



## SUBMISSION TO ICC-OTP PUBLIC CONSULTATION ON POLICY ON COMPLEMENTARITY AND COOPERATION

20 November 2023

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Amnesty International welcomes the opportunity to provide its comments on the ICC Office of the Prosecutor's (OTP) Draft Policy on Complementarity and Cooperation (Hereafter 'Draft Policy')<sup>1</sup>. In our view, complementarity and cooperation go to the heart of the Rome Statute *system*, and the role of all stakeholders within it. In this regard, the overarching theme of the Policy, as well as the intention of the OTP to set out its policy position on complementarity, is very welcome.<sup>2</sup>

### A. Broad observations

#### *The Rome Statute at 40 report*

In 2021, Amnesty International (with the TMC Asser Instituut) published the *Rome Statute at 40 report*<sup>3</sup>, which serves as a record of rich expert discussions of many topics which are contained in the present Draft Policy, including the need for the OTP to engage more meaningfully with affected communities within situation countries. Most presciently, 'One participant [in the report] recommended that the ICC develop policy guidelines on how it will operate in support of, or relate to, other mechanisms'.

Given the depth of discussions and their relevance to the Draft Policy, we kindly urge the OTP to study the findings and recommendations of the report, perhaps with particular attention to 'session 3: The Rome Statute System'<sup>4</sup> and the section: '*A Broader Conception of Complementarity and the Role of the ICC in Relation to Other International Justice Mechanisms*'<sup>5</sup>. This section discusses the role that the ICC should play within a broader Rome Statute system, and specifically, what the Court's role pursuant to the principle of 'complementarity' should be where a 'panoply of different actors [are] working on the same situation'.

Alongside key findings in the *Rome Statute at 40 report*, participants agreed several key findings of relevance to the present Draft Policy, as well as recommendations<sup>6</sup> which we strongly urge the OTP to consider in the finalizing of its present Policy, including a number of recommendations which emphasised

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<sup>1</sup> [https://www.icc-cpi.int/sites/default/files/2023-10/DRAFT-Complementarity-and-Cooperation-Policy-Paper\\_September-2023%20%281%29.pdf](https://www.icc-cpi.int/sites/default/files/2023-10/DRAFT-Complementarity-and-Cooperation-Policy-Paper_September-2023%20%281%29.pdf)

<sup>2</sup> In providing observations and recommendations, Amnesty International discusses discrete aspects of the Policy of particular interest to the organization. However, a failure to comment on a particular aspect should not necessarily be seen as an endorsement of it, nor are these views intended to be conclusive and comprehensive, or the structure of this paper to imply an order of prioritization of issues.

<sup>3</sup> The Rome Statute at 40 report, available here: <https://hrij.amnesty.nl/content/uploads/2021/05/Report-Rome-Statute-at-40-final.pdf>

<sup>4</sup> The Rome Statute at 40 report, page 31

<sup>5</sup> The Rome Statute at 40 report, page 34

<sup>6</sup> The Rome Statute at 40 report, pages 5-12,



the importance of ‘engagement’ and clarity of public information to affected communities. The key recommendations<sup>7</sup> were:

- The ICC and stakeholders should consider how the Court can work with other international justice mechanisms and what role the ICC would play in a broader concept of the Rome Statute system.
- Alongside complementarity, a ‘comprehensive framework’ of cooperation between international justice mechanisms and organizations could be developed by states, international justice mechanisms, and interested stakeholders.
- The ICC should consider how it will engage in transitional justice situations, and - where international justice mechanisms are being established - it should consider the role that the Court can play within or in relation to mechanisms or transitional justice processes.
- International partners, international organizations, and institutions should continue to provide support and capacity to actors and stakeholders at the national level to improve capacity and generate domestic political will.
- The ICC and relevant stakeholders should provide greater clarity in communications and engagement with victims and affected communities, so that expectations can be better managed through explicit information about forms of participation for survivors and survivor communities, including in clarifying the roles that victims of crimes under international law may play in a criminal justice process.
- Relevant stakeholders should consider providing information to affected communities on the role and functions of other international justice mechanisms and processes (if they are available) without privileging the ICC.
- To manage expectations ‘up-front’, the Court could consider realistically setting out what the role of the ICC is, or what it intends to do in a specific situation. The Court should not restrict itself to providing information only on the Court’s mandate, but also discuss what the Court will do to complement the other transitional justice processes that are taking place in relation to the situation country.

In our view, other critical issues of relevance to the current Draft Policy contained within the *Rome Statute at 40* report include, among others: the need for the OTP and Court to consider ‘long-term comprehensive and complementary justice strategies’ with a division of responsibilities and judicial activities between national authorities and the Court; and a proposal for a ‘management protocol’ which could be developed setting out legal relations between national and international mechanisms and how they should be managed and coordinated properly to avoid overlap.

### Observations related to OTP’s ‘hub’ concept

Generally, Amnesty International is in agreement with the broader approach to complementarity outlined in the Draft Policy, with the Office ‘focused simultaneously on delivering on its core investigative mandate while significantly increasing its ability to interface with, and support, efforts of other criminal jurisdictions and accountability actors.’<sup>8</sup> As outlined in our public statement<sup>9</sup> on the 25th anniversary of the Rome Statute, it is imperative that states and all stakeholders should ‘harness’ the Rome Statute and strengthen the *system* of international justice, and the International Criminal Court within it. In this regard, Amnesty International has worked for many years towards the establishment of a strengthened system of

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<sup>7</sup> The Rome Statute at 40 report, page 11

<sup>8</sup> Draft Policy, page 2

<sup>9</sup> *International Justice Day: Harnessing the Rome Statute and strengthening the system of international justice*, July 17, 2023, Available at <https://hrij.amnesty.nl/international-justice-day-harnessing-the-rome-statute-and-strengthening-the-system-of-international-justice/>



international justice, and agrees with the OTP assessment that developments such as the ‘Ljubljana-The Hague Convention’<sup>10</sup> ‘fill a void in the architecture of legal mechanisms designed to promote the investigation and prosecution of core international crimes at the national level.’<sup>11</sup> In our view, the increasing recognition by states, the ICC and other international actors that cooperation and complementarity within a broader system of international justice are prerequisites for comprehensive accountability, are very welcome. Indeed, the unprecedented recent response of the international community to the armed conflict in Ukraine has shown the potential of a multi-faceted international justice response from the national level to the international, with the ICC playing a vital role in pursuing accountability into those most responsible. Such a robust justice response must serve as the standard for all situations where crimes under international law are committed.

However, while Amnesty International considers that, in principle, the broad approach of the OTP is to be welcomed, possible negative implications or repercussions of such a policy approach should be further considered by the OTP. In particular, the OTP’s reimagining<sup>12</sup> of the office ‘not as an apex of the international criminal justice architecture, but as a hub at the centre of global efforts undertaken across different criminal jurisdictions’ requires further elaboration.

Practically, while many national level investigations, or international investigations related to the same situation may be positive, states and international justice mechanisms which have commenced investigations will have different levels of expertise, capacity as well as political and financial resources to undertake criminal investigations. Further, each domestic and international investigation will be acting pursuant to different domestic legislation or international legal basis. In some instances, at the national-level, states exercising jurisdiction over crimes under international law have narrowly defined jurisdiction, for example, strict nationality requirements, thereby inevitably reducing the number of potentially ‘complementary’ cases of relevance to the ICC-OTP. As such, while engaging in a concerted manner with other justice actors may be beneficial, it may also create the risk of the OTP being caught up in potentially inefficient or ineffective processes. The OTP should therefore explain how it will avoid or mitigate potential and perhaps unintended negative consequences of pursuing ‘joint’ accountability efforts.

Crucially, as Amnesty has previously noted<sup>13</sup>: ‘A stronger system of international justice [in which the OTP imagines the ICC as a ‘hub’] is one thing, ensuring that all situations are considered equally within such a framework is another and remains a significant challenge. Selectivity and double standards<sup>14</sup> continue to mark the approaches of some states to international justice.’ In this regard, the OTP should recognize that while national investigations of Rome Statute crimes, or the establishment of certain country-specific international justice mechanisms have increased in recent years, states have not been willing to investigate situations equally. For example, despite regular calls, including by Amnesty International, for states to exercise universal jurisdiction in relation to a number of situations – such as Palestine, Afghanistan, Belarus, Yemen, and Ethiopia – states have steadfastly refused to open investigations or establish relevant

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<sup>10</sup> *Global: States agree landmark treaty to help deliver justice to victims of genocide, crimes against humanity and war crimes*, May 26, 2023, Available at <https://www.amnesty.org/en/latest/news/2023/05/global-states-agree-landmark-treaty-to-help-deliver-justice-to-victims-of-genocide-crimes-against-humanity-and-war-crimes/>

<sup>11</sup> Draft Policy, para. 97

<sup>12</sup> Draft Policy, paragraph 30

<sup>13</sup> See, *supra* footnote 9

<sup>14</sup> See, *The ICC at 20: Double standards have no place in international justice*, Amnesty International, July 1, 2022, Available at <https://www.amnesty.org/en/latest/news/2022/07/the-icc-at-20-double-standards-have-no-place-in-international-justice/>



international mechanisms or responses (indeed in some instances such as Yemen<sup>15</sup> and Ethiopia<sup>16</sup>, such UN-based responses have been disestablished).

