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Report of the Bureau on stocktaking: Complementarity**Taking stock of the principle of complementarity:
bridging the impunity gap**

“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”, Rome Statute.¹

“Impunity for serious crimes and atrocities, including sexual and gender-based violence, which may have occurred before, during and after the conflict can seriously jeopardize peacebuilding efforts during this early phase”, UN Secretary General.²

“We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crisis and conflicts break out”, UN General Assembly.³

A. Introduction

1. Remarkable developments in international criminal law have taken place since the adoption of the Rome Statute. The International Criminal Court (“the Court”) has come into being and has matured into a fully functional and operational court. The first cases are pending before the judges. The jurisprudence of the Court is rapidly developing. Persons bearing the greatest responsibility for the most serious crimes are being brought to justice. The culture of impunity is receding.

2. These developments give reason for reflection on and evaluation of the evolution of international criminal justice over the past decade and discussion of where the international community can do more to further the fight against impunity.

¹ Preamble to the Rome Statute, paragraph 4.

² Peacebuilding in the immediate aftermath of conflict, report of the Secretary General, S/2009/304.

³ 2005 United Nations World Summit Outcome, A/RES/60/1.

3. The Court is a court of last resort. As such the Rome Statute system of international criminal justice relies heavily on actions and activities at the national level. Under the Rome Statute, the Court will only step in when national authorities are unable or unwilling to investigate and prosecute massive atrocities. The principle of complementarity is integral to the functioning of the Rome Statute system and its long term efficacy. The Assembly of States Parties (The Assembly) has agreed to focus on the issue of complementarity at the Review Conference as it is imperative to further the fight against impunity both at the international and at the national level to ensure that any impunity gaps are closed. At the same time the judicial and prosecutorial independence of the Court must be underlined as well as the fact that any issues relating to the admissibility of cases are for the Judges of the Court to decide.

4. The aim of this paper is to provide a background for discussions of complementarity at the Review Conference. The paper will first examine the experience with the principle of complementarity so far and then look at ways in which the Rome Statute system may be strengthened even further. It is in this context important to note the Court's core mandate and function which is a judicial one and to emphasize that the Court is not a development agency. None of the proposals in this paper are in any way intended to add to the functions of the Court or fundamentally change the way in which it interacts with domestic jurisdictions. Activities aimed at strengthening national jurisdictions as set out in this paper should be carried forward by States themselves, together with international and regional organizations and civil society, exploring interfaces and synergies with the Rome Statute system. In this way, the paper attempts to create a platform for further discussions on how such synergies could be identified and utilised within existing development cooperation structures and agencies. As such, enhancing the readiness of national jurisdictions is not foreseen to have any budgetary implications for the Court.

5. It should be emphasized that each State has the responsibility to fulfil its obligations under the Rome Statute. Any proposal and suggestion in this paper shall not detract from these obligations nor make the fulfilment of obligations under the Rome Statute contingent on complementarity initiatives. Furthermore, all activities aimed at strengthening the Rome Statute system are not obligatory but would, rather, seek to engage States in voluntary assistance.

B. Taking stock of the complementarity and the Court

1. The principle of complementarity

6. The Rome Statute system is based on the principle of complementarity. The preamble of Statute as well as article 17 provides that the Court shall be complementary to national criminal jurisdictions. Therefore the Court does not replace national proceedings and is a court of last resort.

7. The Court determines the admissibility of a case through a judicial assessment. Only where States are unable or unwilling to genuinely investigate and prosecute crimes in their own jurisdictions would the Court be in a position to act. Consequently, even where serious international crimes have been committed, a case would not be admissible if the State concerned was conducting genuine domestic proceedings. Any determination of admissibility, however, can ultimately only be made by the judges of the Court.⁴

⁴ It is worth noting the two-step approach utilized in decision ICC-01/04-01/07 OA 8 of 25 September 2009.

