

RESOLUTION 04/2022

COMMITTEE ON COMPLEMENTARITY

The 80th Conference of the International Law Association, held in Lisbon, Portugal, 19-24 June 2022:

HAVING CONSIDERED the Report of the Committee on Complementarity;

EMPHASIZING the fundamental character of the principle of complementarity in the Rome Statute on the International Criminal Court;

MINDFUL of the need to ensure that complementarity is not merely an ideal but also a practice;

ADOPTS the Lisbon Conclusions and Recommendations on Positive Complementarity annexed to this Resolution;

REQUESTS the Secretary-General of the International Law Association to forward a copy of this Resolution and its annex to the President of the Assembly of States Parties of the International Criminal Court and the President, Prosecutor and Registrar of the International Criminal Court;

ALSO REQUESTS the Secretary-General of the International Law Association widely to disseminate the resolution and its annex among international criminal justice and international cooperation actors, including through the ILA's social media channels;

RECOMMENDS to the Executive Council that the Committee on Complementarity, having accomplished its mandate, be dissolved.

ANNEX

THE LISBON CONCLUSIONS AND RECOMMENDATIONS ON POSITIVE COMPLEMENTARITY

1. Complementarity is a cornerstone principle of the Rome Statute. But, as given effect in the Statute by an admissibility rule, complementarity is not enough to promote domestic and regional accountability for crimes within the ICC's subject-matter jurisdiction. It is therefore important to supplement the admissibility rule with policies and practices of 'positive complementarity': 'any cooperation with national or regional criminal jurisdictions aimed at enhancing the capacity and willingness of those jurisdictions to investigate and prosecute crimes within the ICC's subject-matter jurisdiction.'

2. Shared terminology is recommended to avoid confusion and friction. Thus far, states, ICC organs, NGOs and scholars have used 'positive complementarity' for different ideas or invoked 'complementarity', 'positive complementarity' and 'a positive approach to complementarity' interchangeably. It is recommended to differentiate among:

(a) 'complementarity': the admissibility rule, given effect through articles 17-20 and 53 of the Rome Statute;

(b) 'positive complementarity': a policy of cooperation with national or regional criminal jurisdictions aimed at enhancing the capacity and willingness of those jurisdictions to investigate and prosecute crimes within the ICC's subject-matter jurisdiction;

(c) 'a positive approach to complementarity': a policy for the OTP to use when exercising its discretion not (yet) to open an investigation or prosecution which assumes that states that are investigating and prosecuting are doing so genuinely and gives them a chance to render cases inadmissible before the Court.

3. The obstacles to domestic investigations and prosecutions of crimes within the ICC's subject-matter jurisdiction are wide-ranging. Different actors (for instance, states, international organisations, non-governmental organisations, ICC organs, academic institutions, publishers) have different strengths in addressing these obstacles. On the basis of their mandates and strengths, they can each assess what they can do to promote accountability for core crimes at the domestic level. Whether they use the label or not, they can all have their own policies of positive complementarity, acting complementarily. The diversity of actors and approaches is an advantage.

4. The ICC's Office of the Prosecutor can encourage and support domestic proceedings in various ways.

(a) The Statute requires the Prosecutor to consider complementarity as given effect by the admissibility rule at various stages of the proceedings (articles 53 and 15, 17-20 in combination with Rule 48 of the Rules of Procedure and Evidence). The OTP can encourage domestic proceedings by reminding states that complementarity grants them the primary right to investigate and prosecute the crimes within the ICC's jurisdiction, and that the Court has jurisdiction over a case only if no state is genuinely investigating or prosecuting that case or has done so.

(b) The Statute also provides a legal basis for the OTP to transfer evidence to states that are investigating or prosecuting a crime within the Court's subject-matter jurisdiction or which constitutes a serious crime under the national law of the requesting State (article 93(10)).

(c) Some activities to promote domestic proceedings – whether called 'positive complementarity' or not – are within the implied powers of the OTP as long as they do not jeopardise its ability independently and impartially to assess admissibility. Among these are:

- i. pointing to the existence of the ICC Legal Tools Database and the possibility of receiving free training in their use;
- ii. facilitating contact with actors specialised in capacity building, or with the ASP's Complementarity Platform which also fulfils such a facilitating role.
- iii. using the new mandate of a Special Adviser to the Prosecutor on Knowledge Transfer to promote the ICC Legal Tools Database and to facilitate new digital services that can assist domestic criminal justice actors in investigating and prosecuting core crimes cost-effectively, fairly and with adequate quality control.

The OTP must endeavour not to tie the Office to the outcome of specific in-country capacity strengthening. Such projects are frequently long-term and their outcome depends on several factors beyond the control of those who conduct, oversee, fund or initiate the projects. This means that the facilitation by the Office may not be public and that this may not be an area that lends itself well for publicity about the work of the Office.

(d) The OTP has a certain degree of discretion in deciding whether or not and, if so, when to open an investigation or, with respect to specific cases, a prosecution. When exercising that discretion, a positive approach to complementarity can be a policy consideration. After the opening of an investigation and in the preparation of cases for prosecution, the OTP can share information and evidence pertaining to other cases with domestic and regional jurisdictions with a view to catalysing additional prosecutions. A policy of positive complementarity on the part of the OTP is also important in the phase it completes its involvement in a situation.