Specifically, the ICC situation in Afghanistan is a good example. In the OTP's statement<sup>17</sup> of 27 September 2021, the Prosecutor provided that 'in relation to those aspects of the investigation that have not been prioritized' [into Afghan National Security Forces (ANSF) and the armed forces of the United States of America and its Central Intelligence Agency] the OTP would 'promote accountability efforts within the framework of the principle of complementarity'. An approach seeking cooperation and promoting complementary proceedings in European states parties – including in relation to alleged CIA crimes alleged to have been committed in a clandestine network of detention torture facilities on the territories of Poland, Romania, and Lithuania – may perhaps be an effective strategy. However, despite no evidence of national level 'complementary' proceedings having taken place, nor any willingness on the part of states parties to undertake such investigations, the OTP still decided to deprioritize investigations into certain parties to the conflict. As such, the Afghanistan situation demonstrates a significant weakness in the OTP's policy approach and potential contradiction with the OTP's mandate as defined by the Rome Statute, in that its 2021 deprioritization decision appears to rely on the willingness and ability of states (or other international mechanisms) to undertake hypothetical investigations *in the future* – where no evidence exists to foresee such a scenario. The OTP's deprioritization decision<sup>18</sup> in the Afghanistan situation thus exacerbated the disparity of access to justice between victims of crimes committed by different parties to the conflict.

Therefore, while a policy position of seeking to assist or complement existing investigations or activities may expand the OTP's impact, such a position generally pre-supposes that investigations actually exist or are likely to exist. In our view, such an outlook is – presently – optimistic. Indeed, as mentioned, our assessment is that selectivity and double standards are present in many states' approaches to international justice. Indeed, as one participant in the *Rome Statute at 40* report provided<sup>19</sup>; '[states are] calculating bodies and do what is within their own interests (including in protecting their own agents)'. In a similar vein, while cooperation and complementarity with and among international mechanisms is generally to be encouraged, it remains the case that the establishment of international mechanisms and their respective mandates (for example IIIM-type mechanisms or UN Human Rights Council mechanisms) are also marked by a selective approach of states and the international community. It is vital that the Draft Policy explains how the Office will address such realities, and other (perhaps unintended) negative consequences that the conception of the OTP as a 'hub' may present. This is not to say that such a 'hub' approach is wholly unwelcome, but alongside such an approach, the OTP should further set out how it will pursue complementarity in situations where states and/or other international actors are not, or will not be willing to investigate certain situations or to establish other international justice mechanisms/responses.

In our view, while the OTP may not view itself as 'the apex' of the international criminal justice architecture, the ICC still enjoys a key position as a 'Court of last resort'. That is, the Court has a unique role to pursue accountability in situations where only ICC intervention will ensure that certain crimes, perpetrators, or

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<sup>15</sup> See, *Yemen: Saudi Arabia forces an end to mandate of only international mechanism to investigate HR abuses*, Amnesty International, October 7, 2021, Available at <https://www.amnesty.org/en/latest/news/2021/10/yemen-saudi-arabia-forces-an-end-to-mandate-of-only-international-mechanism-to-investigate-hr-abuses/>

<sup>16</sup> See, *Ethiopia: Victims betrayed after states failed to continue UN accountability mechanism*, Amnesty International, October 5, 2023, Available at <https://www.amnesty.org/en/documents/afr25/7271/2023/en/>

<sup>17</sup> A. A. Khan QC, following the application for an expedited order under article 18(2) seeking authorisation to resume investigations in the Situation in Afghanistan, Available at <https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-khan-qc-following-application>

<sup>18</sup> *Ibid.*

<sup>19</sup> The Rome Statute at 40 report, page 38



situations are investigated. While paragraph 31 of the Draft Policy recognizes that the ICC, ‘as an international court, may be best placed to hear a particular case,’ in our view, this position should be further elaborated. In particular, how the *absence* of ‘a wider array of action carried out by a community of accountability actors’ may in fact be a primary circumstance in which the ICC is best placed to hear a case or more broadly pursue an investigation, in ‘legal’ terms of admissibility, jurisdiction, and procedure<sup>20</sup>, but *also* in its unique role as a Court of last resort.

It should also be recalled that, while the ICC-OTP may be willing to engage with other international justice actors, including for example Human Rights Council mandated Commissions of Inquiry or hybrid mechanisms, the ICC-OTP must recognize that among these actors it alone may have the unique mandate and possibility to investigate and prosecute individuals suspected of criminal responsibility. As such, the policy should clarify that while engagement with other mechanisms may be beneficial, unless such mechanisms are undertaking relevant activity and are willing and able genuinely to investigate and prosecute individuals, they are not relevant for the OTP’s assessment of admissibility and complementarity within the Rome Statute.

In this regard, reference in paragraph 31 of the Draft Policy to the OTP being best placed to hear *a case* [emphasis added] appears to be based on references throughout article 17 of the Rome Statute to ‘a case’. However, the policy should clarify in this paragraph that its reference to ‘a particular case’, is not to limit the OTP’s role to individual cases, nor to limit the OTP’s role to contributing to the prosecution of particular cases within situations where other ‘cases’ have been commenced by a community of accountability actors. Rather, this paragraph should clarify that there may often be situations where the ICC is best placed to undertake *investigations* into certain situations, including where individuals and conduct is not being genuinely investigated by states or other actors.

## **B. Two-Track Approach**

In our view, the OTP should strive to promote complementarity whenever possible and should take seriously any state that claims that it is willing and able genuinely to investigate crimes and bring perpetrators to justice. Catalysing national level proceedings through ‘positive complementarity’ is a potentially important aspect of the OTP’s work. Indeed, the possibility of pushing states parties to investigate and prosecute has the potential to increase the OTP’s impact on states significantly, but only if the OTP’s approach to complementarity is appropriate, consistent, inclusive, and – through insistence of the Court’s mandate to independently investigate in the absence of genuine state action - effective. In this regard, complementarity does not mean primacy of state proceedings at all costs, in particular when states are not genuinely willing or able to investigate and prosecute crimes under international law - or only certain politically expedient cases or alleged perpetrators.

The ‘two-track approach’ appears to be a key aspect outlined in the Draft Policy, where the OTP will ‘seek to engage in partnership with States to promote cooperation and complementary action, while remaining vigilant of its mandate to investigate and prosecute Rome Statute crimes’.

While not disagreeing that such an approach *may* lead to ‘genuine proceedings in relevant cases’, Amnesty International remains cautious about how the approach is to be implemented in practice, which the OTP should further consider and elaborate upon in its Draft Policy. Our cautious position is based on the OTP’s and states parties’ past and current practice in relation to cooperation and complementarity where many aspects of a ‘two-track approach’ have already been undertaken or applied by the OTP – as outlined for example in the Office’s annual (now discontinued) Preliminary Examinations reports. In this regard, the

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<sup>20</sup> Draft Policy, paragraph 31



Policy should discuss how such implementation will be based on past experiences and practices of engaging with states in line with a decades-long ‘positive complementarity’<sup>21</sup> approach.

It is crucial to note that in a number of situations subject to ICC investigation, for example where crimes against humanity have been committed, the apparatus of the state - including the military, police, or other investigative and judicial authorities – may well be implicated, if not central to the commission of widespread and/or systematic crimes or abuses. Related to this, it is quite likely that senior state officials, up to the level of heads of states, may be implicated as being individually responsible for the commission of crimes within the ICC’s jurisdiction.

At the same time, for example, in the Venezuela situation, civil society organizations, victims' groups, and other human rights defenders will likely face ongoing targeting by the government for their pursuit of justice and human rights. In Venezuela, this has resulted in attacks, stigmatization, and other forms of harassment. Indeed, attacks and restrictions against civil society organizations and human rights defenders are very likely due to these stakeholders’ and their activities related to documenting human rights violations.

The OTP should therefore much more clearly set out in its Draft Policy how it will engage in a two-track approach in these situations or how it views the nature of its engagement with government authorities and individuals who may be central to the commission of Rome Statute crimes.

