



## Assembly of States Parties

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## Report of the Bureau on complementarity

### Note by the Secretariat

Pursuant to paragraph 47 of resolution ICC-ASP/9/Res.3, of 10 December 2010, 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 on the issue of complementarity and the further implementation of the Review Conference resolution RC/1.

### I. Background

1. At the ninth session, the Assembly of States Parties (“the Assembly”) adopted the following resolution language in relation to complementarity:

“*Welcomes* the report of the Bureau on complementarity and the progress made in implementing the Review Conference resolution on complementarity, *requests* the Bureau to continue the dialogue with the Court and other stakeholders on the issue of complementarity and the further implementation of the Review Conference resolution as set out in the Bureau report on complementarity, “Taking stock of the principle of complementarity: bridging the impunity gap” as well as the progress report of the Bureau, and *invites* the Court and the Secretariat to report to the next session of the Assembly on this matter, in accordance with resolution RC/Res.1.”<sup>1</sup>

2. Furthermore, the Review Conference of the Assembly of States Parties adopted a resolution on complementarity. The operative elements of the resolution include the following:

“*Encourages* the Court, States Parties and other stakeholders, including international organizations and civil society to further explore ways in which to enhance the capacity of national jurisdictions to investigate and prosecute serious crimes of international concern as set out in the Report of the Bureau on complementarity, including its recommendations;

*Requests* the Secretariat of the Assembly of States Parties, in accordance with resolution ICC-ASP/2/Res.3, and, 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 *requests* the Secretariat of the Assembly of States Parties to report to the tenth session of the Assembly on progress in this regard;

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<sup>1</sup> *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Ninth session, New York, 6 – 10 December 2010* (ICC-ASP/9/20), vol. I, ICC-ASP/9/Res.3, para. 47.

*Requests* the Bureau to continue the dialogue with the Court and other stakeholders on the issue of complementarity and *invites* the Court to present to the Assembly at its tenth session, as appropriate, a report in this regard.”<sup>2</sup>

3. On this basis, the facilitators and The Hague Working Group of the Bureau have addressed the issue of complementarity with the Court and the Secretariat, as well as other stakeholders, in accordance with the mandate given by the Bureau at its meeting on 17 December 2010. A number of meetings of the Working Group were held, and in addition the facilitators worked closely with the Secretariat and other stakeholders and actors outside the Assembly to promote prompt implementation of the resolutions.

## II. General findings

4. As a legal principle, and one of the cornerstones of the Rome Statute, the complementarity principle places the primary responsibility for investigating and prosecuting Rome Statute crimes on the national jurisdictions. The Court only steps in as a last resort. Voluntary measures at the national level, aimed at enabling domestic jurisdictions to address situations where such crimes have been committed, therefore strengthen the overall functioning of the Rome Statute system, a concept that has been known as “positive complementarity”.

5. There is a general understanding that in providing such support to domestic jurisdictions, the role of the Court is limited and is confined to that of encouraging domestic prosecutions and catalysing State-to-State cooperation, with the involvement of other actors such as international and regional organizations and civil society. To this effect, the Assembly has tasked its Secretariat with facilitating the sharing of information aimed at strengthening national jurisdictions.

6. States Parties were of the view that the role of the Secretariat would be to “champion” measures to prevent and prosecute Rome Statute crimes in existing development cooperation and rule-of-law programmes through catalysing cooperation between States as well as with other actors, with the aim of enabling national jurisdictions to investigate and prosecute Rome Statute crimes. Since there is activity already ongoing in this area within the international community, the role of the Secretariat would be to facilitate the exchange of information and keep the Rome Statute system and crimes central to any programme dealing with capacity building in the rule of law and judicial reform sectors.

7. In order for the concept to gain support in the development community, the facilitators placed increased efforts on “mainstreaming” positive complementarity initiatives within international and regional organizations, e.g. the United Nations system as well as regional organizations, such as the European Union. This would assist in promoting the inclusion of “positive complementarity” in the programmes planned in the United Nations system and within the European Union. Mainstreaming Rome Statute crimes into the rule of law and judicial reform programmes is important to promote the initiatives of “positive complementarity” and efforts in this regard should continue.

