

**Twelfth session**

The Hague, 20-28 November 2013

**Report of the Court on complementarity:
Completion of ICC activities in a situation country****I. Introduction**

1. This report is submitted pursuant to Assembly resolution ICC-ASP/11/Res. 6 on complementarity, which in its preamble recalls that “[...] greater consideration should be given to how the Court will complete its activities in a situation country and that such exit strategies could provide guidance on how a situation country can be assisted in carrying on national proceedings when the Court completes its activities in a given situation.”¹ The Resolution requested the Bureau to continue the dialogue with the Court on complementarity, including “possible exit-strategies of the Court and related issues”² and requested the Court to “report, as appropriate, to the twelfth session of the Assembly”.³

2. In its latest report on complementarity, the Bureau highlighted that “in the future, [...] exit strategies may include a complementarity component and contribute to addressing remaining impunity gaps. In addition, consideration could be given to addressing, in a timely manner, relevant legacy issues such as preserving and developing the Court’s impact on the national judicial system, where appropriate, taking into account the lessons learnt from other international jurisdictions, in dialogue with the Assembly.”⁴

3. The current report is intended to contribute to these on-going discussions. In particular, the report aims to:

(a) clarify the meaning of completion and other relevant terms (e.g. residual issues, legacy) in the specific context of the ICC;

(b) discuss the relevance of other international courts’ and tribunals’ experiences; and

(c) provide a basis and an information platform for further discussions both within the Court and between the Court and the States Parties for the development of further strategies and policies and coordination amongst relevant stakeholders

II. Completion in the context of the ICC

4. Completion of the ICC’s activities in a situation country is a complex matter. The ICC is a permanent institution with a *sui generis* nature and as such many of the specific issues related to completion strategies of the *ad hoc* tribunals may not apply to the ICC per

¹Preamble of resolution ICC-ASP/11/Res. 6.

²Resolution ICC-ASP/11/Res. 6, OP 7.

³Resolution ICC-ASP/11/Res. 6, OP 10.

⁴Report of the Bureau on complementarity, ICC-ASP/11/24, para. 20.

se. That said, the experiences of temporary international criminal justice institutions may provide useful considerations if adapted to the ICC context.

5. Completion issues have to be considered in the context of each institution's specific mandate. The mandate forms the legal basis for the institution's judicial activities,⁵ which in turn drive operational activities (such as court hearings, official missions, field presence, victim participation, outreach, the protection of witnesses etc.).

6. It follows from the temporal limitations built in or subsequently attached to the mandates of many international or internationalized criminal courts and tribunals – such as the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), the STL and the Extraordinary Chambers in the Courts of Cambodia (ECCC) – that these institutions are expected to eventually complete their activities and cease to exist. To bring about such closure in an orderly manner, *completion strategies* have been devised by some of these institutions.

7. In the case of the ICTY and the ICTR, completion strategies were developed through consultations between the tribunals and their parent body, the United Nations Security Council. Ultimately, strict time limits were specified for the completion of investigations. The SCSL formulated a completion strategy in 2005 following a request from the UN General Assembly.⁶

8. Clearly, there can be no completion strategy for the ICC as a whole, since it is a permanent institution. However, even when focusing on specific situations, various considerations need to be taken into account.

9. The Rome Statute does not pre-define situations for investigations. Situations will be identified by the Office of the Prosecutor, based on a decision of the Prosecutor, taking into consideration any information on crimes under the jurisdiction of the Court, including information received from individuals or groups, States, intergovernmental or non-governmental organizations; or following a referral from a State Party or the Security Council. The OTP will assess whether the opening of an investigation is warranted under the Statute, as set out in article 53(1)(a)-(c).

10. The preliminary examination phase offers an opportunity for the Office to ensure the fulfillment of the Rome Statute goals and can promote the initiation of national proceedings in a very cost effective manner. Information from the Office can be factored in by States and relevant organizations, in order to promote timely accountability efforts at the national level – with due respect for the principle of national ownership. Avoiding in such way the need for the Court to intervene will avoid also dealing with more complex completion issues arising in the context of investigations.

11. The Court may be seized of a number of (investigations across various) situations at the same time. The judges may in turn rule on the jurisdictional parameters of a given situation in the context of proceedings before the Court. Situations may be open-ended (relating to alleged crimes committed since a given date) or temporally defined (relating to alleged crimes committed between a given start date and a given end date). In either case, the ICC's legal framework does not foresee any limit on the number of cases that the OTP may bring before the Court – this is a matter of prosecutorial discretion.⁷ Furthermore, there is nothing *a priori* excluding the possibility of expanding the temporal or other scope of an existing situation.

