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Report of the Bureau on complementarity

Note by the Secretariat

Pursuant to paragraph 7 of resolution ICC-ASP/11/Res.6 of 21 November 2012, the Bureau of the Assembly of States Parties hereby submits for consideration by the Assembly the report on complementarity. The present report reflects the outcome of the informal consultations held by The Hague Working Group of the Bureau with the Court and other stakeholders.

I. Background

1. At the first meeting of the Bureau, on 12 February 2013, the Bureau appointed Denmark and South Africa, as *ad country* focal points. As such, Denmark and South Africa are focal points in both The Hague Working Group and the New York Working Group in the lead up to the twelfth session.

2. At the eleventh session of the Assembly, States Parties resolved to continue and strengthen effective domestic implementation of the Statute and to enhance the capacity of national jurisdictions to prosecute the perpetrators of the most serious crimes of international concern.¹ Consequently, the organs of the Assembly and the Court were essentially given the following mandates: The Bureau was requested to continue the work on complementarity, inter alia in accordance with the Kampala resolution, including continuing the dialogue with the Court and other stakeholders on this issue. The Secretariat of the Assembly of States Parties (“the Secretariat”) was mandated, within existing resources, to facilitate the exchange of information between the Court, States Parties and other stakeholders, including international organizations and civil society, aimed at strengthening domestic jurisdictions, and to report to the twelfth session of the Assembly. The Court, while recalling its limited role in strengthening national jurisdictions, was requested to further cooperate with the Secretariat on complementarity and to report to the twelfth session, in particular on exit-strategies (completion strategies) and related issues.

II. General findings

3. The Rome Statute creates a system of criminal justice designed to ensure that there is no impunity for the most serious crimes of concern to the international community as a whole due to the unwillingness or inability of States to investigate and prosecute the perpetrators of these crimes themselves. This system is based on the principle of complementarity as enshrined in the Statute, which means that the Court will intervene only when States are unwilling or unable genuinely to carry out the investigation or prosecution of these crimes.

4. It is generally understood by States Parties, the Court and other stakeholders that international cooperation, in particular through rule of law development programmes aimed at enabling domestic jurisdictions to address war crimes, crimes against humanity and genocide, contributes to the fight against impunity for such crimes and the functioning of the Rome Statute system. Such cooperation has been described as “positive complementarity” or complementarity activities. National ownership is essential for maximizing the impact of such activities.

5. In order to promote and foster increased international efforts aimed at strengthening national jurisdictions – “positive complementarity” – the focal points have, together with the Secretariat, worked with States, international organizations and civil society on mainstreaming complementarity activities into the rule of law development discourse and relevant programmes.

6. States Parties and the Court have expressed the view that the role of the Court itself is limited in actual capacity-building for the investigation and prosecution of Rome Statute crimes “in the field”. Rather this is a matter for States, the United Nations and relevant specialized agencies, other international and regional organizations and civil society. The Court can, however, in the course of implementing its mandate within the framework of the Rome Statute, in particular article 93 (10), share information with and assist national jurisdictions. The Assembly of States Parties has an important role to play in sustaining and furthering the efforts of the international community in strengthening national jurisdictions through complementarity activities, thereby enhancing the fight against impunity.

¹ *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Eleventh session, The Hague, 14 – 22 November 2012* (ICC-ASP/11/20), vol. I, part III, ICC-ASP/11/Res.6, para. 1.

III. Assembly of States Parties and its Secretariat

7. The Assembly of States Parties is the custodian of the Rome Statute system. While the Assembly itself has a very limited role in strengthening the capacity of domestic jurisdictions to investigate and prosecute serious international crimes, it is a key forum for matters of international criminal justice. Combating impunity both at the national and the international level for the most serious crimes of concern to the international community as a whole is the core objective of the Statute.

8. The Secretariat of the Assembly has continued to develop its outreach, information-sharing and facilitating function.² Given that this function has been established within existing resources there are limits to what can be achieved. However, progress has been made in both tracks: the internet portal for complementarity and the forging of relationships with relevant States and actors in the field. During the period since the last report by the Secretariat there has been a growing interest in submitting information to and accessing the complementarity portal.