2. Complementarity in practice

8. The Court currently has four situations, the Democratic Republic of Congo, Central African Republic, Uganda and Darfur/Sudan. Three of the four situations were self-referrals and the Court has determined in all cases that there were no relevant proceedings.

9. The reasons for inactivity in conducting genuine domestic prosecutions are manifold and may be linked to an **inability** to do so. Of particular interest here is technical or capacity issues in connection with absent or ineffective legislative framework for implementation, limited expertise in and experience with investigations, failure to prioritize serious cases, lack of resources in the judicial system, absence of an effective national witness protection program or safety for judges and prosecutors and enforcement of sentences or a general lack of capacity and means.

10. These challenges may be felt particularly by a number of States that have the will and intent to end impunity but lack the resources, expertise and capacity as well as a well-functioning, independent judiciary.

11. A special challenge is **unwillingness** to conduct genuine national proceedings. This situation could occur due to political interference in the judiciary and governmental complicity in the commission of crimes and can manifest itself in an unwillingness to secure the arrest of suspects. While unwillingness is not addressed in detail in this paper, it is important to keep in mind that assistance and cooperation alone will not solve all issues relating to impunity.

12. The Court will never be able to prosecute all those responsible for crimes under its jurisdiction in a given situation. Whilst not prescribed by the Statute, the Prosecutor has taken a policy decision to focus prosecutions on those bearing the greatest responsibility for the most serious crimes. Furthermore, the Prosecutor on an ongoing basis sets out the strategy and criteria of which cases would be afforded focus. However, this should not mean that lesser perpetrators enjoy impunity. Likewise, crimes that do not meet the gravity threshold should not go unpunished. As established by the Rome Statute, the end-goal of no impunity is efficiently achieved by States themselves assuming as much responsibility and ownership of the process as possible, in partnership with the Court and other stakeholders. Consequently, stakeholders, in particular States and international and regional organizations, as well as civil society, can play a role in proactively strengthening national jurisdictions and advance domestic investigations and prosecutions of the most serious crimes of international concern. It is worth recalling that the preamble of the Rome Statute states 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.

3. The impunity gap

13. As indicated, States have the primary responsibility to investigate and prosecute massive crimes. The Court does not have primacy over the national system and will only act where there is inability or unwillingness on the part of the domestic jurisdiction, as determined by the Court. Furthermore, where there is inactivity linked either to inability or unwillingness, the Prosecutor has chosen a policy of focusing prosecutions on those bearing the greatest responsibility for the most serious crimes. Consequently, the Court does not replace the national jurisdiction in the prosecution of other offenders. Furthermore, as explored above, States in a number of situations either lack the capacity or the will to prosecute these serious crimes for a variety of reasons.

14. The consequences of these problems are manifold, but first and foremost an impunity gap may develop **horizontally** between situations that are investigated by the Court and situations that for legal and jurisdictional reasons are not, or **vertically** between those most responsible brought before the Court and other perpetrators who are not.⁵

15. It should also be emphasised that since the Court has limited resources and capacity and proceeding from the strategy of the Prosecutor, the Court currently only focuses on those bearing the greatest responsibility. Consequently, it is necessary for measures to be taken by States Parties to ensure that all perpetrators of war crimes, crimes against humanity and genocide are brought to justice and that crimes that do not meet the gravity threshold do not go unpunished. Through domestic efforts and mutual international assistance on a voluntary basis the fight against impunity could be further advanced in national jurisdictions.

C. Enhancing the readiness of national jurisdictions through positive complementarity

1. Positive Complementarity

16. While positive complementarity could take many forms, for the purposes of this paper, positive complementarity 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, without involving the Court in capacity building, financial support and technical assistance, but instead leaving these actions and activities for States, to assist each other on a voluntary basis.