12. Neither the Rome Statute nor the Rules of Procedure and Evidence foresee a statute of limitations for the crimes under the Court's jurisdiction. This is a distinct strength of the ICC in the sense that individuals subject to outstanding arrest warrants cannot expect their

⁵ The term "judicial activities" is used here in a wide sense, including e.g. investigations.

⁶ A/59/816-S/2005/350, 27 May 2005.

⁷ Nonetheless, the start of investigations *proprio motu* as well as the issuance of an arrest warrant or summons to appear will remain subject to judicial authorization, and any challenges to the jurisdiction of the Court in relation to a particular case will be determined by the judges.

cases to lapse and disappear.⁸ Moreover, additional cases arising out of a situation could in principle be brought before the Court long after the alleged crimes took place – including on the basis of evidence elicited during trials.

13. Once a case has been initiated before the Court, the Court will remain seized of it until such a time that the case is judicially disposed of, through a finding on its admissibility by the ICC, a final judgement or a decision resulting in acquittal or conviction, or termination of the case by other means. While the Court strives to conduct all proceedings as expeditiously as possible, there are no time limits for the duration of judicial proceedings.

14. Even after a case has been finally disposed of, the Court will remain responsible for issues such as the supervision of the enforcement of sentences, on-going protection and management of witnesses, requests by States for access to Court evidence, and the revision of conviction or sentence.

15. In sum, the ICC's legal framework does not contain provisions relating to the formal completion of the Court's activities in a given situation or case. The completion of judicial activities in the ICC framework differs significantly from *ad hoc* international courts and tribunals which have to consider how certain functions related to the core mandate of such tribunals are to be carried out when those institutions no longer exist. The Court's functions and mandate with respect to a particular situation or case, by contrast, remain subject to the express provisions of the Rome Statute. The permanence of the Court is a key feature of its ability to provide for such ongoing functions.

16. This conclusion does not diminish the need for consideration of a number of issues that are similar to those that have formed part of the completion strategies of *ad hoc* international criminal justice institutions. While a situation before the ICC may not necessarily be closed or completed in a legal sense, the diminishing intensity of the ICC's involvement in a given country will raise a number of practical considerations, in terms of the Court's internal planning as well as in respect of the Court's relationship with the national jurisdiction(s) and the affected communities. In the context of these considerations, the Court will draw from the experiences of other international(ized) tribunals as appropriate.

III. Elements of completion strategies and relevance in the ICC context

17. Completion strategies of international or internationalised courts have been generally described as encompassing three main components:⁹

a) *completion issues* (core judicial and administrative work performed before completion or closing dates, including planning for residual issues),

b) *residual functions* (a range of core judicial and administrative tasks that must be performed post-completion, since a criminal court's mandate is not complete with the final rendering of decisions), and

c) *legacy issues* (long-term post-completion projects, which begin prior to the institution's closure, such as outreach and institutional and capacity-building efforts, aimed at leaving a lasting positive impact on affected communities and their criminal justice systems).

18. The relevance of each of the three areas in the ICC context and for the topic of the present report will be discussed below.

⁸ The case *The Prosecutor vs Bosco Ntaganda* offers an example where judicial activities, including investigations, which had been scaling down, increased again as a result of the implementation of an arrest warrant issued several year prior.

⁹ Adapted from Heller, K. J., "Completion Strategies", Leuven Centre for Global Studies, 2009, online, <http://www.ipp.ghum.kuleuven.be/publications/heller.pdf>

a) *Completion issues*

19. The meaning of completion in the ICC context has already been discussed above. While the closure of a situation in the legal sense is a complex matter, it is obvious that the Court in each situation aims to ultimately bring about the progressive conclusion of investigative, prosecutorial and judicial activities. This would in turn prompt the gradual scaling down of the Court's operational activities in a situation country, notably including field operations as discussed further below. This in a broad sense forms the framework of completion issues for the ICC which will require adequate planning within the context of the Court's overall operations.