### **Inherent ‘dangers’: one-sided or incomplete domestic investigations and manipulation**

Amnesty International has carefully followed the Nigeria preliminary examination since its inception. In relation to this situation, we recall the OTP’s December 2020 statement<sup>22</sup> that: ‘[At the national level is has been the] aspiration [of the Prosecutor] for the Nigerian judicial system to address these alleged crimes. We have engaged in multiple missions to Nigeria to support national efforts, shared our own assessments, and invited the authorities to act. We have seen some efforts made by the prosecuting authorities in Nigeria to hold members of Boko Haram to account in recent years, primarily against low-level captured fighters for membership in a terrorist organization. The military authorities have also informed me that they have examined, and dismissed, allegations against their own troops. [The OTP has] given ample time for these proceedings to progress [13 years by 2023], bearing in mind the overarching requirements of partnership and vigilance that must guide our approach to complementarity. However, our assessment is that none of these proceedings relate, even indirectly, to the forms of conduct or categories of persons that would likely form the focus of my investigations. And while this does not foreclose the possibility for the authorities to conduct relevant and genuine proceedings, it does mean that, as things stand, the requirements under the Statute are met for my Office to proceed.’

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<sup>21</sup> See, *OTP Policy Paper on Preliminary Examinations* - the 2013 Policy Paper provides (pp. 100-103) a number of possible ‘positive complementarity’ initiatives geared towards encouraging genuine national proceedings: Monitoring activities, sending in-country missions, requesting information on proceedings, holding consultations with national authorities as well as with intergovernmental and non-governmental organizations, participating in awareness-raising activities on the ICC, exchanging lessons learned and best practices to support domestic investigative and prosecutorial strategies, and assisting relevant stakeholders to identify pending impunity gaps and the scope for possible remedial measures.

<sup>22</sup> Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the situation in Nigeria, 11 December 2020, available at <https://www.icc-cpi.int/news/statement-prosecutor-fatou-bensouda-conclusion-preliminary-examination-situation-nigeria>



Our assessment of complementarity initiatives, including based on our work in Nigeria<sup>23</sup> as well as Venezuela and other situations, is that state authorities may not be willing (or sometimes willingly unable<sup>24</sup>) to conduct comprehensive impartial and independent investigations at the national level. For example, and as recognized by the OTP itself in the above statement, states may be willing to investigate certain parties to a non-international armed conflict (in Nigeria the government has shown willingness to investigate alleged Boko Haram members and their alleged crimes) but are unwilling to genuinely investigate senior government officials or members of the country's military. Such a practice is not unique to Nigeria, indeed in many situations - for example, Venezuela, UK/Iraq, and others - authorities may only be willing to undertake incomplete, low-level, or one-sided investigations.

In relation to the OTP's preliminary examination into UK/Iraq, which concluded in December 2020 after six years, Amnesty International's assessment is that the conduct of the UK authorities in conducting 'complementary' proceedings resulted in no single prosecution (despite the OTP's finding that the UK military had committed war crimes) and provided a roadmap for obstructionism. Rather than pursuing a complementarity approach leading to investigations and criminal prosecutions, the OTP appeared to ultimately reward delays brought about by the failure of the UK military and authorities to conduct independent and impartial investigations into allegations in the immediate aftermath of the conflict in Iraq.

Further, states may seek to delay or ultimately avoid OTP action, through displaying an apparent willingness to undertake 'complementary' investigations, when in fact investigations and 'complementary' activities do not align with investigations relevant to the ICC, and may potentially point to an intent to shield perpetrators. For example, states may be willing to undertake partial or inadequate investigations which; do not investigate command structures; are selective or one-sided; prosecute 'ordinary' criminal acts; or do not investigate systematic occurrences of crimes. Similarly, states may commit or demonstrate an apparent willingness to strengthen their own domestic laws or legal architecture; establish institutional responses to investigate allegations; and indicate a receptiveness to ICC and other partners' assistance; but all without actual relevant investigative and prosecutorial activity. These initiatives attempt to hide the inaction or unwillingness of the authorities and to create a veneer of accountability.

We have seen in the Nigeria situation, for example, a response to ICC attention based on institution building<sup>25</sup> (for example through the establishment of inquires or 'panels'). Such institutional responses may appear relevant but are not in fact consistent with an intent to bring persons to justice. Rather they are undertaken for the purpose of shielding persons from criminal responsibility. This is especially the case where institutional responses are not followed up by any further investigations, prosecutions, or accountability measures. Similarly, in the Venezuela situation, the ICC Victims Participation and Reparation Section's article 18(2) report<sup>26</sup>, in 2023, described at length how '[j]udicial reform measures adopted in Venezuela are limited and fail to address the lack of genuine proceedings. The report provides that: [a]ccording to the findings of a 2023 report: "the so-called judicial reform, that was enacted in haste [...] is largely cosmetic in nature [...] and fails to: i) reinforce the capacity of the existing judicial system to investigate and prosecute alleged perpetrators, ii) create effective and viable accountability mechanisms to

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<sup>23</sup> See, for example, *Nigeria: Stars on their shoulders: Blood on their hands: War crimes committed by the Nigerian military*, Amnesty International, July 3, 2015, available at <https://www.amnesty.org/en/documents/afr44/1657/2015/en/>

<sup>24</sup> See, *Nigeria: Willingly unable: ICC preliminary examination and Nigeria's failure to address impunity for international crimes*, Amnesty International, December 10, 2015, Available at <https://www.amnesty.org/en/documents/afr44/9481/2018/en/>

<sup>25</sup> Ibid. at pages 31 onwards, and 42.

<sup>26</sup> Report of the article 18(2) process of the VPRS in the Venezuela situation, based on 1875 submissions of views and concerns. Paragraphs 32-34 available at: <https://www.icc-cpi.int/sites/default/files/RelatedRecords/0902ebd180441579.pdf>





bring alleged perpetrators to justice, and iii) establish appropriate remedies for victims, demonstrating the lack of genuine political will to address accountability at all levels within the State.<sup>27</sup>

In this regard, it is noteworthy that the OTP's policy does not discuss its ongoing experience, practices and lessons-learned in Nigeria or its engagement with the UK in the Iraq/UK preliminary examination, or other situations such as the investigation in Afghanistan, which provide apposite case studies of states parties being able to delay the Court or rely on delays in their own domestic proceedings, to ultimately frustrate the ICC's mandate - in the name of pursuing complementarity at the national level or through minimal or effective non-cooperation.

In this context, we recognize the OTP's provision<sup>28</sup> that 'Chambers have, in endorsing cooperative efforts by the OTP and States to promote the complementarity principle where feasible and to maintain a meaningful dialogue, called for vigilance that this does not risk validating national proceedings or tainting any possible future admissibility proceedings'. However, given that the OTP must not accept deficient and inadequate investigations, the Draft Policy should outline clearly how the OTP will approach and deal with situations marked by such investigations. The OTP must ensure that it is not cooperating with or willing to accept selective or one-sided investigations, nor sham investigations or prosecutions, at the national level.

### Cooperation and Complementarity

Throughout the Draft Policy, reference is made to complementarity and cooperation as 'mutually reinforcing'. We agree in principle with this assessment. However, it is important to note that cooperation per se is *not* complementarity. Indeed, cooperation with the Court, which is not matched by genuine domestic level investigative steps, does not fulfil the requirements of complementarity. In this regard, the possibility of high-level OTP missions and the willingness of authorities to host OTP missions or field offices are positive signs of cooperation, as is the willingness of certain governments to enter into formal agreements with the ICC-OTP, alongside high-level commitments to the ICC of support. But they are not indicators of genuine relevant domestic activity, including investigations, and do not fulfil the requirements of article 17 of the Rome Statute. Nor do OTP activities undertaken with state authorities which relate to attending 'seminars' or 'capacity building workshops'

In our assessment states may be willing to 'hold the Court at bay'<sup>29</sup> through ostensible or minimal cooperation, which hampers the OTP's capacity to proceed with its work. Such a situation has been seen at the preliminary examination phase but is not unique to it. For example, in the Kenya situation, at the investigation phase, the Trial Chamber found<sup>30</sup> 'substantial unexplained delay[s] on the part of the Kenyan Government in giving effect to [cooperation requests]'. The Trial Chamber also discussed its findings as to, among others: 'the 'unhelpful manner' in which certain of the Kenyan Government's explanations [to cooperation requests] were framed; the 'complete failure' on the part of the Kenyan Government to pursue alternative sources of information, despite these having been identified to it by both the Prosecution and the

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<sup>27</sup> In 2022, Amnesty International provided that: 'Despite the judicial reform announced in 2021, the main problems around access to justice remained. These included lack of judicial independence, the political use of judicial procedures against those perceived to be opponents of the government, and obstacles hindering victims' access to justice such as denying people access to case files, arbitrarily denying people the right to designate their own legal representatives and unjustified delays.' see, <https://www.amnesty.org/en/location/americas/south-america/venezuela/report-venezuela/>

<sup>28</sup> Draft Policy, paragraph 153

<sup>29</sup> See *Willingly Unable*, *supra* footnote 24 at page 30. See also, *Pressure Point: The ICC's Impact On National Justice, Lessons from Colombia, Georgia, Guinea, and the United Kingdom*, Human Rights Watch, 2018, Available at [https://www.hrw.org/sites/default/files/report\\_pdf/ij0418\\_web\\_0.pdf](https://www.hrw.org/sites/default/files/report_pdf/ij0418_web_0.pdf), p. 13

<sup>30</sup> See, Second decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute, *The Prosecutor v. Uhuru Muigai Kenyatta*, 19 September 2016





Chamber; the lack of any ‘meaningful steps to compel production of the requested materials’; and submissions by the Kenyan Government, throughout the course of the cooperation litigation, which the Chamber found to be ‘indicative of a non-cooperative stance’.

