

**Tenth session**

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**Report of the Court on complementarity****I. Introduction**

1. This report is submitted to the Assembly pursuant to paragraph 47 of resolution ICC-ASP/9/20, which inter alia invites the Court and the Secretariat to report to the next session of the Assembly on the issue of complementarity, in accordance with resolution RC/Res.1.

2. The concept of complementarity has two dimensions: firstly, it entails an admissibility test which is a judicial issue to be determined by the Chamber of the Court; and secondly, it entails collaboration between the Court, national jurisdictions, States Parties and others in ending impunity. An aspect of the latter is positive complementarity as outlined in the Report of the Bureau on stocktaking: Complementarity.<sup>1</sup> It gives effect to the preamble of the Rome Statute which recalls “the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes” and thus foresees the ICC as a court of last resort.

3. The Rome Statute was never intended to replace national courts, and the system it created will only succeed if there is genuine complementary national action. It therefore becomes incumbent on the international community to foster conditions necessary to enable genuine national proceedings in States affected by mass criminality. Since the Rome Statute did not only create the Court, but a system for the enforcement of core crime norms between national and international authorities to end impunity, proceedings before the Court should be an exception rather than the norm.

4. As the report of the Bureau states: “States Parties are in the unique position not only to further the understanding of the Rome Statute system and principle of complementarity, but also – together with the Court and through continued dialogue to catalyse domestic prosecutions and provide a better understanding of the needs of domestic jurisdictions.”<sup>2</sup> In this vein, the mandate entrusted by the States Parties to the Secretariat of the Assembly<sup>3</sup> may further advance this continued dialogue.

5. In this report, the Court elaborates on the activities it has undertaken, within existing resources and consistent with its core judicial mandate that are relevant to complementarity. The report makes reference, where possible, to their impact on and cost-effectiveness for the international justice system created by the Rome Statute. Consistent with the limited role entrusted to the Court by the Assembly of States Parties, the Court, through the mandated core activities described in this report, brings its contribution to the global endeavour to strengthen the capacity of national jurisdictions to investigate, prosecute and

<sup>1</sup> Report of the Bureau on stocktaking: Complementarity (ICC-ASP/8/51).

<sup>2</sup> Report of the Bureau on complementarity (ICC-ASP/9/26), para. 13.

<sup>3</sup> Resolution RC/Res.1, para. 9.

try Rome Statute crimes, thus preventing situations from reaching the Court and international proceedings incurring costs on the States Parties.

6. The Court stresses, however, that any complementarity activities as detailed in this report are not directly related to the issue of the judicial determination of admissibility, which can only be addressed, and ultimately decided by the judges, within the framework of the Court's judicial proceedings. Any cooperation that the Court gives to national authorities in respect of possible or actual national prosecutions for serious international crimes is given strictly without prejudice to any determination the Court's judges may make in respect of inability or unwillingness to conduct genuine national proceedings. In other words, any form of cooperation from the Court to a national authority for the strengthening of their judicial/legal capacity would not amount to a safeguard from the Chamber finding a case admissible within the scope of article 17 of the Rome Statute.

7. Over the past years, the Court has consistently tried to identify and prioritise its actions in the area of positive complementarity. The organs of the Court, through regular exchanges and with a view to complementing each other's mandate, have made a conscientious selection of their engagement in complementarity related initiatives, focusing on those with long term impact, using existing resources and/or resources put at its disposal by various actors of the Rome Statute system.

8. In this vein, the Court has used various key international fora to disseminate messages and forge close ties amongst key actors of the Rome Statute system such as States Parties and non-States Parties, intergovernmental organizations, rule of law organizations, development aid sector, donors and others. The aim has been to mainstream Rome Statute issues into conflict management, democratisation, judicial and legal reform and development programmes, to catalyse discussions amongst the relevant actors and to assist in their efforts of reinforcing the ability of national authorities to prosecute Rome Statute crimes.

9. The Presidency has assumed an important role in raising awareness at the global and bilateral levels about the principle of complementarity and forging long-term relations amongst various actors involved in the areas of justice, development and rule of law, with a particular focus on the role of the United Nations.

10. For the Office of the Prosecutor, positive complementarity has been one of the key principles underlying the prosecutorial strategy of the Office from the first years of its operation. Positive complementarity of the Office includes the full range of activities conducted during the preliminary examination stage, notably the publicity of activities under article 15 to allow States to factor in the duty to conduct national proceedings and mobilization of external resource networks to support such activities, as well as cooperation with national jurisdictions conducting investigations on serious crimes, including by responding positively as far as possible with requests received under article 93, paragraph 10, of the Rome Statute. None of the positive complementarity activities are resource intensive.

11. The Registry's contribution in assisting efforts to strengthen national capacity to conduct fair trials has been centred on its expertise at organizing fair trials for serious international crimes, in partnering and/or providing advice and transfer of knowledge in the areas of translation and interpretation, counsel representation, legal aid, detention conditions, witness protection, victim participation and ensuring efficient proceedings through court management processes.

12. Enhancing communication and coordination among all relevant actors, including through effective dialogue with the Secretariat of the Assembly of States Parties, will remain a key requirement for further progress in the area of complementarity. The organs of the Court are committed to active participation in this process.

## II. Complementarity activities of the Court

### A. The Presidency

13. As the “external face of the Court”,<sup>4</sup> the President represents the Court as a whole in interaction with States Parties and non-States Parties, international and regional organizations and global civil society. This provides important opportunities for the President to address key policy issues, including complementarity, with the relevant actors at the highest levels.

14. During the reporting period, the complementarity related activities of the Presidency focused on the following aspects in particular:

(a) Urging the United Nations to assume a stronger role in the international efforts to enhance the capacity of national jurisdictions to prosecute Rome Statute crimes;

(b) Inspiring the relevant actors to forge closer links between the fields of development and justice with the aim of mainstreaming Rome Statute issues into rule of law, judicial and legal reform and human rights development programmes;

(c) Generally promoting global awareness about the principle of complementarity, stressing the primary responsibility of national jurisdictions to prosecute Rome Statute crimes and the Court’s role as a court of last resort, as well as the importance of strengthening the capacity of national jurisdictions; and

(d) Encouraging and facilitating links between States requiring technical assistance for national capacity building, including the passing of implementing legislation, on the one hand, and those that can provide such assistance on the other hand.

