



Assembly of States Parties

Distr.: General
7 November 2012

Original: English

Eleventh session

The Hague, 14-22 November 2012

Report of the Bureau on complementarity

Note by the Secretariat

Pursuant to paragraph 60 of resolution ICC-ASP/10/Res.5 of 21 December 2011, the Bureau of the Assembly of States Parties hereby submits for consideration by the Assembly the report on complementarity. The present report reflects the outcome of the informal consultations held by The Hague Working Group of the Bureau with the Court and other stakeholders.

I. Background

1. At the seventh ICC-ASP Bureau meeting, on 28 February 2012, the Bureau appointed Denmark and South Africa, as *ad country* focal points. As such, Denmark and South Africa are focal points in both The Hague Working Group and the New York Working Group in the lead up to the eleventh session.

2. At the tenth session of the Assembly, States Parties resolved to continue and strengthen effective domestic implementation of the Statute and to enhance the capacity of national jurisdictions to prosecute the perpetrators of the most serious crimes of international concern.¹ Consequently, the organs of the Assembly and the Court were essentially given the following mandates: The Bureau was requested to continue implementing the Kampala resolution on complementarity and to continue the dialogue with the Court and other stakeholders on complementarity. The Secretariat of the Assembly of States Parties (“the Secretariat”) was mandated, within existing resources, to facilitate the exchange of information between the Court, States Parties and other stakeholders, including international organizations and civil society, aimed at strengthening domestic jurisdictions, and to report to the eleventh session. The Court, while recalling its limited role in strengthening national jurisdictions, was requested to further cooperate with the Secretariat on complementarity and to report to the eleventh session.

3. In the run-up to the first Review Conference of the Rome Statute held in 2010, it was proposed that the issue of complementarity be included in the Stocktaking exercise that was held in Kampala as part of the Conference. This was decided by the eighth session of the Assembly.² Subsequently, a draft resolution was prepared by the Bureau of the Assembly together with a report on complementarity.³ The resolution was adopted by consensus by the Review Conference.⁴

4. Since then, the Assembly and its Bureau together with the Secretariat have been actively engaged in implementing the resolution. Progress reports have been submitted by the facilitators/focal points to the Assembly, along with reports from the Court itself and the Secretariat. This report constitutes the third report to the Assembly on complementarity.

II. General findings

5. 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 to investigate and prosecute themselves the perpetrators of these crimes. This system is based on the principle of complementarity as enshrined in the Statute, which means that the Court can intervene only when States are unwilling or unable genuinely to carry out the investigation or prosecution of these crimes.

6. 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, contributes to the fight against impunity for such crimes and the functioning of the Rome Statute system. Such cooperation has been described as “positive complementarity” or complementarity activities.

7. The international community places great importance on the rule of law and is also in this context increasingly paying attention to the need to combat impunity for Rome Statute crimes. Many concrete activities are taking place around the world aimed at strengthening domestic jurisdictions in dealing with Rome Statute crimes and thus contributing to the closing of impunity gaps and realizing the object and purpose of the

¹ *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Tenth session, New York, 12 – 21 December 2011* (ICC-ASP/10/20), vol. I, part III, ICC-ASP/10/Res.5, para. 58.

² *Official Records ...Eighth session... 2009* (ICC-ASP/8/20), vol. I, part II, ICC-ASP/8/Res.6, annex IV.

³ Report of the Bureau on complementarity: “Taking stock of the principle of complementarity – Bridging the impunity gap (ICC-ASP/8/51).

⁴ Resolution RC/Res.1.

Statute. The Hague and New York Working Groups received updates on some of these complementarity-related activities. The President of the Assembly of States Parties in collaboration with Open Society Justice Initiative and the focal points, Denmark and South Africa, organized a panel discussion in May 2012 in New York on “Putting complementarity into practice”, with reflections provided by States on their national experiences. In July 2012, the New York Working Group received a briefing by the President of the Assembly of States Parties, The International Centre for Transitional Justice, the United Nations Rule of Law Unit, the United Nations Development Programme, and the focal points, Denmark and South Africa, on the development and practices of complementarity since Kampala. Moreover, the Secretariat continues to disseminate information in this regard. Such activities should continue to be welcomed and encouraged.

8. In order to promote and foster increased international efforts aimed at strengthening national jurisdictions – “positive complementarity” – the focal points have, together with the Secretariat, worked with States, international organizations and civil society on mainstreaming complementarity activities into the rule of law development discourse and relevant programmes. The interest shown and support given by the United Nations Rule of Law Unit, The United Nations Development Programme (UNDP), the Office of the High Commissioner for Human Rights (OHCHR) – to mention a few – and a number of States as well as regional and civil society organizations is greatly appreciated.

