24 July 2020

SECRETARIAT OF THE ASSEMBLY OF STATES PARTIES TO THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

THE HAGUE WORKING GROUP

Complementarity

24 June 2020

Summary

Representatives of the ad country co-focal points, Ambassador Matthew Neuhaus (Australia) and Ambassador Brânduşa Predescu (Romania), chaired the meeting.

1. On 24 June 2020, the co-focal points held (via videoconference) a first informal consultation on complementarity with a panel of experts, which included Dr. Marieke Wierda, Prof. Carsten Stahn, and Dr. Rod Rastan. Mr. Richard Goldstone was also present at the meeting, representing the Independent Expert Review experts from Cluster 3 (preliminary examinations, investigations, and prosecutions). The meeting had 73 participants, including from States Parties, the Court, and civil society.

2. In his introduction, Ambassador Neuhaus noted that the **priority focus of the meeting and the year was "Complementarity and the relationship between national jurisdictions and the Court",** as per the Review Resolution agreed at ASP18.[1] In this context, the aim of the meeting was to reflect on how the principle of complementarity had developed **ten years on from the Kampala Review Conference**,[2] including what was working and what was not. Ambassador Predescu introduced the panel of experts.

3. In her presentation (PowerPoint slides circulated with this note), **Dr. Marieke Wierda**[3] noted that the 2010 Review Conference in Kampala highlighted "positive complementarity" as a central objective and one which gave a role to the Assembly of States Parties (ASP). Dr. Wierda highlighted that domestic proceedings had been instituted in many countries where the ICC was active.[4] She noted that some academic research had suggested there was an increase in domestic prosecutions of Rome Statute crimes since the creation of the ICC, although it was still unclear whether there was – scientifically – a causal link with the ICC's presence.[5]

4. Dr. Wierda set out a number of **perceived "flaws" of complementarity**. These "flaws" did not necessarily need to be fixed, but were rather matters of interpretation that had generated complexities. The **first**, in her view, was that the principle of complementarity was sometimes considered as being too "Court-centric". Notions such as the "inactivity test", "uncontested admissibility", "self-referrals", the "division of labour", and "the impunity gap" were sometimes defined from a "Court-centric" perspective, with little reference to the realities of a national jurisdiction.

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[1] ICC-ASP/18/Res.7

[2] https://asp.icc-cpi.int/en_menus/asp/reviewconference/Pages/review%20conference.aspx

[3] Dr. Marieke Wierda is a Dutch lawyer specialised in human rights, international criminal law, rule of law and transitional justice. She is currently working as the Rule of Law Coordinator for the Dutch Ministry of Foreign Affairs. Dr. Wierda presented in her personal capacity.

[4] Dr. Wierda provided a number of examples, including: Colombia – the establishment of the Special Jurisdiction for Peace and before that, Justice and Peace Law; Uganda – International Crimes Division (Kwoyelo case); Libya – trial of 33 senior former Gaddafi regime officials; Afghanistan – 151 potential cases; CAR – the Establishment of Cour Special; Guinee – building a courtroom in order to conduct trials for stadium killings; Cote d'Ivoire – the Special Inquiry and Investigation Unittrials including that of Simone Gbagbo; Gambia – national investigations and trials since overthrow of former president Yahya Jammeh in 2016.

[5] For example, Geoff Dancy and Florencia Montal, "Unintended positive complementarity: Why International Criminal Court Investigations May Increase Domestic Human Rights Prosecutions", AJIL, 2017.

5. A **second** perceived "flaw", in Dr. Wierda's view, was that the Court was competing for cases. In some instances, a national jurisdiction had initiated cases and then found themselves in admissibility battles with the Court. The narrowness of the "same person, same conduct test" had become an issue.[6] The dynamic between national jurisdictions and ICC could change from amicable to adversarial, as had been the case with Libya.

6. A **third** perceived "flaw" was that the principle of complementarity did not seek to address broader rule of law challenges. This allowed the Court a head start on cases at a point when conflict or post-conflict societies were still dealing with many other challenges. The Sustainable Development Goals – in particular goal sixteen of promoting peaceful and inclusive societies – could serve as a useful framework to address these broader rule of law challenges in an integrated and coherent manner.

7. Dr. Wierda highlighted the **distorting effect of complementarity** where the Court focused on a few individuals and a handful of cases. She noted that in some cases this could lead to cynical manipulation by states who could try to guess ahead of the ICC who might be prosecuted and devise a case against this person.

8. A **fourth** perceived "flaw" of complementarity was that it could create a **"due process blindness".** The case of *Abdullah Al-Senussi* was an example. In that case the domestic trial did not meet international standards and the ICC was unable to do anything about it.