#### 1. Activities in the United Nations context and other multilateral fora

15. Presenting the Court’s annual report to the United Nations General Assembly on 28 October 2010, the President of the Court stated:

“The domestic justice systems of each State should be so well equipped to deal with international crimes that they serve as the main deterrent worldwide [...].The Review Conference created significant momentum for broadening and deepening the Statute’s influence with respect to national jurisdictions, but this is merely the beginning. Far more needs to be done, and I am glad to see discussion starting on the mainstreaming of Rome Statute issues into rule of law and judicial reform capacity building. The United Nations is uniquely placed to facilitate that process.”

16. The President had several contacts with the United Nations Secretary-General during the reporting period, encouraging the United Nations to assume a stronger role in the international efforts to enhance the capacity of national jurisdictions by increasing focus on Rome Statute issues within rule of law programming and development aid.<sup>5</sup>

17. At the 28-29 October 2010 high-level retreat, “Complementarity After Kampala: The Way Forward” organized by the International Center for Transitional Justice in New York with the sponsorship of the United Nations Rule of Law Unit and the support of the Secretariat of the Assembly of States Parties, the President stressed in his keynote address that “it is crucial to bring the rule of law and development sectors closer to each other” and called on the relevant actors to seek new ways to cooperate with a view to enhancing the capacity of national jurisdictions. In particular, he called on the United Nations Rule of Law Coordination and Resource Group to play a central role in these efforts.

18. In December 2010, it was reported by the Assistant Secretary-General for Legal Affairs that the United Nations had agreed on concrete steps in view of the requests on this matter from the Court and from Member States, specifically (a) to compile and analyze lessons learned; (b) to add the issue of rule of law development and complementarity to the

<sup>4</sup> Report of the Court on measures to increase clarity on the responsibilities of the different organs, annex.

<sup>5</sup> See e.g. ICC press release ICC-CPI-20101209-PR612 of 9 December 2010 entitled “President Song meets with Secretary-General of the United Nations”.

agenda of the UN-ICC coordination meetings;<sup>6</sup> (c) to develop specific guidelines on integrating national capacity development into rule of law programming, based on a system-wide review of technical issues; and (d) that the Rule of Law Unit would help create a technical community for discussion among actors from the United Nations, development and justice/rule of law policy communities.<sup>7</sup>

19. The President of the Court continued discussions with senior United Nations officials on this matter during 2011, notably with the Administrator of the United Nations Development Program<sup>8</sup> and with the United Nations High Commissioner on Human Rights.

20. The President furthermore exchanged views on the connection between justice and development with a representative of the World Bank – which has been recently paying growing attention to this issue. On 14 November 2011, the President is scheduled to give the keynote speech at the opening of the World Bank’s Law, Justice and Development Week in Washington, which will be a significant opportunity to inspire further progress on this matter among key actors.

21. During the reporting period the President also discussed complementarity in meetings with officials of the European Union, African Union, Organization of American States, La Francophonie, the Commonwealth, Amnesty International and others. In addition, he drew attention to the importance of national capacity building in numerous keynote addresses and speeches delivered at international high-profile events.<sup>9</sup>

## 2. Contacts with representatives of national jurisdictions

22. Members of the Presidency play an important role in promoting awareness about complementarity in communication with representatives of national jurisdictions, at the seat of the Court as well as in the context of official visits to States.

23. Visits by representatives of both States Parties and States not party to the Rome Statute to the seat of the Court have increased in the recent period. Visitors frequently include high-level government officials as well as delegations consisting of e.g. parliamentarians or senior judges and other judicial practitioners. As standard practice agreed among the organs, the President, or in his absence one of the Vice-Presidents, is the first official of the Court to receive such visitors and to brief them on the current status of the Court’s operations.

24. The President uses these occasions to stress the primary responsibility of national jurisdictions to prosecute atrocity crimes and to encourage the national authorities to take the necessary steps to strengthen their national capacity for that purpose, including the passing of adequate implementing legislation,

25. While making it clear that the Court itself has a limited role with respect to such matters, the President frequently informs representatives of national jurisdictions in need of technical assistance about relevant actors such as intergovernmental organizations that offer assistance for national efforts.

26. The President and the Vice-Presidents also meet representatives of national jurisdictions during official visits to various countries and regions. The main purpose of such visits is to raise global awareness about the Court and to encourage ratification and full implementation of the Rome Statute.

<sup>6</sup> The next such meeting is scheduled to take place on 8-9 December 2011 in New York.

<sup>7</sup> Remarks of the Assistant Secretary-General for Legal Affairs at the event “Making Complementarity Work: The Way Forward” held in the margins of the ninth session of the Assembly, on 9 December 2010.

<sup>8</sup> See ICC press release ICC-CPI-20110318-PR643 of 18 March 2011, reporting that the UNDP Administrator “informed President Song that her office has been closely following discussions on complementarity in various forums and that the UNDP will pay due attention to Rome Statute issues within its programming where appropriate.”

<sup>9</sup> E.g. the opening of the ninth session of the Assembly of States Parties, the Commonwealth meeting on the International Criminal Court in London on 5 October 2010, the Asia-Pacific parliamentary consultation on the Universality of the Rome Statute in Kuala Lumpur on 9 March 2011, the CARICOM meeting on the Rome Statute in Port-of-Spain on 16 May 2011, the annual conference of the International Association of Prosecutors in Seoul on 27 June 2011, the signing ceremony of a Memorandum of Understanding between the ICC and the Commonwealth Secretariat at the Commonwealth Law Ministers Meeting in Sydney on 13 July 2011, the Annual General Meeting of the Southern African Development Community Lawyer’s Association in Maputo on 6 August 2011.

