

**SECRETARIAT OF THE ASSEMBLY OF STATES PARTIES
THE HAGUE GROUP OF THE BUREAU OF THE ASSEMBLY OF STATES PARTIES**

Complementarity

Seminar on completion strategies across the ICC's activities

4 April 2019

The Hague

Summary

The seminar was organized by the co-focal points Ambassador of Romania, H.E. Brandusa Predescu and Ambassador of Australia, H.E. Matthew Neuhaus.

The Seminar gathered representatives from International Criminal Courts and Tribunals and civil society. The main objective of the complementarity seminar on completion strategies was to continue the ongoing dialogue between the Court, States Parties and interested stakeholders on completion strategies during all stages of the Court's work. The event was moderated by **Ms. Gabrielle McIntyre** (Chief Judicial Officer, UN International Residual Mechanism for Criminal Tribunals).

Ambassador Predescu welcomed the participants to the Seminar highlighting that this seminar was timely and important for all relevant stakeholders to continue with this dialogue in order to better understand how this complex mechanism works. Ambassador Predescu indicated that the ASP omnibus Resolution specified that greater consideration should be given to how the Court will complete its activities in a situation country and that possible completion strategies could provide guidance on how a situation country can be assisted in carrying on national proceedings when the Court completes its activities.

Dr. Fidelma Donlon (Registrar of the Kosovo Specialist Chambers) noted that a critical lesson learned since the Security Council called for the completion of the ad hoc tribunals in 1998 is that once a tribunal implements its mandate to bring perpetrators of grave crimes to justice, to fulfill its obligations it cannot simply close. She clarified that studying the evolution of the ad hoc Tribunals rather than refer to their complete closure it is better to refer to the winding down of their activities by way of completion strategies and transition to successor entities that continue to manage core tasks/residual functions. In this context, ICC will identify the most valuable lessons that are available while winding down of activities in a situation country. She identified the legal and political challenges by highlighting what must be done to wind down activities and transition. She noted that

after the political trigger to explore completion the following is needed – a viable plan to complete activities, the political and institutional consensus to support the plan, the law to embody the elements of the plan whilst ensuring that the original mandate is upheld and potentially the creation of new organizations because of the plan. Dr. Donlon highlighted that the political driving force for the completion of the ad hoc tribunals was the Security Council whilst the policy and legal driving force was the judges of the tribunals. She described the three interlocking components of the completion strategies – timelines to complete trials, concentration on most senior leaders and transfer of cases to national jurisdictions.

Dr. Donlon indicated that ICTY judges used rule 11 bis of the Rules of Procedure and Evidence regarding referral of cases to give effect to the UNSC policy. She noted that rule 11 bis stipulated that referral was possible only if certain conditions were satisfied, including for example assurances of a fair trial, adequate jurisdiction, and no application of the death penalty. As a result most senior leaders were prosecuted at the ICTY and midlevel leaders were referred to national jurisdictions. She noted that sharing evidence was crucial for success and the ICTY and Bosnia and Herzegovina prosecutions worked closely together. She presented the relationship between the ICTY and the newly created Bosnia War Crimes Chambers (that ICTY referred indictees and cases to) as an example of positive complementarity in practice and referred to Article 93 of the Rome Statute which deals with the issue of sharing of information and evidence. She cautioned that in establishing the legal framework to implement the transfer of cases and evidence attention should be paid to national legislation and procedural challenges related to the collection of use and evidence. She indicated that further lessons might be identified by referencing the Bosnian Law on the Transfer of Cases and Evidence from ICTY, which was adopted to support the case transfer process.

Mr. Hiram Abtahi (Acting Chef de Cabinet, ICC Presidency) noted that the ICC has a permanent character, and often operates in areas of ongoing crisis and conflict, which is a very different, evolving setting compared to the other International Criminal Courts and Tribunals. Mr. Abtahi noted that the jurisdiction of the ICTY was open-ended temporally, but territorially closed, and that the ICTR had a closed temporal jurisdiction but was open territorially to Rwanda and neighboring countries. Unlike these institutions, the ICC could address situations with a variety of possibilities, including, e.g. be open-ended both in terms of territorial and temporal jurisdiction.

