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Stocktaking of international criminal justice

Taking stock of the principle of complementarity: bridging the impunity gap

[Draft] Informal summary by the focal points

A. Introduction

1. At its seventh plenary meeting, held on 3 June 2010, the Review Conference conducted a stocktaking exercise on the issue of complementarity on the basis of the template that had been adopted by the Assembly of States Parties at its resumed eighth session[1], its updated version,[2] the Report of the Bureau on stocktaking: Complementarity[3] and the Focal points' compilation of projects aimed at strengthening domestic jurisdictions to deal with Rome Statute crimes.[4]

2. The co-focal points, Denmark[5] and South Africa,[6] in their opening remarks, recalled that the Court was complementary to national jurisdictions and would operate only where a State was unable or unwilling to carry out investigations and prosecutions. They noted that the global challenge was for States to assist each other to fight impunity where it began, i.e. at the national level. Although having primary jurisdiction to investigate and prosecute the crimes within the jurisdiction of the Court, some States did not have the capacity to do so, which could lead to an impunity gap. They noted that the role that the Court could play in positive complementarity was limited by the nature of the institution and its resources. All efforts at bridging the impunity gap should be done with sensitivity to context and environment.

3. Furthermore, they expressed that the Prosecutor had wisely chosen to prosecute those most responsible. It was thus of utmost importance for States and organizations to work

[1] *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Resumed eighth session, New York, 22-25 March 2010* (International Criminal Court publication ICC-ASP/8/20/Add.1), part II, resolution ICC-ASP/8/Res.9, annex IV.
[2] RC/ST/CM/INF.1.
[3] ICC-ASP/8/51.
[4] RC/ST/CM/INF.2.
[5] Ambassador Thomas Winkler, Under-Secretary for Legal Affairs, spoke on behalf of Denmark and H.E. Mr. Andries Carl Nel, Deputy Minister of Justice and Constitutional Development, spoke on behalf of South Africa.

together to close the impunity gap and ensure that domestic systems were prepared to deal with the crimes in the jurisdiction of the Court. It was key that national jurisdictions be provided with the tools to deal with these crimes.

4. The Moderator noted that the term "complementarity" was not reflected in the Rome Statute. He expressed the view that it had conveyed the idea of an antagonistic relationship between the Court and States. However, once the Statute entered into force, a new approach evolved whereby complementarity was viewed in more positive manner. The concept of positive complementarity then emerged, in the Prosecutorial strategy and in the documentation before the Conference. Furthermore, he opined that positive complementarity could not exist without negative complementarity.

B. Panel discussion

5. Six panellists had been invited to address the Conference. The panel was moderated by Professor William A. Schabas.

1. United Nations High Commissioner for Human Rights

6. The United Nations High Commissioner for Human Rights, Ms. Navanethem Pillay, recalled that, in the traditional understanding of the hierarchy of international tribunals, the ad hoc tribunals established by the United Nations Security Council took precedence over national jurisdictions. The new approach of complementarity was not hierarchical and she viewed as positive the fact that States had the primary responsibility to investigate and prosecute the crimes within the jurisdiction of the Court.

7. As High Commissioner for Human Rights, her chief concern in this regard was to ensure that there were no gaps in the prosecution of violations of human rights. She recalled that the primary responsibility for the investigation and prosecution of violations of human rights law that amounted to violations of international human rights law rested with States. Where States were unable to do so due to lack of capacity, her Office stood ready to assist them to build capacity in the justice sector. International cooperation was offered to States through the United Nations system via the mandate of her office. Her office was a voice for victims and would continue to advocate on their behalf to ensure accountability for atrocities.

8. Where States took a deliberate decision not to investigate or prosecute because of unwillingness, she would intercede directly to encourage them to assume their international responsibilities. Failing that, she would raise concerns regarding the situation and would continue efforts in this regard.

9. While the term "complementarity" was not defined in the Statute, the Statute did not, however, suggest the Court may never exercise jurisdiction unless a State had proved unwilling or unable to do so. She also referred to the jurisprudence of the Appeals Chamber of the Court that where a State took no action, there was nothing to prevent the Prosecutor from commencing an investigation.