27. An integral part of these efforts is to underline in meetings and public speeches that the Court is not intended to substitute but to complement national jurisdictions and that the main responsibility for the prosecution of Rome Statute crimes remains with the domestic justice system even when a country becomes a State Party. By so doing, the members of the Presidency seek to inspire the relevant national authorities to take steps for the strengthening of national capacity.

## B. The Office of the Prosecutor

28. Positive complementarity is a key principle underlying the prosecutorial strategy of the Office.<sup>10</sup> The Office's policy paper of September 2003 noted that "[a] major part of the external relations and outreach strategy of the Office of the Prosecutor will be to encourage and facilitate States to carry out their primary responsibility of investigating and prosecuting crimes. (...) [I]n certain situations, it might be possible and advisable to assist a State genuinely willing to investigate and prosecute by providing it with the information gathered by the Office (...)."<sup>11</sup>

29. This was further developed in the Report on Prosecutorial Strategy of September 2006, which stated that: "The Office has adopted a positive approach to complementarity, meaning that it encourages genuine national proceedings where possible; relies on national and international networks; and participates in a system of international cooperation."<sup>12</sup> The Prosecutorial Strategy for the years 2009-2012, published in February 2009, provided further definition of this approach.<sup>13</sup>

30. Positive complementarity of the Office includes the full range of activities conducted during the preliminary examination stage, as well as cooperation with national jurisdictions conducting investigations on serious crimes. The former notably includes the publicity of activities under article 15 to allow States to factor in the duty to conduct national proceedings and mobilization of external resource networks to support such activities; the latter includes cooperation by responding positively as far as possible with requests received under article 93, paragraph 10, of the Rome Statute.

31. It should be stressed that all activities are consistent with the Office's core judicial mandate and are performed within existing resources. The Office will not be directly involved in providing direct technical assistance or capacity building, as it is not a development agency, and these tasks are best reserved for other competent bodies.

32. There are also statutory limits to the type of activities the Office can be involved in: it will not be directly involved in providing legal advice as such action could risk tainting future Court admissibility proceedings, nor will it provide information without the proper security standards and national authorities' willingness to receive such information.

### 1. Practice

#### (a) Preliminary examination phase

33. Recent years have shown that the preliminary examination phase offers the first opportunity for the Office to ensure the fulfilment of the Rome Statute goals and can promote the initiation of national proceedings in a very cost effective manner. As presented in its draft Policy Paper on Preliminary Examinations,<sup>14</sup> article 15 of the Rome Statute

<sup>10</sup> The other key principles are focused on investigations and prosecutions, addressing the interests of victims, and maximizing the impact of the Office's work; ICC-OTP, "Prosecutorial Strategy 2009-2012", 1 February 2010, 5, available at [http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/prosecutorial%20strategy%202009%20\\_%202012?lan=en-GB](http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/prosecutorial%20strategy%202009%20_%202012?lan=en-GB).

<sup>11</sup> Policy Paper, available at <http://www.icc-cpi.int/Menu/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Policies+and+Strategies/Paper+on+some+policy+issues+before+the+Office+of+the+Prosecutor.htm>.

<sup>12</sup> Report on prosecutorial strategy, 2006, available at [http://www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914_English.pdf).

<sup>13</sup> "Prosecutorial Strategy 2009-2012", 1 February 2010, p. 5, available at [http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/prosecutorial%20strategy%202009%20\\_%202012?lan=en-GB](http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/prosecutorial%20strategy%202009%20_%202012?lan=en-GB).

<sup>14</sup> Draft Policy Paper on Preliminary examinations, 4 October 2010, available: <http://www.icc-cpi.int/Menu/Go?id=e278f5a2-a4f9-43d7-83d2-6a2c9cf5d7d7&lan=en-GB>.

directs the Office to proactively analyze information on crimes within the jurisdiction of the Court allegedly committed by nationals or on the territory of a State Party, or a State not Party to the Rome Statute which has lodged a declaration under article 12, paragraph 3. The Office makes public announcements of the beginning of a preliminary examination activity and is able to send missions, and request information from national governments. This information can be factored in by all States and relevant organizations, in order to promote timely accountability efforts at the national level:

(a) The situation of Guinea is a clear example of the impact of the Office's preliminary examinations activities in triggering national proceedings in accordance with the Rome Statute. Shortly after the Office publicly informed that it was monitoring the serious allegations surrounding the events of 28 September 2009 in Conakry, Guinean Foreign Affairs Minister Alexandre Cécé Loua travelled to the Court and met with Deputy Prosecutor Fatou Bensouda on 20 October 2009. Minister Loua described the events and set out what measures had been taken by Guinea to ensure that the crimes allegedly committed would be investigated. He stated that the national judiciary was "able and willing" to proceed. The Office further met with senior members of the Guinean Government, who indicated that Guinea would "strive to ensure that justice prevails within the country, in partnership and with the concurrence of the Office of the Prosecutor." The Office has sent three missions to Guinea: first, from 15 to 19 February 2010 to enquire and confirm that a national investigation had been opened into the 28 September 2009 events; second, as a follow-up in May 2010, *inter alia* meeting with the three judges in charge of the investigation, assessing whether significant progress was being made; and third, from 8 to 12 November 2010, meeting with, *inter alia*, President Sékouba Konaté, Prime Minister Doré, as well as both election candidates. A most recent mission was conducted from 28 to 31 March 2011. The Office has sought to encourage and cooperate with national and international efforts to conduct genuine national proceedings, thereby ensuring that justice is enforced without the need for the Office to intervene and the commission of new massive crimes is prevented.

