

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

**THE HAGUE WORKING GROUP**

**Complementarity**

**Update on activities on complementarity**

31 October 2019

Summary

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

1. On 31 October 2019, the co-focal points held a second meeting where representatives of the Office of the Prosecutor (OTP), the Office of Public Counsel for the Defence (OPCD), the International Criminal Court Bar Association (ICCBA), and the Secretariat briefed States. Discussion was also invited on the future work of the facilitation.

2. A **representative of the OTP** presented an overview of activities on complementarity. The speaker recalled the twin aspects of the term complementarity, i.e. complementarity as a legal principle for determining the admissibility of cases under article 17 of the Statute, and the attendant case law to date on this issue; and complementarity as a broader rule of law concept aimed at encouraging States to assume their primary responsibility to investigate and prosecute Rome Statute crimes, comprising efforts undertaken by various actors, principally States Parties and other international organizations, but with limited and relevant input from the Court as appropriate.<sup>1</sup> Previous sessions had in this respect highlighted that the role of the Court, mainly the OTP and Registry, in efforts to encourage and offer support to national proceedings was highly focussed and limited, and did not (and could not) for example stray into areas of capacity building and technical assistance which were beyond its mandate and means.<sup>2</sup>

3. The representative of the OTP also noted the relationship between complementarity and the notion of ‘completion’ strategies, which had also featured as a topic of a previous session.<sup>3</sup> This included the ability of the OTP, e.g. to identify when its prosecutorial programme was completed within a situation would be facilitated by identifying early opportunities for national authorities to assume cases that the OTP might otherwise potentially select and prioritize for investigation and prosecution. The speaker recalled the recent Strategic Plan of the OTP in this regard, and the commitment to provide a paper outlining the OTP’s approach towards complementarity, both as a legal principle and as a broader strategy of encouraging a shared effort, principally led by States Parties, to end impunity, as well as to set out a policy paper on completion issues – observing that both documents would be submitted in the future in draft form for comments and inputs from all relevant stakeholders.<sup>4</sup>

4. The Principal Counsel (**OPCD**) **presented Defence perspectives** on complementarity. He explained that the OPCD and the Office of Public Counsel for Victims (OPCV), which were independent offices within the Court, had together with the ICCBA, submitted a recommendation to States Parties that a focal point for the Defence and the Prosecution be appointed, in order to have a balanced view of the role of both sides. The focal point would not be necessary if there was a balance between the Prosecution and the Defence, and if the Defence was established as a separate organ of

<sup>1</sup> HWG - Complementarity facilitation: *Summary of 23 April 2018 informal information session* (annex III).

<sup>2</sup> HWG - Complementarity facilitation: *Seminar on completion strategies across the ICC’s activities*, 4 April 2019 (see annex III).

<sup>3</sup> Ibid.

<sup>4</sup> ICC-OTP *Strategic Plan 2019-2021*, paras. 21 and 23: <https://www.icc-cpi.int/itemsDocuments/20190726-strategic-plan-eng.pdf>

the Court. The OPCD worked in the field and sometimes had to clear up misconceptions about the Court. It was important for States to work on cooperation and capacity building. It was also important for them to receive a clear explanation of the principle *ne bis in idem* set out in article 20 of the Rome Statute. The representative of the ICCBA discussed what he termed ‘selective’ and ‘negative’ forms of complementarity.

5. The **Secretariat** provided an update on the implementation of the mandate contained in resolution ICC-ASP/17/Res.5,<sup>5</sup> in which it indicated that it had received requests from four States Parties, and informed the working group that the Secretariat was liaising with international and regional organizations and States Parties in relation to the requests for technical assistance, prior to putting the States concerned in contact with those organizations or other States.<sup>6</sup>

6. The **co-focal points sought a discussion of the way forward**, including in light of discussions on the “Matrix over possible areas of strengthening the Court and Rome Statute System”.<sup>7</sup> They noted that, in the Matrix, the complementarity facilitation was identified as the forum for discussion in respect of the following topics: a) 2.1 Preliminary examinations; b) 2.2 Relationship between national jurisdictions and the ICC; and c) 2.6 OTP completion strategies. They noted further that the draft Terms of Reference for the Independent Expert Review identified the issues of ‘preliminary examinations’ and ‘OTP completion strategies’ for the experts in Cluster 3 to review. Further, the draft text of the resolution on Review of the Court, which was under discussion, indicated that “the relationship between national jurisdictions and the Court” should be a matter of priority for 2020 through working groups and facilitations, which should report back to the Assembly at the next regular session on progress achieved. States were invited to consider, if the proposed Review resolution and the Terms of Experts were agreed, which topics could be addressed in the complementarity facilitation as a priority for 2020, and what elements should be included in the omnibus resolution for the nineteenth session.