Mr. Abtahi further distinguished between the top down approach principle of primacy of the ad hoc Tribunals and the ICC's principle of complementarity, where the Court is only complementary to national jurisdictions. This situation leads to different challenges with regard to completion strategies. Mr. Abtahi distinguished between completion issues, such as judicial and administrative work before

closing, residual functions such as jurisdictional and administrative functions, and post-closing, as well as legacy issues, related to long-term post completion projects.

Mr. Abtahi noted that as a permanent Court, the ICC did not have to deal with institutional closure. However, there are several completion issues after the conclusion of judicial activities in a situation country, including residual functions, enforcement of sentences, acquitted persons, revision of sentences, protection of witnesses, and implementation of reparation orders. For this reason, national courts should be ready to continue the work needed and assistance should be provided as early as possible.

Ms. Cecilia Balteanu (Head of External Relations and State Cooperation Unit, ICC Registry), indicated that the role of the Registry in a completion strategy is an important one due to its mandated functions and neutrality. Ms. Balteanu noted that strong national systems are a critical component of any effective and sustainable completion strategy given their primary responsibility for investigating and prosecuting Rome Statute crimes. Ms. Balteanu further noted that to date, the Registry has already had experience in closing a field presence in 2010 in Chad relating to the Darfur situation, and in the Uganda situation (between 2011 and 2015), the Court implemented a maintenance strategy reducing its field presence to a minimum due to lack of arrests. Ms. Balteanu also indicated that with regard to residual functions and legacy matters, the Registry has been transferring expertise and knowledge to the situation countries with field presence since 2005. Ms. Balteanu illustrated this point with examples from victims and witness protection, and outreach activities.

With regard to witness and victim protection and support, Ms. Balteanu noted that the Registry: trained witness and victim protection specialists from more than 20 countries; provided expert technical contributions to various witness protection programmes of national law enforcement agencies in several situation countries; gathered voluntary contributions for a special fund to support the relocation of witnesses; and partnered with UNODC to support the enhancement of national witness protection systems. From a legacy perspective, the Registry left behind reinforced national witness protection capacities to ensure that, upon completion of its work, the Court can safely leave those witnesses in need of protection measures in capable hands at the national level, i.e. relocating or resettling.

Regarding public information and outreach activities/projects, Ms. Balteanu indicated that this is one of the most crucial areas of any residual or legacy related initiatives given the fundamental purpose it serves: justice being seen to be done and ownership of that justice being taken by the affected communities and national authorities. Ms. Balteanu showed [a short video of an “Access to Justice”](#)

[Project](#) with testimonies on how innovative engagement with donors or States can cement the Court's legacy in local communities.

Mr. Fabricio Guariglia (Director of ICC Prosecutions Division) noted, while more detailed definitions still need to be refined and the Court's ongoing efforts on this front is a work in progress, that completion at its most basic level might be thought of as where the ICC considers that its mandate in a particular situation is fulfilled and the Court formally 'leaves' the situation country. Mr. Guariglia noted that the ICTY experience is useful for the ICC, but that one has to take a number of specific features of the Court into account, such as the ICC's complementarity framework (meaning that the Court's mandate is at all times subject to the existence and genuineness of relevant national processes) and its permanent nature (meaning that no separate residual mechanism needs to be established). As Mr. Guariglia reemphasized, "you just don't walk away" after the Court winds down its activities. He gave some examples of specific operational scenarios: the first scenario where there is an arrest, an active case with an investigation on full speed follows its normal course; the second scenario where an investigation remains active after a warrant of arrest has been issued, but is reduced in intensity speed pending execution of the warrant; this may lead to scenario one (arrest); or scenario three (hibernation), where evidence gathered is temporarily shelved, with limited activities to maintain or supplement the existing evidence, until there is an arrest. Mr. Guariglia noted that there are two main prosecutorial functions after concluding an investigation from an OTP perspective: tracking suspects and maintaining regular contact with local communities and witnesses, including witness protection. This is to help restart an investigation later on. Mr. Guariglia gave two contrasting examples. In the Bosco Ntaganda (DRC) case, OTP had to re-establish contact with witnesses and the victim community after ten years, many of whom felt abandoned, requiring re-engagement to restore trust. Mr. Guariglia contrasted this with the Ongwen (LRA) case where the OTP had maintained a field presence in Uganda and it was much easier to resurrect the case.

