



**Cour
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**International
Criminal
Court**

**ICC Judicial Seminar: Judicial Reflections on the International Criminal Justice
System after the 20th Anniversary of the Rome Statute**

The Hague, 18 January 2019

Summary

What follows is a summary of the seminar that took place on Friday, 18 January 2019, at the premises of the International Criminal Court ('ICC' or 'Court') in The Hague, Netherlands. The ca. 40 participants of the seminar included judges from the ICC, judges from several national jurisdictions, judges from a number of international or regional courts and tribunals based either in The Hague or elsewhere, and two representatives of civil society organisations in expert capacity.

The summary reflects the overall, thematic flow of the discussion and not necessarily the views of any individual speaker, nor the order in which they were presented.

Welcoming remarks by Judge Chile Eboe-Osuji, President of the ICC

President Eboe-Osuji welcomed all participants, thanking them for joining the ICC judges at the seminar. He expressed appreciation that all the ICC judges have for their colleagues around the world and was grateful that some of them had come to The Hague to attend the formal opening of the ICC's judicial year as well as to participate in the seminar.

The President recalled that last year, on the occasion of the 20th anniversary of the adoption of the Rome Statute, ministers and policymakers came to the Court to share reflections on the meaning of the Rome Statute to the world from their perspective; this seminar presents an opportunity for judges to do the same from the point of view of their expertise on the subject of law and order, both international and national.

The President noted that the ICC is a court that belongs to the world, both in a general sense but also specifically in that, within the context of the principle of complementarity, primary jurisdiction lies with the States Parties.

The President observed further that international tribunals, including the ICC, are presently facing different challenges and that today's discussion welcomes reflections to help resolve those challenges and share ideas about how to bring home the mandate of the Rome Statute.

Working Session 1 – International criminal justice in the 21st century: role of the judicial profession in addressing the challenges

Moderator: Judge Robert Fremr, First Vice-President of the ICC

Panellists: Judge Luz del Carmen Ibáñez Carranza, ICC; and Judge Ivana Hrdličková, President of the Special Tribunal for Lebanon

The goal of this session was to inspire discussion on the role that judges – whether in national, regional or international jurisdictions – can play in raising awareness of international criminal law around the world and helping to address challenges facing the Rome Statute system of international criminal justice. These challenges include current lack of global support for the ICC and how to make progress toward universal ratification of the Rome Statute; cooperation of states as a key challenge for the ICC’s effective functioning; and recent trends in global politics undermining multilateralism and the rule of law at the international level.

A central theme present throughout the discussion was the importance of building connections between different jurisdictions with a view to judges supporting each other. It was noted that putting an end to impunity is a global, joint task of all judges in the world. In this context, it was suggested that there should be a constant process of mutual learning and feedback between the ICC and judges of domestic jurisdictions. It was also said that judges should be good communicators, working as a team within a chamber, working with colleagues within their courts, as well as cooperating with other courts and tribunals to find ways to strengthen support and awareness of international criminal law. The experience and work of judges contributes irreplaceably to the rule of law in the international arena as well as in national systems.

It was recalled that in accordance with the principle of complementarity, it is a prerogative of national jurisdictions to investigate and prosecute crimes under the Rome Statute. States have the primary duty to provide justice with a view to ending impunity; the ICC is a court of last resort. However, certain national jurisdictions may lack the necessary capacity to effectively handle the gravity of cases falling under the jurisdiction of the ICC. The view was expressed that programmes are needed wherein the ICC shares its expertise and experiences to help develop the capacity of national jurisdictions for the sake of effective implementation of the principle of complementarity.

It was noted that the various international courts and tribunals face many similar challenges. The most pressing among these is ensuring the cooperation and support of States, and maintaining such support. Some of the States that currently support the international criminal justice system, moreover, are becoming increasingly critical and demand more results. It was emphasised that the ICC should make efforts not only to win over those countries that hesitate to join the Rome Statute, but also reach out to and communicate with those States that have always been committed to the Court. There is a need to discuss valid points of criticism with such States and carefully consider any suggestions or comments they may have. Their continued support is essential.

It was said that presidents of international courts and tribunals should work with States to secure the support that the institutions need as well as to help set realistic expectations, for instance with respect to the length of proceedings. Once reasonable common understanding has been reached in terms of what is realistic, every effort should be made to meet and, if possible, exceed such expectations.

It was observed that the lack of universal ratification of the Rome Statute, the Court's founding treaty, is one of the main challenges of the ICC. That said, it was noted that the 123 States Parties to the Rome Statute demonstrate the increasing acceptance of the proposition that 'injustice anywhere is a threat to justice everywhere', in the words of Dr. Martin Luther King. In reference to recent critical statements from the United States against the ICC and the fact that several major powers have not joined the Rome Statute, one participant recalled the statement of Benjamin Ferencz, the last remaining prosecutor of the Nuremberg trials, to the effect that 'It takes courage not to be discouraged'. It was observed that the positions of States can and do change; one should not become too pessimistic but rather continue to promote awareness of the Court and encourage the public and governments everywhere to support the cause of the ICC.