20. Many of the completion issues faced by temporary institutions, such as the projected timelines of the remaining proceedings, or the downsizing of staff and the related risk of "brain drain", while presenting considerable administrative and budgetary challenges for *ad hoc* bodies, have limited relevance for the ICC, or can be more easily accommodated by the Court as a permanent institution.

21. Notably, there is no need to devise any special mechanism for the referral of cases to national jurisdictions, which has been an integral element of the completion strategies of the ICTY and the ICTR. In the context of the ICC, such matters are regulated by the existing legal framework of admissibility issues, a permanent feature of the Rome Statute that is available at all stages of the Court's engagement with a situation and not only in the context of 'completion'.

22. By nature, the ICC will focus its prosecutions on few individuals, leaving it to the national judicial systems to deal with other perpetrators. Assistance from the ICC to a national jurisdiction, including the sharing of information, subject to necessary legal caveats, is envisaged by the Court's legal framework.¹⁰ Pursuant to article 93(10) of the Rome Statute, national jurisdictions may request judicial assistance from the Court.¹¹ Similar assistance from an international jurisdiction to national authorities has been an important feature of the ICTY and ICTR completion strategies.¹²

b) *Residual functions*

23. "Residual functions" is a term used to refer to on-going obligations and outstanding issues which remain to be fulfilled *after* the close of the main judicial activities in a situation. They commonly include:

- a) Human resources management, e.g. staff pensions;
- b) Enforcement of sentences;
- c) Situation of acquitted persons;
- d) Considering possible requests for revision of conviction or sentence;¹³
- e) Protection of witnesses;
- f) Management of archives, ensuring the availability of case records and other materials for the Court itself as well as for other interested stakeholders, notably national jurisdictions;
- g) Hearing requests for the variation of protective measures, e.g. for disclosure of protected materials to national authorities for the purpose of proceedings in a national jurisdiction;
- h) Implementation and monitoring of reparation orders; and

¹⁰ In Uganda for instance, in addition to the Office's investigation and prosecution of the top leaders of the Lord's Resistance Army (LRA), the Office has been providing assistance to the national authorities to investigate and prosecute other individuals.

¹¹ Such assistance might become particularly relevant in the context of a successful admissibility challenge.

¹² See e.g. <http://www.icty.org/sid/10184>.

¹³ Article 84 is the relevant provision of the Rome Statute.

i) Outreach for the purpose of informing the affected community of the outcome of the case(s) and the implementation of the judgement(s); establishing public information centres etc.

24. In the case of the ICTR and ICTY, a Mechanism was established by the United Nations Security Council to carry out a number of residual functions of these tribunals after the completion of their respective mandates and the dissolution of the tribunals themselves.

25. As for the ICC, there will be no need for a special body for residual functions; instead the Court itself, as a permanent institution, will continue to exist and deal with any residual activities relating to completed cases as part of the Court's mandate under the Statute. That said, the fulfilment of certain functions listed above by the Court may well have synergies with the strengthening of, or the provision of assistance to national jurisdictions.

26. Furthermore, as acknowledged by the Bureau's report on complementarity, "assessments of what assistance is needed to enable the relevant country's judicial system to handle any residual issues could be seen part of the exit strategies".¹⁴ In this respect, the management of these residual functions as well as their adaptation to the post-judicial context of a given situation country, alongside with any assistance assessments in the sense defined in the Bureau's report, will be among the matters that the Court will consider with the progressive completion of activities within a situation.

c) *Legacy matters*

27. Legacy in the context of international criminal proceedings has been defined as the "lasting impact on bolstering the rule of law in a particular society, by conducting effective trials to contribute to ending impunity, while also strengthening domestic judicial capacity."¹⁵

28. Different from the *ad hoc* tribunals, notably, the ICC does not have primacy vis-à-vis national jurisdictions, which in the Rome Statute system bear primary responsibility for the investigation and prosecution of the crimes. The ICC can intervene only in the absence of genuine national proceedings. It is the primary responsibility of the Office of the Prosecutor to determine where relevant statutory conditions for the opening of investigations are met, subject to judicial review as appropriate.

29. Since national jurisdictions by default have primacy in the Rome Statute system, the completion of the ICC's activities in a given situation does not entail returning primacy to the national jurisdiction – which could be said to be the case with the *ad hoc* tribunals. That said, the progressive completion of the ICC's activities in a situation may in practice coincide with an increase in the ability of the domestic jurisdiction to *exercise* its primacy over the crimes.

