September 2015

The Peripheries of Justice Intervention: Preliminary Examination and Legacy/Sustainable Exit

CONCEPT NOTE

International Expert Meeting, co-organized by the Grotius Centre for International Legal Studies and the Centre for International Law Research and Policy, with support from Netherlands Organisation for Scientific Research, in the context of the Project 'Post-Conflict Justice and Local Ownership', on 29 September 2015 in the Peace Palace at The Hague

I. BACKGROUND

In contemporary discussions on the impact and effectiveness of international criminal justice, considerable emphasis has been placed on trials, legal procedures and their effects. Less attention has been devoted to the peripheries of justice intervention (the 'in' and the 'out'), namely preliminary examinations ('PEs') and exit/legacy strategies. Both activities are crucial for the accomplishment of goals and mandate of international courts and tribunals, but not yet subjected to systematic discourse. Statutory instruments provide only provide rudimentary guidance. Most elements have been developed incrementally through prosecution ('OTP') practice[1], judicial action and policies of the Registrar. ICC action (that is, the opening and management of PEs) and certain types of inaction have come under scrutiny or critique.[2]

The purpose of this expert seminar is to take stock of policies and practices regarding the peripheries of justice intervention, to review some of the existing approaches, and to identify potential strategies to address underlying tensions and problems. It draws on findings of the project on 'Post-Conflict Justice and Local Ownership', carried out by the Grotius Centre for International Legal Studies, with support of the Netherlands Organization for Scientific Research.

The seminar forms part of a new project on 'Quality Control in Preliminary Examination' undertaken jointly by the Grotius Centre for International Legal Studies and the Centre for International Law Research and Policy (the 'Quality Control' Project). The 'Quality Control' project will hold a second international seminar and produce an anthology on 'Quality Control in Preliminary Examination' (to be edited by Professor Carsten Stahn and Professor Morten Bergsmo).[3]

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1 See, e.g., OTP, Policy Paper on Preliminary Examinations, November 2013, ICC-OTP, Report on Preliminary Examination Activities 2014 , 2 December 2014 and the OTP Strategic Plan (2016-2018), 6 July 2015.

2 See Human Rights Watch, 'ICC: Course Correction: Recommendations to the Prosecutor for a More Effective Approach to "Situations under Analysis"', 16 June 2011; 'Unfinished Business: Closing Gaps in the Selection of ICC Cases', September 2011.

3 Building on Morten Bergsmo (ed.): 'Quality Control in Fact-Finding', Torkel Opsahl Academic EPublisher, Florence, 2013, ISBN 978-82-93081-78-4, 500 pp.

II. FOCUS

1. PRELIMINARY EXAMINATIONS

Over the past decades, PEs have become one of the most important instruments in ICC activity. They produce significant political and legal effects. The conduct of PEs raises fundamental questions relating to the nature of the Court, its mandate and its perception. The seminar will explore three dimensions in greater detail: (i) Context, nature and function of PEs, (ii) the legal framework, and (iii) methodology.

Welcome
9.00 – 9.15 Carsten Stahn (Leiden University) and Morten Bergsmo (Peking University)

Panel 1:
Context, Nature and Functions of PEs
09.15 – 10.45

The role and treatment of PEs differs across situations. ICC practice reveals a certain degree of uncertainty regarding the goals and functions of PEs. In the framework of the Statute, PEs are 'investigation-centred'. They are meant to serve as a means to decide whether or not to open an ICC investigation. But this narrow functional/institutional view, that is, the conception of PEs as gateway to investigations, contrasts with some of the broader analytical features of assessment and the link between PEs and goals of the Statute (that is, prevention, complementarity, ending impunity).[4] PEs carry significant leverage through their public exposure of potential violations. There is a deeper question whether and to what extent PEs might have a value *per se*, and what purposes they should legitimately pursue. Points of discussion include:

- Is there virtue in opening a PE *per se,* in light of its contribution to early warning, its potential deterrent/preventive effect[5] or its catalytic impact on domestic action? Or does a PE only make sense if it is quickly connected to the prospect of criminal investigations?
- Should the effectiveness of PEs be assessed in relation to processes or specific outcomes?
- To what extent should PEs be pursued to engage with national authorities and encourage national trials? What factors are conducive to ICC leverage, and what are its potential unintended effects/risks?
- Can and should the threat of a PE be used as an instrument to foster/sequence accountability in the peace and justice debate, and how? What space is there for dialogue prior to the opening of a preliminary examination?
- Does the opening of too many PE's without follow-up weaken the Court? What is in reverse, the cost and impact of inaction, that is, the non-opening of a PE?

[4] According to the OTP Strategic Plan 2016-2018,. sub-goals for the 2016-2018 time period include: '(1) further developing cooperation activities and networks related to preliminary examinations, (2) further enhancing complementarity at the preliminary examination stage, and (3) continuing to increase the transparency of and public information on preliminary examinations' (para. 54).
[5] OTP Strategic Plan 2016-2018, para. 54 (PEs 'can also help deter actual or would-be perpetrators of crimes through the threat of international prosecutions').