(b) In Colombia, the prospect of the Court exercising jurisdiction was mentioned by prosecutors, courts, legislators and members of the Executive Branch as a reason to make policy choices in implementing the Justice and Peace Law, thus ensuring that the main perpetrators of crimes would be prosecuted. It has been widely reported that the Office's preliminary examination of the situation in Colombia served as an incentive for the Colombian authorities to fulfil their primary responsibility to investigate and prosecute crimes under the Court's jurisdiction. Since 2004, the Office has analyzed public reports as well as information submitted to it by Colombian authorities, organizations as well as individuals. The Office has thus gathered information on a large number of crimes that could fall under the temporal and subject-matter jurisdiction of the Court, including killings, abductions, sexual violence, forced displacements, enforced disappearances, torture and child recruitment. In a letter dated 3 March 2005, the Prosecutor informed the Government of Colombia that there was a reasonable basis to believe that crimes within the Court's jurisdiction had been committed by the Fuerzas Armadas Revolucionarias de Colombia (FARC), the Ejército de Liberación Nacional (ELN), paramilitary groups and members of the armed forces.

Since then, the preliminary examination in Colombia has focused on assessing the criteria for admissibility and, in particular, complementarity. In so doing, the Office has consistently encouraged and monitored efforts by the Colombian authorities to bring the perpetrators to account, including through the Justice and Peace Law adopted in 2005 with respect to paramilitary leaders. In addition to the Justice and Peace Law, national proceedings have been initiated against guerrilla group leaders, police and army officials, and politicians with alleged links to armed groups. There are also investigations into the so-called "false positives" cases.

In October 2007 and in August 2008, the Prosecutor led missions to Colombia during which he sought information on the activities of the judicial system, met with members of the government, Supreme Court judges, peace and justice judges, prosecutors, member of the police, and civil society. In addition, numerous meetings were held between other Office representatives and State representatives. On each occasion, the Office sought information on whether proceedings were conducted to establish the criminal responsibility

of those who had taken part in orchestrating the most serious crimes committed within the country, and especially the responsibility of commanders and those who had assisted them. The Office has also requested information from 11 countries, including Colombia itself, regarding investigations that might be conducted against persons suspected of offering some form of support to armed groups responsible for committing crimes within the Court's jurisdiction in Colombia.

The Office will continue to examine the situation and national proceedings in Colombia. In this context, in accordance with its positive approach to complementarity, the Office has welcomed President Santos' efforts at seeking further international support for the Colombian national proceedings and at promoting South-South cooperation. The appointment of Spanish Judge Baltasar Garzón, who has worked as consultant for the Office, as advisor to the Mission to Support the Peace Process (MAPP) in Colombia of the Organization of American States is another example of positive complementarity in practice and will hopefully contribute to helping the Colombian authorities moving forward on the road toward the end of impunity.

(c) The example of Georgia also shows how preliminary examination activities can bolster complementarity. Shortly after the Prosecutor confirmed that his Office had started the examination of the situation in Georgia on 14 August 2008, the Office received information from both the Georgian and the Russian Governments that their respective General Prosecutor's Office had started investigations into alleged violations committed during the armed conflict that broke out between the two countries in August 2008. Since then, the Office has requested and received volumes of information about the ongoing investigations. The Office has also paid several visits to the Russian Federation and to Georgia where it met with the prosecutors and investigators in charge of the respective national inquiries.

**(b) Investigation and prosecution phase**

34. Following the opening of an investigation into a situation by the Office, positive complementarity continues to inform its policy toward the selection of cases to be the focus of its investigation and prosecution. Situations under investigation by the Office will typically involve a large number of crimes committed by numerous perpetrators against scores of victims. Pursuant to its policy of focused investigations and prosecutions, the Office will investigate and prosecute those bearing the greatest responsibility for the most serious crimes, based on the evidence that merges in the course of an investigation.

35. Accordingly, the Office supports a comprehensive approach to combat impunity and the prevention of recurring violence, by combining its own efforts on the most serious crimes and on those who bear the greatest responsibility, while encouraging and supporting national investigations and prosecutions of other alleged perpetrators as well as truth and reconciliation mechanisms. It may, for example, provide national authorities with information collected by the Office that could be of assistance to their national proceedings, subject to the existence of a credible local system of protection for judges or witnesses, the integrity of domestic proceedings and other security caveats. The Office may also share with national authorities expertise in relation to its best practices in the conduct of investigations and prosecutions, including witness protection and evidence handling. This approach not only assists States in fulfilling their primary responsibility for investigation and prosecution of crimes under the Court's jurisdiction, but also allows the Office to promote considerable cost savings in relation to the overall goal of ending impunity, contributing thereby to the efficiency also of its own work.

36. In Uganda for instance, in addition to the Office's investigation and prosecution of the top leaders of the Lord's Resistance Army (LRA), the Office has been providing assistance to the national authorities to investigate and prosecute other individuals. An example is the visit of Richard Buteera, Director of Public Prosecutions of Uganda, in November 2010 to the Court, in relation to the investigation and prosecution before the Ugandan High Court of an LRA commander arrested in the Democratic Republic of the Congo. The charges included some incidents committed after 2002 that were investigated by the Court. The Office received from the Ugandan authorities logbooks and radio intercepts that are related to the incidents selected for prosecution in the High Court of

Uganda. The Office is not only able to provide copies of the raw material received, but also full Acholi/English typed transcripts of some of the taped intercepts, as well as typed and searchable records of handwritten logbooks and of taped intercepts. The Office will provide maps and graphs developed. Uganda has also requested the Office to provide assistance with regards to witness-related issues. In March 2011, as a follow-up to this visit, senior staff of the Public Prosecutions' Office, including Venis Baguma Tumuhimbise, Head of the Ugandan War Crimes Investigation Unit and Joan Kagezi, Head of the Ugandan War Crimes Prosecution Unit and Commissioner of Police, visited the Office for ten days for a program of meetings with relevant staff. The Office shared lessons learned and best practices, including in relation to witness protection and support and evidence handling.<sup>15</sup> The Ugandan prosecutors have welcomed the assistance they are receiving, and emphasized the importance attached to securing the arrest of Joseph Kony and the other top LRA commanders and their surrender for trial at the Court.