### Delays and inconsistency by the OTP

A significant concern regarding the two-track approach concerns the possibility that such an approach may lead to delays in the OTP pursuing its investigation and prosecution mandate, including the issuance of arrest warrants and bringing cases to Court. We should also recall that in several situation countries, the OTP has *already* delayed opening investigations by many years (as stated earlier, 13 years in the case of Nigeria<sup>31</sup>), and the OTP’s investigations may also commence after significant and time-consuming litigation before the ICC. Consequently, ostensible commitments to ‘complementarity’ and related activities on the part of the ICC and states parties are likely to lead to delays (intentional or not).

In this regard, while the two tracks are independent of each other, they are also seen as ultimately ‘converging’. As such, it is presently unclear in the Draft Policy to what extent the OTP’s pursuit of complementarity efforts at the national level will ultimately affect or converge with the ICC prosecutor’s pursuit of investigations and cases before the ICC’s chambers. Relatedly, while the OTP’s approach to complementarity is grounded in the legal criteria related to admissibility and cooperation in the Rome Statute, the ‘broader’ complementarity approach and strategy adopted by the OTP would appear to inevitably move beyond a ‘legal test’ assessment under the framework of admissibility.

As the OTP provides<sup>32</sup>: ‘this new approach is defined by placing emphasis not only on the judicial application of the principle of complementarity under article 17 of the Statute, but also through concerted efforts to support national authorities in shouldering greater responsibility with respect to the investigation and prosecution core international crimes. As such, the Office will seek to engage in partnership with States to promote cooperation and *complementary action* [emphasis added], while remaining vigilant of its mandate to investigate and prosecute Rome Statute crimes [...] Such joint efforts are intended to take multiple forms ranging assisting national jurisdictions in their domestic proceedings, the sharing of information, knowledge and best practices, the definition of common operational standards on areas of common interest, the secondments of experts, and engagement with local, regional, and international partners.’

In our view, the OTP’s independent prosecutorial activities on one ‘track’ must remain the primary focus of a two-track approach. OTP efforts to pursue complementarity on another track, for example through capacity building efforts or national-level trainings, must not come at the expense of the OTP expeditiously fulfilling its mandate. Of course, the two-track approach must result in genuine investigations and prosecutions: at the ICC, nationally, or both. Where a two-track approach shows no progress towards such a result, or will not produce such a result, it is imperative that the OTP fully and expeditiously pursues its independent mandate.

It should be recalled that national-level institutional capacity building and other such initiatives take significant time, and the OTP must also be clear in its approach that such efforts will not delay the expediency of investigations and prosecutions. Linked to this, even a state’s – *prima facie* genuine - commitment to strengthening its own capacity etc., should not delay the OTP in its mandate. Ultimately,

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<sup>31</sup> See, *Nigeria: Four calls to the ICC Prosecutor*, Amnesty International, 5 December, 2022, Available at <https://www.amnesty.org/en/documents/afr44/6264/2022/en/>

<sup>32</sup> Draft Policy, paragraph 3



‘complementary action’ may be welcome, but it cannot substitute the OTP’s investigations and prosecutions.

Similarly, we note from the Policy that, as in the Venezuela situation, in adopting a two-track approach the OTP ‘will continue to assert its jurisdiction before the ICC until it is of the view that Venezuela can effectively implement its obligations.’ In our view, the OTP should clarify this statement and provide in the context of the broader report what the Office means by a state being in a position that it can ‘effectively implement its obligations’ – rather than referring to a state’s activity in pursuing relevant cases, or willingness and ability to genuinely investigate and prosecute Rome Statute crimes, which would be the required assessment to defer to a state’s investigation; and how such a determination relates to an admissibility assessment.<sup>33</sup>

In sum, it is crucial that the Draft Policy provide further information and criteria on how the OTP will consistently and robustly apply the Policy in a manner that must lead to genuine investigations and prosecutions. In this regard, Amnesty International strongly urges the OTP to adopt a policy of ‘benchmarking’ - which the organization has advocated for in relation to a number of situations. In our view, a consistent ‘benchmarking’ approach could establish the relationship between the two tracks and, crucially, strengthen the compliance of states with their primary responsibility to investigate and prosecute core crimes.

## Benchmarking

In line with our call for greater transparency, consistency and inclusivity to the OTP’s complementarity approach, and as Amnesty International has proposed<sup>34</sup> for many years, the Draft Policy – with its emphasis on cooperation and complementarity - could be significantly strengthened by setting out a practice of public ‘benchmarking’ tailored to each unique situation under investigation (or preliminary examination). In our view, such an approach is imperative as the OTP pursues a ‘broader’ policy of complementarity, and to increase the ‘catalytic effect’<sup>35</sup> that the OTP’s intervention could have in a particular situation. As the OTP pursues a ‘two-track’ approach, a practice of benchmarking will be critical to demonstrate consistency and transparency of the OTP’s actions to all stakeholders – above all victims and affected communities.

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<sup>33</sup> See, for example, the Report of the article 18(2) process of the VPRS in the Venezuela situation, based on 1875 submissions of views and concerns, which provides: ‘By way of a general observation based on the material received, victims overwhelmingly support the OTP’s Request [to resume its investigation in Venezuela]. They maintain that the Venezuelan Government is unwilling to genuinely investigate and prosecute the crimes against humanity committed in Venezuela, with total impunity, by State authorities, security forces, and the ‘colectivos’ – armed groups allegedly supported and shielded by state authorities’ available at: <https://www.icc-cpi.int/sites/default/files/RelatedRecords/0902ebd180441579.pdf>

<sup>34</sup> In our 2018 *Willingly Unable* report on the OTP’s ongoing preliminary examination in Nigeria, Amnesty International proposed (pages 34, 40, and 41) benchmarks for compliance by the authorities, in terms of co-operation and complementarity, with a recommendation to the OTP to publicly define and report on them.

<sup>35</sup> See, Rome Statute at 40 pages 32-33: ‘A number of participants discussed the ‘catalytic effect’ that the Rome Statute and ICC has had on states and regional bodies adopting legal frameworks to investigate and prosecute international crimes and establishing justice mechanisms or processes [...] while the catalytic effect was recognised, one participant stated it would be wrong to assume that as a consequence there was no need for the ICC to intervene in certain national situations [...] [The catalytic effect] also had limitations which should be explored. For example, while the ‘fear of the ICC’ may provide some pressure on states parties to domesticate the Rome Statute or commence national-level proceedings, if the Court subsequently did not effectively undertake cases, motivation for establishing domestic mechanisms may ‘disappear’ [...] It was said that the Court could undertake a number of actions to pursue ‘positive complementarity’ including trainings and sessions for sharing best practices, but if a State’s national authorities or the international community did not engage with that process, then complementarity would become an ‘empty slogan.’ In this regard, one participant stated that ‘after a certain period of time there has to be an ‘end point’, where ‘enough is enough’ and a time to take a decision is reached. In this regard, one participant highlighted that the differences and discrepancies in when and how the OTP had made its ‘end point’ determination had led to criticisms of the OTP’s complementarity practice.’



In relation to the present Draft Policy proposal, benchmarks would be a critical aspect of a two-track approach, setting out the relationship or ‘bridge’ between the two tracks in any given situation. Crucially, a practice of consistent, transparent, and wherever possible (cognisant of OTP operational and confidentiality considerations) public benchmarking could strengthen the compliance of states with their primary responsibility to investigate and prosecute core crimes and to provide information on relevant developments to the OTP. A practice of ‘benchmarking’ may also provide clarity and predictability on the expected ‘timeframes’ for each situation.

We understand that benchmarks have to an extent been used by the OTP and were publicized in relation to the OTP’s preliminary examinations in Guinea and Colombia (although we note that such practices are not currently discussed in the Draft Policy). We are aware that in the Colombia situation, the OTP provided a list of suspects to the government of those who should be tried, as well as reporting in early 2020 that ‘the [OTP] delegation further held consultations [with Colombian authorities] relating to the development of indicators and benchmarks in order to assess the current national efforts to provide accountability for Rome Statute crimes.’