9. Finally, Dr. Wierda noted the perceived "flaw" of complementarity as creating **"parallelism",** whereby challenges at the national level were often replicated at the international level. This was because the ICC was reliant on national jurisdictions on issues such as arrests, witness protection, and security. In this context, Dr. Wierda noted "positive complementarity" might have had the most impact in Colombia. However, this could have been because Colombia was more capable of carrying out of investigations and prosecutions. It could be considered that the Court may have had the most impact where it was needed the least.

10. Despite certain perceived "flaws", Dr Wierda maintained the principle of **complementarity remained important.** In her view, complementarity should also be about the internalization of the Rome Statute at a domestic level, in the same way that states internalized international human rights norms and standards. More could be done under this conception of positive complementarity to stimulate national jurisdictions to take some of the burden from the ICC and allow it to act where it could have the most impact. Dr. Wierda added that a slightly wider role for complementarity could allow for the development of specialized entities. In this context, there remained a role for the ICC to draw on its expertise to strategically and selectively assist or bolster national jurisdictions, without incurring significant costs.

11. Dr. Wierda highlighted the political role of the ASP, which could increase the impact of the Rome Statute and enhance long-term prevention efforts. However, it was important to create coherence with other international interventions that sought to do the same, including UN peace operations and the UN High Commissioner for Human Rights. The ASP was in a position to advance that coherence, which would in turn alleviate pressure on resources available to the ICC. Dr. Wierda encouraged the ASP to take a more proactive approach to linking national authorities with organizations that could provide technical assistance.

12. In his presentation, **Prof. Carsten Stahn**[7] noted that when talking about the application of complementarity towards domestic jurisdictions there were **different concepts of complementarity in the Rome Statute.** On the one hand, there was the legal technical concept in articles 17, 18 and 19 of the Statute. On the other hand, there was a more systemic concept of complementarity reflected in

[6] See, e.g., DRC (Lubanga, Katanga, Ngudjolo Chui), Libya (Saif Al-Islam, Abdullah Al-Senussi), Cote d'Ivoire (Simone Gbagbo).

[77] Prof. Carsten Stahn is Professor of International Criminal Law and Global Justice at Leiden University and editor of Leiden Journal of International Law. He is also the Program Director of the Grotius centre of International Studies in The Hague.

the preamble of the Statute, which was related to the goals of the ICC. The latter referred to questions of the division of labor, coordination and cooperation between the ICC and domestic jurisdictions.

13. Prof. Stahn said that the ICC had developed jurisprudence according to which domestic jurisdictions had to model their own cases after ICC cases. This approach had been developed based on a more literal and systematic reading of the "same person, same conduct" test in the Statute. This test was strict in light of a number of different elements: the fact that the challenge fails in case of inaction; states need to show concrete investigative steps; the timing requirement, which requires admissibility to be assessed at the time of the Court's determination on admissibility; and the standard of review, namely the "substantially the same conduct" test which has been interpreted to require "overlap between incidents being investigated by the Prosecutor and those being investigated by a State". **Complementarity had become more "ICC-centric" rather than State centered**, by focusing on the charges and outcomes rather than dialogue and process.

14. Prof. Stahn echoed Dr. Wierda's point on the tendency for "parallelism" between the ICC and domestic jurisdictions, whereby they mirror each other's weaknesses and strengths but do not complement each other. This was the broader policy critique that had developed in practice, where there was not enough leeway or time for States who were willing to exercise their domestic jurisdiction to genuinely investigate and build their domestic case to catch up with the ICC. In his view, this was particularly a burden for States with limited resources and could have a deterrent effect in circumstances where they were willing to pursue cases but then see little hope of successfully achieving this.

15. Prof. Stahn suggested **three ways to address this problem**. The **first** option would entail abandoning the "same person, same conduct" test and instead focusing any genuine domestic process on satisfying the admissibility threshold. This approach would require reflection on the meaning of "genuineness" of State conduct. One could not expect the Court to rely on the good faith of States. Another downside of this approach would be the possibility that one national case could block an entire ICC situation. However, Prof. Stahn indicated that the most fundamental objection to this approach was that it would require amendments to the Statute. Complementarity had been adopted as a package. Changing the "same person, same conduct" test would, for example, also require an amendment of Article 20 (*ne bis in idem*) and Part 9 (cooperation) of the Statute. This would result in opening a broader discussion on the framework of the Statute itself.