37. The investigation and prosecution of crimes allegedly committed by the Forces démocratiques de libération du Rwanda (FDLR) militia in the Kivu provinces in eastern Democratic Republic of the Congo represent one of the most successful examples of complementarity under the Rome Statute system. Part of the FDLR leadership was based in Europe. Ignace Murwanashiyaka and Straton Musoni, the FDLR's President and Vice-President, respectively, were arrested by German authorities on 17 November 2009 and are currently facing trial in Germany. Callixte Mbarushimana, the militia's Executive Secretary was based in France. He was arrested by French authorities and surrendered to the Court on 25 January 2011.

38. The prosecution of the FDLR leadership is the result of more than two years of investigations conducted by Germany, Rwanda, the Democratic Republic of the Congo, France and the Office, into the alleged crimes in the Kivus and specifically into the activities of the FDLR.

39. The Office's cooperation with Germany regarding their case is an example of this approach. Since at least June 2009, investigations were conducted in consultation between the Office and the Federal Public Prosecutor General's office at the Federal Court of Justice in Germany, to maximize the effectiveness of the Rome Statute system and to engender a complementary approach between the Court and national proceedings. The Office has received information from Germany, in accordance with usual cooperation mechanisms, and it has provided information to support the German investigation as well. The Office has also facilitated the contact between German and national judicial authorities in the region, in particular in the Democratic Republic of the Congo.

40. Rwanda, which is not a State Party, has accepted OTP operations on its territory in relation to the FDLR case and has offered full cooperation to the Office, activities facilitated by a meeting of the Prosecutor and the Deputy Prosecutor with President Kagame in late 2009. The Office also facilitated in several instances contacts between national authorities investigating cases in Europe and in Rwanda.

41. As in different other cases before the Court, the Democratic Republic of the Congo has consistently supported the Office's investigation into crimes committed by the FDLR by providing information and assisting with its operations, witness protection and access to the crime scenes. Joint activities were also conducted by the Office and national judicial authorities in relation to some incidents in which Callixte Mbarushimana was allegedly involved and in relation to which other lower level perpetrators should be brought to justice before the national jurisdictions.

42. Apart from the arrest and surrender of Callixte Mbarushimana to the Court, France was particularly involved in the investigation through collecting information, sharing intercepts and other material in relation to this case and investigating certain aspects of the case at the Office's request. The Office has expressed its availability to facilitate the work of the French authorities in the Great Lakes region and support their investigations. The Office is now liaising with different national jurisdictions, checking the activities of other members of the FDLR present in Europe.

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<sup>15</sup> In relation to any information shared, the Office has received a formal undertaking from the Ugandan authorities that such information will be used in the context of proceedings that are consistent with internationally recognized human rights standards.

43. In relation to alleged crimes of sexual violence committed in early August 2010 in several villages of North Kivu in the Democratic Republic of the Congo, the Office has also approached the United Nations Development Program and the United Nations Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) to promote joint investigation by the Office, which would focus on identifying the most responsible for the gravest crimes, and the national authorities to ensure that those responsible at all levels are brought to justice. The Office intends to continue such efforts in this case with the hope to use this model in future cases.

44. The prosecution of the FDLR leadership is a perfect example of State cooperation in practice and of how the Office's positive complementarity approach works in practice, as the Office in its investigation in the Kivus aims at a coordinated approach to transfer background information, contextual analysis, or evidence on alleged perpetrators of crimes in the Kivus to relevant national judicial authorities in order to support complementary efforts, subject to the satisfaction of the necessary conditions.

**2. Other forms of cooperation: engaging with a variety of national and international networks**

**(a) Developing a network of law enforcement agencies (“LEN project”)**

45. After meeting with war crime units and chiefs of police from around the world, the Office has been actively involved in creating and has participated in a Law Enforcement Network (LEN) of national law enforcement officials, including from situation countries, and INTERPOL, working together to define investigations and projects that can be undertaken domestically to support efforts against massive crimes. Over the last years, thirty-two officials from fourteen states have participated. The goal is to pool resources, share relevant information and identify areas for potential judicial cooperation. Critical areas are financial investigations as well as efforts to tackle support networks that materially assist perpetrators and contribute to the commission of crimes and to prosecute pillaging of natural resources as a war crime or as a central element of most of the criminal patterns the Office is investigating.

**(b) Contributing to national efforts to build expertise and capacities**

46. The Office has also sought to contribute to the efforts of situation countries by:

(a) Calling upon their officials, experts and lawyers to participate in investigative activities, taking into account the need for their protection;<sup>16</sup>

(b) Inviting experts from situation countries to participate in training in the context of the LEN; and

(c) Brokering support for national judiciaries by approaching international organizations.

47. In the course of its work, the Office has developed contacts with, inter alia, the World Bank Bureau for fragile states, the United Nations Peace Building Commission, United Nations Development Program programs in the Democratic Republic of the Congo, the various Special Representatives of the United Nations Secretary-General, including Special Representative for Gender Violence in Conflict, Margot Wallström, as well as with donors to inform them of the specific needs of such countries which have come to its attention. The goal is to encourage the international community, including donors, to adopt a policy of promoting justice efforts which effectively complement the work of the Court.

<sup>16</sup> Some examples: In 2009, the Central African judicial authorities assisted in the forensic examination of a victim in relation to the case against Jean-Pierre Bemba. Also 2009, Congolese Prosecutors participated in the forensic examination of a crime scene in Bogoro in relation to the case against Kantanga and Ngudjolo.

(c) **Providing information to those involved in mediation/accountability efforts**

48. The Office also provides information about its judicial work to those involved in mediation efforts such as United Nations and other special envoys in order to promote comprehensive solutions to conflict situations, including ensuring accountability.<sup>17</sup>

**3. Integrating efforts: reports to States**

49. While States have the primary responsibility to conduct genuine proceedings for the massive crimes that fall under the Court jurisdiction, there is much else that the Office can and plans to do in order to ensure an effective implementation of the complementarity framework established by the Rome Statute.

