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**Report of the Bureau on complementarity****I. Background**

1. At its first meeting, the Bureau appointed Botswana and Sweden, under a silence procedure, as *ad country* focal points, on 24 February 2016. As such, Botswana and Sweden are focal points in both The Hague Working Group and the New York Working Group in the lead-up to the fifteenth session of the Assembly.

2. At the fourteenth session of the Assembly, States Parties resolved to continue and strengthen, within the appropriate fora, 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.<sup>1</sup> Consequently, the subsidiary bodies of the Assembly and the organs of the Court were essentially given the following mandates: The Bureau was requested “[...] to remain seized of this issue and to continue the dialogue with the Court and other stakeholders on complementarity, 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, and also including to assist on issues such as witness protection and sexual and gender-based crimes”. The Secretariat of the Assembly of States Parties (“the Secretariat”) was mandated to, within existing resources, continue to develop its efforts in facilitating 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 fifteenth session of the Assembly on further progress in this regard.<sup>2</sup> The Court, while recalling its limited role in strengthening national jurisdictions, was encouraged to continue its efforts in the field of complementarity, including through exchange of information between the Court and other relevant actors.<sup>3</sup>

**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 themselves to investigate and prosecute the perpetrators of these crimes. 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 genuinely unable to carry out the investigation or prosecution of these crimes.

<sup>1</sup> *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Fourteenth session, The Hague. 18 – 26 November 2015* (ICC-ASP/14/20), vol. I, ICC-ASP/14/Res.4, para 86.

<sup>2</sup> *Ibid.*, annex 1, para. 13.

<sup>3</sup> *Ibid.*, para. 94.

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, may contribute to the fight against impunity for such crimes. Such cooperation has been described as “positive complementarity” or complementarity activities. National ownership is essential and a requirement to engage in, and ensure the success of, such activities.

5. Financial contributions to development programmes and to civil society are deemed highly important to promote complementarity. A number of countries have allocated development cooperation resources to promote the strengthening of national judicial capacity to address Rome Statute crimes.

6. In 2016, a number of events and conferences on the issue of complementarity in relation to sexual and gender based crimes (SGBC) have been held with relevant stakeholders, including States, the organs of the Court as well as with representatives of civil society.

7. On 25 May 2016, the co-focal points held the first informal consultations to present the programme of work on complementarity. The co-focal points briefly outlined the objectives of the activities planned for 2016. Some delegations expressed an interest in taking part in these activities since the majority of them were not planned in The Hague. Many States had made substantial progress on complementarity-related activities and there was therefore a need to continue the involvement of national stakeholders. Other delegations stressed again the need to have a broad perspective of Rome Statute crimes.

8. In The Hague, the United Nations International Criminal Tribunal for the former Yugoslavia (ICTY) and The Hague Institute for Global Justice, with support from the Embassies of Sweden, Australia and the United Kingdom, on 31 May 2016, organized a book launch event for the book “Prosecuting Conflict-Related Sexual Violence at the ICTY”, a volume edited by ICTY Prosecutor, Mr. Serge Brammertz, and ICTY Deputy to the Prosecutor, Ms. Michelle Jarvis. ICTY’s ground-breaking work has proven that it is possible to reach convictions for conflict-related sexual and gender based violence as serious international crimes and has also contributed to addressing sexual and gender-based violence as an issue of international peace and security.

9. In Dakar, Senegal, H.E. Mr. Sidiki Kaba, Minister of Justice of Senegal and President of the Assembly of States Parties together with the Ministry of Justice of the Republic of Senegal, on the occasion of the Day of International Criminal Justice organized a high-level conference on “International Criminal Justice and Sex and Gender-Based Crimes” on 16 July 2016. The event was organized with the support of the governments of Italy, the Netherlands, Sweden and Switzerland. The conference addressed, inter alia, the national and international initiatives to investigate and prosecute sexual and gender based crimes and the lessons learned from these initiatives, the major role that national criminal justice systems play to identify, bring to light, repress and punish atrocity crimes and the challenges national criminal justice systems face in the fight against impunity for sexual and gender-based crimes.

10. The Ministry for Foreign Affairs of Sweden organized a workshop on “Promoting the enjoyment of women’s human rights and reforming national laws and practices which discriminate against women” in Stockholm, Sweden, 3-4 October 2016. Participants, including Minister for Foreign Affairs of Sweden Ms. Margot Wallström, Prosecutor of the International Criminal Court Ms. Fatou Bensouda as well as practitioners and civil society from diverse national legal systems, discussed inter alia how atrocities against and disempowerment of women and girls impacted on their access to justice. Participants addressed strategies to strengthen the enjoyment of women’s rights and increase their representation and resources.