9. In addition, the Secretariat is in the process of conducting a needs survey among States Parties,³ and has in that respect developed a more proactive approach to engaging with interested States. As the survey is still in progress, the Secretariat was encouraged to continue the work and report to the next session of the Assembly.

10. States Parties welcomed the efforts by the Secretariat and encouraged it to continue the work. In addition it is recommended that the Assembly considers making Complementarity an agenda item to be discussed at future sessions.

IV. The Court

11. As has been established, the role of the Court in building domestic capacity for the prosecution of the most serious international crimes is limited. From a judicial point of view, complementarity has a specific meaning relating to the admissibility of cases before the Court. This remains exclusively a judicial issue.

12. Nevertheless the Court has extensive investigation and prosecutorial experience and expertise. In addition, concerning situation countries, the Office of the Prosecutor continues to gather knowledge and develop expertise on the national judicial system and has thoroughly investigated the crimes that have occurred. Taken together this provides opportunities for the Court to, within the framework of the Rome Statute, in particular article 93 (10), share information with and assist national jurisdictions. Naturally this has to be done bearing in mind the requirements of the Statute as well as other relevant factors such as the need to protect witnesses and preserve the integrity of evidence collected. In the same way, the Court can benefit and learn from the experiences and best practices of states that have themselves investigated and prosecuted Rome Statute Crimes.

13. In accordance with Assembly resolution ASP/11/Res.6, the Court has focused its report to the twelfth session of the Assembly on possible completion strategies for situation countries where the Court's judicial activities are coming to an end. It was noted that while the Court is a permanent institution and thus will itself be responsible for completion and residual issues, important lessons could be learned from the other ad-hoc courts and tribunals. In addition an important conclusion was that, as the Court only deals with those most responsible for crimes in a given situation, efforts aimed at strengthening the national judicial system should not wait for Courts' activities to draw to a close. Rather, assistance to the national system should be provided as early as possible to support not only completion of any cases before the Court, but also to foster national prosecutions of other perpetrators.

14. Given the complexity of the issue, the report of the Court on completion of activities in situation countries should be seen as a first step in defining the parameters for possible completion strategies. As such, States Parties welcomed the report and encouraged further

² Report of the Secretariat on complementarity (ICC-ASP/12/33).

³ ICC-ASP/11/Res.6, para. 8.

work on this issue. In this context it was noted that the Statute itself does not contain provisions on closure of situations or termination of jurisdiction. It was also noted that support to the national judicial system was linked not only to the existing ability of that system but also the issue of willingness.

V. Broader efforts of the international community

15. In addition to discussions and information-sharing and facilitation within the Assembly and by the Court, various actors organize a remarkable number of activities relevant to complementarity and capacity building for fighting impunity for the most serious crimes of concern to the international community as a whole. States Parties have received updates on some of these, and more comprehensive information will be available on the Secretariat's complementarity web portal.

16. Apart from general activities undertaken at the UN and other international and regional organizations, a myriad of concrete capacity building projects are being implemented around the world, not least in countries in or emerging from conflict. These activities are carried out both by States, international and regional organizations and civil society.⁴

17. As an example of these many activities, States Parties were briefed on the complementarity activities undertaken by Justice Rapid Response, an intergovernmental mechanism that provides surge capacity assistance to States and international institutions in the framework of international criminal investigation and prosecution. There was also an opportunity to exchange views with the European Commission on the completion and implementation of the EU tool-kit on complementarity. States Parties welcomed these efforts, as well as all efforts of the international community at large in this regard.

VI. Conclusion and recommendations

18. The above highlights not only the importance of continued efforts in strengthening national capacity for investigating and prosecuting Rome Statute crimes, but also the important roles of the Assembly and its Secretariat, as well as the Court itself, in promoting such capacity building. Ensuring that national judicial systems are able to deal with the most serious crimes of concern to the international community is vital for making the Rome Statute system work, ending impunity for these crimes and preventing their reoccurrence.

19. In this context it is recommended that the Assembly adopt the draft resolution on complementarity contained in the annex to this report, delete any unnecessary paragraphs from the omnibus resolution as appropriate and consider including the issue of complementarity on the agenda of future sessions of the Assembly for further discussion.