50. In the context of its investigations and preliminary examination activities, the Office can identify the specific situations and areas that require assistance in order to fully enforce the scope of the Rome Statute in the national contexts. For example, the Office could offer to regularly report to States on the specific difficulties and gaps it encounters, whether in terms of lack or inappropriate domestic legislation regarding witness protection, independence of the judiciary, the crimes covered by the Rome Statute, etc. This would in turn help States, in particular donor States, to better diagnose the needs, and would also help further connecting or linking the Court and the general question of justice and accountability with national, regional and international development programs, in particular in the framework of the responsibility to protect (R2P) and of good governance programs. Justice and accountability related needs could thus be mainstreamed more effectively throughout Ministries and Departments, e.g. Justice, Foreign Affairs, Defence, Development, United Nations and other multilateral representations, etc.. As the Office sends its investigators to the field on a very regular basis, the production of these reports would not necessitate additional resources. Similarly, the Office is also exploring ways to work with the Secretariat of the Assembly of States Parties.

**4. Other activities**

(a) **Legal Tools Project**

51. The ICC Legal Tools Project, conceived by the Office of the Prosecutor, and drawing on the support of outside partners for the development and maintenance, has been designed to equip users, such as criminal jurisdictions, counsel and NGOs, with legal information, digests and an application to work more effectively with core international crimes cases. They comprise at present over 44,000 documents in several databases, together with four legal research and reference tools, i.e. the Case Matrix, the Elements Digest, the Proceedings Digest and the Means of Proof Digest. The Tools serve as an electronic library on international criminal law and justice to which the general public has free access, thus providing a useful tool supporting national complementarity efforts. It represents the most comprehensive and current on-line resource for the practice and research of international criminal law.

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<sup>17</sup> Examples include: in Uganda, in the context of the Juba peace process, the Office made clear that the Court warrants against the top leadership of the LRA could not be subject to negotiation, and that amnesty for those subject to the Court's warrants was not an option. In the Democratic Republic of the Congo, when negotiating the Goma Peace Agreement of January 2008, participants were briefed by the Office and *in fine* excluded any amnesty for crimes under the Court's jurisdiction. In the Central African Republic the Prosecutor met with the Head of the United Nations Peacebuilding Office in the Central African Republic (BONUCA) and briefed the Inclusive Political Dialogue (consisting of representatives of the Government, civil society, opposition and armed groups) under the auspices of the Geneva Centre for Humanitarian Dialogue. The process led to the June 2008 Peace Agreement excluding amnesty for war crimes, crime against humanity and genocide. In Darfur the Office pursued its cases as the Sudanese authorities were not conducting relevant proceedings. At the same time the Office supported efforts by the Arab League as well as by the African Union High-Level Panel on Darfur, chaired by the former President of South Africa, Thabo Mbeki, to ensure accountability at all levels.

**(b) Promoting educational activities**

52. Education is one of the fundamental means to maximize the contribution of the Court to the prevention of future crimes. In particular, domestic educational curricula at all levels can integrate:

(a) How global organizations, such as the Court and the United Nations work; this can be complemented regionally by information on the work of regional institutions, e.g. the African Union, the European Union, the Organization of American States, etc.;

(b) Information on historical events involving massive crimes, e.g. the holocaust, the Rwanda genocide, the former Yugoslavia, etc., as well as on the concepts of genocide, war crimes, and crimes against humanity, gender crimes and crimes against children; and

(c) Teaching on how to develop individual skills to manage violence and conflicts of every day life.

53. Representatives from several States Parties and non-States Parties, as well as officials from international organizations, such as the World Bank and the Inter-American Development Bank, have engaged in this idea and committed to share their best practices and increase efforts to promote national curricula that can contribute to the reduction and prevention of violence. Other relevant actors, including academia, NGOs and school book publishers, have similarly expressed their willingness to contribute.<sup>18</sup>

54. The completion of the first trial of the Court (*The Prosecutor vs. Thomas Lubanga*) will be an opportunity to focus on how States Parties and other relevant actors can maximize the work of the Court through their national curricula, and thus contribute to prevention. Further discussions and exchanges could take place during a side-event at the tenth session of the Assembly of States Parties in New York.

**(c) Justice Rapid Response**

55. The Office contributes to States' initiatives to compile rosters of experts who can be made available upon request by States facing massive crime, such as the Justice Rapid Response (JRR) project. Office staff has participated in trainings to provide expertise on the Office's own investigative practices.

**C. The Registry**

56. The Registry has many statutory functions in respect of managing the non-judicial aspects of the Court, and this must be its primary focus. Using existing resources creatively, and armed with good will and the knowledge that the Court operates in a wider system on which it also depends, the Registry has nevertheless been able to develop some initiatives to further complementarity, all of which build on existing activities.

57. Generally, the Registry plays a central role within the Court in facilitating fair trials, from court services such as translation and interpretation, to counsel representation, legal aid, detention conditions and enforcing the presumption of innocence to witness protection, victim participation and ensuring efficient proceedings through court management processes. The capacity of a State in all these areas is crucial to its capacity to conduct fair domestic proceedings for serious international crimes. This capacity is essential both to give the primacy to national jurisdiction which the Statute dictates, as well as to ensure that countries of situation are in a position to try lower level perpetrators which the Court is not pursuing.

58. The Registry, within the existing resources and in the implementation of its mandate as set forth in the Rome Statute and the Rules of Procedure and Evidence, can contribute to advancing complementarity work either through participation in multilateral fora and

<sup>18</sup> On 14 June 2011, the Colombian Vice-Minister for Education, Mauricio Perfetti del Corral, visited the Court and met with the Office staff to present what Colombia has been doing in terms of educational programs to reduce, manage and prevent violence, thus showing leadership in this area. The Vice-Minister also met with representatives of States Parties and non-States Parties, as well as academics, in order to discuss sharing of experiences and best practices and further develop concerted efforts to link education and conflict management.

debates, engaging with wider international and donor community initiatives related to complementarity and fostering effective initiatives in the situation countries in close dialogue with local actors and rule of law programmes and closely coordinating with the other organs of the Court.