16. The **second** approach, in his view, would be to rely on a more contextual interpretation of Article 17. Judge Usacka had supported this reading, arguing that conduct was only one element that needed to be taken into account in admissibility. Consequences and circumstances should also be taken into account. This approach would allow the Court to take a more flexible reading of the "same person, same conduct" test by, for example, dropping the requirement that States must investigate or prosecute the same incident.

17. The **third** approach would be to apply the principle of "qualified deference". This principle had originally developed in the context of transitional justice and could enable more dialogue and a process-based understanding of complementarity, taking context into account. This approach provided greater deference to domestic jurisdictions in the determination of admissibility, while at the same time limiting possible manipulation of the Court as a result. This approach was already embodied in Article 18(2) of the Statute, but further guidance was needed to develop and define the criteria needed for application of this principle.

18. Prof. Stahn noted that the best way to **strengthen complementarity was through dialogue and consultation**. The ICC jurisprudence (*Yekatom* case) had made it clear that issues which arise from admissibility before the Court under Article 17 remained a judicial matter to be addressed by the judges. This, however, did not exclude the ASP from playing a constructive role at the political level and particularly in relation to dialogue on complementarity in the spirit of Kampala stocktaking exercise.

19. As a concrete step, Prof. Stahn suggested the creation of a **more structured forum inside the Assembly**, such as an "ASP task force on complementarity". This taskforce could help address some

of the more systemic dimensions of complementarity. It could be composed of selected representatives of States Parties. Currently, the Secretariat was at the technical level mandated with some limited assistance functions. However, there was no political structure for States Parties to consult and coordinate collectively on the more systemic dimensions of complementarity, such as galvanizing support for capacity building or facilitating communications between the Court and non-States Parties. Such a forum would become more desirable as the ICC moved towards formulating completion strategies for its own situations. It would also be useful in relation to the question of reparations, where the interplay of the Court and the domestic jurisdiction often continued years after the cases had been decided.

20. Prof. Stahn noted that by facilitating dialogue and cooperation with such a body, the ASP could address complementarity issues as an intermediary between affected States and the ICC beyond issues of non-compliance. It could also serve as a collective platform to create leverage for effective investigations or prosecutions, channel knowledge and expertise to facilitate domestic justice efforts, engage with States that face impediments, and serve as a sounding board for concerns from States. Such a forum could also link actions of different international actors, including State support or engagement of international organisations or NGOs. Lastly, this body could have a mediating role in respect of difficult relations between the Court and States Parties, including with non-State Parties. Such a novel approach would require a more targeted and sustainable structure beyond the Bureau structures. In responding to a question, Prof. Stahn suggested that a way to reduce budgetary expenditure for the suggested ASP body could be to initiate a more informal structure, which could in effect lead to costs savings from the Court's budget.

21. **Dr. Rastan**[8] started his presentation by recalling the delegates attention to the – still relevant – 2010 Report of the Bureau on stocktaking with regards complementarity, which was submitted to Kampala as part of the broader stocktaking exercise.[9] In his presentation, Dr. Rastan **recalled the two dimensions of complementarity** set out in that report: on the one hand, the national authorities having the primary responsibility to investigate and prosecute crimes, and on the other hand, the Court complimenting that existing system.

22. Dr. Rastan distinguished between the systemic aspect of complementarity trying to combat impunity through a shared effort between primarily national authorities and the Court, and the more technical aspect of complementarity in Article 17, which related to the Court determining forum allocation in view of whether a case should be heard at the ICC or at the national level. He observed that over the years it was clear that some confusion had been created around the complementarity principle, stemming in part from the OTP's use of the term "positive complementarity". Dr. Rastan indicated that what the OTP was seeking to convey was that the Office did not view complementarity, in principle, as a competition between the ICC and States Parties over cases. Rather, the OTP viewed complementarity as a partnership where there was a role for the Court, but the primary responsibility resided at the national level. He added that the OTP ICC aimed to engage in a "positive" manner with States in determining issues of admissibility, which required a combination of partnership and vigilance.

23. Dr. Rastan observed that complementarity -- thought of as a collective effort to combat impunity – was, in this sense, based on the idea of a system of **cooperation and dialogue between the OTP and national authorities**, in particular on matters of forum determination where there was a wide scope for consultations with the national authorities due to the significant discretion of the ICC prosecutor in terms of case selection. Dr. Rastan noted that because the Court was set as a permanent body it could not spend 20 to 30 years dedicated in its focus on one single situation, such as the ICTY and ICTR. It had to be much more restrictive in its scope. This was one of the weaknesses of the Court when compared to the *ad hoc* tribunals, which became more efficient and developed economies of scale after each case, with evidence, knowledge and expertise gathered in one investigation capable of being rolled over to another. The ICC could not easily replicate the depth of this model, as it lacked