9. 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 in the course of implementing its core mandate in some ways assist national jurisdictions thereby contributing to the functioning of the Rome Statute System. The Assembly of States Parties has an important role to play in sustaining and furthering the efforts of the international community in strengthening national jurisdictions through complementarity activities, thereby enhancing the fight against impunity.

10. The application of the complementarity principle in practice does not lead to an either-or situation – either national or international prosecution - when the Court is actively engaged in a situation. In situations where the Court is prosecuting those most responsible there will often be a need for national proceedings against other perpetrators and possibly other forms of transitional justice mechanisms for low level accomplices and others involved in the crimes. The State must in these situations avoid the development of a vertical impunity gap.⁵ The national and international jurisdiction can complement each other in such situations.

11. 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. Assembly of States Parties and its Secretariat

12. 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.

13. In this respect the Assembly has an important role in encouraging and promoting capacity-building at the national level and thereby strengthening the States Parties pillar of the Rome Statute system. Assisting States in assuming their primary responsibility to

⁵ ICC-ASP/8/51.

investigate and prosecute through promoting complementarity in new and existing rule of law programmes and other relevant instruments constitutes an important element in the fight against impunity.

14. As for the Secretariat it has continued to develop its information-sharing and facilitating function together with the focal points.⁶ Given that this function has been established within existing resources there are limits to what can be achieved. However, progress has been made in both tracks: the internet portal for complementarity⁷ and the forging of relationships with relevant States and actors in the field. Recently there has been a growing interest in submitting information to and accessing the portal. Concerning the forging of relationships between various actors working towards putting complementarity into practice, the Secretariat has in some instances helped to bring those requesting assistance and those able to give it together.

15. The Secretariat is encouraged to continue its efforts, and all stakeholders are encouraged to submit information to the Secretariat for posting on the portal using the Secretariat's submission forms which are available on its website.

IV. The Court

16. As has been established the role of the Court in building domestic capacity for the prosecution of the most serious international crimes is limited⁸. 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.

17. However, specifically in regard to States where the Court is executing its core mandate, i.e. is either analyzing, actively investigating or prosecuting a given situation, the Court may have interaction with national authorities or be involved on the ground. In addition officials of the Court have regular interaction with high-level officials from States and international organizations. In this way, the Court can in the course of carrying out its core functions and without assuming any new responsibilities promote, support and catalyse domestic prosecutions. Additionally, under article 93, paragraph 10, of the Statute, on request, the Court has the ability to cooperate with and provide assistance to a State Party conducting national investigations or prosecutions of crimes under the jurisdiction of the Court or conduct which otherwise constitute a serious crime under the national law of the requesting State.

18. While the Court is not a development agency, the Court does have vast investigative and prosecutorial expertise, knowledge of situations and needs 'on the ground' and hands-on experience with the challenges associated with investigating and prosecuting the most serious international crimes and how such challenges can be addressed. In the context of voluntary contributions, the Court's Legal Tools Project is an important platform for legal information on international criminal law which may assist the development of national capacity.

19. The Court's report to the eleventh session of the Assembly⁹ provides for detailed information rule of law actors could refer to when considering specific complementarity-related activities. As the Court has indicated in its report, an exchange of information between rule of law actors and the Court, with full respect for the judicial independence of the Court, would be particularly beneficial when complementarity-related activities are considered for countries where the Court is also active. This should not create additional tasks or financial burdens for the Court and shall remain within its core judicial mandate.

20. The Committee on Budget and Finance noted in the report of its seventeenth session that consideration should be given to formulating exit-strategies for situations where the Court has completed its judicial activities¹⁰. Such strategies could include assessments of what assistance is needed to enable the relevant country's judicial system to handle any

⁶ Report of the Secretariat on complementarity (ICC-ASP/11/25).

⁷ <https://extranet.icc-cpi.int/icc/complementarity/default.aspx>

⁸ Report of the Court on complementarity (ICC-ASP/11/39).