Mr. Guariglia also noted the difficulty in solving the dilemma of complementarity, where there is a referral by a State or the Security Council because national authorities are inactive or otherwise are unwilling or unable to carry out genuine investigations and prosecutions. He noted that it remains a challenge for the OTP to decide how and when to leave in such scenario. Mr. Guariglia highlighted a promising yet challenging example in the Central African Republic, where the OTP was exploring the possibility of sharing evidence with the CAR Special Court in Bangui. He noted that this was a very peculiar case and not easy to replicate. In Colombia, although the preliminary examination had lasted a long time, focused on complementarity, the OTP viewed its stance as the best outcome to continue promoting genuine national proceedings, which has often required a combination of persuasion and sanction by the OTP, and which have ultimately remained progressive to date. If the OTP has been required to end its preliminary examination prematurely, through an enforced deadline for example,

the result would have been the opening of OTP investigations. He gave the example of the OTP's 2012 interim report on Colombia, where the OTP identified potential cases that would be admissible (and therefore deserving the opening of ICC investigations), but decided to instead continue efforts to promote genuine national accountability efforts, which have since remained progressive and ongoing.¹

During his intervention **Mr. Rod Rastan** (Legal Advisor, ICC Office of the Prosecutor) recalled the relevance of the OTP's Policy Paper on Case Selection and Prioritization,² to the question of completion. Regarding preliminary examinations, Mr. Rastan recalled that the that OTPs involvement will often be due to the inactivity or otherwise inability or unwillingness of the State concerned conduct domestic proceedings genuinely. The speaker recalled that OTP's goal, as set out as early as 2003, is always to avoid ICC intervention as a result of genuine national accountability processes. There is always a preference for national processes, not just by design of the Statute, but also in terms of the benefits of local ownership, consolidation of domestic accountability norms and operational efficiency and economy for the local judiciary, for witnesses, for victims and the effected population as a whole.

Mr. Rastan then noted that when the OTP commences work in a situation, there is an OTP integrated team from the outset with team members from all divisions of the OTP. This team then develops not just a case hypothesis, but is also mandated to help the Prosecutor conceive of the OTP's overall prosecutorial programme by mapping all potential cases that meet the OTP's case selection and prioritization criteria. This not only helps to identify which cases the OTP should pursue, but also identify one aspect of completion, namely the potential end of the OTP's prosecutorial programme within a given situation. The speaker noted that due to the budget and capacity constraints of the Court, the OTP will not be able to address its identified prosecutorial programme within different situations simultaneously, leading to the need for prioritization. Beyond cases identified for prosecution at the ICC, the OTP integrated team will often be able to assesses the local situation, share lessons learned and best practices with local counterparts (described as a two-way process), and potentially cooperate in matters of evidence preservation and/or evidence sharing . He further indicated that OTP has at times been able to act as a bridge to encourage local authorities or to galvanize external assistance by other international agencies involved in areas such as technical assistance and capacity building which are beyond the capacity and mandate of the ICC.

Ms. Alison Smith (Legal Counsel and Director of the International Criminal Justice Program, No Peace Without Justice) noted that this was a useful discussion for improving perception particularly

¹ ICC-OTP, *Situation in Colombia*, [Interim Report](#), November 2012.

² ICC-OTP, [Policy Paper on Case Selection and Prioritization](#) (15 September 2016).

for the affected communities. Ms. Smith highlighted that while the ICC is a permanent institution in general, it is not a permanent institution from the perspective of a situation country, but rather a transitional justice mechanism. With regard to terminology, she indicated she preferred the term “completion” rather than “exit” or “closure”, as this was more fitting to the ICC’s context. Her perspective on completion – namely, what to do to complete the Court’s mandate going from point A to point B – is for the Court to deliver justice, but also to create conditions so that justice can be delivered locally. Ms. Smith noted that it was important to hear perspectives from the different organs of the Court, but highlighted the crucial importance and utility of having a shared vision by the Court as a whole from the beginning of an ICC activity until its end.

With regard to timelines, Ms. Smith indicated that specific deadlines might not be a useful approach. She noted that having a strategy with benchmarks could prove to be a better, more useful and manageable approach. In her view, timeframes are more difficult to predict, benchmarks answer the same questions with different answers, and a flexible and dynamic tool could be useful for the Court as a whole.