(e) Encouraging states to refer situations involving crimes over which these states could exercise jurisdiction to the ICC may sometimes work against the ideal of promoting domestic proceedings. This is especially the case if the ICC faces the same or similar obstacles as those that hamper domestic proceedings, for instance, obtaining custody. If custody is the only obstacle to domestic proceedings, the OTP could consider deferring a case to domestic proceedings once it has obtained custody of the suspect or accused.

5. It is recommended that the ICC Legal Tools project enhance its search functionality on questions pertaining to statutes of limitations, amnesties, and immunities.

6. States Parties can play important roles in promoting positive complementarity, both collectively, within the Assembly of States Parties, and individually. It is therefore recommended that they adopt policies of positive complementarity, within the ASP and individually.

It is recommended that the ASP:

- (a) support projects that enhance the capacity to adopt legislation incorporating the core crimes in domestic law, such as the National Implementing Legislation Database of the ICC Legal Tools Project;
- (b) promote more actively its Complementarity Platform and integrate it into existing networks so that it can provide quick and tailored follow up to requests. The ASP can also do more to promote the ICC Legal Tools Database *vis-à-vis* domestic criminal justice actors, including raising awareness of the possibility to receive free training in their use.

States Parties individually are recommended to:

- (a) assist other states in drafting, adopting and reviewing legislation with a view to having legislation that enables them to prosecute Rome Statute crimes; that does not have statutes of limitations for core crimes, even when prosecuted as ordinary crimes; that establishes the jurisdiction that is allowed by international law; that does not offer more immunity than is strictly required by international law and that facilitates cooperation;
- (b) assist other states in reviewing the legal and operational framework in which prosecutors and judges work with a view to enhancing independence and exchange lessons learnt from anti-corruption programmes;
- (c) assist other states that are investigating Rome Statute crimes in evidence gathering;
- (d) provide other in-kind and financial support for domestic accountability efforts, for instance through international cooperation programmes;
- (e) develop new international legal instruments that fill gaps in the existing accountability framework for domestic prosecutions including adopting the International Law Commission's 2019 Draft Articles on Prevention and Punishment of Crimes against Humanity as a global treaty, and the proposed Mutual Legal Assistance Convention;
- (f) review their other engagements with the state concerned to assess whether they are consistent with the aim of promoting domestic accountability efforts;
- (g) recognise that domestic justice systems may have other priorities and that in some circumstances such alternative priorities can be normatively defensible assuming they are consistent with international law and the interests of justice under the Rome Statute. In the determination and assessment of priorities, the voices of victims must

be truly listened to. Justice sector actors should consider their roles as complementary to those voices.

7. International organisations and civil society actors can also play valuable roles by adopting policies of positive complementarity (whether or not they use that label). It is recommended that they:

- (a) identify obstacles to domestic accountability;
- (b) show that certain conduct is not merely ‘political’ or ‘related to conflict’ but also criminal according to international law;
- (c) reveal and problematise double standards;
- (d) follow and attend proceedings;
- (e) remind states that complementarity gives them the primary right to investigate and prosecute core crimes and that if they don’t, cases may be admissible before the ICC;
- (f) assist states in drafting, adopting and reviewing legislation with a view to having legislation that enables them to prosecute Rome Statute crimes; that does not have statutes of limitations for core crimes, even when prosecuted as ordinary crimes; that establishes the jurisdiction that is allowed by international law; that does not offer more immunity than is strictly required by international law and that facilitates cooperation;
- (g) review the legal and operational framework in which prosecutors and judges work with a view to enhancing independence;
- (h) persuade states to develop new international legal instruments that fill gaps in the existing accountability framework for domestic prosecutions including adopting the International Law Commission’s 2019 Draft Articles on Prevention and Punishment of Crimes against Humanity as a global treaty, and the proposed Mutual Legal Assistance Convention;
- (i) assist states in fully implementing the 2003 UN Convention against Corruption and the provisions concerning corruption of the 2000 UN Convention against Transnational Organized Crime; share best practices and facilitate training of police officers, members of the judiciary and the prosecution in countering corruption;
- (j) recognise that domestic justice systems may have other priorities and that in some circumstances, such alternative priorities can be normatively defensible assuming they are consistent with international law and the interests of justice under the Rome Statute. In the determination and assessment of priorities, the voices of victims must be truly listened to. Justice sector actors should consider their roles as complementary to those voices.

8. Transnational professional networks of investigators, prosecutors and judges can facilitate discussions among members on how they have overcome obstacles to accountability in their jurisdictions. They can also send senior trial observers.
9. Scholars can play a valuable role in promoting accountability at the domestic level by making relevant scholarship freely available online, assisting in developing the ICC Legal Tools Project and related training activities, and highlighting the legal dimensions of conflicts that governments treat as 'purely political'. Academic publishers can make relevant material freely available to actors promoting or involved in domestic accountability efforts.
10. Recognising the diversity in human aspirations for justice, all actors interested in justice should ensure that calls for individual criminal accountability should not crowd out other modalities or conceptions of justice. Additionally, the strengthening of criminal justice, for instance, through enhanced cooperation, should not be abused to violate the human rights of potential defendants or to target refugees, who are entitled to specific protections under international law.