17. The actual assistance should thus as far as possible be delivered through cooperative programmes between States themselves, as well as through international and regional organizations and civil society. Such assistance rendered under positive complementarity can broadly be divided into three categories:

- a) Firstly, there is **legislative assistance**, which includes the drafting of the appropriate legislative framework and assistance in overcoming domestic hurdles for passing such legislation. In addition, assistance may be provided for ratification of an Agreement of Privileges and Immunities and other legal instruments pertaining to investigating and prosecuting the most serious crimes. Annex A gives an example of such assistance.
- b) Secondly there is **technical assistance and capacity building** with regard to domestic judicial systems. Such assistance includes, but is not limited to, training of police, investigators and prosecutors, capacity building with regard to protection of witnesses and victims, forensic expertise, training of judges and training of defence counsel, security for and independence of officials. Such assistance could take the form of supplying judges and prosecutors to assist national courts or other forms of support to special war crimes divisions of domestic institutions and hybrid tribunals, as appropriate. Furthermore, assistance could be rendered for capacity building with regard to mutual legal assistance in criminal matters, to underpin cooperation in actual prosecutions. Annexes B to D provide examples of technical assistance and capacity building in the context of the Rome Statute.

⁵ Some sources suggest that the number of direct perpetrators in Bosnia alone is 15,000 to 20,000, while the ICTY has only indicted 161 in all States of FRY. Such numbers are not available for Court situations, but it seems likely that there would be some parallels.

- c) Thirdly, assistance with construction of **physical infrastructure**, such as courthouses and prison facilities, and the sustainable operation of such institutions. Capacity building would, however, be needed to ensure that the functioning of such institutions comply with internationally accepted standards and that adding an element of training to the operation of the institutions may be beneficial. Annexes E and F provide examples of this type of assistance.

18. In general, experience shows the importance of a holistic approach to enhancing national capacity, taking into account the entire judicial cycle from initiating investigations to enforcing sentences. If one part of the judicial sector is not working, assistance to other parts will not achieve the desired result. More mundane issues, such as provision of electricity and office stationary or food in the case of prisons, must also be taken into account, to ensure sustainability. In addition, many areas of assistance cut across the three categories. For instance witness protection may require both legislative assistance and capacity building.

2. Scenarios

19. Cooperation between stakeholders in the international community may take different forms and have different approaches depending on situations and areas of need. As indicated above, the role of the Court is quite limited and in most scenarios primary activities will rest with states, international organisations and civil society. The following situations could be envisaged:

a) Situations where no crimes under the jurisdiction of the Court have been committed.

20. This is the situation experienced by most State Parties. This situation does not, however, detract from the obligations to investigate and prosecute any future crimes, and commitments undertaken to protect civilian populations from such crimes.

21. These situations generally provide for a very limited role of the Court, but there may be significant scope for bilateral cooperation between States Parties themselves and between States Parties and relevant regional and international organizations with a view to enhancing the readiness and preventive effect of the domestic jurisdiction across the different areas mentioned above. This will be a purely preventive endeavour to ensure impunity gaps will not develop in the future and deter the commission of future crimes. However, such assistance may, in addition, enable the State in question to combat illegal activities undertaken on its territory or by its nationals that are linked to the commission of the most serious crimes abroad. Synergies with existing development cooperation programmes – notably in the area of rule-of-law – could be explored.

b) Situations where crimes under the jurisdiction of the Court may have been committed.

22. These situations, often where the Court has initiated a preliminary examination, can be in States that are experiencing ongoing conflict or emerging from conflict, or have witnessed some other form of violence. No determination has yet been made to initiate an investigation.

23. Such situations offer early opportunities to catalyze domestic proceedings. They call for immediate action by the international community in cooperation with the State in question and the Court. Avoiding impunity by ensuring that the judicial system is capable of dealing with war crimes, crimes against humanity and genocide, crimes that may have occurred during the conflict is vital in underpinning peacebuilding efforts. Cooperation should focus on promoting the immediate ability of the national judicial system to deal with the most serious

crimes, regardless of any future admissibility determination. This can and should be done as part of any ongoing peacebuilding and stabilization efforts aimed at early recovery.

c) Situations where the Court is investigating and prosecuting crimes under its jurisdiction.

