



## **AJC SUBMISSION ON ICC OFFICE OF THE PROSECUTOR (OTP)'s DRAFT POLICY PAPER ON COMPLEMENTARITY & COOPERATION (2023)**

The Asia Justice Coalition (AJC) secretariat<sup>1</sup> welcomes the call for input towards the new Policy Paper on Complementarity and Cooperation (hereinafter “draft policy”) of the Office of the Prosecutor (“OTP”/ “the Office”) of the International Criminal Court (“ICC”), to revise the 2003 Complementarity Paper.<sup>2</sup>

Our submission focuses on two broad themes: 1) the relationship between the OTP and external independent investigative bodies; and 2) cooperation with non-States Parties.

We welcome the framing of the four pillars by the OTP to further complementarity and cooperation i.e., building a community of practice, bringing justice closer to communities, harnessing cooperation mechanisms, and technology as an accelerant.<sup>3</sup>

Furthermore, we support the assertion by the Prosecutor that “there is no tension, nothing incompatible, between strengthening our cooperation with national actors, regional and international organisations, and exercising the necessary vigilance in fulfilling [the Court’s] own core investigative mandate”.<sup>4</sup>

As an Asia-based and focused organisation, we recognise the importance of complementarity in our region. The engagement of Asian States with international justice mechanisms has been minimal, with no regional justice or accountability institution. Only 19 States have become parties to the Rome Statute (“Statute”) from the region and the legal frameworks across the region are not favourable to the exercise of universal or extra-territorial jurisdiction for atrocity crimes. The principle of

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<sup>1</sup> **This submission shall be attributed to the Asia Justice Coalition secretariat; its contents may not necessarily reflect the position of a specific Member and/or all Members of this Coalition.**

<sup>2</sup> Office of the Prosecutor, Paper on some policy issues before the Office of the Prosecutor, (2003), [https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B2560AA962ED8B6/143594/030905\\_Policy\\_Paper.pdf](https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B2560AA962ED8B6/143594/030905_Policy_Paper.pdf).

<sup>3</sup> Office of the Prosecutor, Draft Policy on Complementarity and Cooperation, (2023), <https://www.icc-cpi.int/news/icc-office-prosecutor-launches-public-consultation-policy-complementarity-and-cooperation>, pp. 8-9 (hereinafter 2023 Draft Policy on Complementarity and Cooperation).

<sup>4</sup> Ibid, p. 2.

complementarity provides an assurance to States, including in this region, to prioritize international accountability by taking national ownership of the process of accountability.

We concur with the twin foundational principles of “partnership” and “vigilance”<sup>5</sup> based on which the OTP undertakes measures to give effect to the complementarity principle to effectively investigate and prosecute core international crimes. The Office acknowledges and seeks to build partnerships with national authorities, international mechanisms, and civil society to effectively discharge its mandate under the Statute. Such partnerships could be effectuated by exchanging information, best practices and knowledge, providing assistance in evidence collection and tangible support by building capacity and secondment of experts, and other such activities.

The principles of complementarity and cooperation are mutually reinforcing under the Statute. In that vein, to advance the pursuit of international justice, the Office sees itself as a “hub for accountability efforts”<sup>6</sup>, building relationships with situation countries, accountability mechanisms, and CSOs.

## **I. The relationship of the OTP and Independent Investigative Bodies**

The collection of information to understand the legal and factual situation and context within a situation is often in partnership with international, regional, or local actors. Evidence collection and preservation become crucial for the purposes of investigation and prosecution of atrocity crimes. In situations where OTP does not have access to the territory of non-States Parties to investigate and give effect to its complementarity framework, collaboration with independent investigative mechanisms and other accountability institutions, established by inter-governmental bodies, can assist the OTP in discharging its mandate.

For the purpose of clarity, the relevance of such investigative bodies<sup>7</sup>, now and in the future, make the relationship and interaction worthy of greater attention. The submission is based on publicly available information, and the reference to the

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<sup>5</sup> 2023 Draft Policy on Complementarity and Cooperation (n 3), para. 2.

<sup>6</sup> Office of the Prosecutor, Strategic Plan 2023 – 2025, <https://www.icc-cpi.int/sites/default/files/2023-08/2023-strategic-plan-otp-v.3.pdf>, pp. 12-13.

<sup>7</sup> For the purposes of this submission, investigative bodies mean UN-established specialised mechanisms tasked with the investigation, evidence collection and preservation, and accountability function to facilitate criminal prosecutions for individual criminal responsibility. It does not include institutions whose mandate is to monitor, document, report, and make recommendations on human rights violations like Fact-Finding Missions, Commissions of Inquiry, Commission on Human Rights, etc.