We also note that the Final Report of the Independent Expert Review of the International Criminal Court and the Rome Statute System recommended that the OTP implement a detailed practice of ‘benchmarking’.<sup>36</sup> The Final Report provided that ‘a more productive approach would be to establish an overall plan for each [Preliminary Examination ‘PE’], including meaningful benchmarks for the progress in each situation, each phase of the PE, and target deadlines. The plan should contain transparent criteria for when a PE should move from one phase to the next, when it should be closed, and, if needed, re-opened. The benchmarks should be flexible in order to discourage intentional delays by anyone wishing to frustrate the work of the OTP.’<sup>37</sup> In this regard the Independent Experts recommended that ‘[t]he OTP should consider adopting an overall strategy plan for each PE, with benchmarks and provisional timelines for all its phases and activities, including closure, and, if relevant, re-opening.’ The Independent Experts continued that an overall strategy plan ‘should include, at a minimum: (i) the timeline of the PE, with an estimate of the dates for delivery of the analytical reports to the Prosecutor; (ii) benchmarks and timelines for the assessment of complementarity; (iii) benchmarks and time limits for any responses requested from the state concerned; (iv) any missions (visits) or other activities apart from the analysis conducted at the seat of the Court, together with an estimate of the time and resources required for each of them (including unique investigative opportunities). It should be made apparent that such a plan retains flexibility and be subject to change in the event of supervening material and substantial changed circumstances.’<sup>38</sup> Although the recommendations were made in the context of preliminary examinations, the recommendations could be transposed to the investigation phase. Indeed, the Independent Experts also provided that ‘nothing precludes the OTP from engaging states [as regards positive complementarity] in the same manner during the investigation stage’<sup>39</sup>.

The obligation on states parties to investigate and prosecute ‘potential cases’ covering ‘the same persons and substantially the same conduct as alleged in the proceedings before the Court’ provides ample scope for the OTP to set out indicators and benchmarks for each situation in which it investigates. The OTP is well

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<sup>36</sup> Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report, 30 September 2020, Recommendations 255 and 256, Available at [https://asp.icc-cpi.int/sites/asp/files/asp\\_docs/ASP19/IER-Final-Report-ENG.pdf](https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP19/IER-Final-Report-ENG.pdf)

<sup>37</sup> Ibid. at paragraph 718

<sup>38</sup> Ibid. at Recommendation 256

<sup>39</sup> Ibid. at paragraph 734



within its mandate to ensure that states meet this clear obligation and to request information from states that relevant national level investigative steps are being carried out.

While we note that the emphasis of the Draft Policy is the ICC exiting a situation – ‘if States step up, the Office will step out’<sup>40</sup> - our proposal would be to recognize that – on the other hand – if states are not stepping up, the OTP will have to step in. That is to say, the OTP will not only have to continue with its independent investigations and prosecutions track, but increase its activities along that track, and – if necessary – reconsider the two-track approach.

If carried out properly, a practice of benchmarking can be suitably deferential to states parties where states have a genuine intent and willingness to bring persons to justice. However, a practice of benchmarking must also demonstrate that concrete progress and results at the national-level are required – without undue delay – through, for example, setting timeframes for meeting certain obligations, or, where appropriate and based on sound assessments and genuine assurances, in giving more time to states who do not currently have full capacity to carry out domestic investigations and prosecutions to do so.

It is also recognized that each investigation within a situation country will be different, and that benchmarks for situations under investigation may not be the same. However, in our view, a practice of bench-marking has significant potential as it: provides certainty to states parties of what is required of them; provides a map to victims and affected communities, as well as other partners seeking to directly engage in the ICC investigation; imposes some form of set timeframe, and deadlines to meet Rome Statute obligations; may encourage states to meet their domestic obligations to investigate and prosecute; may encourage states to cooperate and; may provide a measure of consistency and transparency in the OTP’s work. Of course, as above, all of this is premised on an unambiguous OTP commitment to states that if benchmarks are not met, the OTP will take action.

Although it is not possible in this short paper to outline all possible indicators and benchmarks which the OTP may wish to employ in each situation, we firmly believe that such a practice should be urgently developed and consistently applied. In our previous reports<sup>41</sup>, Amnesty International had based certain proposed benchmarks on unambiguous state party obligations contained within the Rome Statute’s articles on complementarity and cooperation. In this regard, we urged the OTP to:

- i. Establish benchmarks on progressive investigative developments (charges and prosecutions against those most responsible) and ‘crucial investigative steps’ (interviewing witnesses, forensic examinations, crime-base investigations, structural investigations) to be taken in a defined timeframe;
- ii. Consider providing indicative lists of conducts, persons, and incidents to national authorities (and publicly if appropriate), along with timeframes and deadlines by which investigations and (likely) prosecutions should have been taken into persons and conducts specified;
- iii. Set timeframes in which the Office expects to receive full responses to information requested from authorities;

However, a two-track approach may also lend itself to other potential benchmarks which are not strictly related to an admissibility assessment and statutory cooperation obligations.<sup>42</sup> Such benchmarks cannot

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<sup>40</sup> Draft Policy, paragraph 3

<sup>41</sup> See, *Willingly Unable*, supra fn. 24

<sup>42</sup> In 2013, the Court published a report on ‘Completion of ICC activities in a situation country’, in which the Court set out, amongst others, that ‘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.’ The report provided that completion strategies encompass as a ‘main component [...] legacy issues (long-term post-completion projects, which begin prior to the



therefore replace or delay states parties' primary obligations to investigate and prosecute *genuinely* relevant cases at the national-level, but could perhaps be considered, for example:

- a) Bringing domestic laws and criminal procedures in line with the Rome Statute and international standards;
- b) Addressing technical, legal and other capacity shortcomings, and building such capacity relevant to the genuine, independent, and impartial investigation and prosecution of Rome Statute crimes at the national level, in line with international law and human rights standards;
- c) Undertaking activities aimed at strengthening national jurisdictions, together with international and regional organizations and civil society, in order to fulfil Rome Statute obligations;
- d) Establish and demonstrate effective witness and victim protection provisions and capacity within the domestic system;
- e) Demonstrate that the rights of all victims to truth, justice, and reparations can be effectively and meaningfully realized at the national-level;
- f) Completion of a comprehensive domestic strategy for genuine, impartial, and independent investigations into all relevant cases at the national level.

### **Participation of, and impact on, affected communities**

The OTP must be acutely aware of the impact that entering into a 'two-track approach' will have on victims and affected communities – many of whom have already experienced significant delays or unavailability of justice at the national level, or who may be victims of crimes committed by the state and its most-senior officials. For such victims, an OTP approach which willingly enters into a 'complementarity' track with a state's authorities and its officials is likely to be viewed – at best – with overt scepticism, if not seen as a betrayal of those who look to the ICC for redress. In this regard, a willingness of the OTP to enter into a 'two-track approach' with a state may run counter to the OTP's stated aims of the policy to engage with and have constructive dialogue with those most directly affected including victims and survivors, as well as civil society organizations and other relevant stakeholders.

Furthermore, the OTP's investigations may well take place in situations, for example Venezuela, where authorities have attempted to hinder victims-groups and local NGOs, including through the introduction of laws which are intended to threaten local organizations and their legality. Such attempts leave victims and survivors in a vulnerable and unprotected situation. Further, in many situation countries local civil society organizations are the primary documenters and sources of information of human rights violations and crimes against humanity and the repression of these activities undoubtedly harms, or aims to harm efforts towards international justice. As such, while the OTP conducts its work, including pursuant to complementarity, it should – as a matter of priority - consider protection issues as they relate to NGOs and other information providers. Indeed, the ICC should be acutely aware of the dangers facing local stakeholders and information providers in Venezuela, and other situations, who interact with the Court.

More broadly, therefore, in entering into a 'two-track' approach, the OTP should thus be constantly aware of the impact that such an approach will have on victims, especially if the OTP agrees to enter into 'complementarity' activities, through Memorandums of Understanding for example, with individuals and state authorities who at the time could be the subject of its investigations or committing ongoing human rights violations against local populations.

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institution's closure, such as outreach and *institutional and capacity-building efforts*, aimed at leaving a lasting positive impact on affected communities and their criminal justice systems) [emphasis added]. ICC-ASP/12/32, 15 October 2013, paragraph 17.



It goes without saying that victims of human rights violations and international crimes seek international bodies such as the ICC to satisfy their demands due to the *absence* of local remedies to seek truth, justice, reparations, and guarantees of non-repetition. In many situations, a lack of domestic accountability leads to continual revictimization, and victims and survivors continue to live in constant fear of further violations of their rights. It is imperative therefore, that the OTP discuss in its Policy that victims and affected communities are not regarded only as ‘passive’ actors or recipients of justice, but as active participants and integral stakeholders to international justice processes. In determining what a complementarity approach for any given situation should look like, the OTP should ensure that it receives and ‘centres’ the input of national level stakeholders and affected communities in its strategy. In particular, the OTP should consider at the outset, and throughout its work in a situation, what ‘complementarity’ (including as it relates to impact and legacy) means and looks like in practical terms, for local stakeholders, and in particular affected communities. This approach should also aim towards national-level stakeholders (understood not only as state authorities) and affected communities being in a position to receive ‘ownership’ of a situation when the OTP has completed its activities and may serve to manage expectations.