10. As regards how her Office could assist States to fulfil their obligations under the principle of complementarity, it had committed to judicial capacity building in States, helped in monitoring violations, facilitated commissions of inquiry into violations. It had also established a mapping project which enabled it to maintain a clear picture of the incidence, patterns and frequency of human rights violations.

11. She also noted that the "most responsible" policy had only recently evolved and had its origins in the Special Court for Sierra Leone, and that the Prosecutor of the International Criminal Court (the Court) had adopted this as part of the Prosecutorial strategy.

2. Mr. Serge Brammertz, Prosecutor of the International Criminal Tribunal for the former Yugoslavia

12. Mr. Brammertz addressed the relationship between international and national jurisdictions, and the impact that the completion strategy might have on how the Court was viewed at the national and international levels.

13. He noted that, although the Court was a permanent court, it would be necessary to put in place a completion strategy for each individual situation. A lesson learned from the ad hoc tribunals was that the sooner the completion strategy was defined, the better.

14. In the experience of the International Criminal Tribunal for the former Yugoslavia (ICTY), the completion strategy had not been the main focus at the inception and, in fact, after the Balkans war, cooperation with national jurisdictions had been difficult. The tribunal began to focus on complementarity only after the adoption of the relevant Security Council resolutions on the completion strategy. Cases were then transferred to national jurisdictions in the region. He recalled that, at the inception of the ad hoc tribunals, complemenarity was a "side-product" while today it had become a main priority.

15. Incentives had been created to encourage cooperation with the ICTY and relevant tools had been put in place, e.g. a transition team which served as an interface with local prosecutors. An extensive database had been made available to prosecutors in the region and, in 2009, the ICTY integrated a liaison prosecutor from the region to provide assistance to the tribunal and vice-versa.

16. He noted that the best forum for dealing with crimes was the location where they were committed, closer to affected communities and in the local language. He therefore viewed as positive the willingness of local judiciaries to deal with the crimes and to ensure that measures were put in place to do so.

17. The Security Council had made clear that the ICTY would continue to deal with cases against the main perpetrators and refer the low and mid-level ones to national jurisdictions. He saw this as an effective way of dealing with national jurisdictions while respecting international jurisdictions.

18. The Moderator queried whether this method of reserving for international tribunals only those most responsible did not have pitfalls e.g. it would telegraph to persons that unless they were at the top level, they need not be concerned about the international tribunals.

19. Mr. Brammertz noted that the notion was based on the fact that international tribunals cannot deal with all cases. However, the notion was changing and was being looked at from situation to situation.

20. The Moderator expressed the view that the process of transferring cases back to national jurisdictions, as indicated in rule 11 bis of the Rules of Procedure of the Tribunals, could be termed "complementarity in reverse".

3. Hon. Justice Akiiki Kiiza, High Court of Uganda, Head of the Special War Crimes Division

21. Judge Kiiza addressed the experience of the relationship with the Court from the perspective of the national level, in particular the establishment of the War Crimes Division of the High Court of Uganda.

22. He recalled that it was the Government of Uganda that had referred the situation in Uganda to the Court, thus taking up its international responsibility. Regarding the issuance of the arrest warrants by the Court against the five indictees, he referred to the view that the Lord's Resistance Army (LRA) had thereby been prompted to start peace talks. The referral to the Court had therefore had positive results for Uganda, since there had been peace since 2006.

23. The Juba peace talks had included an agreement on accountability. A special Division of the High Court, the War Crimes Division, consisting of four judges, had been established to try individuals suspected of atrocities. The War Crimes Division worked in partnership with the Court.

24. He appealed to the Court and international bodies for assistance in capacity building e.g. the training of prosecutors in the Special Investigations and Prosecutions Unit within the War Crimes Division, as well as for assistance from States Parties, the Court or international organizations in capacity building.

25. He noted that the national courts were ready and willing to try anyone brought before them, and had the competence and the capacity to try everyone, including the indictees before the Court. It had not yet heard cases but might soon do so in respect of lieutenants and other military personnel who had not been indicted by the Court.

26. With the recently adopted implementing legislation, as well as the existing Geneva Conventions Act, the possibility and the capacity now existed to prosecute persons at the domestic level accused of the crimes within the jurisdiction of the Court.