Independent Investigative Mechanism for Myanmar<sup>8</sup> (“IIMM”/ “Mechanism”) is merely to indicate the one current example of an investigative body that functions in the same ambit as the ICC. There will doubtless be other such bodies in the future, and this example is used to highlight potential modes of interaction and issues that may arise. The submission has been made by the AJC secretariat to further the understanding and conversation on the relationship between investigative bodies and the Court.

There are two UN established international investigative bodies – the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 (“IIIM”)<sup>9</sup> and the IIMM. The IIIM established in 2016 by the UN General Assembly to “assist in the investigation and prosecution of persons responsible for the most serious crimes under international law committed in the Syrian Arab Republic since March 2011”.<sup>10</sup> Due to the impasse at the UN Security Council and the consequent failure to refer the situation in Syria to the ICC, the Court cannot exercise its jurisdiction and investigate violations of international humanitarian and human rights law that may amount to crimes under the Statute.

In 2018, the IIMM was established by the UN Human Rights Council to “collect, consolidate, preserve and analyse evidence of the most serious international crimes and violations of international law committed in Myanmar since 2011 and prepare files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over those crimes, in accordance with international law”.<sup>11</sup>

Unlike the *ad hoc* establishment of new mechanisms as a response to the commission of atrocity crimes, the proposal to establish a “Standing Independent Investigative Mechanism (SIIM)” – a permanent mechanism to bridge the accountability and

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<sup>8</sup> See, in general, Independent Investigative Mechanism for Myanmar <<https://iimm.un.org/>>

<sup>9</sup> See, in general, International, Impartial and Independent Mechanism for Syria <<https://iiim.un.org/>>.

<sup>10</sup> Ibid, Mandate, <https://iiim.un.org/who-we-are/mandate/>.

<sup>11</sup> Terms of Reference, Independent Investigative Mechanism for Myanmar, <https://iimm.un.org/wp-content/uploads/2022/02/N1901663.pdf>, para.1.

enforcement gap at the international level where national responses are absent or ineffective - is growing momentum.<sup>12</sup>

In the situation of Myanmar/Bangladesh, the IIMM cooperates with the Office in information exchange, collection and preservation of evidence, identification of perpetrators, preparation of case files, amongst others. Resolution 39/2 establishing the IIMM calls for close cooperation with “any future investigations of the International Criminal Court pertaining to human rights violations”.<sup>13</sup> In other words, the investigation, evidence collection and documentation carried out by the IIMM could be relied upon by the OTP to further its own investigation or build cases.

### **A) Legal Basis of Cooperation and its Effects under the Rome Statute**

According to the OTP, “the Office has been working to deepen its cooperation with the Independent Investigative Mechanism for Myanmar established by the United Nations Human Rights Council”.<sup>14</sup> The cooperation between the IIMM and the OTP is a welcome collaborative step towards accountability, promoting efficiency and non-duplication. It allows an opportunity for the Court to deepen its cooperation and engagement with accountability and investigative mechanisms to put an end to growing impunity.

It is understood that the Office and the IIMM have a working relationship and that the Mechanism regularly shares its evidentiary and analytical reports that are relevant to the Court.<sup>15</sup> In 2022, “the Mechanism [...] continued its close coordination with the Office of the Prosecutor of the International Criminal Court and has increased the volume of witness-related information, including screenings and statements, shared with that Office”.<sup>16</sup> The Mechanism continues to identify further opportunities for sharing ... [information] ranging from witness-related materials to audiovisual and

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<sup>12</sup> See, International Commission of Jurists, ‘Options for the establishment of a Standing Independent Investigative Mechanism (SIIM)’, (2022), <https://icj2.wpenginepowered.com/wp-content/uploads/2022/09/Options-for-the-establishment-of-a-Standing-Independent-Investigative-Mechanism-SIIM-26-September-2022-1.pdf>; Federica D’Alessandra, Ambassador Stephen J. Rapp, Kirsty Sutherland, and Sareta Ashraph, ‘Anchoring Accountability For Mass Atrocities: The Permanent Support Needed to Fulfil UN Investigative Mandates’, (Oxford Institute for Ethics, Law, and Armed Conflict, 2022), <https://www.bsg.ox.ac.uk/sites/default/files/2022-06/Oxford%20ELAC%20Anchoring%20accountability.pdf>.

<sup>13</sup> UN Human Rights Council, Resolution adopted by the Human Rights Council on 27 September 2018 - Situation of human rights of Rohingya Muslims and other minorities in Myanmar, 3 October 2018, A/HRC/RES/39/2, <https://undocs.org/en/A/HRC/RES/39/2>, para. 24.

<sup>14</sup> 2023 Draft Policy on Complementarity and Cooperation (n 3), para. 81.