¹⁰ *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Tenth session, New York, 12 – 21 December 2011* (ICC-ASP/10/20), vol. II, part B.2, para. 19.

residual issues such as witness protection and any remaining investigations and prosecutions. The Court is addressing this issue and will in the future be able to discuss this issue in detail, in particular when judicial activities in one or more cases have been completed. In the future, however, such exit strategies may include a complementarity component and contribute to addressing remaining impunity gaps. In addition, consideration could be given to addressing, in a timely manner, relevant legacy issues such as preserving and developing the Court's impact on the national judicial system, where appropriate, taking into account the lessons learnt from other international jurisdictions, in dialogue with the Assembly.¹¹

V. Broader efforts of the international community

21. In addition to discussions and information-sharing and facilitation within the Assembly and by the Court, various actors organise a remarkable number of activities relevant to complementarity and capacity building to fight 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.

22. Rule of law remains a top priority for the international community. In this context, the need to ensure that national justice systems are able to handle serious international crimes – in particular during or after conflict – is increasingly recognized as a key contribution to establishing the rule of law alongside other transitional justice mechanisms. The report of The United Nations Secretary-General entitled 'Delivering Justice: programme of action to strengthen the rule of law at the national and international levels' highlights a number of issues in this regard and make recommendations to relevant stakeholders¹². The report of the United Nations Secretary-General entitled "Strengthening and coordinating United Nations rule of law activities"¹³ also displays the complementary role of national and international jurisdictions in ensuring accountability for serious international crimes.

23. Likewise, the international community has committed to ensuring that impunity for genocide, war crimes and crimes against humanity and other violations of international humanitarian law or gross violations of human rights law is not tolerated, that such crimes are properly investigated and sanctioned and encouraged the strengthening of national judicial systems in this regard.¹⁴ This commitment was affirmed in the declaration adopted by the High-level Meeting of the General Assembly on the Rule of Law at the National and International levels which took place on 24 September 2012 in New York during the 67th session. A number of States Parties to the Rome Statute have made specific pledges in this regard.¹⁵

24. Apart from these general activities to make complementarity work 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.¹⁶

25. The United Nations is currently providing rule of law assistance in over 150 Member States. These activities take place in all contexts, including development, fragility, conflict and peace building, including in 17 peace operations with rule of law mandates. Three or more United Nations entities engage in rule of law activities in at least 70 countries, and five or more entities in over 25 countries. Such countries can be situation countries, or situations under preliminary analysis of the Office of the Prosecutor. The United Nations family brings together a wide range of complementary skills to support the

¹¹ See for instance: "Report of the President on the Conference Assessing the Legacy of the ICTY", dated 27 April 2012, for a brief overview of some of the legacy issues pertaining to the ICTY. (http://www.icty.org/x/file/Press/Events/100427_legacyconference_pdt_report.pdf).

¹² A/66/749, in particular paragraphs 24-25 and 35-40.

¹³ A/67/290.

¹⁴ A/67/L.1*

¹⁵ See the United Nations Rule of Law website: www.unrol.org for individual pledges.

¹⁶ See: Focal points' compilation of examples of projects aimed at strengthening domestic jurisdictions to deal with Rome Statute crimes (RC/ST/CM/INF.2).

strengthening of national capacity to investigate and prosecute crimes under the jurisdiction of the Court. The Office of the High Commissioner for Human Rights (UNHCHR) has a dedicated mandate to support States in their transitional justice efforts. The United Nations Development Programme (UNDP) engages in rule of law development programmes in over 100 countries, which include capacity development of national actors to ensure accountability for serious international crimes in relevant contexts. The Department of Peacekeeping Operations (DPKO) is key in strengthening the entire criminal justice chain in countries under a Security Council mandate. The United Nations Office on Drugs and Crime (UNODC) has unparalleled expertise in strengthening criminal justice systems more broadly, including both general technical assistance and specific expertise related to organized crime, corruption, and terrorism prevention. UN Women (UNIFEM) assists to ensure that the work of the United Nations has a strong gender perspective and that it incorporates the full justice needs of women, including for reparations. United Nations Children's Fund (UNICEF) and United Nations High Commission for Refugees (UNHCR) assist to ensure that the work of the United Nations promotes and protects children's rights as well as those of refugees and stateless persons. Working together, the United Nations family is a key partner assisting States in their primary responsibility to ensure accountability for the most serious crimes.¹⁷

26. In addition, UNDP and the International Center for Transitional Justice (ICTJ) are – together with the focal points Denmark and South Africa – continuing the Greentree process, which focuses on how to implement complementarity in practice and mainstream complementarity into development cooperation and Rule of Law programmes. The report of the latest meeting will be made available to the Assembly of States Parties. States also received an update on the Greentree process and a report on recent developments in the first half of the year. In this context the Government of Sweden, together with ICTJ, convened a number of representatives of States, international and regional organizations and civil society in May 2012 in Stockholm, Sweden, to further relevant discussions. These processes are open to all States Parties.