24. These situations are similar to sub-paragraph (b), except that the Court has determined prima facie the admissibility of cases within the situation, and thereby also that crimes have been committed. These situations include cases where the Court has issued arrest warrants which may or may not have been executed, and are therefore more complicated from a complementarity point of view as no initiative should infringe on the judges' determinations. There are, however, opportunities for burden-sharing between the Court and national courts.

25. In these situations, where the Court is investigating and prosecuting those bearing the greatest responsibility for the most serious crimes, there will be a need for support to national jurisdictions to enable them to deal with other perpetrators and victims through enhancing the capacity of the domestic judicial system, examining options for giving support also to hybrid tribunals and truth and reconciliation commissions, as well as forms of traditional justice, where and as appropriate. The need to preserve the judicial and prosecutorial independence of the Court must, in particular, be taken into consideration in all situations. Actions under positive complementarity must not be misused to avoid justice. In addition, activities undertaken should also take into account leaving a lasting legacy of the Court. Again, synergies should be explored with regard to on-going peacebuilding and stabilization efforts aimed at early recovery.

d) Situations where the Court has concluded investigations and prosecution of those most responsible.

26. The Court has concluded its investigation and possibly prosecutions or may be in the process thereof. Those bearing the greatest responsibility have been brought to justice. However, there is still a need for dealing with other perpetrators and ensure that the judicial system is capable of handling future crimes. There is a role to be played by both the Court and the international community with regard to actual proceedings and preventing future crimes. Where the situation has stabilized, this could be part of regular development cooperation efforts, or otherwise as support to transitional justice activities and stabilization efforts

3. Actors

27. States, the Court, the international community and civil society have different roles to play in the different situations, and may be active through different mechanisms.

a) Role of States

28. Whilst the activities that can be carried out by the Court will contribute significantly to furthering national proceedings and strengthening the rule of law, there are a number of obvious constraints. In this context, much more can be done by the international community through **State-to-State cooperation**, with involvement, as appropriate, of the Court.

29. States Parties have an obligation to cooperate with the Court under the Rome Statute. However, as the preamble of the Rome Statute emphasizes, serious crimes of concern to the international community should not go unpunished and prosecutions must be ensured by taking measures at the national level. Increased cooperation between States themselves to this end would be desirable.

30. Many of the activities described above are already, to some extent, being undertaken by donor States in cooperation with partners. Many development cooperation organizations are operating extensive rule-of-law programmes, and synergies between the Rome Statute system and these activities should be explored further. Benefits could accrue, moreover, from mainstreaming and integrating issues of international and domestic rule of law and criminal justice across governmental sectors, as well as in the work of other relevant organizations.

31. Also, in situations where States are emerging from conflict there is a need to ensure that impunity does not prevail. Efforts aimed at peacebuilding and stabilization could include efforts aimed at enabling the national judicial system to combat the most serious crimes in order to avoid an impunity gap that may impact negatively on the recovery of the State in question.

32. In general, mainstreaming of the Rome Statute system with existing development cooperation and assistance efforts could strengthen the impact of the Statute and of the Court. In addition, this could avoid situations where various actors in the field work at cross-purposes.

33. The need for assistance will vary from State to State depending on the type of scenario and other circumstances. More often than not, however, many of the activities mentioned above will be needed in different situations. Donor States as well as partner States should pay due attention to the specific needs of the judicial system created by the specific situation and attempt to address them.

34. Support for implementing legislation is already available for some States and could be expanded. Efforts with regard to establishing tri-partite relationships between States willing to undertake witness protection and States with the ability to provide financial support are underway. Such relationships could be explored in relation to other aspects of support to national jurisdictions, as the Court seeks agreements to obtain the necessary cooperation.

35. Generally, much may be achieved by States examining their existing activities and development programmes with a view to identifying areas where synergies could be explored and additional efforts undertaken with a view to reinforcing the Rome Statute system. The same applies to existing partnerships between States on the one hand and international organizations and civil society on the other.