<sup>15</sup> See, ICC – Situation of Bangladesh/Myanmar <<https://iimm.un.org/icc-situation-of-bangladesh-myanmar/>>.

<sup>16</sup> Independent Investigative Mechanism for Myanmar, Report of the Independent Investigative Mechanism for Myanmar (2023), <https://iimm.un.org/wp-content/uploads/2023/08/G2312500-1.pdf>, para. 20.

documentary items”.<sup>17</sup> In doing so, the Mechanism recognises that the Court have its own “different rules and procedures regarding the admissibility of evidence, the protection and privacy of witnesses, and the language of documents and evidence they can consider”.<sup>18</sup>

Increased consultation and cooperation between the Mechanism and the OTP could be crucial in effectively discharging its investigative mandate and using available resources judiciously. Further, unlike the Court, investigative bodies like the Mechanism must cooperate with States to collect information, documentation, or evidence. Likewise, any State, irrespective of ratification of the Rome Statute, could cooperate and assist in the discharge of the mandate of the Mechanism.

The Policy Paper does not address the relationship of the OTP and investigative bodies and mechanisms. For example, how the evidence and analysis reports prepared by investigative bodies like IIMM sit with the “independent and impartial investigation” mandate of the OTP under the statute.<sup>19</sup> The 2022 ICC-Eurojust CSO guidelines on “Documenting International Crimes and Human Rights Violations for Criminal Accountability Purposes”<sup>20</sup> provide dos and don’ts regarding “collection and preservation of information that may ultimately become admissible evidence in [international] court”.<sup>21</sup> However, the guidelines do not extend to investigative authorities if such an investigation is carried out “under a legal mandate related to a national or international judicial accountability mechanism”.<sup>22</sup> Further assessment of these issues could contribute to clarity as to the legal basis of the relationship of investigative mechanisms and its alignment within the Rome Statute, including the questions of admissibility and fair trial rights.

## **B) Bolstering the Exercise of Domestic and Universal Jurisdiction**

The Office, in its Policy Paper, reaffirms the “primary responsibility of domestic jurisdictions under the Rome Statute”<sup>23</sup> and renews its commitment to “coordinate their

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<sup>17</sup> Independent Investigative Mechanism for Myanmar, Report of the Independent Investigative Mechanism for Myanmar (2022), <https://iimm.un.org/wp-content/uploads/2022/08/A-HRC-51-4-E.pdf>, para. 37.

<sup>18</sup> Ibid, para. 35.

<sup>19</sup> Article 54, Rome Statute, International Criminal Court.

<sup>20</sup> The Office of the Prosecutor, International Criminal Court and Eurojust, ‘Guidelines for Civil Society Organisations on documentation of International Crimes and Human Rights Violations’ (hereinafter 2022 CSO Guidelines on Documentation), (2022), <https://www.icc-cpi.int/news/icc-prosecutor-and-eurojust-launch-practical-guidelines-documenting-and-preserving-information>.

<sup>21</sup> Ibid, p.2.

<sup>22</sup> 2022 CSO Guidelines on Documentation (n 20), p. 3.

<sup>23</sup> 2023 Draft Policy on Complementarity and Cooperation (n 3), para. 62.

efforts to achieve criminal responsibility and to increase the overall impact of different accountability actors”.<sup>24</sup> To that effect, under Article 93(10), the OTP is under obligation to cooperate with not just national authorities but international organizations and judicial entities by providing necessary information and evidence. If such a cooperation obligation extends to investigative mechanisms, the Office could share relevant information and evidence to strengthen the exercise of domestic (universal) jurisdiction over atrocity crimes, if other jurisdictional conditions are met.

The Mechanism under its mandate is required to cooperate with the ICC for any future investigations concerning the Myanmar/Bangladesh situation.<sup>25</sup> The IIMM has an obligation to collect information and evidence concerning all violations of international law committed in Myanmar since 2011 (not limited to the scope of the investigation being carried out by the Office) and share it with the OTP.<sup>26</sup> Under Article 87(6) assistance (information or documents) from intergovernmental organisations like the UN and its agencies could also be sought by the Office<sup>27</sup> but there is no equivalent provision facilitating the exchange of information from the Office to external investigative bodies like the IIMM. Such a provision becomes important keeping in mind the mandate and structure of the ICC as the *court of last resort* investigating and prosecuting not all but only selected individual perpetrators. As a result, it becomes significant to understand whether and in what circumstances the Office shares the information and evidence it has collected during its preliminary examination and investigations phase with investigative mechanisms.