11. Following the co-focal points’ efforts to strengthen national capacity at the national level, they arranged a roundtable discussion in Kampala, Uganda, on 12 October 2016, with a view to following up the workshop held in August 2015. Together with the International Development Law Organization (IDLO) and the Directorate of Public Prosecutions (DPP) in Uganda, the Embassy of Sweden in Kampala gathered a number of practitioners, including the Attorney General, the DPP, the War Crimes Unit of the High Court, the

Justice, Law and Order Sector (JLOS), the Regional Training Facility on Prevention and Suppression of Sexual and Gender Based Violence in the Great Lakes Region and UN Women.

12. Based on the recommendations that the Assembly took note of at the fourteenth session, the roundtable discussion focused on three main areas, notably: improving the investigation and prosecution of SGBC; developing standards for the medical care of victims; and increasing resources for victims. JLOS had, since the meeting in 2015, set up a task force with the aim of combatting SGBC in a holistic and strategic manner. Progress had been made but issues such as the courts' backlog of cases, low quality of justice actors, lack of implementation and enforcement of existing regulations and lack of resources remained to be addressed. Cultural issues such as stigma and shame also remained a challenge.

13. After conducting a number of seminars and workshops at the national level, a general finding is the need to strengthen cooperation between local actors in domestic justice systems, civil society and victims' organizations as well as international justice actors and international development cooperation communities in order to implement the principle of complementarity which would enhance the effective and efficient functioning of the Rome Statute System as a whole and in setting up long term strategies for rule of law capacity-building. In both the examples of Guatemala and Uganda, Sweden has been involved in capacity-building activities for a number of years. This has resulted in a network of stakeholders that was already in place and could be further developed by the co-focal points.

14. By organizing workshops at the national level, the co-focal points have been able to draw on national efforts to come up with concrete measures on how to overcome impunity for mass atrocity crimes. The recommendations developed by IDLO and the co-focal points in 2015 are a concrete example of these measures.

15. During the fifteenth Assembly, the co-focal points will organize a side-event to present and conclude their work on complementarity, including progress reports from Guatemala and Uganda on the implementation of the recommendations on strategic action to ensure access to justice and to enhance empowerment of victims at national level.

16. 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, paragraph 10, upon request, share information with and assist national jurisdictions. The Assembly of States Parties has an important role to play in continuing the dialogue on the efforts of the international community in strengthening national jurisdictions through complementarity activities, thereby enhancing the fight against impunity.

17. It is important to recall that issues arising from the admissibility of cases before the Court under article 17 of the Rome Statute all remain a judicial matter to be addressed by the judges of the Court. Initiatives by State Parties to strengthen national jurisdictions to enable them to genuinely investigate and prosecute the most serious crimes of concern to the international community as a whole should always preserve the integrity of the Rome Statute and the effective, independent functioning of its institutions.

### **III. The President of the Assembly of States Parties, and the Secretariat**

18. 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.

19. The promotion of complementarity and national capacities of States is one of the four priorities of the President of the Assembly, H.E. Mr. Sidiki Kaba. In this respect, on 16 July 2016, the President and the Ministry of Justice of the Republic of Senegal organized a high-level conference on “International Criminal Justice and Sex and Gender-Based Crimes” to commemorate the Day of International Criminal Justice in Dakar, Senegal. The introductory panel, before the more specific discussions, included Government representatives as well as high-level representatives from international and national legal institutions and non-governmental organizations. The distinguished speakers included, *inter alia*, H.E. Mr. Andrea Orlando, Minister of Justice of Italy, Mr. Mandiaye Ndiaye, former Judge at the International Criminal Tribunal for Rwanda, Ms. Fatou Bensouda, Prosecutor of the ICC, Mr. Serge Brammertz, Prosecutor of the ICTY and the MICT, H.E. Mr. Cheick Sako, Minister of Justice of the Republic of Guinea, H.E. Mr. Flavien Mbata, Minister of Justice of the Central African Republic, H.E. Ms. Tiina Intelmann, Ambassador, former President of the Assembly of States Parties and H.E. Mr. Ciré Aly Ba, judge, Administrator of the Extraordinary African Chambers.