8. It is understood that the Court contributes to strengthening the capacity of national jurisdictions to investigate and prosecute Rome Statute crimes, in the course of implementing its mandate. Thereby, while investigating and prosecuting crimes under its jurisdiction the Court at the same time contributes to strengthening the Rome Statute system as a whole.

## III. Complementarity – the legal parameters

9. It was emphasized at the initial stages of discussions that any “positive complementarity” activities are not related to the issue of the judicial determination of admissibility, which can only be decided by the judges, within the framework of the Court’s judicial proceedings. Any cooperation and support that is given to national

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<sup>2</sup> *Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May – 11 June 2010* (RC/11), part II.A, RC/Res.1, paras. 8-10.

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 the inability or unwillingness of a State to conduct genuine national proceedings.

10. States Parties received a presentation by the Office of the Prosecutor on the legal framework of the complementarity system in the Rome Statute, in particular in relation to articles 17 and 19 of the Rome Statute. States Parties were also informed about the progress with respect to jurisprudential developments within the Court in relation to complementarity and the admissibility criterion used by Chambers when making a determination of whether the case is admissible before the International Criminal Court.

#### **IV. The role of the Assembly and its Secretariat**

11. The facilitators have held numerous meetings with the Secretariat in order to develop the information-sharing function mandated by the Assembly with respect to complementarity. This includes facilitating the sharing of information between the Court, States Parties and other stakeholders, such as international and regional organizations and civil society, aimed at strengthening the capacity of national jurisdictions.

12. The Hague Working Group has had discussions on the role of the Secretariat of the Assembly of States Parties and discussed in particular how this mandate is being carried out. The States Parties agreed that a gradual approach be adopted in relation to implementing the mandate so that the approach taken could be continuously adapted and optimized in light of experience. As such, the establishment and development of the mechanism will be work in progress.

13. The Secretariat informed that, in implementing its mandate, it has taken a two-track approach. One is establishing a web portal for complementarity, the other more direct and selective contacts between the Secretariat and other stakeholders. States Parties welcomed the progress on the web portal established by the Secretariat to ease the sharing of information and with the goal of having a one-stop portal for access to complementarity-related initiatives. The uploading of data to the website would, of course, have security requirements and all information uploaded would need to be filtered in accordance with the guidelines for usage. All States Parties and non-States Parties were encouraged to provide data for the website. The Secretariat has also set up an operational framework for the information sharing function of the Secretariat and its relationship with other relevant actors. Progress made on actually facilitating contacts in building capacity, especially with new State Parties, was welcomed by the States Parties.

14. The Secretariat was encouraged to further its work in this area, in particular in the collection and identification of best practices, as well as a more proactive forging of cooperative relationships between relevant stakeholders. It was noted that a significant role could be to maintain and contribute to the dialogue between the international legal community and the relevant development cooperation and rule-of-law communities. Through this kind of information-sharing, the Secretariat could facilitate increased awareness of Rome Statute crimes and "positive complementarity" within the rule of law development sector and be a "champion" of mainstreaming capacity building for dealing with these crimes domestically. In this regard, it is important not to reinvent the wheel but to ensure that in existing capacity building programmes the focus on Rome Statute crimes is incorporated and emphasized.

#### **V. The role of the Court**

15. It has been emphasized that the Court is not a development agency. However the various organs of the Court are already, within the course of their core activities, carrying out certain undertakings which have a positive impact on strengthening national jurisdictions. While the role of the Court is indeed limited in this area, the Court does possess relevant information from its contacts with the authorities of situation countries and other States Parties and, for instance, the Office of the Prosecutor has a section for complementarity analysis.

