



Complementarity in action:

New gateways in the interaction between international and domestic justice

On 15/16 September 2009, the Grotius Centre held an interdisciplinary research conference on the theme of complementarity at the Peace Palace and Campus The Hague. The Conference brought together Hague officials, researchers, members of the diplomatic community and NGOs to discuss the relationship between the ICC and domestic jurisdictions. The Conference was opened by Prof. Dr. *Jouke de Vries*, Director of Campus Den Haag and chaired by Dr. *Carsten Stahn*, convenor of the conference and Programme Director of the Grotius Centre for International Legal Studies. Speakers included Mr. *Luis Moreno-Ocampo* (Prosecutor, ICC), Mrs. *Silvana Arbia* (Registrar, ICC), Mr. David Tolbert (Registrar, Special Tribunal for Lebanon), Hon. *Freddie Ruhindi* (Minister of State for Justice and Constitutional Affairs, Uganda) and Justice *Dan Akiiki* (War Crimes Division, Uganda).

Origins and theorisation

Since the negotiations of the Rome Statute, the principle of complementarity has been one of the core concepts underlying the functioning of the International Criminal Court (ICC). But the idea of complementarity developed over a period of almost 75 years prior to the adoption of the 1998 Rome Statute and since the 1919 Peace Treaties (Dr. *Mohamed El Zeidy*, ICC). Prof. *Mauro Politi*, former ICC Judge and negotiator, reminded participants that the founding fathers of the Statute originally associated three ideas with complementarity: (i) a division of labour between the ICC and domestic jurisdictions, (ii) duties of states, including the understanding that complementarity should not be a short cut for impunity, and (iii) the power of the ICC to assess the requirements under the Statute. To what extent are these conceptions still relevant? Presenters shared divided views. Prof. *Mark Drumbl* (Washington & Lee University) argued that the ICC should leave greater leeway for “qualified deference” to domestic justice processes. Others suggested that there are certain gaps in the architecture of the Statute that require further attention, such as the parameters for case selection (Prof. *William Burke-White*, University of Pennsylvania) or the policies of non-state organised armed groups (Dr. *Jann Kleffner*). Others contended that complementarity must be newly construed from the point of view of ‘global governance’ and systems theory (Dr. *Christoph Burchard*, Tübingen). A ‘positive’ or ‘proactive’ vision of complementarity was distinguished from a classical ‘carrots and sticks’ based understanding (Dr. *Carsten Stahn*, Leiden University). It was further suggested to develop a new set of criteria for “positive complementarity” (Mr. *Christopher Hall*, Amnesty International).

Interpretation and application of the Statute

ICC Prosecutor *Luis Moreno-Ocampo* stressed the need to identify and apply legal standards in order to make complementarity operational. He supported the view that independent monitoring powers (Article 15, ICC Statute) could be used effectively to serve as an incentive for compliance. Panellists highlighted means and methodologies to bring the existing ambiguities of the Statute to life. Prof. *Darryl Robinson* (Queen’s University, Canada) highlighted current misreading of the Statute (disregard of the ‘inaction scenario’ under Article 17) and organisational models to structure complementarity in case of inaction of domestic jurisdictions. *Lorraine Smith* (International Bar Association) pleaded for a new definition of criteria and benchmarks for ‘inaction’, in light of the ambiguous existing jurisprudence. Dr. *Rod Rastan* (ICC) and Prof. *Hector Olasolo* (University of Utrecht) developed criteria to analyse complementarity at the stage of the “situation” and the “case”. Prof. *Harmen van der Wilt* (University of Amsterdam) argued that the ICC could benefit from the rich jurisprudence of the European Court of Human Rights in its assessment of the “inability” or “unwillingness” of domestic jurisdictions. Questions were raised regarding the extent to which it is necessary to re-think existing notions and approaches, in order to establish a proper balance and organisation of labour between international and domestic jurisdictions (“gravity” of crimes, overlap of judicial activities, maximisation of cooperation). The definition and cross-situational use of “gravity” as a tool of selecting situations/cases was called into question from a social science point of view.