Ms. Elizabeth Everson (Associate Director, International Justice Program, Human Rights Watch), Ms. Everson noted that completion is about how the Court’s legacy is consolidated, about the scope and content of its mandate, and the crucial need for a vision. Ms. Everson said that having a vision is beneficial to help local communities and civil society better understand the ICC’s actions, but also for States to support the Court’s work. In her view, the term completion strategy is not necessarily appropriate for other aspects of the Court’s work, i.e. preliminary examinations. The kinds of completions are very different in preliminary examinations as opposed to when a situation is opened or a case is underway. It is a very different framework to the rest of the Court’s activities.

Ms. Everson also mentioned that unlike the ad hoc tribunals, who instead of a focused vision had financial pressure to close, the ICC does not have such pressure and can instead utilize its vision to communicate the need for additional resources. A vision could also help avoid miscommunication with victims’ communities to avoid the feeling of abandonment. Ms. Everson concluded that a vision on completion could be a flexible dynamic tool adaptable for each situation. The prosecutorial programme could be the first step and other Court organs can build up from there. In her view, a clear vision of what the Court is set up/out to do in a specific situation can also help develop performance indicators to assess whether the Court is doing what it is supposed to be doing. She highlighted the important role of States Parties in positive complementarity that can help support not only what the Court can do for States but also what the States can do for the Court to enable it to successfully complete its work in situation countries and hand over responsibilities to other authorities.

Questions and answers session:

In answering a question on the use of timelines or benchmarks and on building partnerships with States **Ms. Balteanu** noted that the Court reports could be seen as benchmarks, and highlighted that the Court is engaged with local communities since the opening of investigations in 2005. She noted that the video showed how the Court is forging partnerships with national authorities and local communities.

Regarding a question on case prioritization and closure of preliminary examinations **Mr. Guariglia** indicated that the OTP only works in situations where the State is unwilling or unable to investigate or prosecute. With regard to the Colombia preliminary examination, he noted that the Court has not engaged in capacity building, but that ICC staff was simply invited to participate in conferences or other similar events; The Office has also made amicus brief submissions or addressed letters or reports to the authorities outlining its position. He further clarified that in the Colombian preliminary situation, the OTP followed and assessed crimes potentially admissible under the Court's jurisdiction, then mapped out a course of action to avoid ICC opening an investigation – this included cost effective measures such as following/monitoring national efforts. In his view, this prevents the opening of an investigation by the OTP which would have more expensive implications. An additional aspect of this role includes encouraging that the peace process would be compatible with accountability goals of the Rome Statute. In terms of the OTP's own involvement, Mr. Guariglia noted that the Statute creates its own unique combination of civil law and common law traditions, by making the initiation of investigations mandatory once the art 53(1) criteria are met, but bestowing the OTP with considerable discretion once an investigation is opened to identify and selection relevant cases for investigation and prosecution.

With regard to the same question as above and a comment on the role of the Defence Council **Mr. Rastan** recalled the importance of the role of the both defense and victims counsel in matters of both complementarity sand completion, and the critical role that national Bar Associations have to play in this regard – noting also initiatives by the ICCBA at the last ASP in this area. On the issue of benchmarks or timelines in preliminary examinations, he noted that each situation was of course different and dynamic and that a premature entry might be unwise and may suffocate a national process as a result – either the OTP might exit early, stultifying a nascent domestic process that was progressing due in part to the focus of ICC preliminary examination, or the OTP might be required to open an investigation, which again might impact negatively on nascent national processes. The OTPs efforts continued to focus on catalyzing the impact and nudging the process forward. In the Colombia preliminary situation, the OTP signaled in its 2012 interim report that it was ready to open investigations with regard to a number of categories of potential cases, including the so-called 'false-positive' cases. This detailed report helped to encourage the Colombian authorities to select and

prioritize relevant cases for domestic investigation and prosecution domestic to thereby forestall the need for OTP intervention, a relationship which has resulted in the OTP accompanying the domestic process, with its attendant challenges. The same process has been attempted in the Guinea preliminary examination, where the domestic process has taken a very long time to complete, but remain progressive and ongoing. In Kenya, the same approach was tried, but failed, as no national processes were ultimately adopted and the OTP was required to intervene. In other situations, the OTP has been able to put novel questions of law early in the process to the Pre-Trial Chamber, as in the example of the jurisdictional ruling in the Myanmar/Bangladesh preliminary examination. On timelines, it was recalled that these can be artificial by not taking into account the realities on the ground and may force OTP to intervene or exit prematurely – which might be detrimental for victims’ communities as well as the national authorities concerned. The OTP had instead focused on developing benchmarks, linked to statutory or policy based criteria, which it shares with other stakeholders, to guide its assessment and help visualize the completion of its activities.