16. It was also noted that the Court, in carrying out its mandated activities, can utilize opportunities to promote “positive complementarity” and furthermore, that these activities have the impact on reducing the overall costs to the Court, as cases would be conducted in the national jurisdiction. In this regard, the Committee on Budget and Finance stated that “greater consideration is required on how the Court will complete its activities in a situation country and what will be required to leave. Exit strategies will help provide information to the Assembly on how existing resources can be redeployed, as well as providing guidance on how a situation country can be assisted to carry on national proceedings when the Court will have finished its activities in a given situation.”<sup>3</sup>

17. It was agreed that as part of the information sharing function of the Secretariat, a good working relationship should be established between the Secretariat and the organs of the Court to allow for the best possible flow of information in both directions.

18. Apart from this, the organs of the Court do undertake some activities with regard to complementarity and “positive complementarity”. For instance, in the course of routine high-level contacts between the heads of organs and other actors, opportunities present themselves to promote and encourage domestic proceedings and capacity building. In these cases, such contacts and the commitments that might have been agreed should be passed on to the Secretariat for working-level follow-up. Likewise, if witness protection officers or investigators are deployed as part of an on-going investigation, there may be scope for interacting with local authorities while in between witnesses or victims. As far as witnesses are concerned, there is also scope for utilizing the Trust Fund for Witness Relocation for capacity building purposes. These activities could be further explored in dialogue with the Court to see what can and should be done, without detracting from the core mandate.

## **VI. Broader efforts of the international community**

19. States Parties received updates from various actors outside the Rome Statute system who are active in the field of complementarity. In order to create better synergies and linkages, the Secretariat has begun to engage with these actors. It is evident that many efforts in different countries and regions are underway, but also that more needs to be done to maximise output and coherence. While these activities take place outside the Assembly, the Secretariat can maintain the link between the Assembly and other actors.

20. In order to further ensure mainstreaming of “positive complementarity” within the development community, the facilitators have partnered with United Nations Development Programme (UNDP) and International Center for Transitional Justice (ICTJ) in continuing the discussion on how addressing Rome Statute crimes can be better incorporated within the broader rule of law and development efforts. The results of the most recent of such meetings at Greentree Estates, New York, will be presented to the Assembly and will hopefully also, apart from other concrete outcomes, provide the Secretariat with further opportunities to develop its own role.

21. States Parties also received a presentation by the European Union on the toolkit that is being developed on “positive complementarity”, as an example of ongoing efforts. The European Union has shown strong interest in and support for the concept of “positive complementarity”, and has taken concrete actions in this regard. States Parties were invited to contribute to this process. Upon completion of the toolkit, States Parties would be informed, and ways in which the toolkit could benefit other actors could be discussed with the European Union.

22. It was agreed that the Secretariat should continue to engage with these actors in order to further the efforts and emphasize the importance of Rome Statute crimes in various capacity building initiative.

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<sup>3</sup> Report of the Committee on Budget and Finance on the work of its seventeenth session (ICC-ASP/10/15), para. 19.

## Annex

### Draft resolution language for the omnibus resolution

*(Suggested draft text, for omnibus to be included under one sub-heading).*

*Resolves* to continue and strengthen effective domestic implementation of the 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;

*Encourages* States, particularly in view of the fundamental principle of complementarity, to include 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 those laws;

*Welcomes* the Bureau report on complementarity and the progress made in implementing the Review Conference resolution on complementarity and *requests* the Bureau to remain seized of this issue and to continue the dialogue with the Court and other stakeholders on complementarity and the further implementation of the Review Conference resolution on complementarity, as set out in the Bureau report on complementarity, "Taking stock of the principle of complementarity: bridging the impunity gap";

*Welcomes* the report by the Secretariat of the Assembly of States Parties on the progress in giving effect to its mandate to, within existing resources, 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 *requests* the Secretariat to report to the eleventh session of the Assembly on further progress in this regard;

*Welcomes* the report of the Court on complementarity, *recalls* its limited role in strengthening national jurisdictions, *notes* that the Court in carrying out its judicial mandate could have a positive impact on the ability and willingness of domestic jurisdictions to investigate and prosecute Rome Statute crimes and can have a positive impact on the functioning of the Rome Statute system, *and requests* the Court to further cooperate with the Secretariat on this issue and report with the Secretariat to the next Assembly session.