[8] Dr. Rod Rastan is a Legal Advisor in the Office of the Prosecutor at the International Criminal Court.
[9] Report of the Bureau on stocktaking: Complementarity – Taking stock of the principle of complementarity: bridging the impunity gap (ICC-ASP/8/51). See at: https://asp.icc-cpi.int/iccdocs/asp_docs/ASP8R/ICC-ASP-8-51-ENG.pdf

the resources, capacity and time. The Prosecutor will typically need to investigate multiple situations, with highly different complexities, at the same time. By its nature, the OTP had to focus on bringing cases that would be admissible before the Court – the primary role of the OTP was not to act as investigative mechanism to collect evidence and build cases that would be handed over for national prosecutions, as a result of an inadmissibility finding.

24. In terms of the more technical aspect of complementarity under Article 17, Dr. Rastan noted that the Court's case law has been focused and narrow in scope, contrasting with the systemic notion of complementarity. This was unavoidable, since the Statue's admissibility provisions were very specific in focussing on avoiding two jurisdictions concurrently investigating and/or prosecuting the same case. This would be not only inefficient, but would also violate the defendant's right in view of the principle of '*ne bis in idem*' (double jeopardy) under article 20(3) -- whereby the same person cannot be tried in two jurisdictions for the same conduct. Dr. Rastan highlighted that Article 17 was not only linked to the principle of *ne bis in idem*, but also other provisions, such as Article 90, which made it clear that the admissibility assessment occurred with respect to "the same person for the same conduct". Thus, changing this test would require amendments to the Statute. To date, the Appeals Chamber had upheld this test, with the proviso of requiring a qualitative assessment of sameness of conduct to the standard of "substantial sameness".

25. Echoing the two previous presentations and the approach taken in the Kampala stocktaking exercise, Dr. Rastan recalled that the Court and the ASP have different roles. The Court perforce had to focus on the specific case before it, and therefore could not directly engage in helping a State Party to build national capacity more generally. Instead, building a broad framework for combating impunity was a role reserved for the ASP and other actors. But while these two roles were different, they complemented each other, and the Rome Statute system could not work unless they were working together: i.e. specific Court rulings on the admissibility of particular cases, and the broader effort to ensure States assume their primary responsibility to investigate and prosecute such crimes.

26. Dr. Rastan recalled how the **2010 Complementarity Stocktaking Report of the Bureau** described four different scenarios in which the notion of complementarity in a systemic manner saw a separate role for the Court and the ASP. He indicated that these still remained relevant.

27. In the **first scenario** – where no crimes within the jurisdiction of the Court had been committed – the Bureau report noted it was for relevant States and others to address accountability, with limited role for the Court, but greater scope for bilateral cooperation between States themselves.

28. In the **second scenario** – where crimes within the jurisdiction of the Court may have been committed and the situation was under preliminary examination – the Bureau report observed that ASP assistance to build ability or willingness could avert the need for the Court to intervene.

29. In the **third scenario** – where the Court was investigating and prosecuting cases but there was an increase in domestic capacity that would enable burden sharing – the Court could share information or best practices and build synergies; albeit, as the Bureau report stressed, the roles of building capacity and delivering technical assistance were for States Parties, not the Court.

30. In the **fourth scenario** – where the Court had concluded its investigations and prosecutions, accountability for other alleged perpetrators had to revert to the national system – the Bureau report noted that the ASP could help the Court in creating a complex multifaceted response to the transitional justice needs of a State and help to transition from the ICC's involvement to a fully national process.[10]

31. In his conclusion, Dr. Rastan highlighted the significance of the 10 year anniversary of the Kampala stocktaking exercise and the value of revisiting its conclusions and taking stock of developments in recent years, across different national jurisdictions as well as by international partners. The speaker noted that the goal of ensuring **national systems are catalyzed into domestic action** was a process that must continue to be strengthened in order to meet the objectives of the

[10] Report of the Bureau on stocktaking: Complementarity – Taking stock of the principle of complementarity: bridging the impunity gap (ICC-ASP/8/51), paras. 19-26. See at: https://asp.icc-cpi.int/iccdocs/asp_docs/ASP8R/ICC-ASP-8-51-ENG.pdf

preamble: since failure to do so would detract from the primary responsibility of States in this area and likely overwhelm the Court beyond its capacity.

32. In response to a question on the potential for a broader role for the ASP, Dr. Rastan recalled previous initiatives undertaken post-Kampala, including the Greentree process, which had focused on the question of how to implement complementarity in practice and mainstream complementarity into development cooperation and Rule of Law programmes.[11] He suggested that there could be room for exploring and enhancing the role of the ASP in relation to the themes that were in Kampala stocktaking recommendations.

