisdictions in addressing Rome Statute crimes. In his remarks, he placed such United Nations support in the broader context of the efforts to promote the rule of law and build the capacity of national judiciaries. Through capacity building activities which aim to align the domestic systems with international rules and standards, the United Nations works with national partners to address various challenges in the justice sector.

The United Nations peacekeeping missions have increasingly been mandated by the Security Council to assist host authorities in developing national capacities to investigate and prosecute international and other serious crimes. The justice components of peacekeeping missions, in partnership with national actors, help to lay the foundations for the long-term strengthening of rule-of-law institutions by, among other things, assisting nationally led investigations and prosecutions of atrocity crimes. Examples were given of providing technical advice and logistical support to improve the ability of national authorities to address atrocity crimes, including sexual violence. Specific examples where the United Nations has supported new forms of domestic tribunals, with different levels of international assistance or participation were also discussed, as well as the role of the United Nations as regards international non-judicial accountability mechanisms.

Mr Taro Morinaga, Director of the United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI) gave a presentation about the Institute's role in supporting the capacity building of national jurisdictions through the training of criminal justice practitioners. UNAFEI, which is embedded in the Ministry of Justice of Japan, is an UN-affiliated entity that belongs to the UN Crime Prevention and Criminal Justice Programme Network, which comprises 19 institutes around the world. UNAFEI's training courses are aimed at strengthening the skills of criminal justice practitioners from different countries. There is a strong network of alumni, which is valuable for instance in the context of mutual legal assistance. While UNAFEI's activities are not geared toward Rome Statute crimes specifically, the ICC's jurisprudence and practice reflect modern criminal justice theories, and as such form important referencing material, particularly for addressing the most heinous crimes. Based on a recently concluded a cooperation agreement

between the ICC and UNAFEI, it will be possible to work together to assist the strengthening of national jurisdictions in this respect.

Some speakers drew attention to the importance of the ICC engaging with not only governments, but also with academic communities, students and other stakeholders to create networks and empower and inform all those who want to make a contribution to humanity's common efforts to fight impunity,

In the last segment of the Seminar, several participating judges from national and other jurisdictions shared their practical experiences and gave examples of challenges faced and solutions found in proceedings for international crimes.

An example was given of a national system in which the majority of witness interviews in the case of international crimes are conducted abroad, in the country of the witness, to avoid culture shocks. The witness is heard in a formal session by an investigative judge, who is accompanied by a public prosecutor and a defence counsel. This obviates the need to hear the witness again during the trial.

The importance of protecting the safety and wellbeing of witnesses was emphasised by several speakers, this being a particularly important question in trials of international crimes. One speaker made the point that, when dealing with parties or participants in a legal process hailing from other countries – such as the accused, or victims and witnesses, it is important to have some understanding of the legal system and culture background of those countries. One national system has a practice of appointing an anthropologist to assist the court in this respect.

A representative of one national jurisdiction spoke about the use of experts in trials of international crimes, for instance to help the court determine whether a particular situation is an armed conflict or not, and if so, whether the conflict is internal or international in nature. In some cases, the expert can be a person working for the law enforcement system.

The condition of dual incrimination present in some states' legislation – requiring that the offence is punishable also under the laws of the country where it was committed – was mentioned as a potential challenge to holding perpetrators of Rome Statute crimes accountable under universal jurisdiction.

The features of a hybrid (internationalised) court were highlighted by one participant, such as the appointment of national and international officials working alongside each other, and the ability to apply national as well as international law and procedure. It was also suggested that hybrid tribunals can play a particularly important role in the context of complementarity where the ICC's has finished its investigative activities.

There was extensive discussion and sharing of experiences on interpreting modes of liability, *inter alia* with a view to enabling the prosecution of direct perpetrators as well as persons higher up who were complicit in the criminal acts but not involved in their physical commission. It was suggested by one participant that efforts toward more consistent jurisprudence across jurisdictions on interpreting command responsibility would be welcome, as there has been a multitude of interpretations across different courts and tribunals.

Similarly, several voices called for more harmonisation in the interpretation of international crimes between different jurisdictions. On a related point, it was stated that knowledge of international jurisprudence as well as the jurisprudence of other national jurisdictions can be highly instructive for domestic courts in the context of interpreting the elements of international crimes, as well as in the context of sentencing. A challenge mentioned in this context is that not all cases adjudicated in national courts are published – and even if they are, the lack of translations may inhibit effective access for judges from other jurisdictions. It was recognised that various actors are working to make case law from different jurisdictions available as widely available as possible.

In line with the calls for more harmonisation and cross-referencing between jurisdictions, several participants strongly emphasised the importance of exchanges between judges, and one participants proposed the creation of a network for this purpose. The value and timeliness of the ICC's Judicial Seminar in promoting the abovementioned goals was recognised in several interventions.

In her closing remarks, Judge Luz del Carmen Ibañez Carranza, First Vice-President of the ICC, emphasised that the effective fight against impunity requires the creation of strong synergies among national jurisdictions and international tribunals, especially the ICC. She further stated that complementarity is a two-way street: while the ICC hopes to inspire national jurisdictions, the opposite is equally true: national experiences can be instructive for the ICC as the Court continuously seeks ways to strengthen its work.