7. In the **Q&A segment**, in response a query on the relationship between the OPCD and the ICCBA and how they worked together, the OPCD representative indicated that the activities of the OPCD and the ICCBA were complementary. Being on the list of ICC Counsel, he could intervene as Counsel if he was chosen, and had done so on a few occasions. The Court preferred to have only one interlocutor, hence the creation of the ICCBA. His mandate as OPCD was different, i.e. assisting the Defence teams from the technical and legal perspectives.

8. A point was made that some States were reluctant for the OTP to engage in capacity building. They preferred prioritization of existing cases and situations. On the other hand, the view was expressed that the Court had knowledge and expertise that could be shared with States Parties, especially developing countries, many of whose legal systems were not adequate to prosecute Rome Statute crimes. Assistance from the Court in the areas of, e.g. skills development, victims and witnesses issues, etc. would be welcomed.

9. As regards positive complementarity, there was some concern that actors could look to the Court for more proactive complementarity beyond the terms envisaged in the current debate. In response, it was recalled that, as stated during the Kampala stock-taking exercise, it was for States Parties themselves, not the Court, to provide such assistance.<sup>8</sup>

10. In response to the co-focal points’ questions, Some States indicated that there was a need to review how the principle of complementarity was being applied, and whether this was in conformity with the goals of the Rome Statute. States should review how the Court and national jurisdictions could work to implement the principle of complementarity, including by reviewing the threshold for admissibility. It was also suggested that more work needed to be done by the OTP on prioritization.

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<sup>5</sup> Annex I, para. 14 (b).

<sup>6</sup> See paras. 24-26 of the Report of the Bureau on complementarity (ICC-ASP/18/25).

<sup>7</sup> Prepared by the Presidency of the Assembly following the 13 June 2019 Bureau retreat that focused on “Meeting the challenges of today for a stronger Court tomorrow”.

<sup>8</sup> Report of the Bureau on stocktaking: Complementarity (ICC/ASP/8/51): [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP8R/ICC-ASP-8-51-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP8R/ICC-ASP-8-51-ENG.pdf)

11. As regards future work on complementarity, one State suggested that the facilitation review a) the interpretation and implementation of article 17; b) the OTP's completion strategy paper; and c) the application of the concept of "genuinely unwilling or unable".

12. Another States inquired about the indication in the latest OTP Strategic Plan that the Prosecutor might focus on mid-level cases, to question whether the Court might thereby seek to assume a greater number of cases from national jurisdictions.

13. In response to queries posed, the representative of the OTP clarified that the Prosecutor had proposed the preparation of a discussion paper on complementarity partly due to differences of views and partly the lack of clarity among some actors regarding what the Court could and should do. He emphasized that the Court did not engage in capacity-building, which was both beyond its mandate and means. Instead the Court had typically, as part of its core mandated activities, and acting upon request of relevant States Parties, exchanged lessons learned and best practices with national authorities, responded to incoming requests for judicial assistance in accordance with article 93(10) of the Statute, or participated on a cost-neutral basis in training activities or seminars organized and funded by others. For the OTP's work, in particular, it was noted that such interaction was often a natural consequence of its own engagement with relevant national authorities in pursuance of its preliminary examinations or investigative activities and was a key aspect enabling it to prioritize its own work: by identifying opportunities to defer to national proceedings with respect to particular situations/cases in order to avoid the need for ICC intervention.

14. The speaker emphasized that complementarity was fundamentally a filter to prevent cases coming before it where they could be more appropriately handled at the national level. This was not only a goal that the OTP supported, but also practically, given the current workload of the OTP, it was in the mutual interest of both States and the Court to make sure this filter was working effectively. The OTP typically sought to promote as far as possible relevant cases being handled genuinely at the domestically level, referring to its efforts in Guinea and Colombia, among others. At the same time, as shown by the *Al Senussi* case in Libya, the OTP had not opposed active cases before the Court being transferred to the domestic level where it was satisfied that these related to the substantially same conduct and could be conducted genuinely. However, even with a positive approach towards encouraging domestic proceedings, there would nonetheless remain grave cases would need to be heard before the ICC to prevent an impunity gap.

15. Regarding notorious and mid-level perpetrators, the speaker recalled that this was an evidentiary based assessment to be understood in the context of a overall prosecutorial programme that sought to build upwards towards those who might be considered most responsible, based on the evidence.<sup>9</sup> But the complementarity assessment would be applied in the same manner, irrespective of the level of the alleged perpetrator.

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<sup>9</sup> ICC-OTP, *Policy paper on case selection and prioritisation*, 15 September 2016, paras. 42-43: [https://www.icc-cpi.int/itemsDocuments/20160915\\_OTP-Policy\\_Case-Selection\\_Eng.pdf](https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf)