

**Coalition for the International Criminal Court (CICC)  
ICC Review Team Paper**

**Comments on the Review Mechanism’s proposal for categorization of the Independent Experts  
Review recommendations and remaining review issues**

***Complementarity and positive complementarity***

The Coalition for the ICC (CICC) Review Team<sup>1</sup> submits the following comments on the “Proposal for categorization of the Independent Expert Review Recommendations and remaining Review issues” submitted by the Review Mechanism to the Bureau of the Assembly of States Parties (ASP) on 28 April 2021. These comments focus on the proposed categorization of the Independent Expert Review (IER) recommendations on complementarity and positive complementarity (R262-265) and recommend that the Bureau, in approving the final categorization, assign these recommendations exclusively to the Court.

**Key principles in the review process**

The review process offers an important opportunity to bring together states parties, Court officials, and civil society in a joint effort to bolster the International Criminal Court (ICC) and its ability to serve the communities affected by its work, as well as the international community as a whole, given that the Rome Statute crimes are of international concern. In this regard, the final report of the IER provides a common framework for discussion among all relevant stakeholders as to how to strengthen the Court’s work and the Rome Statute system.

The Team believes that the follow-up to the IER report should be guided by:

- Transparency;
- Inclusive and meaningful engagement with stakeholders; and
- Respect for the court’s judicial and prosecutorial independence – While states parties play an important role to encourage, support and ensure change at the ICC, the review process must at all times ensure respect for the Court’s independence.

The process of categorization of the IER recommendations and remaining review issues is a first important test of these principles.

**IER recommendations on complementarity and positive complementarity**

The IER final report contains four recommendations under the heading “Complementarity and Positive Complementarity.” These are:

R262. The OTP should not have regard to prospective national proceedings and focus solely on whether national proceedings are or were ongoing (Article 17). This would further align

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<sup>1</sup> This paper has been prepared by Coalition members most active on the issue of the review of the ICC and the Rome Statute system. It does not represent the views of all Coalition members. Since the Rome Diplomatic Conference, Coalition members have organized themselves into thematic teams to follow issues addressed by the ASP or its subsidiary mechanisms and by the ICC. Teams are a forum to discuss and follow issues and with a view to developing advocacy. All Coalition members can join any team. For further information contact the CICC Review Team co-leaders Dorine Llanta (International Federation for Human Rights, FIDH), at [dllanta@fidh.org](mailto:dllanta@fidh.org) and Maria Elena Vignoli (Human Rights Watch), at [vignolm@hrw.org](mailto:vignolm@hrw.org), or the Team’s focal point in the CICC’s International Secretariat, Virginie Amato at [amato@coalitionfortheicc.org](mailto:amato@coalitionfortheicc.org).

the admissibility criteria on complementarity with Article 17 of the Rome Statute (‘is’, ‘has been’ conducted), and the requirements set out by the Appeals Chambers (‘tangible’ steps).

R263. Time limits should be considered for states to comply with OTP requests during complementarity assessments, in combination with providing clear criteria of what the OTP requires in order to make an Article 17 determination.

R264. Positive complementarity activities should not delay the opening of an investigation or closure of a PE. The OTP should consider positive complementarity in the context of the strategy for the situations at all stages of proceedings, and not restricted to PEs. The OTP should consider whether positive complementarity activities would be more appropriate after an investigation is authorised.

R265. Positive complementarity should be considered in the design of completion strategies.

### **Review Mechanism’s categorization of the recommendations on complementarity and positive complementarity**

The CICC Review Team welcomes the Review Mechanism’s overall proposal and shares its assessment that the categorization is not a “*scientific endeavor*.”<sup>2</sup> When outlining its overall approach to the categorization of the IER recommendations, the Review Mechanism distinguished the entity “*formally and in practice responsible to assess and take possible further action as appropriate to commence implementation of the recommendations*” from the entity, which should “*be involved in the assessment and/or implementation through extensive consultations and engagement*.”<sup>3</sup>

In this respect, the Team is concerned by the Review Mechanism’s proposal to assign the above four recommendations to both the Court and the ASP. We believe these recommendations would be more appropriately assigned to the Court –particularly the Office of the Prosecutor (OTP)—alone.

Complementarity is a bedrock principle of the Rome Statute. The ASP has had a facilitation on complementarity since 2009. States have the primary responsibility for investigating Rome Statute crimes and can play an important role to support other states to conduct such proceedings in their respective jurisdictions, where appropriate. As such, the assessment of the four related recommendations could benefit from input from a range of stakeholders.<sup>4</sup>

However, policy matters that touch upon the way in which the OTP assesses complementarity fall within the remit of prosecutorial independence. Similarly, any consideration of the way in which complementarity is interpreted judicially falls under the Chamber’s purview. The Review Mechanism acknowledged that the OTP should take the lead in considering the IER recommendations on complementarity and positive complementarity.<sup>5</sup> Yet, it assigned them to both the Court and the ASP, referring to the ASP’s intention to address issues of “complementarity and

<sup>2</sup> Review Mechanism, “Proposal for categorization of the Independent Experts Review Recommendations and remaining Review issues – Introductory note” (Introductory note), April 28, 2021, para. 7.

<sup>3</sup> Review Mechanism, Introductory note, paras. 6-7.

<sup>4</sup> In its overall response to the IER report, the Court itself noted that the experts’ recommendations on complementarity and positive complementarity will require engagement with the ASP, “to obtain its views on their substance.” See International Criminal Court, “Overall Response of the International Criminal Court to the Independent Expert Review of the ICC and the Rome Statute System – Final Report: Preliminary Analysis of the Recommendations and information on relevant activities undertaken by the Court,” April 14, 2021, para. 501.

<sup>5</sup> Review Mechanism, “Proposal for categorization of the Independent Experts Review Recommendations and remaining Review issues” (Categorization proposal), April 28, 2021, comments column for IER recommendations on complementarity and positive complementarity.

the relationship between national jurisdictions and the Court.”<sup>6</sup> The Team agrees that complementarity is a matter of shared interest –there are a number of relevant issues that require joint consideration. However, we note that recommendations R262-R265 are very specific in both scope and purpose and that they go to the core of prosecutorial discretion.

Finally, the experts themselves assigned these recommendations to the Court, and the OTP in particular, not to states parties. In the Team’s view, this should be adequately reflected in the categorization. While states parties can be consulted by the OTP in its assessment of these recommendations (particularly with regard to the role of states parties and the Assembly in supporting positive complementarity), the recommendations are aimed at prosecutorial decision-making and policy. Assigning them to both the Court and the ASP risks encroaching on the Court’s independence and conflating the Court’s and the ASP’s respective roles and responsibilities.

## **Conclusion**

The CICC Review Team believes that the categorization of the specific recommendations on complementarity and positive complementarity should be formally assigned exclusively to the Court. While it will be important to encourage the OTP to act transparently and openly and create fora for dialogue with states parties and civil society, the OTP should be the entity ultimately in charge of the policy decisions related to these issues. This is consistent with respect for its prosecutorial independence as well as practical policy expertise.

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<sup>6</sup> Review Mechanism, Categorization proposal, comments column for IER recommendations on complementarity and positive complementarity. See also ASP, “Review of the International Criminal Court and the Rome Statute system,” Res. ASP/18/Res.7, December 6, 2019, para. 18.