The OTP should therefore set out how it will ensure that the views and concerns of victims and those most affected are considered in the formulation and implementation of a ‘two-track approach’, independently from those of the government if necessary. As discussed, the OTP should provide in the Policy that victims and affected communities as integral partners in any complementarity process, including at the outset of such a process, who should be actively and regularly consulted as the OTP undertakes its continuous assessment of national-level activities as part of a complementarity approach. In considering whether to pursue a two-track approach, the OTP should consider the lived-experiences of victims and affected communities in seeking redress and accountability at the national (and possibly international) level, as well as - for example - the challenges or obstacles victims may have already faced in accessing justice. Such considerations will be crucial in determining whether a ‘two-track approach’ is appropriate, feasible, or likely to have a positive impact.

Ultimately, if the OTP enters into a two-track approach, and given the potential adverse repercussions of such a decision on victims and affected communities, at the very least it is imperative that the OTP accompanies such an approach by genuine and meaningful outreach to victims and affected communities.

### **C. Public Reporting**

The OTP’s approach to complementarity since the ICC’s establishment has been marked by a lack of consistency and transparency – in particular concerning the OTP’s decision-making in relation to a number of situation countries (at the preliminary examination and investigative phases) which it has appeared to ground on ‘complementarity’ considerations.

Public reporting goes to the heart of bringing the ICC closer to victims and affected communities, who should be considered the primary beneficiaries of such reporting. In this regard, Amnesty International fully aligns itself with the *Joint NGO Comments on the “[Draft] Policy on Complementarity and Cooperation (September 2023)”* signed by 43 NGOs and Amnesty International, annexed to this submission. The principal recommendation within the Joint Comments is that the Office should commit to regular, detailed, situation-specific public reporting on its preliminary examinations, investigations, and any other context in which it is actively supporting national proceedings.

A failure to report to victims and affected communities may severely impact the perception of the OTP’s legitimacy. Public reporting also impacts on the willingness of victims and affected communities to engage with the ICC and OTP in its investigations and prosecutions. For instance, since the announcement that the criteria are met for the opening of an investigation in Nigeria, the communication by the OTP has been



marked by very few communiqués with contradictory and confusions statements and a refusal to give clarity to the Nigerian population on whether and when the OTP will open an investigation. Civil society actors have been telling us of the lack of understanding, the confusion, the frustration, or sometimes the despair the OTP statements have had on affected communities. Similarly, the sudden announcement of the closure of the investigation in CAR in December 2022 without providing explanation of the rationale of that decision led to shock, questioning and disappointment among civil society actors in CAR.

A practice of public reporting on the OTP's situation-specific work will be vital as the OTP implements a 'two-track' approach, and a strategy of broader complementarity and cooperation with other international actors and mechanisms. Such a practice should describe the OTP's broader strategic engagement and relationship with other relevant international justice actors and mechanisms and serve to inform other actors within the Rome Statute system of the possibility of further collaboration. In our assessment, while a significant number of international and national actors working on a particular situation is undoubtedly positive, issues of collaboration and coherent strategy among all actors pursuing justice in a particular situation is a significant challenge, which could – as a first step – be improved by transparent reporting by all actors, including the ICC.

The need for regular and clear reporting as a crucial requirement during the investigation and preliminary examination phases is a regular observation made by Amnesty International staff who have worked in such countries. This is particularly important during lengthy investigation and preliminary examinations which – if coupled with lack of public information provided by the ICC - provide opportunities for misinformation and miscommunication.

In line with our recommendation that the OTP publicly define benchmarks for situation countries, the Office should consider publicly reporting on progress made towards benchmarks – which would allow for transparent and consistent measures of progress to be charted each year. Alongside this, the OTP should consider how it can more forcefully put states parties 'on notice' if they do not meet their Rome Statute obligations during investigation and preliminary examination phases. Indeed, given the global attention that the OTP's annual preliminary examination reports had garnered in the past (from media outlets, NGOs, etc.), the OTP could consider how to best use an annual reporting practice both to provide information broadly and to maintain pressure on states parties.

Finally, Amnesty International notes that the OTP appears to be increasing its practice of entering into agreements with states parties, including Memorandums of Understanding. Such agreements with states should be public and accessible to local stakeholders, allowing for public scrutiny of each party's commitments.

#### **D. Unwillingness**

Amnesty International recognizes that 'the Court's jurisprudence on the assessment of genuineness step of the complementarity assessment under article 17(2)-(3) continues to evolve [...] as such [the OTP's] interpretation and application of the law will be continuously updated in response to the decisions of the judges.'<sup>43</sup>

Nonetheless, the Rome Statute provides the OTP with broad independent discretion to assess complementarity at different phases of proceedings in a situation. With that in mind, in conducting its own examination for the purposes of article 17, including a complementarity and genuineness assessment pursuant to article 17(2) of the Rome Statute, the OTP must ensure that its assessment is in line with, and

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<sup>43</sup> Draft Policy, paragraph 146





does not exceed the relevant standards in the Rome Statute. In this regard, the OTP's position in paragraphs 142-143 of the Draft Policy should be further elaborated, if not reconsidered, as it relates to unwillingness and the Office's assessment of a particular approach adopted by the national authorities. In particular, in considering an 'intent to shield' persons from criminal responsibility, the OTP has proposed a policy position that provides for an assessment of unreasonableness, namely 'whether [the approach of a national authority is] so unreasonable or deficient in the circumstances as to constitute unwillingness'. However, Amnesty International believes this position does not find sound basis in the Statute and appears to require an overly high threshold of unreasonableness.

A standard of 'so unreasonable' is indeed found in the ICC's jurisprudence<sup>44</sup>. This standard has been interpreted by the Appeals Chamber as allowing for interference with a discretionary decision only under limited conditions<sup>45</sup>, namely 'where the decision is so unfair and unreasonable as to constitute an abuse of discretion.' However, it should be noted that such a limited interference foreseen by the Appeals Chamber, in this decision, followed a Pre-Trial Chamber's *proprio motu* determination of admissibility under article 19 (1) of the Statute, not a *proprio motu* determination of admissibility made by the OTP. Furthermore, while the ICC's jurisprudence describes the threshold for a finding that a state is unwilling genuinely to investigate or prosecute as a 'high' one<sup>46</sup>, the Appeals Chamber has not elaborated on what may amount to a high threshold, given that the reference in this case was made in regard to a particular fair trial violation that did not meet the 'high' threshold.

As such, the OTP's adoption in the Draft Policy of a 'so unreasonable' test in assessing unwillingness (paragraph 143) is concerning given the height of the threshold envisaged and the overt deference to state proceedings such a position would seem to demonstrate. This policy position is also troubling in light of its grounding on and citation of the OTP's UK/Iraq situation 2020 report<sup>47</sup>. The OTP's 2020 report marked 'the first time where a state's potential unwillingness has formed the primary focus of the Office's complementarity assessment', as well as 'the first time that the Office has set out its findings on genuineness as the primary focus of its complementarity assessment'.<sup>48</sup> In light of the 2020 Report's application of (as ECCHR stated) 'incorrect legal standards and factual analysis'<sup>49</sup> and its finding (which was not subject to ICC judicial review) that the UK was not unwilling to investigate on the national level, it is concerning to see the UK/Iraq report constituting the basis for the OTP's position.

Given that the OTP bases its designated policy threshold on its Iraq/UK preliminary examination decision, we are concerned that the OTP appears to be adopting, as a general policy position, an overly deferential approach to states in assessing unwillingness which would (as in UK/Iraq) be to accept domestic delays, deliberate obstruction and eventually frustration of the Court's mandate. With this in mind, the OTP's policy reasoning for adopting such a high threshold - 'the necessity of ensuring that its assessment can withstand judicial scrutiny' – does not appear convincing. This is because there is in fact a current lack of specific

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<sup>44</sup> See, Judgment on the appeal of the Defence against the "Decision on the admissibility of the case under article 19 (1) of the Statute" of 10 March 2009, *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhmmbo, Dominic Ongwen*, paragraph 80. See also *Slobodan Milosevic v. Prosecutor*, Decision on Interlocutory Appeal of Trial Chamber's Decision on the Assignment of Counsel, Case No. IT-02-54-AR 73.3 (1 November 2004) at para. 10

<sup>45</sup> Judgment on the appeal of the Defence against the "Decision on the admissibility of the case under article 19 (1) of the Statute" of 10 March 2009, *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhmmbo, Dominic Ongwen*, paragraph 80.