**(a) Strengthening legal representation**

59. The Registrar's role is to facilitate the dissemination of information and case law of the Court to defence counsel and, as appropriate, cooperate with national defence and legal associations to promote the specialisation and training of lawyers in the law of the Statute and the rules.<sup>19</sup> In addition, any counsel who wishes to practice before the Court, either on behalf of defendants or on behalf of victims must be inscribed in the list of counsel administered by the Registry.<sup>20</sup>

60. In this respect the Registry organizes a yearly Seminar for both defence and victims counsels on the ICC list of counsel. The Seminar is funded through voluntary contributions.<sup>21</sup> Through this training scheme the counsels are updated on the latest jurisprudence, applicable procedure and other topical issues. In relation to victims' participation, it is clear that only with experienced and dedicated counsel will the jurisprudence on the scope and depth of victim participation be properly and fully developed.

61. Since 2009, to maximize its impact, in the margins of the Seminar, a training course targeting, in particular, counsel from situation countries has been introduced. In the years to come the impact will be further enhanced. The Registry is looking to include more specific complementarity issues into the upcoming Seminars, introduce a "train the trainer" component and encourage the election of regional focal points amongst participants. The objective is to ensure that these training sessions can be replicated nationally and/or regionally by the lawyers themselves, further spurring national ownership and engaging the legal profession.

62. This initiative is aimed at strengthening the competencies of the counsel at the national level as they will have the ability to prosecute or defend international crimes in their own national jurisdictions. Their increased knowledge of international criminal law and the Rome Statute system will also contribute to the creation of necessary public awareness and support and ultimately political will for the prosecution of serious international crimes at the national level.

63. Raising awareness about the ICC list of counsel is a key element. To this end, the Registry has contacted States Parties and local and international bar associations to publicize the requirements for inclusion and to encourage eligible counsel to apply. This open list system has allowed the Court to develop a dynamic list of counsel to draw from to ensure quality defence and victims' representation in proceedings before the Court. The list is also open to lawyers from states that are not parties to the Statute. Enlistment of such lawyers is beneficial to the Court as it allows professionals from states not party to the Statute to better understand the Court, which should create a spill-over effect in the state concerned and foster better understanding of, and increased engagement with, the Rome statute system and issues of international criminal justice.

**(b) Witness protection**

64. Witness protection is one of the crucial areas contributing to effective prosecution of Rome Statute crimes and the conduct of fair trials. The Registry has worked over these initial years to systematically develop a tool kit on witness protection. This includes developing witness protection capabilities in the situation countries, by cooperating with

<sup>19</sup> Rule 20(f) of the Rules of procedure and Evidence.

<sup>20</sup> Rule 22 of the Rules of Procedure and Evidence and regulation 68 of the Regulations of the Court.

<sup>21</sup> The Seminar is currently funded by the European Commission and MacArthur Foundation. There are 282 persons on the list of counsel, 226 men and 56 women from 49 different countries, including 77 from Africa, 5 from Asia, 7 from Eastern Europe, 189 from the Group of Western and Other States, and 4 from Latin America and the Caribbean.

local law enforcement on local security arrangements, for example by setting up an Immediate Response System for any emergencies.

65. The Registry has tapped into existing networks and specialised bodies in order to use their expertise maximize use of resources and foster lasting national solutions through effective engagement with the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) and United Nations Office of Drugs and Crime (UNODC). Within existing resources, in the Democratic Republic of the Congo, the Registry has provided specific witness handling training to the special Units trained by the United Nations civilian police. This initiative is aimed at fostering the development of a national capacity on witness protection, so that a national solution can be found. It strengthens both the ability of the Court to conduct fair trials in The Hague, as well as the local capacity to conduct fair trials in-country. This practice can be then used in other situation countries.

66. To maximize impact and strengthen national capacity beyond situation countries, the Registry, within existing resources, is relying on either bilateral or multilateral partners active in the area, such as UNODC. The Registry assists them by making staff available as trainers, thereby lowering their costs and creating synergies and infusing knowledge in the international justice system.

67. As a last resort, however, the international relocation of protected Court witnesses is the only solution where the threat does not permit internal resettlements. In this area and with a view to strengthening the national systems, the Court has opened a Special Fund where countries that have capacity, skills and resources donate funds for the relocation of witnesses to countries that have the willingness to accept protected witnesses, but no capacity or resources for doing so. This cost-neutral initiative for the States in question is also aimed at strengthening national witness protection capacity. Efforts are needed to ensure that as many States as possible make use of this initiative.

**(c) Court management**

68. Effective court management is crucial to providing fair trials, from archiving and document management to translation, interpretation and judicial support functions. There are a number of initiatives currently explored by the Registry, based on lessons learned from ICTY and ICTR, which can have a lasting impact in the situation countries and can be an integral part of the legacy, thus contributing to empowering the national jurisdictions.

69. For example, the Court's expertise in court management systems and best practices can be transferred to situation countries. Ensuring national access to Court archives allows the facts and issues which come out of trials to be part of the historical record of the country. Exploring how best to leave a copy of the archives of a situation to the country concerned, and how to best advise on its safekeeping and general access. In terms of complementarity, this would again increase local knowledge and stimulate demand for local prosecutions of international crimes, as well as provide a model for national document management and archiving.

70. As regards translation and interpretation, the Court has a real spread of dialects and languages.<sup>22</sup> For this purpose, the Court has recruited staff from the region in question, trained them both in translation and interpretation standards, and in the official language of the Court. This activity absolutely crucial to the conduct of fair trials has clear complementarity effects, since the personnel concerned, upon return, will bring best practices in this area and work as interpreters or translators in any domestic proceedings.

**(d) Public information and outreach**

71. Outreach is an integral part of conducting fair and public trials. The Court has mainly been focusing on disseminating information about its mandate and judicial proceedings in the six situations before it targeting a variety of audiences. The aim was to

<sup>22</sup> Currently used in the proceedings: Acholi, Lingala, Sango, Zagawa, Swahili, Lendu. The Acholi language had to be codified in order to be transcribed and translated.

make the proceedings accessible to and meaningful for the affected communities, through constant dialogue. In turn, the Court's policies and priorities could be steered accordingly.