Complementarity in perspective

Mr. *David Tolbert* made it clear that the ICC does not operate in a vacuum. He highlighted that the Court could learn lessons from the ICTY, both in terms of outreach and division of labour. This finding was echoed by Mrs. *Federica Gioia* (ICC) who pointed out the importance of ‘reverse cooperation (i.e. cooperation from the ICC to domestic jurisdictions), Ms. *Fidelma Donlon* (Irish Centre for Human Rights) who demonstrated models of interaction between the ICTY and Bosnian Courts in the Srebrenica trials and Dr. *Cedric Ryngaert* (Leuven & Utrecht Universities) who outlined the increasing importance of the application of complementarity in the use of universal jurisdiction by states.

Complementarity in practice

A different perspective and method (bottom-up v. top-down) was provided by panellists who addressed the theme from the angle of individual situation countries. Opposing views were expressed as to the impact of the ICC in Colombia. Some commentators praised the efforts of Colombia to be in compliance with international standards, while others stated that Colombian legislation complicated the judicial response to crimes committed (complexity, over-judicialisation, extradition) (Prof. *Kai Ambos*, University of Göttingen) or that the time had come for the ICC Prosecutor to bring forward *proprio motu* investigations (Mr. *Paul Seils*, UN). The situation was contrasted with other pending situations. The point was made that complementarity is difficult to implement under conditions where the domestic jurisdiction is *de facto* unable (DRC, Central African Republic) or unwilling to act (Sudan). On the other hand, it was also stressed that the concepts of “inability” and “unwillingness” should not serve too easily as a pretext to provide continuous preference to ICC intervention and that complementarity must be read in light of cooperation duties under Part 9 of the Statute (Prof. *Robert Cryer*, University of Birmingham). Questions were raised regarding the extent to which ‘negotiated justice’ compromises the perception of independence and impartiality of the ICC (Dr. *Phil Clark*, University of Oxford), as well as the reliability of domestic justice responses. Specific attention was drawn to the need for implementing legislation, but also to legitimate differences in domestic legislation (Dr. *Olympia Bekou*, University of Nottingham). It was discussed whether the label of an ordinary crime under domestic legislation might satisfy the requirements of complementarity, in particular in situations of demobilisation and peace building (Uganda). It was further questioned to what extent the use of military courts is an appropriate response to accountability challenges.

Institutional dimensions

Throughout the two days it became evident that complementarity is not only a multi-jurisdictional, but a cross-organizational issue. Complementarity relates not only to States and the Prosecutor, i.e. by way of incentives and carrots and sticks, but also to Chambers and the Registrar. The ICC Registrar illustrated the need for greater on-site presence and harmonisation and implementation of domestic legislation in relation to crimes and procedure (e.g. relocation, protection of witnesses). It was suggested that impact could be enhanced through communication by way of judicial and executive (e.g., police), rather than diplomatic channels, and use of findings of non-cooperation. The ICC Prosecutor highlighted the usefulness of complementarity as a tool to maximize prevention and deterrence. It was further pointed out that the existing jurisprudence of Chambers on complementarity (e.g. *Katanga* case) continues to be shaped by ambiguities and possible misunderstandings. It was suggested that the issue of complementarity be taken up by States at the Review Conference, in addition to the issue of cooperation.





Impact

The Conference revealed that there is a risk of mismatch between intent and results. Many of the original ideas of the drafters of the Statute are still in flux, or in need of further development. We are, in fact, still very far from the idealist vision which *Moreno-Ocampo* outlined in 2003 when taking office, namely: the dream of an International Criminal Court that has to deal with no cases because of the effective functioning of domestic judiciaries. The actual number of domestic trials held in situation countries in response to ICC engagement is limited. It is also evident that international justice carries certain risks, both in terms of its means (e.g. prioritisation of atrocity trials, channelling of resources, judicialisation of responses to conflict, over-regulation) as well as some of its ends (sustainability). However, we are facing a new era in the interaction of international and domestic jurisdictions. It is fundamental to explore how international justice can interrelate better and more effectively with domestic justice systems. This requires a fresh look at the goals and methods of criminal justice. Propositions to this effect will be formulated in the forthcoming volume on this theme, published by Cambridge University Press.

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