VI. Conclusion

27. The above highlights and reaffirms the respective roles of States Parties, the Secretariat and the Court in advancing complementarity. It also summarizes some of the events and activities that have taken place in 2012. Most of these activities take place outside the Assembly itself, but do have a direct and positive impact on the functioning of the Rome Statute System. From the perspective of the Rome Statute and the Assembly of States Parties all such events and activities contribute to achieving the overall purpose of the Statute to fight impunity for the most serious crimes of concern to the international community as a whole and should be welcomed and reflected on by the Assembly.

28. To this end it is recommended that the draft resolution in annex I be adopted by the Assembly following the plenary session on complementarity, which is described in annex II.

29. In addition, it is recommended to delete relevant operative paragraphs concerning complementarity from the draft omnibus resolution for the eleventh session of the Assembly (paragraphs 58-63 of resolution ICC-ASP/10/Res.5) but to retain the relevant preambular paragraph (preambular paragraph 7 of that resolution).

¹⁷ Based on information provided by the United Nations Rule of Law Unit in consultations with relevant United Nations organization.

Annex I

Draft resolution on complementarity

The Assembly of States Parties,

Reaffirming its commitment to the Rome Statute of the International Criminal Court and its determination to combat impunity for the most serious crimes of international concern, 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 these crimes to justice and *noting* the jurisprudence of the Court on the issue of complementarity,

Recalling 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 capable of genuinely prosecuting such crimes,

Recalling further 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 such exit 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. *Resolves* to continue and strengthen 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;
2. *Welcomes* the international community's engagement in strengthening the capacity of domestic jurisdiction to enable States to genuinely prosecute Rome Statute crimes;
3. *Welcomes further* the commitment by United Nations bodies to continue to mainstream 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, and *strongly encourages* further efforts in this regard by other international and regional organizations, States and civil society;
4. *Welcomes* the Declaration adopted by the High-Level Meeting of the 67th session of the United Nations General Assembly on the rule of law at the national and international levels;
5. [Placeholder for outcome of plenary discussions, including commitments and other concrete outcomes]
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 these laws, and *calls on* States to do so;
7. *Welcomes* the report of the Bureau on complementarity and the progress made in implementing the Review Conference resolution on complementarity, and *requests* the Bureau to remain seized of this issue and continue the dialogue with the Court and other stakeholders on complementarity, in accordance with resolution RC/Res.1 and as set out in the report of the Bureau on complementarity: "Taking stock of the principle of complementarity – Bridging the impunity gap",¹ including with regard to

¹ ICC-ASP/8/51.

complementarity-related capacity-building activities by the international community to assist national jurisdictions, and possible exit-strategies of the Court and related issues;

8. *Welcomes* the report of the Secretariat of the Assembly of States Parties on the progress of 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,² *welcomes further* the work that has already been undertaken by the Secretariat and *requests* the Secretariat to, within existing resources, continue to develop its efforts in facilitating the exchange of information in this regard, including through inviting States to submit information on their capacity-needs for the consideration of States and other actors in a position to provide assistance, and to report on the practical steps taken in this regard to the twelfth session of the Assembly;

9. *Encourages* States, international and regional organizations and civil society to submit to the Secretariat information on their complementarity-related activities, and *requests* the Secretariat to report to the twelfth session of the Assembly in this regard;

10. *Welcomes* the report of the Court on complementarity and, while recalling the Court's limited role in strengthening national jurisdictions, its contribution to the efforts of the international community in this regard, including the Court's Legal Tools Project, and *requests the Court* to, within the existing mandate, continue cooperation with the Secretariat on complementarity and report, as appropriate, to the twelfth session of the Assembly.

² Report of the Secretariat on complementarity (ICC-ASP/11/25).

Annex II

Draft programme for the Assembly segment on complementarity

Monday, 19 November 2012

- 10.00 – 10.10: Opening remarks by the ASP President and Denmark/South Africa.
- 10.10 – 10.30: Key-note address by Ms. Helen Clark.
- 10.30 – 11.15: Presentation of concrete cases by Government representatives.
- 11.15 – 12.45: Plenary debate on complementarity, including opportunities for States and observer international and regional organizations to provide information on complementarity activities, initiatives and commitments.
- 12.45 – 13.00: Reflections and closing remarks by Ms. Helen Clark, the President and the Prosecutor of the Court, Denmark/South Africa and the ASP President.
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