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Report of the Bureau on complementarity

Note by the Secretariat

Pursuant to paragraph 8 of resolution RC/Res.1, of 8 June 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.

I. Background

1. At its eighth session, the Assembly of States Parties (“the Assembly”) decided to include in the stocktaking exercise of the Review Conference the issue of complementarity. This served as an opportunity to reflect on the success and challenges of the Rome Statute system in relation to the principle of complementarity, the cornerstone of the Rome Statute system.
2. Preparations for the Review Conference held in Kampala from 31 May to 11 June 2010 contributed to significant developments in relation to complementarity and to developments in the discussion about a concept of “positive complementarity”.¹ In preparation for the Review Conference, extensive consultations were undertaken by the co-focal points, Denmark and South Africa with representatives of States Parties, the organs of the Court, international organizations, non-States Parties and non-governmental organizations.
3. As a result of these consultations and in preparation for the Review Conference, the Assembly adopted during the resumed eighth session a Bureau report on “Taking stock of the principle of complementarity: bridging the impunity gap” and a draft resolution.

II. Review Conference Outcomes

4. On 8 June 2010 at its 9th plenary meeting, the Review Conference adopted the resolution on complementarity following a panel debate on complementarity held on 3 June 2010.²

5. The Review Conference was successful as progress was made in acknowledging the role of States in making the Rome Statute system work and strengthening national jurisdictions to fight impunity. The Review Conference resolution on complementarity recognized the need for additional measures to be taken at the national level in combating impunity and the desirability of States assisting each other in this regard. This has given effect to the Rome Statute’s fourth preambular paragraph:

“Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.”

6. During the Review Conference stocktaking exercise, the topics of Cooperation and the Impact of the Rome Statute system on victims and affected communities also touched on the necessity to strengthen national jurisdictions. It became clear that these issues are linked and contribute to a comprehensive view on the ways that the capacity at the national level could be strengthened in relation to the Rome Statute.

7. The Review Conference resolution on complementarity contains three operative elements in paragraphs 8, 9 and 10. In operative paragraph 8, States Parties of the Review Conference, “encouraged 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.”

8. Since the Review Conference the topic of complementarity and the discussion of a concept of positive complementarity have generated much interest from States, international and regional organizations as well as civil society. Consequently, the “exploring of ways to enhance capacity at the national level” has already begun. Recent meetings at the Commonwealth Secretariat incorporated discussions on strengthening the capacity of national jurisdictions. During the month of October 2010, the International

¹ For the purposes of this paper, “positive complementarity”, as referenced in the Bureau report on, “Taking stock of the principle of complementarity: bridging the impunity gap” (ICC-ASP/8/51) refers to all activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of crimes included in the Rome Statute.

² RC/Res.1.

Center for Transitional Justice (“ICTJ”) hosted a high-level retreat with the aim of bringing different role players together to explore synergies between States, civil society and international organizations in building capacity for Rome Statute crimes. Such discussions should bear in mind that the Court is not a development agency and that capacity building of national jurisdictions is for other actors as set out in the Bureau report on complementarity.

9. There is also an increasing awareness that building national capacity with regard to Rome Statute crimes requires a targeted approach providing the necessary expertise required in this area. Consequently, there would be a need to ensure that rule-of-law programmes take into account the specific needs of investigating and prosecuting such crimes and bringing the cases to a successful conclusion. In addition, it would over time, as experience grows, be possible to identify best practices with regard to investigations and prosecutions at the national level and how States can and should assist each other in building capacity in this area.

10. States Parties at the Review Conference requested the Secretariat of the Assembly 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 requested “the Secretariat of the Assembly to report to the tenth session of the Assembly on progress in this regard”. The focal points and Secretariat of the Assembly have already had preliminary discussions in this regard and the Secretariat is developing a process for soliciting information from the relevant actors.

11. More guidance will need to be given to the Secretariat to ensure that there is a proactive solicitation of information and awareness raising, as well as a process of distilling best practices in building capacity in the area of Rome Statute crimes. More efforts would also be needed in identifying and exploring synergies with organizations which are already involved in capacity building in this area. The focal points have held consultations with the Secretariat of the Assembly and have requested preliminary a paper from the Secretariat as a basis for discussion during the inter-sessional period. Cooperation between the States, the Court and the Assembly is necessary to develop the role of the Secretariat in a beneficial way.

12. The Bureau has been tasked with continuing a dialogue with the Court and other stakeholders on the issue of complementarity and States Parties have invited the Court to present to the Assembly at its tenth session, as appropriate, a report in this regard. Such a dialogue is an ongoing process which can take place both within the Assembly on the basis of the activities of the Secretariat and the focal points as well as in other relevant fora.

13. Clearly the Court and the Assembly are not development cooperation agencies, and hence their role in the practical aspects of strengthening national jurisdictions will be very limited. This must be the responsibility of dedicated rule-of-law actors. Nevertheless, States Parties are in a unique position not only to further the understanding of the Rome Statute system and the 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 in this regard as described in the Bureau report on complementarity. The focal points have held consultations with the different organs of the Court and have requested preliminary papers from the Court as a basis for discussion during the coming inter-sessional period.