27. He further noted that the War Crimes Division was the first of its kind in Africa and recommended that States Parties that had not established national tribunals consider doing so, as this would assist them in fulfilling their responsibilities in respect of the jurisdiction of the Court.

28. As regards training, he indicated that Uganda could benefit from the Court, the ad hoc tribunals, seminars, internships to enable staff to gain greater experience.

4. Colonel Toussaint Muntazini Mukimapa, Deputy Auditor General, Kinshasa, Democratic Republic of Congo

29. Col. Muntazini Mukimapa addressed the experience of complementarity in Democratic Republic of the Congo. He stated that Democratic Republic of the Congo had referred three nationals to the Court, and was a model for cooperation with the Court.

30. At the national level, Democratic Republic of the Congo had put in place arrangements to prosecute persons who committed serious crimes under the Rome Statute. After ratifying the Rome Statute in 2002, Democratic Republic of the Congo had established a military court in November 2002 with jurisdiction over Rome Statute crimes. The first sentence had been delivered in February 2006 and marked the first time that a national jurisdiction had condemned the Congolese State with respect to civil responsibility for sexual violence.

31. He noted that there was an important impunity gap in respect of crimes committed before 2002, since neither the Court's jurisdiction nor the penal code of the Democratic Republic of the Congo had retroactive effect. After 2002, there were two strategies, i.e. cooperation with the Court on the basis of a request sent to the Court regarding the situation in the Democratic Republic of the Congo since 1 July 2002; and domestic military jurisdictions in respect of criminal matters.

32. Among the key challenges for the principle of complementarity in Democratic Republic of the Congo were: a lack of implementing legislation; a lack of human resources; training and a lack of know-how in the protection of victims, sexual violence, serious crimes,exhumations; infrastructure, e.g. prison facilities, as there was no functioning military prison for the completion of the judicial process; operational capacity, i.e. a lack of matériel, since Democratic Republic of the Congo was emerging from war; the need for restructuring of the army; training of army personnel; localization of the army and those who can investigate; the identification of suspects, since most military persons bore assumed names, making investigation of someone with a pseudonym difficult; access to displaced populations; and infrastructure, e.g. security, bad roads.

33. The strategy put in place to cover the impunity gap in Democratic Republic of the Congo included training, e.g. capacity building with the Human Rights and Rule of Law Divisions of MONUC, as well as bilateral cooperation, e.g. with NGOs.

34. The Moderator noted that the Lubanga case marked the first time that the Pre-Trial Chamber had decided on admissibility in light of article 17. The judges developed the principle of inactivity, i.e. that Democratic Republic of the Congo system seemed capable of prosecution, but because it was inactive as it was not possible at the time to prosecute cases of recruitment of child soldiers at the national level, the Court had jurisdiction. He noted further, that Democratic Republic of the Congo was now showing that it was capable of judging all cases.

35. Col. Muntazini Mukimapa indicated in this regard that the situation in Democratic Republic of the Congo had been referred to the Court on the basis of action by the State. At the time, the judiciary had not been in a position to carry out investigations. Democratic Republic of the Congo was ready to cooperate with the Court in respect of prosecutions. The transfer of the situation to the Court did not mean that the State had defaulted on its primary responsibility but the inactivity had been due to fact that the crime of recruiting child soldiers was not included in the penal code.

5. Ms. Geraldine Fraser-Moleketi, Director, Democratic Governance Group in the Bureau for Development Policy, United Nations Development Programme

36. Ms. Geraldine Fraser-Moleketi addressed the role of development assistance by the United Nations Development Programme (UNDP).

37. She indicated that UNDP, as the development arm of the United Nations, looked at many challenges that needed to be confronted to reduce poverty and create a fertile ground for human development. UNDP based its interventions on agreement with the respective Governments. It was engaged in rule of law programmes in approximately 90 countries, 30 of which were affected by or had emerged from violent conflict, and all interventions were based on the principle of national ownership. UNDP was not engaged in producing normative frameworks or in monitoring the situation of human rights, but ensured that development efforts were based on the principle of inclusion, participation, equality and non-discrimination. The main focus in its rule of law programming was in the area of capacity development as one of the preconditions for national ownership.