5th Judicial Seminar of the International Criminal Court (ICC)

ROLE OF NATIONAL COURTS IN THE INTERNATIONAL CRIMINAL JUSTICE SYSTEM

20 JANUARY 2023 | The Hague, The Netherlands

CONCEPT NOTE

The fifth Judicial Seminar of the International Criminal Court (ICC, Court) is devoted to discussing the crucial role that national courts and jurisdictions play in the international criminal justice system aimed at closing the gap of impunity for the gravest crimes under international law.

The legal framework of the International Criminal Court is fundamentally based on the principle of *complementarity* enshrined in the Court's founding treaty, the Rome Statute, which provides that national jurisdictions always have the primary right – and the primary responsibility – to address crimes within the ICC's jurisdiction: genocide, crimes against humanity, war crimes and the crime of aggression. The ICC can exercise its jurisdiction only if the relevant national jurisdiction or jurisdictions are not investigating or prosecuting the crimes in question, or if they are unwilling or unable genuinely to carry out the investigation or prosecution.

Indeed, it would be impossible for the ICC, with a total of 18 judges and 3 courtrooms, to be the default institution for hearing all cases of alleged violations of international criminal law from all over the world. Instead, for the fight against impunity for the perpetrators of the gravest atrocities to be successful, it is essential that national jurisdictions everywhere are well equipped to address such offences. To begin with, this requires that the criminal acts in question be domesticated in the criminal code of each national jurisdiction. The need for effective mutual legal assistance is often also heightened in the context of proceedings related to Rome Statute crimes.

Domestic judicial systems faced with actual cases of Rome Statute crimes may find that their personnel need specialised skills, such as those related to forensic evidence, witness protection, or the interpretation of international humanitarian law. In the latter context, recourse to the jurisprudence of other courts and jurisdictions can be beneficial and instructive.

In addition to the ICC and purely national jurisdictions, hybrid or regional courts and tribunals can also pay a crucial role in the fight against impunity for the crimes in the Rome Statute.

The first session of the Seminar will focus on the legal aspects of the principle of complementarity from the viewpoint of the ICC – in other words, looking at how the ICC has so far interpreted and applied the provisions of the Rome Statute (particularly articles 17-19) on the admissibility of cases with a view to the activity of national jurisdictions, or lack thereof. The importance of incorporating the Rome Statute crimes in national law will also be discussed in this session, and a presentation of the ICC's publicly available Case Law Database will be provided.

The second session of the Seminar will begin with two presentations regarding the support of the United Nations for the capacity building of national jurisdictions. The session will continue with interventions and open discussion on the experiences of national (and hybrid) jurisdictions, whether in terms of their preparedness to hear cases related to offences included in the Rome Statute, or experiences from actual trials of such crimes, including any legal or practical challenges encountered. All interested participants are encouraged to take the floor during this segment.

To allow for a candid and open exchange of views, the Judicial Seminar will not be a public event, and discussions will take place under Chatham House rules. Accordingly, while a report reflecting the content of the conversations will be produced and made public, no statements will be attributable to individual participants, apart from the speakers listed on the programme.

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PROGRAMME

SESSION 1 **11:15-12:45**	**Moderator: Judge Antoine Kesia-Mbe Mindua, Second Vice-President, ICC**
11:15-11:25	**OPENING REMARKS** ▪ Judge Piotr Hofmański, President, ICC
11:25-11:45	**Relationship of the International Criminal Court's jurisdiction with the jurisdiction of national courts under the ICC's legal framework: Rome Statute provisions on admissibility and related ICC jurisprudence.** ▪ Judge Marc Perrin de Brichambaut, President of Appeals Division, ICC
11:45-12:00	**Q & A / discussion**
12:00-12:20	**The benefits and challenges of incorporating Rome Statute crimes, modes of liability and general principles in national law.** ▪ Judge Kimberly Prost, President of Trial Division, ICC
12:20-12:35	**Q & A / discussion**
12:35-12:45	**Presentation of the ICC's Case Law Database** ▪ Ania Salinas Cerda, Legal Officer, ICC Chambers
12:45-13:30	*Lunch break*
SESSION 2 **13:30-15:00**	**Moderator: Judge Socorro Flores Liera, President of Pre-Trial Division, ICC**
13:30-13:40	**United Nations (UN) support to national jurisdictions in addressing Rome Statute crimes.** ▪ Miguel de Serpa Soares, UN Legal Counsel and Under-Secretary-General for Legal Affairs
13:40-13:50	**Role of United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI) in supporting the capacity building of national jurisdictions through the training of criminal justice practitioners.** ▪ Taro Morinaga, Director of UNAFEI
13:50-14:00	**Q & A / discussion**
14:00-14:50	**Experiences of national and hybrid jurisdictions.** ▪ Interventions by participants ▪ Discussion
14:50-15:00	**CLOSING REMARKS** ▪ Judge Luz del Carmen Ibañez Carranza, First Vice-President, ICC

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