33. In relation to a similar question on the role of the ASP, Prof. Stahn noted that the Secretariat provided support of a technical nature, but there were broader political issues of the systemic dimension of complementarity that needed to be addressed. The Bureau structures had limitations, for example, its rotating nature and lack of rule of law assistance expertise. A specialized body could provide support in a sustainable manner by furthering completion strategies, mobilizing support for domestic investigations and prosecutions, facilitating reparations, and acting as a mediator. This forum could include political expertise, experts from capitals, and expertise on complementarity work, including representatives from the Court, and from OTP in particular.

34. Dr. Wierda noted that unfortunately there was a **tendency to work in silos**, with the international criminal justice community, transitional justice community, and rule of law community working separately. In this regard the ASP could play a role in facilitating and streamlining discussions among the different actors in the different fields to better address global challenges. She also recalled the Greentree process, and recalled that such initiatives were of a coordination nature, were budget neutral and could in fact generate saving and efficiencies.

35. **Comments from States** representatives touched on the challenges surrounding the criteria defining "unwillingness" or "inability" to carry out investigations or prosecutions by national jurisdictions, with unclear and different interpretations of the standard of proof. Some delegations noted that enhancing interactions and dialogue between OTP and national authorities should be possible without establishing an intermediary body. At the same time, the **ASP should be able to facilitate State to State cooperation** and interactions between the Court, States, international organizations and civil society for strengthening national jurisdictions without increasing financial resources for the Secretariat of the ASP for this purpose.

36. Some concerns were also raised with regards the effects of the COVID-19 pandemic in slowing down complementarity processes. Dr. Rastan noted that COVID-19 had not considerably affected the work of the Court, though there had been an increase in the challenges encountered, and that the proceeding had been able, with adjustment, to continue.

37. Comments from some States also echoed a call from the presenters to rely less on the Court by looking to the efforts of other institutions in the international system for technical cooperation, as a means by which to strengthen national capabilities.

38. One State queried whether the facilitators could **enable direct engagement between States Parties and the Prosecutor** concerning complementarity issues in the OTP's Preliminary Examination Policy – including the complementarity phase of a preliminary examination and the alleviation of some of the Court's current problems (e.g. the OTP's methods for determining "willingness") with stricter structures and timeframes. Another State raised concerns with regards to the potential unintended consequences of publicizing preliminary examinations and whether it was advisable for the OTP to only publicize once permission was sought to open an investigation. With regards to next steps, the idea proposed by the co-focal points on the dissemination of a questionnaire was welcomed. In addition, calls were made for continuing dialogue with States Parties for the uniform application of the principle of complementarity, that was deeply rooted in the Court acting as one of last resort and in setting out a timeframe for the completion of the complementarity phase of a preliminary examination.

[11] See e.g. *Report of the Bureau on complementarity*, ICC-ASP/11/24, 7 November 2012, para. 26.

39. One State noted the **disparity between the national jurisdictions and the Court** in respect of the limitations on investigation work. While at the domestic level there tended to be a time limit for the closing of an investigation, a similar limitation did not exist in the Rome Statute – this created a lack of balance. This disparity should be therefore considered when the Court assessed the seriousness and completeness of an investigation carried out by a national judicial authority. Prof. Stahn noted in response that such a deadline already existed in the jurisprudence, as the OTP needed to close its investigations by the confirmation hearing. With regards to preliminary examinations, Prof. Stahn noted that a middle ground could perhaps be found by incentivizing the OTP to create its own internal benchmarks rather than the more difficult solution of amending the Statute, noting that a rigid approach would not be workable as each situation was different.

40. Dr. Rastan recalled that, as signaled in its last Strategic Plan, the **OTP would be consulting with States Parties and other stakeholders on two forthcoming papers** – one on the OTP's approach to complementarity and another on completion strategies. The aim of the papers was to better explain how the OTP engaged with and encouraged national systems to seize their own primary responsibility, while also elaborating on the OTP's understanding of the admissibility test under Article 17. The report would also attempt to also seek to address some of the issues surrounding the OTP's imposition of timelines. In this respect, it was noted there could be a conflict in the objectives discussed by different speakers, since imposing timelines could work in favour of the OTP opening investigations as much as the OTP declining to proceed. Timelines did not always translate into the Court doing less, they could result in the Court doing more. With regards the issue of publicity, Dr. Rastan noted that the paper would also address this issue, while highlighting the competing demands between the need for more transparency and the level of discretion and confidentiality the Office required to carry out its work.

41. The co-focal points thanked the presenters and adjourned the meeting.