30. Whereas lessons may be taken from the *ad hoc* tribunals regarding legacy matters, the functions the ICC will perform in this regard should again be understood in light of its specific nature. Unlike the *ad hoc* tribunals, each with a multitude of cases from one situation, the ICC is seized of a number of situations and will normally address a very limited number of cases per situation. Its legacy as such will therefore be more restricted in terms of the footprint it will leave on the situation country – in accordance with the principle that the ICC *complements* rather than substitutes national courts.

31. Accordingly, and considering that the rationale for the ICC's existence is to contribute to ending impunity and preventing future crimes, the Court aims to maximize the positive impact of each of its activities, from the preliminary examination stage, to the investigation, trial, judgements and possible reparation orders. Public information and outreach, as well as professional working relationships with national jurisdictions, play an important role in this regard.

¹⁴ Bureau report on complementarity, ICC-ASP/11/24, paragraph 20.

¹⁵ "Rule-of-Law Tools for Post-Conflict States - Maximizing the legacy of Hybrid Courts", Office of the United Nations High Commissioner for Human Rights, 2008.

32. Legacy of the ICC's involvement in a particular situation naturally bears the highest relevance for the country concerned, but it also has a global aspect, as the crimes under the Rome Statute are of concern to the international community as a whole. The potential preventive effect of disseminating the ICC's work extends to all States Parties and reverberates worldwide.

33. The second report of the ICC on complementarity outlined selected thematic areas which in the Court's view should be given particular attention in the planning and provision of capacity building assistance by other actors in the international justice system.¹⁶ It also clearly indicated that, with regard to situation countries, it would be desirable to implement capacity building initiatives timely and sustainably, so that a great deal of work would have been achieved and the national authorities would have benefited to the fullest from the Court's involvement by the time when the Court's work in these countries would approach its completion.

34. As acknowledged in the Greentree consultations on complementarity, capacity building is intimately linked to the willingness of a given State to address possible gaps at the national level, with the assistance of third parties/donors where appropriate.

35. Furthermore, a fully functioning national system would assist the Court's efforts in dealing with residual functions and thus may impact positively, amongst others, on the Court's costs related to its exit strategy.¹⁷ Taking a practical example, witness protection and support, reinforced national capacities in this area, will ensure that the Court can safely leave those witnesses in need for protection measures, even if the Court had completed its work, in capable and knowledgeable hands at the national level instead of continuing supporting them financially or otherwise, i.e. relocating or resettling. In this respect, synergies with actors developing witness protection and support programmes are essential to be pursued all along the Court's involvement in a given country. As noted in the 2012 Court's report on complementarity, close consultations with the Court is key to ensure the successful implementation of such projects. The ICC's experience in situation countries is relevant and must be continuously shared with actors leading complementarity projects and replicated when needed.

36. Working in this vein will also have the benefit of ensuring that maximum use is made of the Court's involvement in a given country, and it would help avoid a possible gap between its exit moment and the moment in which national authorities start dealing effectively with Rome Statute crimes themselves. In other words, ideally, when the Court is exiting a given country, the national authorities should already be fully ready to pick up and effectively continue work, if needed.

37. However, it should be stressed that the question of synergies between the ICC and the strengthening of national jurisdictions should not be considered solely, or even predominantly, in the context of the completion of the Court's activities in a situation country. Given the ICC's complementary character, assistance to the national justice system in a situation country should be made available from as early on as possible. Likewise, possible assistance that the Court may be able to provide in this respect should be considered throughout *all* stages of proceedings, from preliminary examinations to investigations, trials and beyond.

IV. Field operations - a relevant element for the completion of the Court's activities in a given situation

38. It is submitted that one concrete way to give context and shape to further consideration of completion and legacy issues in the ICC context is to look at these questions through the prism of the Court's field operations. Field presence and field operations are organically related to the Court's judicial activities in a situation, and in many ways represent the "face of the Court" among national stakeholders.

¹⁶ The report was intended as a basis for further discussions with other actors leading complementarity related initiatives and, in this respect, their feedback, channeled through the Secretariat of the Assembly of States Parties in view of its new mandate, would be much appreciated by the Court.

¹⁷ Report of the Court on complementarity ASP-ASP/11/39, paragraph 19.