72. The impact of the Court's outreach activities in all situation countries has been extensively described as part of the Court's Annual Outreach reports.<sup>23</sup> One target audience has been the local judiciary in Kinshasa and Ituri Province in the Democratic Republic of the Congo. The training has been instrumental and contributed to rebuilding national judicial capacities. Deepening the impact of these training sessions can be achieved through the use of the syllabus and materials of the Seminar for counsel. Hence, the local judiciary can use them as veritable capacity building tools, as their knowledge in the law and jurisprudence of the Court is strengthened and it can be applied in domestic proceedings of serious international crimes. Creating a culture of no impunity through training sessions with Universities and lobbying for the introduction of international criminal law in the curricula has been another useful tool to advance complementarity.

73. Broadening and deepening the Court's outreach efforts and thus its long term impact at the situation country level are subject to the availability of resources. The Court will continue through the use of existing resources and in partnering, where and when possible, with local networks work towards transferring knowledge at the national level. Together with national counsel, the Registry's role in this area is another useful tool in raising awareness about the principles of international criminal law and stimulating demand for the national prosecution of international crimes. This is likely to contribute to the creation of domestic political will for doing so, thus furthering complementarity.

**(e) Field engagement**

74. To date, the Court has opened five field offices.<sup>24</sup> The field offices of the Court are essential in the implementation of the Court's mandate in the situation countries.<sup>25</sup> Whilst field offices are not engaged in technical assistance projects, they can play a catalyst role in ongoing national discussions with bilateral and multilateral actors working on rule of law reform issues, as well as directly with the Government. In this way and, within existing resources, the national capacities can be reinforced and the funds already allocated by the rule of law actors can better target the real needs of the national systems, thus reinforcing the mechanisms needed for the prosecution of international crimes in at the country level.

**D. Court-wide initiatives**

**1. Participation in and organization of seminars, trainings and conferences**

75. The Court regularly participates in events organized by civil society, international organizations or government authorities that are, directly or indirectly, relevant for its complementarity efforts. In this respect, it provides information on the Rome Statute framework with a view to advancing national (implementation legislation or investigation and prosecution) efforts, sharing best practices on a number of relevant subjects, as well as maintaining and creating a relevant contact network. These include local trainings, such as of judges, government officials, law enforcement officials and prosecutors; seminars and conferences, such as those organized by the International Center for Transitional Justice and Parliamentarians for Global Action; and others.

76. The Court is currently conducting series of five regional seminars in partnership with the *Organization Internationale de la Francophonie* (OIF): seminars have been so far held in Dakar, Senegal (7-11 December 2009), Yaoundé, Cameroon (4-8 October 2010) and the third one will take place in Addis Ababa at the seat of the African Union on 19 July

<sup>23</sup> Outreach Report 2010, <http://www.icc-cpi.int>.

<sup>24</sup> The Court has field offices in Bangui (Central African Republic) and in Kinshasa (Democratic Republic of the Congo), forward field presence in Bunia (Democratic Republic of the Congo), field presence in Kampala (Uganda) and Task Force Field Presence in Nairobi (Republic of Kenya).

<sup>25</sup> The mandate entails undertaking investigations, ensuring the protection of witnesses and victims, enabling the victims to exercise their statutory rights of participation and reparation, carrying out effective outreach activities directed to the affected communities, assisting counsel teams (defence and legal representatives of victims) and the Trust Fund for Victims, ensuring the security of staff working in and traveling to the countries of situation, and providing IT services and logistical, administrative and medical support.

2011. The Court also co-organized a seminar with the State of Qatar and the League of Arab States in Doha on 24-25 May 2011. On 5-6 July 2011, the Court hosted an induction session for court presidents and chief prosecutors of the Association of High Courts of Cassation in Francophone Countries in The Hague.

77. These events promote the principle of complementarity by forging links between the Court and national jurisdictions, by sharing knowledge and experiences and by raising awareness about the Rome Statute and international criminal law among national practitioners.

## **2. Internship and Visiting Professionals Program**

78. The Court's Internship and Visiting Professionals Program annually facilitates the participation of approximately 150 young or mid-career professionals in the work of the Court's organs. This provides them with an invaluable opportunity to develop skills, knowledge and awareness of the Court and the wider international criminal justice system. The European Commission, States Parties and foundations' financial support has enabled the Court to select the best applicants regardless of their financial situation or country of origin. The Court has put in place an alumni network a key tool in measuring the impact of the programme as it can provide information as to those participants have continued work in international criminal justice realm.

79. Many of the interns and visiting professionals will later contribute to the development of national capacity for the prosecution of Rome Statute crimes in their home countries, either as legal practitioners or in other roles such as government officials.

## **III. Conclusion**

80. Further developing the potential of the overall Rome Statute system to prevent impunity at all levels requires coordinated efforts to develop both capacity and willingness to prosecute international crimes in national jurisdictions. Genuine and timely national proceedings should always be the primary mechanism of addressing mass atrocities, and proceedings before the International Criminal Court the exception.

81. Many actors have a role to play here. In the first place, the governmental, parliamentary and judicial authorities of each national jurisdiction; the States Parties, through their political and diplomatic actions as well as development aid; multilateral donors and development aid agencies; the United Nations and its specialized agencies; international and regional organizations; civil society; and, to a limited extent, the different organs of the Court. Acting within existing resources, the Court is undertaking various efforts to support the ability of national jurisdictions to address Rome Statute crimes, thereby also helping prevent situations from reaching the Court and international proceedings incurring costs on the States Parties.

82. The Assembly of States Parties has a particularly important role in raising awareness in the international arena and promoting continued and focused efforts on complementarity, as well as coordination of activities among different actors. The Court will continue to explore ways to work together with the Secretariat of the Assembly in light of the mandate given by the Review Conference to the Secretariat to facilitate the exchange of information between the Court, States Parties and other stakeholders aimed at strengthening domestic jurisdictions.