14. In addition, and with a view to not only implementing the resolution on complementarity but also give practical meaning to the strengthening of domestic jurisdictions, other actors need to be involved in the process. These could for instance be relevant UN organizations, regional organizations, national donor agencies, civil society and academic institutions. A balance needs to be struck whereby each organization stays within its mandate while ensuring a coherent and holistic approach to complementarity. Activities in this regard have already been carried out – for instance the complementarity retreat organized by the ICTJ in New York in October 2010 with the participation of the Court, the Assembly representatives, States Parties and UN organizations, as mentioned above (the report from the ICTJ meeting is forthcoming).

15. A role for the Secretariat and the focal points could be envisaged in including such events in the information sharing function and in the reporting to the Assembly.

III. Pledges on complementarity

16. During the general debate of the Review Conference and during the pledges made to the Conference many States Parties, non-States Parties and other stakeholders made specific reference to steps taken or actions contemplated with regard to complementarity. In one instance, a pledge was made in respect of positive complementarity. Some other pledges included commitments with regard to implementing legislation, the support of initiatives to enhance national capacity to investigate and prosecute Rome Statute crimes and other forms of capacity building efforts.

IV. Future work on complementarity

17. The Review Conference resolution on complementarity sets out a substantial area of future work on complementarity, as indicated above. It also requested the Court and the Secretariat to submit reports to the Assembly at its tenth session. The focal points propose to take up the issues identified in resolution RC/Res.1 in the coming year. Three issues arising from the resolution on complementarity adopted at Kampala require further consideration.

A. Dialogue between stakeholders

18. The modalities for an enhanced dialogue among all relevant stakeholders on strengthening capacity of domestic jurisdictions in respect of Rome Statute crimes would need to be further explored. Included in this dialogue should be practical steps to strengthen national jurisdictions and how these could be prioritized.

19. Further work would also need to be undertaken with regard to complementarity initiatives by other organizations, donors and academic institutions, and how synergies could be explored in this regard.

20. Many actors, including donors, international organizations and academic institutions have already undertaken efforts in relation to complementarity, and drawing on the lessons learned and the knowledge accumulated as a result of this would greatly diminish the burden on the Secretariat while adding much value. Some of these activities were highlighted in the compilation paper distributed by the focal points prior to Kampala and/or were presented during various events during the Review Conference.

21. It is worth noting that other fora dealing with issues such as piracy, narcotics trafficking and terrorism (such as the UN Counter-Terrorism Committee and its Executive Directorate) have established practices aimed at building national capacity, which may provide valuable lessons for the Rome Statute system.

22. The issue of addressing the challenge of political will could also be a subject of further dialogue between the relevant stakeholders.

B. Activities of the Court

23. The various organs of the Court are already within the course of their core activities carrying out certain “complementarity related initiatives”. Consequently, while the role of the Court is indeed limited as set out in the Bureau report, the Court does possess relevant information from contacts with the authorities of situation countries and other States Parties. The Office of the Prosecutor has included a concept of “positive complementarity” as one of the four key principles upon which the Prosecutorial Strategy is based.³ The other organs of the Court have informed that they do undertake some activities within their respective mandates in relation to strengthening national jurisdictions to enable them to

³See: Prosecutorial Strategy 2009 – 2012 at <http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPPProsecutorialStrategy20092013.pdf>.

conduct genuine investigations, prosecutions and trials. Examples of such activities were outlined in the focal points' compilation of examples of projects aimed at strengthening domestic jurisdictions to deal with Rome Statute crimes.⁴ A dialogue with the Court in this regard will take place during the course of next year.

24. As part of the information sharing function, 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 in this regard.

C. The Role of the Secretariat

25. As indicated above, operative paragraph 9 of the Review Conference resolution on complementarity tasks the Secretariat with facilitating the sharing of information between the Court, States Parties and other stakeholders, including international organizations and civil society aimed at building capacity of national jurisdictions. The overall aim of the exchange would be to strengthen national jurisdictions with respect to Rome Statute crimes. In this regard a useful approach would be the collection of relevant information analysis and dissemination thereof, and identification of best practices as well as to proactively facilitate and encourage cooperative relationships between relevant stakeholders as appropriate.

26. The Secretariat with the support of the focal points could also play a role in maintaining dialogue with stakeholders and actors in the relevant development cooperation fields so as to maintain focus on Rome Statute crimes.

27. An operational function for the information sharing function of the Secretariat and its relationship with other relevant actors needs to be developed, including the feasibility and practical possibility of voluntary support from different stakeholders as a means of strengthening this function.

28. Clearly, and in accordance with resolution RC/Res.1, any such activities undertaken by the Secretariat have to be within existing resources and in accordance with resolution ICC-ASP/2/Res.3.

V. Proposal for the ninth session of the Assembly

29. The annex contains draft language to be included in the omnibus resolution.

Annex

The Assembly of States Parties,

Welcomes the Bureau report 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 on complementarity 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 of the Assembly of States Parties to report to the next session of the Assembly on this matter in accordance with resolution RC/Res.1.

⁴ RC/ST/CM/INF.2.