Speakers:

- Leslie Vinjamuri, SOAS, University of London
- Priscilla Hayner, Consultant
- Mark Kersten, University of Toronto, Munk School of Global Affairs
- Mark Drumbl, Washington and Lee University

Panel 2:
Legal Framework of PEs
11.15 – 13.00

The legal framework of PEs is only partially regulated. Key procedural and policy elements have been developed by OTP practice (for example, Regulations, Policy Papers) and jurisprudence. Criteria of assessment have been defined for purposes of consistency. But crucial aspects remain ambiguous or in need of clarification.

- Step-based approach towards Art. 53: Does it make sense to divide assessment under Art. 53 into individual steps that are sequenced after each other ('check-list' approach), or is feasible to adopt more fluid framework of analysis?
- Exercise of prosecutorial discretion: To what extent does the OTP enjoy a greater degree of discretion in relation to PEs than in relation to investigations, and how do assessments differ?
- Timing: Does an open-ended PE serve the purposes of the Statute? Should there be a time limit, or an ideal timeline for PE's to assess relevant national proceedings or continue to collect information in order to establish sufficient factual and legal basis to make a determination?
- Exit from PE's: What criteria should guide 'exit' from PE's? Should they be formalized?
- Judicial review: Only limited aspects of PEs are subject to judicial review. Is the existing framework adequate, and how should a proper balance be struck between prosecutorial discretion, State interests and judicial assessment (Comoros)? Would certain aspects of PEs, such as jurisdictional determinations, benefit from greater judicial scrutiny since the start of the proceedings? Would it make it sense to create a procedure for early Pre-Trial Chamber involvement, in light of the limitations of Regulation 46 and Art. 19(3)?

Speakers:

- William Schabas, Middlesex and Leiden University
- Elizabeth Evenson, Human Rights Watch
- Mohamed M. El Zeidy, ICC
- Comment: Rod Rastan, ICC

Panel 3:
Methodology
14.00 – 15.30

OTP methodology has evolved in past years. More and more non-judicial or quasi-judicial bodies produce evidence, materials and information that is relevant to ICC investigations and prosecutions. But the ICC often needs to start from scratch in its own analysis and investigative policies. Demand exceeds capacity. There is a turn towards greater transparency in ICC analysis.

This transparency enhances leverage and the perception of the equal application of the law. But it also comes with reputational costs for States or potentially individuals. This panel discusses some of these dilemmas.

- Transparency vs. confidentiality: What are the pros and cons of transparency? To what extent should PE serve as a means of 'naming and shaming'? In what areas might there be room for confidential dialogue? It is helpful to produce an annual report, as in the tradition of human rights bodies[6]?
- Relationship to other fact-finders: To what extent does an ICC PE differ from other types of fact finding (for example, commissions of inquiry), and how appropriate are existing resources and ICC methodologies?
- To what extent should the ICC carry out monitoring, and how does its role in this regard relate to/differ from general human rights monitoring? To what extent is the ICC able to monitor domestic proceedings, and how could this be improved?
- Efficiency: To what extent is there a risk that lengthy PEs are 'frontloading' the process or come at the expense of effective investigations and trials?

Speakers:

- Paul Seils, ICTJ
- Shehzad Charania, Foreign and Commonwealth Office, UK
- Cecile Aptel, OHCHR
- Comment: Emeric Rogier, ICC

2. SUSTAINABLE EXIT

Exit from situations remains one of the challenges of ICC action. Traces of an exit strategy have been identified as part of the work on complementarity and outreach.[7]. But Court policies are still emerging. The final panel seeks to review this debate.

Panel 4:
'Legacy' and Sustainable Exit after Intervention
16.00 – 17.30

The main question is whether and how the ICC can leave a sustainable impact in situations after the closure of situations and cases. This involves consideration of a number of crucial issues:

- Should there be greater transparency in relation to the closure of situations, and post-ICC intervention strategies?[8] What functions should the ICC continue to exercise after 'exit' from cases/situations?
- How can ICC engagement leave a sustainable impact in situations? What lessons can be learned from other tribunals? Can and should ICC work on complementarity and reparation be more effectively connected to broader objectives of peace, justice and human development?

[6] OTP Strategic Plan 2016-2018, para. 54.
[7] Report of the Court on complementarity: Completion of ICC activities in a situation country, ICC-ASP/12/32, 15 October 2013.
[8] OTP Strategic Plan 2016-2018, para. 36 ('exit strategy for situations').

- Is the notion of 'legacy' helpful?[9] What lessons can be learned for international justice from transitional justice processes?

Speakers:

- Stephen Rapp, former US Ambassador-at-Large for War Crimes
- Kevin Heller, SOAS, University of London
- Gabrielle McIntyre, ICTY
- Viviane Dittrich, London School of Economics

Closing

[9] Stahn, Carsten, Re-Constructing History Through Courts? Legacy in International Criminal Justice (June 9, 2015). Available at SSRN: http://ssrn.com/abstract=2616491 or http://dx.doi.org/10.2139/ssrn.2616491