It was emphasised that judges must be independent from all other stakeholders and they must remain firm under their judicial mandate. Equally, States must respect the independence of the judiciary. Political issues will always be around the cases before the ICC due to the very nature of the crimes within its jurisdiction; the offences the Court deals with are intimately linked to power. This is part of the challenge that the ICC faces and the judges are the ones who must guarantee the fairness and impartiality of the proceedings to all parties.

The important and demanding role of the Prosecutor in international courts and tribunals was also highlighted, particularly in terms of presenting cases before the judges. Acquittals sometimes raise suspicions of politicization in the public eye, but a judge cannot bring a guilty verdict if the responsibility of the accused has not been demonstrated to the required standard of proof.

On a separate note, it was proposed that the ICC take note of the progress of domestic courts as well as international and regional tribunals, such as the important developments at the Inter-American Court of Human Rights with respect to victims and reparations. These include for instance the right of access to justice, the criteria for identifying direct and indirect victims, and what kind of reparations should be granted to victims. Harm suffered by victims transcends their individual lives, affecting their families and destroying the fabric of society. This cannot be repaired with money alone; other types of adequate measures are also needed.

A human rights approach requires that the justice process take into account the rights of the victims as well as the rights of the accused. The right to a fair trial extends to both. There have been developments in different directions in national jurisdictions; it is important to strike the right balance. The judges of the ICC are proud to serve in the first international criminal tribunal that gives victims the right to participate as well as awards reparations upon conviction, while also safeguarding the rights of the defendants.

Finally, it was observed that Judges should explore ways to limit the cost of proceedings. Efforts should be made to increase productivity and effectiveness while preserving fairness. Judges must strive to be efficient in everything that they do and play an active role in the cases over which they preside. Judges can increase the transparency of proceedings for instance by publicising timeline estimates and setting self-imposed deadlines, thereby addressing misconceptions about efficiency as well as helping to manage expectations. Best practice methods should be developed and shared among all judges. In this context it was highlighted that since 2015, ICC Judges have been developing a set of best practices harmonised through chambers, collated in the publicly available Chambers Practice Manual.

Working session 2 – Do judicial proceedings provide an effective response to mass atrocities?

Moderator: Judge Marc Perrin de Brichambaut, Second Vice-President of the ICC

Panellists: Judge Rosario Aitala, ICC; Mariana Pena, Senior Legal Officer, Open Society Justice Initiative; and Melinda Reed, Executive Director, Women’s Initiative for Gender Justice

This session was intended to provoke critical reflections as to the effectiveness of criminal proceedings in addressing large-scale international crimes and human rights violations, inter alia in terms of providing meaningful justice to victims and affected communities, and also in terms of deterrence of future crimes. Discussions touched upon topics such as criminal proceedings in the broader framework of transitional justice; reparations and the role of victims in proceedings; challenges posed by the magnitude of crimes and the number of perpetrators typically involved in criminal offences under the Rome Statute; the effect of acquittals; and the importance of outreach programmes.

The session produced rich discussion, with a range of diverse views, on the purpose of international criminal justice and whether judicial proceedings provide an effective response to mass atrocities. Within a specific situation, the impact of proceedings will depend on many factors, notably their outcome, the conduct of the process, inclusion of victims, outreach, and the presence or absence of other proceedings and justice measures. Globally considered, international criminal trials have extraordinary cumulative value in demonstrating that offenders can no longer count on impunity.

It was suggested that the tolerance of mass atrocities by the global community is akin to acquiescence in their commission. Respect for international law is a precondition for international stability: as one participant put it, lowering international compliance with international criminal law “brings bitter fruits to everyone”. The importance of a permanent international institution capable of addressing the gravest crimes under international law was heavily emphasised.

One of the participants recalled that most mass atrocities are committed by offenders wielding state power or the power of organisations. In this connection, it was noted that international law has over time shifted from a state-centred system to a modern approach that recognises individuals as subjects of international law, both as perpetrators and as victims. It was emphasised that by shifting from state responsibility toward individual responsibility, the international community knowingly assumes the

burden of the slower, more cumbersome criminal proceedings, as well as the challenges of presenting compelling evidence in a fair trial to prove guilt beyond reasonable doubt.

Furthermore, in this context, the challenge presented by the frequently massive scale of Rome Statute crimes was highlighted: inevitably, only a limited number of perpetrators will stand trial for crimes that caused mass victimisation, and only a portion of the crimes can be covered by the investigations. One of the participants stated that judges are well aware that they “can write a small page of history, but the entire book is not in our hands”.