36. To advance, as appropriate, such voluntary assistance, the Assembly should task the Secretariat of the Assembly of States Parties (“the Secretariat”) with facilitating the exchange of information between the Court, States Parties, signatory States, international organizations, civil society and other stakeholders aimed at strengthening domestic jurisdictions. This function would be established within existing resources and be limited in its role. It should be emphasized that this function would not in any way engage in the actual provision of assistance or capacity building. The modalities of this function, if established, should be discussed further. The Secretariat should report on progress in this regard to the tenth session of the Assembly of States Parties. Overall, such aspects of complementarity merits further discussions in the Assembly and its subsidiary bodies on an on-going basis.

b) International organisations and civil society

37. Experience has shown that progress in the fight against impunity can only be achieved through collaboration of the entire international community. There are certain practical limitations in the role that States can play, including not being present in the field or not having sufficient practical capacity to implement activities. The need to minimize administration and bureaucracy is a guiding principle for many States. In addition, different States have different areas of expertise and ability.

38. Also against this background, partnerships and implementation of positive complementarity through international organizations and NGOs have proven invaluable in the fight against impunity. These organizations possess both the necessary technical expertise and the implementing capacity.

39. Many specialised international and regional organisations undertake a range of rule-of-law activities. Some of them have independent financing for these activities, other rely on voluntary funding and a programme or project basis. The organisations could – together with States – explore ways in which The Rome Statute system could be further strengthened through positive complementarity. Annex A to F provide examples of how this can be done.

40. In addition, civil society and NGOs also have a wealth of experience of being in the field and understanding the needs of domestic jurisdictions. They already implement projects in a range of sectors and can play a vital role in bridging the impunity gap through positive complementarity.

41. Furthermore, with regard to universality, NGOs play a vital role vis-à-vis non-States Parties by building awareness of the benefits of the Rome Statute and promoting ratifications.

c) The role of the Court

42. The role of the organs of the Court is limited. It is not envisaged that the activities described here would entail additional resource for the Court, nor should the Court become a development organization or an implementing agency. The Court is seen as a catalyst of direct State-to-State assistance and indirect assistance through relevant international and regional organizations and civil society, with a view to strengthening national jurisdictions. Annex H sets out some of the activities undertaken by the Court within the existing setup.

43. The Court and its different organs currently engage in activities which enhance the effectiveness of national jurisdiction capacity to prosecute serious crimes. Each has different roles to play in different situations. Responding to national authorities and cooperating with them is increasingly becoming part of the strategy of the Prosecutor. These efforts can also contribute to decreasing the overall financial and capacity burden placed on the Court in the long term, as assistance to national authorities can have an impact on the case load of the Court.

44. While the types of practical assistance that can appropriately be provided by the Court is limited by the Court's core judicial mandate, there may be scope for the Office of the Prosecutor to engage in certain capacity building activities within existing resources and without compromising its judicial mandate. The Prosecutorial Strategy entails that the Office of the Prosecutor involves as much as possible national law enforcement experts in its activities. There may be scope for exchanging information with national authorities and efforts would need to be undertaken by stakeholders involved to ensure that this would not jeopardize the security of witnesses and victims and the on-going activities of the Court. In addition, in-situ proceedings, if and when possible, could provide opportunities for strengthening the national jurisdiction and build interest in complementary national investigations and prosecutions. The Registry could assist States Parties by helping to identify areas that could be the subject of their activities aimed at strengthening domestic judicial systems. Such efforts would also not impact on the independent judicial mandate of the Court.

45. The relevant organs of the Court could, within the limits of their respective mandates, also act as a catalyst for assistance, helping to bridge the divide between donors and potential partner countries. In this way, the justice system envisaged by the Rome Statute – involving States Parties and the Court in partnership – can give effect to the principle of complementarity.

D. Broader implications – universality and rule of law

46. The Rome Statute was created to ensure that those bearing the greatest responsibility for the most serious crimes of concern to humanity do not go unpunished. This system can only fully realise its potential when the Statute is universally adhered to.