<sup>46</sup> *The Prosecutor v. Gaddafi and Al-Senussi*, Judgment on the appeal of Mr. Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled "Decision on the admissibility of the case against Abdullah Al-Senussi", 24 July 2014, para. 217

<sup>47</sup> Situation In Iraq/UK Final Report, OTP, 9 December 2020, Available at <https://www.icc-cpi.int/sites/default/files/itemsDocuments/201209-otp-final-report-iraq-uk-eng.pdf>

<sup>48</sup> Ibid. paras. 149 and 293

<sup>49</sup> See, *War crimes by UK forces in Iraq: ICC Prosecutor should review decision on closed investigation*, ECCHR, Available at <https://www.ecchr.eu/en/press-release/war-crimes-by-uk-forces-in-iraq-icc-prosecutor-should-review-decision-on-closed-investigation/>. See also,



jurisprudence or examples of judicial review of the OTP's assessment of 'unwillingness' and 'intent to shield' - when these are the main focus of the complementarity assessment - which would indicate a standard of assessment which would withstand scrutiny.

However, if despite the issues raised in this submission, the OTP intends to maintain the current 'unreasonableness' threshold in Draft Policy paragraphs 142 and 143, it is essential that the Office provides the criteria it will use to make a determination of unreasonableness or deficiency in the circumstances as to constitute unwillingness, and how it will consider factors in assessing "unwillingness". Notably, the 2003 Expert Paper on the Principle of Complementarity<sup>50</sup>, referenced in the current Draft, provides that 'the admissibility assessment should be based on procedural and institutional factors, not the substantive outcome.' Therefore, it is imperative that reference to the indicators<sup>51</sup> for an 'intent to shield' in the OTP's Policy Paper on Preliminary Examinations should be added to the Draft Policy, as well as the 2003 Expert Paper which also includes indicia<sup>52</sup>. In this regard, the OTP should further set out how it will undertake its assessment of factors – which should be holistic and consider potential actions (demonstrating unwillingness) by a totality of different government authorities.

Finally, in relation to its assessment of unwillingness, the OTP should provide when and on what basis it 'may seek a ruling from the Court regarding a question of [...] admissibility' pursuant to article 19(3) of the Rome Statute. We recall that due to its independent and wide-ranging decision-making prerogatives within the Rome Statute, the OTP must hold itself to the highest standards of legal review and due process norms. The Office should also be willing to seek rulings on admissibility – particularly when exercising its *proprio motu* prerogatives, and to correct or reconsider decisions where legal or factual errors may be identified.

In our view article 19(3) provides the Office with a significant opportunity to actually *benefit* from judicial scrutiny of its admissibility assessments (as provided in paragraph 144 of the Draft Policy), and to gain much needed clarity for the exercise of its discretion. This may be particularly necessary in considering highly complex and still relatively novel legal issues such as unwillingness and 'intent to shield' in the Rome Statute.

## E. KEY RECOMMENDATIONS

- Given its relevance to the Draft Policy, we respectfully urge the OTP to study the findings and recommendations of the *Rome Statute at 40* report, with particular attention to 'session 3: The

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<sup>50</sup> Informal Expert Paper: The Principle of Complementarity in Practice, OTP, 2003, paragraph 46, available at [https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2009\\_02250.PDF](https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2009_02250.PDF)

<sup>51</sup> See, *OTP Policy Paper on Preliminary Examinations*, 2013, paragraph 51: Intent to shield a person from criminal responsibility may be assessed in light of such indicators as, manifestly insufficient steps in the investigation or prosecution; deviations from established practices and procedures; ignoring evidence or giving it insufficient weight; intimidation of victims, witnesses or judicial personnel; irreconcilability of findings with evidence tendered; manifest inadequacies in charging and modes of liability in relation to the gravity of the alleged conduct and the purported role of the accused; mistaken judicial findings arising from mistaken identification, flawed forensic examination, failures of disclosure, fabricated evidence, manipulated or coerced statements, and/or undue admission or non-admission of evidence; lack of resources allocated to the proceedings at hand as compared with overall capacities; and refusal to provide information or to cooperate with the ICC.

<sup>52</sup> Informal Expert Paper: The Principle of Complementarity in Practice, OTP, 2003, 'Indicia of a purpose of shielding the person from criminal responsibility or a lack of an intent to bring the person to justice' at para. 47: Direct or indirect proof of political interference or deliberate obstruction and delay; general institutional deficiencies (political subordination of investigative, prosecutorial or judicial branch); procedural irregularities indicating a lack of willingness to genuinely investigate or prosecute; or a combination of these factors. Also 'Annex 4: List of indicia of unwillingness or inability to genuinely carry out proceedings' pages 30 and 31. Available at [https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2009\\_02250.PDF](https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2009_02250.PDF)



Rome Statute System’ and the section: ‘A Broader Conception of Complementarity and the Role of the ICC in Relation to Other International Justice Mechanisms’.

- The OTP should further set out how it views its mandate in light of the ICC as a ‘Court of last resort’ and how it will pursue complementarity in situations where states and/or international actors are not willing – often due to selectivity or double standards - to investigate certain situations or to establish other international justice mechanisms/responses for the purposes of investigation.
- The Draft policy should clarify that while engagement with other international mechanisms may be beneficial, they are not relevant for the OTP’s assessment of admissibility and complementarity within the Rome Statute unless such mechanisms are undertaking relevant activity and are willing and able genuinely to investigate and prosecute individuals.
- The Draft Policy should discuss how the implementation of a two-track approach will be based on past OTP experiences and practices of engaging with states in line with a previous ‘positive complementarity’ approach.
- The OTP should much more clearly set out in the Draft Policy how or if it will engage in a two-track approach in situations where the apparatus of the state - including the military, police, or other investigative and judicial authorities – or certain senior state officials may be implicated in the commission of widespread and/or systematic crimes within the ICC’s jurisdiction.
- The Draft Policy should outline clearly how the OTP will approach and deal with situations marked by deficient and inadequate investigations on the national level. This should include setting out that the OTP will not be willing to accept selective or one-sided investigations, nor sham investigations or prosecutions at the national level.
- The Draft Policy must provide further information and criteria on how the OTP will consistently and robustly apply the two-track approach in a manner that must lead to genuine investigations and prosecutions.
- The OTP should clarify what the Office means by a state being in a position that it can ‘effectively implement its obligations’ – rather than referring to a state’s activity in pursuing relevant cases, or willingness and ability to genuinely investigate and prosecute Rome Statute crimes.
- In line with our call for greater transparency, consistency and inclusivity to the OTP’s complementarity approach, the Draft Policy could be significantly strengthened by setting out a practice of public ‘benchmarking’ tailored to each unique situation under investigation (or preliminary examination).
- In determining situation-specific complementarity approaches, the OTP should ensure that it receives and ‘centres’ the input of national-level stakeholders and affected communities in its strategy. In particular, the OTP should consider at the outset, and throughout its work in a situation, what complementarity (including as it relates to impact and legacy) means and looks like in practical terms, for local stakeholders and in particular for affected communities.



- The OTP should set out how it will ensure that the views and concerns of victims and those most affected are considered in the formulation and implementation of a ‘two-track approach’, independently from those of the government if necessary.
- If the OTP enters into a two-track approach, and given the potentially adverse repercussions of such a decision on victims and affected communities, at the very least it is imperative that the OTP accompanies such an approach by genuine and meaningful outreach to victims and affected communities.
- In line with the principal recommendation in the *Joint NGO Comments on the “[Draft] Policy on Complementarity and Cooperation (September 2023)”* the OTP should commit to regular, detailed, situation-specific public reporting on its preliminary examinations, investigations, and any other context in which it is actively supporting national proceedings.
- In conducting its own examination for the purposes of article 17, including a complementarity and genuineness assessment pursuant to article 17(2) of the Rome Statute, the OTP should ensure that its policy position does not provide for an overly high threshold of ‘unreasonableness’.
- The OTP should provide the criteria it will use to make a determination of unreasonableness or deficiency in the circumstances as to constitute unwillingness, and how it will consider factors in assessing “unwillingness” under article 17(2) of the Statute.
- The OTP should provide in the Draft Policy when and on what basis it ‘may seek a ruling from the Court regarding a question of [...] admissibility’ pursuant to article 19(3) of the Rome Statute.



## ANNEX 1

### Joint NGO Comments on the “[Draft] Policy on Complementarity and Cooperation (September 2023)”

November 13, 2023

Dear Prosecutor,

We write in response to your Office’s call for comments on the “[Draft] Policy on Complementarity and Cooperation” (draft policy). The undersigned organizations welcome the opportunity to provide comments to the draft policy and note the specific request for “proposals from its civil society partners with respect to ways in which dialogue and engagement can be deepened to accelerate efforts towards more effective implementation of the Rome Statute, and in particular the principles of cooperation and complementarity” (para. 72).