20. Further, considering that the adoption of implementing legislation that enables States to investigate and prosecution at the national levels the crimes under the Rome Statute is fundamental to enable the principle of complementarity, the President has encouraged and offered the assistance of the Assembly to those States Parties that have accepted, in the framework of the Universal Periodic Review of the United Nations Human Rights Council, to implement the Rome Statute nationally.

21. The Secretariat of the Assembly has continued to carry out its outreach, information-sharing and facilitating function. Given that this function has been established within existing resources, there are limits to what can be achieved. The Secretariat continues to update the internet portal for complementarity on the basis of responses received to its invitation for States Parties and other stakeholders to share information on their complementarity-related activities. The Secretariat has received responses from seven States and one NGO. The Secretariat will continue and to facilitate the exchange of information between relevant States and stakeholders via its complementarity internet portal.

#### **IV. The Court**

22. As has been stated, 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.

23. 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, paragraph 10, upon request, 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, as reiterated by the States Parties in the omnibus resolution, the Court has been called on to benefit from the experiences and lessons learned by States that have themselves investigated and prosecuted Rome Statute crimes.

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

24. 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.

25. Apart from general activities undertaken at the United Nations 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.

26. As an example of these many activities, on 30 May - 1 June 2016, African Legal Aid (AFLA), in cooperation with Fundación Internacional Baltasar Garzón (FIBGAR) and the Kenya Human Rights Commission, organized a seminar entitled “Complementarity, the Habré Trial, and the Evolution of Universal Jurisdiction” in Dakar, Senegal. The seminar coincided with the historic judgement of Hissène Habré, former President of Chad, and Habré was sentenced to life in prison for torture, war crimes, and crimes against humanity and found personally guilty of rape. The seminar gathered high-level representatives and practitioners from international and national legal institutions and non-governmental organizations for discussions on a set of issues, including complementarity, universal jurisdiction and immunity.

27. On the occasion of the Day of International Criminal Justice on 17 July 2016, the International Center for Transitional Justice (ICTJ) launched a handbook on complementarity entitled: “An Introduction to the Role of National Courts and the ICC in Prosecuting International Crimes”, written by ICTJ Vice-President Mr. Paul Seils. The aim of the handbook is to explain in a simple and comprehensive way international criminal law and in particular its relationship to national legal systems.

28. Further, on 29 September 2016, REDRESS organized a conference on “Justice for victims and accountability for torturers: past, present and future strategies” in The Hague. The conference gathered distinguished practitioners from international and national legal institutions and non-governmental organizations who discussed a range of approaches taken to afford justice to victims and to hold those responsible for torture to account, including, with emphasis on the Thomas Kwoyelo trial, the importance of national capacity-building in order to strengthen national jurisdiction to investigate and prosecute international crimes.

29. The United Nations, international and regional organizations, States and civil society are encouraged to mainstream these 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, in realms such as human rights, development, and the rule of law. These efforts should continue to be done in such fora, rather than by the Court or in the Assembly of States Parties, which have a limited role for such purpose.

## VI. Conclusion

30. The above highlights the importance of continued efforts, within the appropriate fora, in strengthening national capacity for investigating and prosecuting Rome Statute crimes, bearing in mind the limited contributions that can be made by the Assembly and its Secretariat, as well as the Court itself in that regard. 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.

31. In this context it is recommended that the Assembly adopt the draft provisions on complementarity contained in annex II to this report. Finally, it is also recommended that the Assembly consider also making complementarity an agenda item to be discussed at future sessions.

## Annex I

### **Roundtable discussion to follow up on the implementation of the 2015 recommendations to address SGBC at national level and its way forward in view of existing challenges in Uganda, Kampala, 12 October 2016**