47. The decision on whether or not to sign and ratify the Statute rests solely with sovereign States. However, the prospect of assistance under the heading of positive complementarity may alleviate some concern over whether States are ready to assume the obligations and commitments that the Statute entails. The prospect of strengthening the domestic jurisdictions may also provide added incentives for ratification

48. In addition, experience with assistance to national jurisdictions in combating impunity for war crimes, crimes against humanity and genocide shows that such assistance can have significant and substantial spill-over effects on the entire judicial system of the State receiving assistance. Furthermore, international cooperation in combating the most serious international crimes can lead to cooperation with regard to other forms of transnational criminal activity.

E. Conclusion

49. It is of paramount importance that the complementary justice system of the Rome Statute is strengthened and sustained and that the Court and States Parties support and enhance mutual efforts to combat impunity.

50. The possibilities for enhancing the fight against impunity through positive complementarity are many and diverse. As the preamble of the Rome Statute states, this includes further measures at the national level. Positive complementarity seems to be one tool by which such measures can be taken. Sharpening this tool could help bridge the impunity gap and dissuade and deter the commission of future crimes.

51. Considering the many facets of the issue, closing the impunity gap through positive complementarity seems to merit further discussions among States Parties and within the Assembly. The aim is not to create new roles for the Court. Neither is it to create new structures of assistance or additional obligations for States Parties, financial or otherwise. The aim is to identify ways in which States Parties, in a dialogue with the Court, may even better, more targeted and more efficiently assist one another in strengthening national jurisdictions in order that these may conduct national investigations and prosecutions.

52. The basis for this already exists, namely the current activities of States Parties, international and regional organizations and civil society. The aim would be to strengthen national jurisdictions through increased donor awareness and improved coordination with a specific view to the Rome Statute System of international criminal justice. To this end, the Secretariat should be tasked with facilitating the exchange of information between the Court, States Parties, signatory States, international organizations, civil society and other stakeholders aimed at strengthening domestic jurisdictions. It should be noted that it is neither desirable nor appropriate that the Secretariat should take upon itself any major role with regard to coordination and implementation of activities.

53. Some activities elaborated in this paper are already routinely carried out. Furthering the issue of positive complementarity as set out in this paper could, however, strengthen the impact of the Rome Statute system through effective measures, both at national and international levels. Such measures may contribute to closing the impunity gap, enhancing the prevention of crimes and promoting the rule of law, with potential positive effects for international peace and security.

F. Recommendations

54. Based on the above, the following recommendations could be used to further the principle of complementarity through positive complementarity at the national level:

- a) States Parties should reaffirm that national jurisdictions have the primary responsibility for investigating and prosecuting the most serious crimes and acknowledge that the fight against impunity is dependent on the commitment of the international community as a whole.
- b) States, the Court and other actors should strengthen the principle of complementarity by encouraging national proceedings where relevant as a means to bridge the impunity gap, taking into consideration the prosecutorial and judicial independence of the Court.
- c) States Parties should consider the need for further measures at the national level in combating impunity and, as appropriate and in cooperation with the Court, examine ways in which domestic jurisdictions can be further enabled to deal with the most serious crimes. Such measures would in the first instance be part of ongoing development cooperation activities and other forms of assistance under the heading of positive complementarity.
- d) The Court should develop a report on positive complementarity and present this report to the Assembly of States Parties.
- e) The Assembly should establish a designated function within the Secretariat of the Assembly of States Parties, within existing resources, tasked with facilitating the exchange of information between the Court, States Parties, signatory States, international organizations, civil society and other stakeholders, aimed at strengthening domestic jurisdictions. The Secretariat should provide an update on progress in this regard to the Assembly of States Parties.
- f) The Assembly and the Bureau of the Assembly should continue the dialogue with the Court, States Parties, international organisations and civil society on how best to advance the fight against impunity at the national level through positive complementarity.