These limitations are relevant factors when considering the impact of judicial proceedings on the victimised populations and society at large, and they underline the crucial importance of outreach, which is discussed in more detail further below. On a related note, participants discussed at some length the impact that decisions on charging and crime labelling have on victims, even for those who are not directly participating in the case.

A number of participants placed international criminal justice in the broader context of transitional justice. It was observed that transitional justice employs a range of responses to mass atrocities, including judicial proceedings, truth and reconciliation commissions, reparation regimes and institutional reforms. As such, transitional justice seeks long-term benefits in reforming and healing the affected society. Accordingly, the effectiveness of judicial proceedings, from a transitional justice perspective, would be assessed according to their impact toward that goal, in complementarity with other measures. Victims commonly view judicial proceedings as only one part of achieving meaningful justice.

It was posited that different societies attached varying relevance to criminal proceedings but all of them do recognise the value of justice. Not only the outcome of proceedings matters; the process in itself is highly important. Actively engaging with and consulting victims regarding how they want to be represented will add to a personal sense of justice. To victims, inclusion in the judicial process is key to making them feel empowered, heard and acknowledged. The more victims have a positive experience of justice, the greater the likelihood of positive impact on society.

This is closely connected to the importance of outreach, which was underlined repeatedly by several speakers during the session. Outreach activities are necessary to ensure that victims and affected communities have the opportunity to fully understand and appreciate the judicial proceedings of the ICC. Communities need to be properly informed on how the Court functions, why it may intervene in certain situations but not others, how and why various decisions are taken, what are the rights of victims, and so forth.

It was stated that effective outreach needs to be local, victim centred, gender sensitive and innovative, adapting to the circumstances. As an example of such an approach, it had been suggested in a recent study that rural health workers could be engaged in the outreach process in the Central African Republic, because they speak the local language, they are trusted by the community, they can reach to those who have no access to media, and they are skilled in communicating with victims of sexual and gender based crimes.

It was recognised that the ICC has inadequate resources to conduct extensive outreach activities at a micro-level, and civil society organisations are encouraged to assist. More broadly, the important role of non-governmental organisations in increasing support for and understanding of the ICC and its proceedings was emphasised by many speakers, one of them calling civil society the Court's "third pillar".

Details were given on the ground-breaking procedures of the ICC that enable the participation of thousands of victims in the Court's cases through legal representation. The work carried out in the field by the ICC Registry is key in this regard. Equally was highlighted the importance of the ICC's reparation regime – a first in international criminal justice – and the role played by the Trust Fund for Victims in this context.

It was strongly suggested that reparations should not be restricted to money – they can also be symbolic and restorative, as is indeed the case at the ICC. One participant suggested that the ICC should move away from a reparations system that depends on convictions, and endorse a non-conviction-based system – rather basing reparations on the fact that the crime occurred – one argument for this being that the convicted persons are frequently indigent. In return, it was highlighted that the Trust Fund for Victims associated with the ICC is, in fact, already at present able to provide assistance to victims regardless of convictions and irrespective of trial proceedings. The Fund is currently expanding its assistance activities, which are specifically aimed at addressing harm caused by crimes under the Rome Statute.

While it was acknowledged that acquittals can cause collective disappointment among victimised populations, it was also stressed that this is not always the case. Specifically, one participant noted that, to this day, victims celebrate the conviction of former Guatemalan President Ríos Montt for genocide and crimes against humanity, viewing it as an acknowledgement of their suffering despite the conviction having been overturned by the country's Constitutional Court.

On a related note, it was highlighted that the legal process can be very significant also in the absence of a conviction. The case of former Augusto Pinochet was given as an example of proceedings which were immensely valuable for ushering in an “era of accountability”, even though he never actually stood trial. The deterrent effect and symbolic value of international trials was brought up by several participants.

Outreach is important to manage the expectations of the victims, so that everyone is properly prepared for possible outcomes of cases before the Court. Outreach activities are, therefore, necessary to inform the victims and the civil society in general that judicial proceedings concerning mass atrocities – just like any criminal trials – might end up in either convictions or acquittals.

A comment was made to the effect that military and political responses to mass atrocities may be quicker in halting violations, but they cannot replace judicial proceedings, which have great symbolic and normative impact, thereby providing the victims with the first step of restorative justice.

Closing remarks by Judge Chile Eboe-Osuji, ICC President

President Eboe-Osuji thanked all those present for their participation, noting that the discussion had been very stimulating. He expressed particular appreciation for colleagues from other jurisdictions who had travelled far and wide to join the seminar. The President recalled that this was the second judicial seminar organised by the ICC, following the first one held the previous year. The exercise had proven to be fruitful and beneficial, and the Court intends to make it an annual tradition.