1. In their opening remarks, the Swedish Ambassador to Kampala and Uganda Director of Public Prosecutors, referred to the main objective of the roundtable, namely to assess the state of affairs regarding strategic action against impunity to address SGBC at the national level.
2. The representatives from the Swedish Embassy in The Hague and the Botswana Embassy in Brussels presented the workshop as a follow up initiative to continue the dialogue with the Court and other stakeholders on complementarity, including on complementarity-related capacity-building activities. IDLO's representative referred to their involvement in co-organizing the 2015 SGBV workshop in Uganda (the 2015 workshop) to identify shortcomings and existing challenges, as well as in developing a set of comprehensive recommendations to effectively address impunity regarding SGBV in conflict, as a result of the 2015 workshop and similar initiatives supported by the Swedish government.
3. A representative from the Justice Law and Order Sector (JLOS), shared with the participants a comprehensive overview of the progress that has been made since the 2015 workshop, addressing three key recommendations and related initiatives: 1) improving the investigation and prosecution of SGBC; 2) developing standards for the medical care of victims; and 3) increasing resources for victims.
4. Following JLOS' presentation, practitioners representing key stakeholders, including police, prosecutions and the judiciary, discussed remaining challenges and possible ways to overcome them. Participants agreed on the need to 1) address courts' backlog: by reengineering the criminal justice system in a holistic manner, addressing institutional shortcomings and in particular the quality of investigations to ensure the timely collection of evidence, and using plea bargaining with adequate safeguards; 2) increase the quality of justice actors: by fostering accountability and through specialised training, the latter to be institutionalized with a view to ensure sustainability and which may lead to setting up specialized unit/staff; 3) strengthening enforcement and implementation overall: through broad dissemination of legislation and publications as well as training on their application in practice; 4) deepening, harmonizing and analysing data collection/statistics to identify trends that should guide future reforms; 5) enhance victims' protection and support: through awareness raising, by expanding shelters, increasing their sustainability through governmental involvement, and improving relevant legal and institutional frameworks; 6) expanding criminal jurisdictions' magistrates following regional best practices (Kenya); 7) increasing the allocation of resources overall, in particular to police (CID); and 8) analysing the functioning of informal Justice mechanisms and promoting their compliance with international human rights standards to make them more women/children friendly.

## Annex II

### Draft resolution language for the omnibus resolution

*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 the crimes under the Rome Statute to justice and thus to contribute to the prevention of such crimes and *noting* the jurisprudence of the Court on the issue of complementarity,

*Recalling* 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. *Recalls* 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 willing and able genuinely to carry out investigations and prosecutions of such crimes;
2. *Resolves* to continue and strengthen, within the appropriate fora, 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;
3. *Welcomes* the international community's engagement in strengthening the capacity of domestic jurisdictions and inter-State cooperation to enable States to genuinely prosecute Rome Statute crimes;
4. *Also welcomes* efforts by the United Nations, international and regional organizations, 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;
5. *Welcomes*, in this regard, the adoption of the 2030 Agenda for Sustainable Development<sup>1</sup> and acknowledges the important work being undertaken with regard to promoting the rule of law at the national and international levels and ensuring equal access to justice for all;
6. *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 those laws, and *urges* States to do so;
7. *Welcomes* the report of the Bureau 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, 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

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<sup>1</sup> United Nations General Assembly resolution 70/1.

national authorities and other actors in this regard; and also including to assist on issues such as witness and victims protection and sexual and gender-based crimes;

8. Also *welcomes* the information by the Secretariat of the Assembly of States Parties on the progress in 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; *welcomes further* the work that has already been undertaken by the Secretariat and the President of the Assembly, and *requests* the Secretariat to, within existing resources, continue to develop its efforts in facilitating 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 sixteenth session of the Assembly on further progress in this regard;

9. *Further welcomes* the efforts made by the international community and national authorities, including national capacity building activities to investigate and prosecute sexual and gender-based crimes that may amount to Rome Statute crimes, in particular the continued efforts on the strategic actions to ensure access to justice and to enhance empowerment of victims at national level, recalling the recommendations presented by the International Development Law Organization<sup>2</sup> during the fourteenth session of the Assembly;

10. *Encourages* the Court to continue its efforts in the field of complementarity, including through exchange of information between the Court and other relevant actors, while *recalling* the Court's limited role in strengthening national jurisdictions and also *encourages* continued inter-State cooperation, including on engaging international, regional and national actors in the justice sector, as well as civil society, in exchange of information and practices on strategic and sustainable efforts to strengthen national capacity to investigate and prosecute Rome Statute crimes and the strengthening of access to justice for victims of such crimes, including through international development assistance.

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<sup>2</sup> International Development Law Organization paper entitled "Complementarity for sexual and gender-based atrocity crimes", November 2015.



## Annex III

### **Draft language for inclusion in the annex on mandates of the omnibus resolution**

With regard to **complementarity**,

(a) *requests* the Bureau to remain seized of this issue and to continue the dialogue with the Court and other stakeholders on complementarity, 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; and also including to assist on issues such as witness and victims protection and sexual and gender-based crimes;

(b) *requests* the Secretariat to, within existing resources, continue to develop its efforts in facilitating 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 sixteenth session of the Assembly on further progress in this regard;

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