

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 Organization
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)