



**REVIEW CONFERENCE TEAM**  
**COALITION FOR THE INTERNATIONAL CRIMINAL COURT (CICC)**  
**COMMENTS AND RECOMMENDATIONS**  
**ON COMPLEMENTARITY IN THE CONTEXT OF THE STOCKTAKING**  
**EXERCISE AT THE REVIEW CONFERENCE<sup>1</sup>**

**Kampala, Uganda 31 May - 11 June 2010**

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As indicated in advance of the eighth session of the Assembly of States Parties, the Coalition's Review Conference Team ('Team') views stocktaking as an essential component of the Review Conference as it is the means through which reflection on the performance to date of the system as established by the Rome Statute can take place, as well as a platform for the reaffirmation of the fundamental legal principles and norms underpinning the fight against impunity. In that regard, the Team appreciates the work conducted by States Parties during the eighth Assembly session to identify four topics for stocktaking and to take seriously preparations for stocktaking by including further discussion of proposals as to format and outcome at the Assembly's resumed session. Members of the Coalition have been invited to informal consultations on all four stocktaking topics in the context of The Hague and New York Working Groups and have welcomed and seized the opportunity to provide input as discussions and plans were formulated in the build-up to the Review Conference.

While Coalition members have taken an active interest in all aspects of the stocktaking exercise, the Team takes this opportunity to provide comments and observations on the discussions that have been scheduled and as reflected in the Report of the Bureau on Stocktaking: Complementarity ('Report') and its corresponding template and draft resolution.

The Team welcomes the attention of States Parties to the principle of complementarity, and language in the Report underscoring the primary obligations of States Parties under the Rome Statute. As the Report notes, fulfilment of these obligations is not contingent on international assistance. At the same time, as proposed in the Report, the Team supports recognition by States Parties of the need for increased efforts to increase the likelihood of the investigation and prosecution of serious international crimes by national authorities. Such complementarity initiatives are required to strengthen the global fight against impunity.

Members of the Team have followed and provided input into various initiatives in situations where serious international crimes have been committed, to ensure that complementarity is implemented in practice. Members have also advocated for this principle to become a reality through global ratification campaigns to make the ICC a truly global institution and advising on laws implementing the Rome Statute, as well as on capacity building projects. The Team is, therefore, in a unique position to provide crucial expertise and institutional knowledge in discussions at the Review Conference.

The Team supports the general approach of the Report, including in large part the recommendations addressed to States Parties, the Assembly, the ICC, and other actors. The

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<sup>1</sup> While the work of the Review Conference Team reflects the positions of those Coalition members most active on particular issues, and this paper has been prepared in consultation with other Coalition Members, this paper cannot be construed to represent the views of all organizations/Members of the CICC.

Team notes in particular that the Report and draft resolution seek to affirm obligations on the part of States Parties that already exist and were agreed upon under the Rome Statute. In this respect the Team further supports the need to synergise existing and ongoing endeavours by States Parties and international and regional organisations to address impunity in the context of Rome Statute crimes. The Team nevertheless makes the following comments and observations with a view toward contributing to the strengthening of discussions and initiatives on complementarity at the Review Conference and beyond.

### Evaluation of complementarity in practice

The Team notes with appreciation that from the outset the Report states that it will “examine the experiences with the principle of complementarity so far” and with a view to “[looking] at ways in which the Rome Statute system may be strengthened even further.” The Team agrees that meaningful discussion on complementarity would be assisted by an assessment of what States Parties have done to fulfil their complementarity obligations in their own jurisdictions. Part of this examination should examine the role that has been played by the Court, other states, intergovernmental organizations and civil society to promote the application of the principle of complementarity, which is legally binding for States Parties.

While the Prosecutorial Strategy and the Presentation of the Registrar at the Consultative Conference on International Criminal Justice in September 2009 provide a certain degree of information about court activities (also described in the Report), with the exception of replies in response to questionnaires issued by the Assembly Secretariat in the context of the Plan of Action, the Team is not aware of a document collecting and assessing the experiences of States Parties and on the measures that have been implemented within their own jurisdictions that would facilitate the investigation and prosecution nationally of Rome Statute crimes.<sup>2</sup>

Given the absence of any such inventory being undertaken with respect to those experiences, the Team strongly encourages States Parties to reflect on this as part of the stocktaking exercise and that those experiences are reflected in interventions during plenary discussions. Furthermore, the Review Conference should consider those situations that are the subject of a preliminary examination by the Prosecutor or a situation country and the measures taken and/or obstacles faced in implementing such measures, following the initiation of investigations or the announcement of a preliminary examination by the Prosecutor. Any such presentation should be objective and highlight not only the positive steps undertaken but also the areas where further efforts are needed with a view to providing lessons learned.

### Inability and Unwillingness

The Team notes that the Report correctly refers both to the inability and unwillingness of States to address the prosecution of international crimes. While the Report indicates that

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<sup>2</sup> The successful arrest operation in Germany and consequent exercise of jurisdiction against FDLR leaders Mr. Ignace Murwanashayaka and Mr. Straton Musoni is an example of where such mechanisms were utilised by a national jurisdiction (see speech of Mr. Jean-Michel Dumont, Political Advisor of the Special Representative of the Great Lakes of the EU at the PGA International Conference on Justice & Peace, December 2009, <http://www.pgaction.org/Kinshasa2009.html> ).

unwillingness to conduct genuine proceedings is a special challenge and that “assistance and cooperation alone will not solve all issues relating to impunity,” the balance of the Report deals with activities addressed to inability, rather than unwillingness.