Answering a question regarding carrying out Court functions after winding down of its activities **Dr. Donlon** noted that the residual mechanisms from the experience in Sierra Leone is useful by having the classic residual functions with ongoing enforcement of sentences and supervision of conditions of detention, as well as an early release mechanism which prisoners can apply to (practice of automatic release after 2/3 of the sentence served). She noted that a residual mechanism deals with matters such as conditional release many years after closing the Court, however the ICC as a permanent institution can deal with this via its Registry.

With regard to a question on performance indicators, **Mr. Abtahi** noted that discussions were continuing under the new Registrar and new Presidency. He noted that there was no timeline, but that details would be forthcoming and that performance indicators had been often referred to in the strategic planning process of the Court. With regard to the comments raised by the Defence, Mr. Abtahi indicated that States Parties had taken these issues into account in the Rome Statute, for example through article 106 enforcement arrangements. He added that the model agreement between the Court and States also uses criteria gathered from the experience of ad hoc Tribunals.

Ms. Everson commented that completion strategies should not be seen as all-encompassing strategies, but should rather be used as a tool to orient the work of the Court. Complementarity played an important role in the legacy of the Court’s work, including through its ability to build support at the national level for issues such as the rights of defence. It could also have a catalytic effect, depending on different factors. In this regard it was important to keep checking our understanding of terminology, and refreshing the conversation, especially given the history associated with concepts such as complementarity.

In answering a question **Mr. Guariglia** suggested dropping the term “positive” complementarity to avoid confusion, and simply refer to complementarity. He noted that the 2012 OTP report shows the Colombia preliminary examination as an example of complementarity in motion. The report showed the co-existence in the same situation of areas or clusters of crimes where due to the existence of measures by the national system then there was no need for the ICC to intervene, with other clusters where the situation was clearly admissible due to lack of adequate measures; OTP however decided to engage with the national authorities rather than opening an investigation. With regard to the prerogative of the Prosecutor, he noted that the OTP has its policies which are adopted to guide the office’s functions. In addition, the 2019 strategic plan will refer to how OTP views prioritization in action. Mr. Guariglia emphasized that preliminary examinations are different from investigations. He indicated that prioritization of cases takes place within and across situations. He also noted that no case goes forward without an OTP panel of prosecutors that are not involved in the case deliberating internally in critical evidence reviews and deciding whether to recommend to the Chief Prosecutor to move forward with a warrant of arrest. In case there is no immediate arrest the case goes into hibernation, with periodic reviews and assessments on the likelihood of arrest.

Mr. Rastan added that the meaning of the phrase “positive complementarity” has evolved over time, as also signaled in the discussion at the Kampala review conference in the complementarity stock-taking exercise. At its conception, in 2003, the phrase was used by the OTP merely to address the idea that the OTP would not address its relationship with States as competitive – instead, the OTP would welcome (and even encourage) genuine national accountability efforts – meaning that it adopted a ‘positive’ approach to complementarity.

Concluding Remarks

In his closing remarks **Ambassador Neuhaus** summarized the main take-aways of the seminar. He noted that public information and transparency were of crucial importance in building respect for the ICC’s work within the local community. He added that completion in the broad sense means that the Court must make an effective contribution to long term justice. He reiterated that while the ad hoc Tribunals and the ICC are different given the ICC’s permanent nature, the main challenge for the ICC was to successfully transfer responsibility over time to national authorities that are willing and able to handle the situations. This is an important part of the ICC’s contribution to complementarity. Ambassador Neuhaus said that the Court, although a permanent institution, has a temporary nature in a situation country; the Court has to focus on delivering justice and creating a situation where justice can be delivered nationally over the long term. He further pointed out that financial pressure should not be the main force to guide the Court’s efforts but can help in priority setting and developing cost effective approaches. He concluded by recalling the Preamble of the Rome Statute emphasizing that the Court ‘shall be complementary to national criminal jurisdictions.’