39. Since 2005 the Court has implemented its mandate in the situation countries using various forms of field operations such as exploratory missions and periodic missions; limited and temporary deployment of certain functions; time-bound scalable field office presences in and/or near situation countries; and in-situ visits by judges. The field work entails undertaking investigations, ensuring the protection of witnesses and victims, enabling the victims to exercise their statutory rights of participation and reparation, carrying out effective outreach activities directed to the affected communities, assisting counsel teams (defence and legal representatives of victims) and the Trust Fund for Victims, ensuring the security of staff working in and traveling to the countries of situation, and providing IT services and logistical, administrative and medical support.

40. Under particular circumstances, such as a deteriorating security situation, diminished intensity of judicial activities, or lack of cooperation in the implementation of the Court's mandate for long periods of time, the Court may proceed to close an in-country field presence while catering for on-going activities in a different way, for example through missions from Headquarters, or other forms of field engagement such as missions from field presences in neighbouring countries. Such a situation may occur to ensure the optimal use of financial resources and create efficiencies at the field level.

41. In the Court's report on the Review of the field operations, under Part B "Key factors with impact on the field operations", a non-exhaustive list of factors that impact not only on the day-to-day field activities, but also on the selection of various forms of field operations is presented.¹⁸ These factors are also expected to inform the completion strategy of the Court in a given situation. The same report explains, in detail, the link between various forms of field operations and the judicial developments in a given situation. It underlines that, should the Court operate in a situation via a field presence, the delivery of judgment (if no other cases or investigations in the situation remain pending) is a key judicial moment for commencing the scaling down of this presence in preparation for its closure in accordance with any prepared closing strategy.¹⁹

42. It should be underlined that, to date, this scenario has not occurred in any of the current situations before the Court. However, the Court has experienced closing its field operations in a country near a situation country (Darfur/Sudan), namely Chad, due to the reduced level of field activities. The judicial work in relation to the case *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamusin* has since been catered for through missions from Headquarters, as needed. In Uganda, the Court implemented a maintenance strategy since 2011, and consequently has reduced its field presence over the years with currently minimum staff in charge of victims and witness management and protection, outreach, implementation of the Trust Fund for Victims projects and victims participation and reparation matters.

43. The Court has built experience in closing operations not only from a logistical and administrative view point, but also in terms of the development of a tailored training plan for local staff. This plan has supported their efforts of reintegration in the local labour market, as it has allowed them to develop new skills and competencies. This experience should be built into the human resources part of any exit strategy of the Court.

V. Conclusion

44. This report has aimed to clarify key concepts and provide preliminary considerations in order to provide a basis for further discussions among the relevant stakeholders on completion and legacy issues and their possible synergies with the strengthening of national jurisdictions within the ICC framework.

45. The completion strategies and experiences of other international and internationalised courts provide a highly useful basis for a structured discussion of completion in the ICC framework, as demonstrated in this report – despite certain intrinsic differences due to the ICC's nature as a permanent institution. Where possible and relevant,

¹⁸ Report on the review of field operations, ICC-ASP/9/12, paragraphs 21-22.

¹⁹ Report on the review of field operations, ICC-ASP/9/12, paragraphs 17-21.

the Court will continue to draw from the experiences and lessons learnt of other institutions in the planning of the pertinent issues.

46. The completion of Court activities within a situation *in a judicial sense* is predominantly a matter that concerns prosecutorial strategies and judicial developments rather than issues within the mandate of the complementarity facilitation of the Bureau of the Assembly.

47. That said, the Court's involvement in a situation country does create various different opportunities for synergies between the Court's own activities on the one hand and the broader goals of the Rome Statute system on the other hand, notably the strengthening of national jurisdictions – a key objective repeatedly recognised by the Assembly of States Parties in accordance with the principle of complementarity that underpins the entire Rome Statute system.

48. Potential for such synergies has been discussed previously in various reports of the Court, particularly the second Report of the Court on Complementarity,²⁰ submitted to the eleventh session of the Assembly, in which the Court outlined several areas where the Court's specific expertise could benefit efforts of national capacity building.

49. The Court is strongly of the view that assistance to the national justice system in a situation country should be made available from as early on as possible to address the cases that will not be subject to ICC proceedings. Synergies with the ICC's activities should be considered throughout the involvement of the Court in a situation – and not only in connection with the completion of activities.

50. The Court will continue its internal consideration of the issues discussed in this report and looks forward to further discussing these matters with States Parties and other relevant stakeholders.

²⁰ ICC-ASP/11/39.