38. UNDP had adopted an integrated approach to transitional justice and rule of law. It had been noted that international assistance for transitional justice mechanisms was of limited impact if wider rule of law and peace building efforts were not taken into account. Among the actions that UNDP could take were to inform the judiciary about international law and promote its use in domestic practice; help develop legislation and implement witness protection programmes; develop communication strategies with the public for cases of gender-based violence and organized crime. She noted that building capacity in the justice

sector, e.g. for drafting and enacting legislation, increasing the number of executions of court decisions, building outreach and legal awareness, providing for broad-based free legal aid programmes could reciprocally increase the effectiveness of processing cases of serious crimes.

39. The work of UNDP also touched on conflict-related prosecutions and efforts to deepen national accountability mechanisms, e.g. in Colombia, UNDP had begun to facilitate an intergovernmental process whose aim was to strengthen prosecutorial capacity and reparations programmes that centred both on national mechanisms and community-level initiatives.

40. In addition, across regions, UNDP had provided targeted support for criminal justice in criminal cases of international concern, e.g. developing the capacity of the Bosnia and Herzegovina State Court's War Crimes Chamber and district level courts, as well as the development of the national strategy for war crimes prosecutions. Also, in Timor Leste, as part of a sector-wide assistance to judicial reform, UNDP provided support for developing prosecutorial capacity, and assisted the Commission for Reception, Truth and Reconciliation with training of commissioners/district representative and community outreach efforts.

6. Mr. Karel Kovanda, Deputy Director General for External Relations, European Commission

41. Mr. Kovanda addressed the role of international donors in international cooperation and, in this regard, focused on the measures undertaken by the European Union.

42. He referred to the main areas in which the European Union provided assistance, including direct assistance to the Court, to civil society and to state institutions through extensive development progammes. Assistance was also provided to NGOs in some situation countries, e.g. in Democratic Republic of the Congo and Kenya. Support was provided to some countries under preliminary investigation e.g. Afghanistan, including to its transitional justice platform. Furthermore, support was available for civil society monitoring as well as the traditional justice mechanisms in Rwanda.

43. In addition to support for the Court, the European Union also provided support to other tribunals, including the ICTY, the International Criminal Tribunal for Rwands (ICTR), the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia and the Special Chamber in Kosovo. The efforts of these other courts and tribunals did not cover the crimes within the jurisdiction of the Court but were indispensible judicial mechanisms for closing the impunity gap for past crimes.

44. He noted that the key lessons learned were that willingness mattered, since a lack of political will to remove those in power could hinder programmes of reform; the voluntary nature of assistance; the importance of prioritizing, i.e. immunity must be high on the agenda of the affected State, although the government of a country that has emerged from conflict may face economic issues; yet Rome Statute crimes must be given precedence to other concerns; and understanding the impact of impunity, i.e. without a broad consensus that impunity leads to the perpetuation of violence, it would be difficult to argue against those who advocate approaches other than accountability

45. As regards future action, he suggested that it might be useful to translate a common understanding of what is encompassed by complementarity into a tool kit of complementarity that would incorporate accountability into assistance and cooperation projects; guidelines; lessons learned; and what should be avoided future. The tool kit could be developed jointly with States, the United Nations Office on Drugs and Crime (UNODC), the Office of the High Commissioner for Human Rights (OHCHR), the Commonwealth Secretariat, the Court, civil

society, the European Union. The tool kit would facilitate those involved in rule of law programmes, post conflict etc.

46. He noted that the report of the Bureau referred to horizontal and vertical complementarity but that it did not elaborate on the latter. He expressed the view that vertical complementarity extends to ensuring that the neighbouring States are equipped to deal with, the LRA members if captured on their territory.

47. He suggested that the most useful means should be sought to implement the recommendations of the Report of the Bureau on stocktaking: Complementarity,[7] as well as those set out in the focal points' compilation of projects.[8]

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[7] ICC-ASP/8/51.

[8] Focal points' compilation of projects aimed at strengthening domestic jurisdictions to deal with Rome Statute Crimes (RC/ST/CM/INF.2).