Some of our organizations have participated in the ongoing consultations or will submit separate written comments on other aspects of the policy. **We write now with one key proposal: To best implement the policy and bring increased transparency to the Office of the Prosecutor’s work on complementarity and cooperation, the Office should commit to regular, detailed, situation-specific public reporting on its preliminary examinations, investigations, and any other context in which it is actively supporting national proceedings. This reporting should include what have previously been called “phase 1 situations.”** For the reasons discussed below, this would advance the effective implementation of the draft policy and, in particular, of the two pillars “bringing justice closer to communities” and “creating a community of practice.”

The Office’s past reporting on preliminary examinations provides an example of the kind of public communication that is most likely to benefit the successful implementation of the policy across all situations.

#### Reporting on preliminary examinations

From 2011 to 2020, the Office of the Prosecutor issued an annual report on its preliminary examinations. With time, these reports became increasingly substantive, reflecting:

- a) Details about article 15 communications received by the Office of the Prosecutor, but which were not yet the subject of formal preliminary examinations (i.e., “phase 1 situations”);
- b) In open preliminary examinations, the Office’s assessment to date, including, as relevant, details on procedural background; preliminary jurisdictional issues; subject-matter jurisdiction; and admissibility assessment, including information on relevant national proceedings; and
- c) Cataloging the Office’s activities in a given situation, including engagement with national authorities and other stakeholders, as well as signaling next steps.

These annual communications were at times supplemented by detailed reports at other key moments, including the closure of preliminary examinations without proceeding to an investigation (for example, [Final report on the situation in Iraq/UK](#)) and the opening of situations



pursuant to state referrals (for example, [situation in Mali: Article 53\(1\) Report](#)). The Office has also issued a detailed report in the midst of a preliminary examination to provide important updates on its progress, such as the [2012 Interim Report](#) on the situation in Colombia.

The Office of the Prosecutor is now issuing an annual report offering an overview of all of its activities. The 2022 report included details regarding the Office's engagement with domestic authorities and complementarity activities in Colombia, Guinea, Central African Republic, Venezuela, and Nigeria. The report, however, lacked the level of detail generally provided in the Office's previous reporting on preliminary examinations, and which we now recommend the Office replicate across all situations.

### **Bringing justice closer to communities: Transparency as a core value**

Transparency through regular reporting, where it includes the types of information previously included in the annual preliminary examination report, can be a key vehicle for the Office to bring justice closer to communities and to uphold the court's legitimacy.

The court's independence and legitimacy are demonstrated by and reinforced through transparency and reporting on situations, within the boundaries of the need to keep sensitive information confidential. A practice of public reporting tracking a *consistent* application of the draft policy and the Office's approach to complementarity in situations countries should protect the Office from accusations of bias and show that the Office is operating free from political or other external interference.

Indeed, the Office's annual preliminary examination reports provided an important measure of transparency as to the Office's progress in assessing article 15 communications and state referrals before it, where those communications and referrals are publicly known. This responded to victims' right to have information about processes that could affect their interests. The reports also provided specific, public information on the legal process and criteria for determining ICC action that could be cited to counter disinformation efforts, including those aimed at undermining the credibility of human rights defenders working on behalf of justice.

These detailed annual reports—along with the publicity given by the Office to these reports— also provided:

- A singular measure of recognition to victims that the crimes committed against them were under consideration;
- Information that better equipped victims to exercise their rights of participation under the Rome Statute; and
- Legal characterizations that could be used as a reference point by civil society organizations to support advocacy to mobilize effective justice and atrocity prevention responses.

We recognize that the Office of the Prosecutor now has a more limited number of open preliminary examinations, and seeks to proceed more expeditiously in taking assessments as to whether or not to seek to open an investigation. If anything, however, transparency following the closure of a preliminary examination with a decision not to investigate and a commitment to



support or monitor national authorities (e.g., pursuant to a memorandum of understanding) is even more important.

This is because ongoing reporting by the Office may provide victims with a key and at times only official source of information necessary to understand whether and how their rights will be vindicated by national authorities. This is particularly true where memoranda of understanding between the court and national authorities are confidential. Regular reporting across all situations will also support the Office's stated commitments to engage on complementarity during investigations and when closing preliminary examinations and investigations, or when deprioritizing certain aspects of investigations while indicating support for complementarity efforts. As a corollary of victims' rights to access justice, they are entitled to understand the Office's decision not to proceed with an investigation, as in Colombia and Guinea. The absence of detailed reports in these two situations affects this understanding.

In addition, given that the policy contemplates a new "two-track" approach of cooperation and complementarity, detailed public reporting will aid victims and survivors in understanding this new approach and whether and how it will serve their rights to access effective justice.

### **Creating a community of practice: The value of public reporting to complementarity**

The draft policy aspires to create a "community of practice" to support complementarity efforts. The Office's annual reports on preliminary examinations did precisely this as they became a key reference point for civil society groups in efforts to seek justice, both before national courts and at the ICC. Looking ahead, regular reporting could play this function as well in the Office's complementarity efforts wherever they take place—that is, whether in tandem with preliminary examinations or investigations, or after the closure of the Office's activities.

Regular reporting is relevant to creating the necessary community of practice to support genuine justice for several reasons:

1. The Office's annual reporting highlighted to civil society and other potential partners on complementarity the existence of possible Rome Statute crimes in a given situation and, typically, the need for concerted efforts to support justice. While this information was widely known to civil society organizations working in a particular context, the fact of the preliminary examination and details on the Office's assessment and investigations galvanized further attention, whether from the media, other NGOs, international partners, or UN agencies. At times, the Office signaled key benchmarks or obstacles to advancing genuine domestic proceedings, providing a map not only to national authorities as to necessary steps, but to partners seeking to directly engage those authorities. Robust partnership on justice, sustained over time, is necessary to see results in positive complementarity efforts.
2. Civil society organizations consulted the Office's annual reports to understand what information the Office was relying on to advance its subject matter or admissibility assessments. This allowed them to tailor reporting in a manner aimed at enhancing the effectiveness and efficiency of the Office's intervention. This could apply equally in





situations that are no longer subject to a preliminary examination but where the Office is monitoring or engaging national efforts. As the draft policy points out, a key tension in this work is ensuring that professed complementarity efforts do not become a fig leaf for impunity. Public reporting by the Office allows for other actors, including civil society, to provide additional information to support debate and dialogue as to the status or genuineness of proceedings.

3. The reports served to highlight states party (in)activity in any given preliminary examination situation and to put pressure on states party to meet their Rome Statute obligations, serving as part of an overall “catalyzing” function on national justice.
4. The Office’s reporting in a given situation also helped complementarity efforts elsewhere. By clarifying the criteria used, and how those criteria were applied by the Office, reporting provided civil society actors in situations not yet subject to preliminary examination with critical information that could be used in engaging national authorities around their responsibilities, as well as the ICC. The Office’s annual reports taken together also provided a useful resource to draw on in advancing analysis in future situations.

For these reasons, we urge you to ensure regular, public, and detailed situation-specific reporting from your Office across its activities. This transparency will be key to realizing victims’ rights within the Rome Statute system including through the implementation of initiatives to support complementarity and cooperation with the ICC.

Sincerely,

Afghanistan Transitional Justice Coordination Group  
Africa Youth Coalition Against Hunger Sierra Leone  
Al-Haq (Palestine)  
Amnesty International  
Armanshahr/OPEN ASIA (Afghanistan)  
Australian Centre for International Justice  
Bahrain Transparency Society  
Canada House of resilience Society  
Centre des droits de l'homme et du développement (Democratic Republic of Congo)  
Citizens for Global Solution  
Coalition for Prevention of Hazara Genocide (Afghanistan)  
Collectif des Associations Contre l'Impunité au Togo  
Comisión Mexicana de Defensa y Promoción de los Derechos Humanos  
Ditshwanelo - The Botswana Centre for Human Rights  
Ecumenical Service For Peace (Cameroon)  
European Center for Constitutional Rights  
Global Centre for the Responsibility to Protect  
Human Rights Watch  
In Defense of Human Rights and Dignity Movement  
International Federation for Human Rights (FIDH)



Just Access e.V.  
Justice Call  
Kenyan Section of the International Commission of Jurists  
Koncicc (Iraq)  
Kurdistan without genocide  
Lawyers for Justice in Libya  
Legal Action Worldwide  
Libya Crimes Watch  
No Peace Without Justice  
Palestinian Human Rights Organisation  
Parliamentarians for Global Action  
People for Equality and Relief in Lanka  
Philippine Coalition for the International Criminal Court  
Rescue and Hope (Benin)  
Solidarité Echange pour le Développement Intégral (Democratic Republic of Congo)  
StoptheDrugWar.org  
Transitional Justice Working Group (South Korea)  
Ukrainian Legal Advisory Group  
United Nations Association of Sweden  
Vous et Vos Droits (Democratic Republic of Congo)  
Women's Initiatives for Gender Justice  
Youth for peace and Dialogue between cultures (Morocco)