⁴ See, for example, the web portals of the Secretariat of the Assembly and of the United Nations Rule of Law Unit, respectively, at: http://www.icc-cpi.int/en_menus/asp/complementarity/Pages/default.aspx and http://www.unrol.org/article.aspx?article_id=37.

Annex

Draft resolution on complementarity

The Assembly of States Parties,

Reaffirming its commitment to the Rome Statute of the International Criminal Court and its determination that the most serious crimes of concern to the international community as a whole must not go unpunished, and *underlining* the importance of the willingness and ability of States to genuinely investigate and prosecute such crimes,

Welcoming the efforts and achievements of the Court in bringing those most responsible for these crimes to justice and *noting* the jurisprudence of the Court on the issue of complementarity,

Recalling the primary responsibility of States to investigate and prosecute the most serious crimes of international concern and that, to this end, appropriate measures need to be adopted at the national level, and international cooperation and judicial assistance need to be strengthened, in order to ensure that national legal systems are capable of genuinely prosecuting such crimes,

Recalling further that the application of articles 17 and 19 of the Rome Statute concerning the admissibility of cases before the Court is a judicial matter to be determined by the judges of the Court,

Recalling further that greater consideration should be given to how the Court will complete its activities in a situation country and that possible completion strategies could provide guidance on how a situation country can be assisted in carrying on national proceedings when the Court completes its activities in a given situation,

1. *Resolves* to continue and strengthen effective domestic implementation of the Rome Statute, to enhance the capacity of national jurisdictions to prosecute the perpetrators of the most serious crimes of international concern in accordance with internationally recognized fair trial standards, pursuant to the principle of complementarity;
2. *Welcomes* the international community's engagement in strengthening the capacity of domestic jurisdictions to enable States to genuinely prosecute Rome Statute crimes;
3. *Welcomes further* efforts by the United Nations, international and regional organisations, states and civil society in mainstreaming capacity building activities aimed at strengthening national jurisdictions with regard to investigating and prosecuting Rome Statute crimes into existing and new technical assistance programmes and instruments, *strongly encourages* additional efforts in this regard by other international and regional organizations, States and civil society, and in that context *takes note* of the important work being undertaken in the United Nations on the post-2015 development agenda, including the important role of rule of law in that regard;
4. *Stresses* that the proper functioning of the principle of complementarity entails that States incorporate the crimes set out in articles 6, 7 and 8 of the Rome Statute as punishable offences under their national laws, to establish jurisdiction for these crimes and to ensure effective enforcement of these laws, and *urges* States to do so;
5. *Welcomes* the report of the Bureau on complementarity, and *requests* the Bureau to remain seized of this issue and continue the dialogue with the Court and other stakeholders on complementarity, in accordance with resolution RC/Res.1 and related documents, including on complementarity-related capacity-building activities by the international community to assist national jurisdictions, on possible situation-specific completion strategies of the Court, and the role of partnerships with national authorities and other actors in this regard;
6. *Welcomes* the report of the Secretariat of the Assembly of States Parties on the progress of giving effect to its mandate to facilitate the exchange of information between the Court, States Parties, and other stakeholders including international organizations and

civil society, aimed at strengthening domestic jurisdictions,⁵ *welcomes further* the work that has already been undertaken by the Secretariat, including inviting States to submit information on their capacity-needs and reporting on this to the Assembly, and *requests* the Secretariat to, within existing resources, continue to develop its efforts in facilitating the exchange of information in this regard, and report to the thirteenth session of the Assembly on progress achieved;

7. *Calls upon* States, international and regional organizations and civil society to submit to the Secretariat information on their complementarity-related activities, and *requests* the Secretariat to report to the thirteenth session of the Assembly in this regard;

8. *Welcomes* the report of the Court on complementarity and completion of ICC activities in situation countries and, while recalling the Court's limited role in strengthening national jurisdictions, its contribution to the efforts of the international community in this regard, including the Court's Legal Tools Project, and *requests* the Court to, within the existing mandate, continue cooperation with the Secretariat on complementarity and report, as appropriate, to the thirteenth session of the Assembly.

⁵ Report of the Secretariat on complementarity (ICC-ASP/12/33).