The Team agrees with an emphasis on and understands the need to address the inability of States to address international crimes within their own jurisdictions. The absence of legal or institutional capacity is indeed a barrier to prosecution of serious international crimes. The Team suggests, however, that emphasis in discussions at the Review Conference also be placed on the unwillingness to address such crimes. A national criminal jurisdiction that has developed its judicial system through the assistance of third parties may still fail to conduct its own investigation and judicial proceedings due to systematic problems including a lack of judicial and prosecutorial independence. Technical assistance and capacity building would not resolve these systemic problems that generate unwillingness. Indeed, in some situations inability can be closely linked with unwillingness. For example, authorities that claim they are unable to act because of national barriers to justice such as amnesties, statutes of limitations and immunities, also demonstrate an unwillingness to address the national obstacles. The same can be true of national jurisdictions that have developed strong judicial institutions without the need for assistance from third parties, but that are unwilling to activate them in the fight against impunity. Conversely, capacity building initiatives may contribute to building willingness through awareness raising and training of judicial professionals and national authorities.

The Team recognises the complexities of this issue, but recommends that it be included in discussions at the Review Conference. This would complement a discussion on capacity building initiatives, which in the absence of political will to bring investigations and prosecutions may not successfully contribute to closing impunity gaps.

#### Complementarity in situations under investigation and preliminary examination

The Team notes the intention of the Focal Points to identify specific situations that may give rise to the need for positive complementarity efforts and welcomes the comprehensive approach proposed. In particular, the Team recognizes the importance of initiatives in situations where the Prosecutor has initiated an investigation or a preliminary examination. Situations under preliminary analysis offer a unique opportunity to promote national proceedings, as the fact that the Office of the Prosecutor is considering opening an investigation might boost genuine local efforts to avoid ICC action, especially in cases where lack of will has traditionally blocked national accountability initiatives. In those States where the Prosecutor is investigating or the Court is adjudicating, there already exists a critical need to address impunity, including investigating and prosecuting those who are unlikely to be pursued by the ICC. As the Report itself indicates, “[these situations call for immediate action].” This would also assist in capitalising on the legacy of the ICC in situation countries, as well as permitting States Parties and others to draw on the experience of ICC officials and staff in undertaking positive complementarity efforts. Focused efforts on existing ICC situations could also provide a useful starting point for the designated function recommended in the Report.

As identified in the Report, this should not detract attention from the obligations that all States Parties have undertaken while adhering to the legal regime of the Rome Statute based on the principle of complementarity, which places the duty on every State to exercise its criminal jurisdiction over those responsible for international crimes. Therefore, the Review

Conference's treatment of the subject of complementarity should be extended to all States that have decided to be bound by the Rome Statute's norms and principles.

### Importance of Specialized Expertise and Targeted Initiatives

The Report notes that some activities that can have a positive impact on complementarity are already being undertaken by donor States, including development cooperation organisations' extensive rule-of-law programs, and notes the desirability of increasing synergies between such activities and the Rome Statute system as well as mainstreaming international and domestic rule of law and criminal justice issues across governmental sectors. The Team wishes to stress the importance of bringing a special focus on investigation and prosecution of serious international crimes to new or existing initiatives. Whether programs are aimed at providing legislative assistance, technical assistance and capacity building, or construction of physical infrastructure, they should be initiated and carried out with the specific aim of enabling national jurisdictions to meet their obligations under the Rome Statute.<sup>3</sup>

Ensuring this focus is at the core of realizing positive complementarity. While such programs are in general of benefit to the construction or reconstruction of a functioning investigative and judicial infrastructure, these programs often do not focus on implementation or application of the Rome Statute system or may be wholly inadequate and would thus render a national system no more capable of prosecuting international crimes. Past experiences suggest that in the absence of a focus on prosecuting international crimes—and equally, the absence of specialized expertise notwithstanding a stated focus—rule-of-law programmes may not succeed in furthering prosecution of Rome Statute crimes.

### Outcomes

The Team stresses the need for concrete outcomes at the Review Conference with a view to generating tangible results that capitalise on discussions in Kampala and to ensure that the overall investment in preparing for the stocktaking issues is a worthwhile endeavour, as well as adequate follow-up by the Assembly on complementarity. In this regard, the Team notes that the draft resolution seeks to endow the Assembly Secretariat with the mandate to facilitate the exchange of information and with a view to strengthening domestic jurisdictions. The Team supports in principle the creation of such a mandate and while it is mindful that the notion of "existing resources" is a transient concept, it would be reticent of the Team not to stress the importance of sufficient and adequate support to the ASP Secretariat in developing this part of its prospective mandate.

The Team welcomes continued discussion in defining the parameters of this mandate and support to be given to the Assembly Secretariat once this function has been established.

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<sup>3</sup> With respect to implementing the Rome Statute, some Team members have identified recurrent pitfalls and weaknesses in national legislation that derived from "models" or draft-articles prepared by International Organisations providing technical assistance to States. Discussions on concrete points to be addressed and revised by these Intergovernmental Organisations and concerned States have started at the 8<sup>th</sup> Assembly of States Parties (see *Journal of the ASP No. 2009/10, p. 3, 24 Nov. 2009: Meeting on technical issues related to implementing legislation (organized by Parliamentarians for Global Action and Amnesty International, [www.icc-cpi.int/NR/rdonlyres/37885D7A-EB61-46B4-9331-B8CC168097B2/0/ICCASPASP8Journal23Nov2009.pdf](http://www.icc-cpi.int/NR/rdonlyres/37885D7A-EB61-46B4-9331-B8CC168097B2/0/ICCASPASP8Journal23Nov2009.pdf))*. Among these concrete points, participating-experts identified the selective incorporation of general principles of international criminal law in most national legal systems, the inadequate definitions of RS crimes in some National legislations and the politicisation of the process to exercise jurisdiction over RS crimes in certain National systems.