The IIMM has the power to “conclude agreements, on behalf of the United Nations, with any State, organization or entity for the implementation of its mandate”<sup>28</sup> and put in place its “procedures and methods of work, modalities” to further cooperation.<sup>29</sup> Similarly, the OTP, under the Statute, is empowered to seek cooperation with any State or intergovernmental organization or arrangement and enter into agreements to

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<sup>24</sup> Ibid, para. 37.

<sup>25</sup> UN Human Rights Council, Resolution adopted by the Human Rights Council on 22 June 2020 - Situation of human rights in Myanmar, 3 July 2020, A/HRC/RES/43/26, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/162/25/PDF/G2016225.pdf?OpenElement>, para. 9, p. 4.

<sup>26</sup> Resolution adopted by the Human Rights Council on 27 September 2018 - Situation of human rights of Rohingya Muslims and other minorities in Myanmar (n 13), para.22, p. 5.

<sup>27</sup> See, International Criminal Court, Negotiated Relationship Agreement between the International Criminal Court and the United Nations, (2004), ICC-ASP/3/Res.1, <https://www.refworld.org/docid/51b080fa4.html>.

<sup>28</sup> Terms of Reference (n 11), para. 36.

<sup>29</sup> Terms of Reference (n 11), para. 37.

facilitate such cooperation.<sup>30</sup> Even in the absence of a clear mandate to cooperate with the ICC in the terms of reference of specialised investigative mechanisms, such organisations are vested with explicit or inherent powers to enter into agreements for furthering their mandate. Therefore, since the IIMM and the OTP have overlapping investigative functions, there is a need to cooperate effectively, in keeping with respective mandates, to maximise the common goal of preventing and punishing atrocity crimes.

The obligation and practice of the Office to cooperate with investigative bodies under the Statute, could help in better understanding the scope and limits of information-sharing. If this is a two-way relationship, such information sharing would complement the Office’s goal to bring justice closer to communities and build a community of practice. Such an exercise actuates the Office’s vision to “taking forward proceedings in a manner that brings justice closer to affected communities, and the potential to target a wider array of perpetrators, at different levels of responsibility”.<sup>31</sup>

The OTP’s efforts in “contributing to action at the national level”<sup>32</sup> by providing “support in the development of legislative/regulatory provisions seeking to increase alignment of domestic legislation with the requirements of the Statute”<sup>33</sup> could bolster domestic accountability. It could assist in shaping a more victim and survivor-friendly legal framework and system. In conjunction with support from investigative mechanisms, it could also contribute to the wider application of universal jurisdiction cases. This would result in justice that is cost-effective, closer to victims, and strengthen national systems.

## **II. Strengthening Cooperation with non-States Parties**

### **A) Creative and Sustained Engagement with non-States Parties**

The Court’s cooperation framework is set out under Part 9 of the Rome Statute. The OTP requires constant and effective cooperation and support from States Parties to

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<sup>30</sup> Article 54(3)(c)–(d), Rome Statute, International Criminal Court.

<sup>31</sup> 2023 Draft Policy on Complementarity and Cooperation (n 3), para. 59.

<sup>32</sup> 2023 Draft Policy on Complementarity and Cooperation (n 3), pp. 12-13.

<sup>33</sup> 2023 Draft Policy on Complementarity and Cooperation (n 3), para. 74.

discharge its duties under the Statute.<sup>34</sup> But, the Rome Statute envisages cooperation not only with States Parties but with non-States Parties also.

On the basis of Article 87(5), the Court may enter into an *ad hoc* arrangement or an agreement to establish cooperation with a non-State Party. Such an arrangement will be limited to the terms of cooperation and assistance as mutually agreed upon. In case of a default by a non-State Party after entering into an agreement with the Court, the Court may refer non-compliance to the Assembly of States Parties (ASP), or where relevant, the UN Security Council.<sup>35</sup> Additionally, Article 93(10) applies to both States and non-States Parties and the Court may provide the required assistance concerning national investigations and prosecutions of crimes under the Statute.

The Office's willingness to "open channels of communication with all States, whether States Parties or non-States Parties..."<sup>36</sup> to support or catalyse genuine national proceedings is a welcome step. Similarly, the OTP's decision to strengthen its technological set-up to advance its ability to undertake activities and cooperate with non-States Parties is laudable.<sup>37</sup>

Engagement with non-States Parties may be required in specific circumstances. For example, where either the perpetrator(s) of the crime under the Statute or the victims/witnesses are present in the territory of non-States Parties. Taking into account that the Prosecutor requires the consent of a State Party before undertaking on-site investigations<sup>38</sup>, the prosecutor cannot conduct an investigation in the territory of a non-State Party without its assent. Similarly, the Court depends on States to arrest and surrender persons before it.<sup>39</sup>

Further, if the Office is unable to ensure cooperation of a non-State party, then the Office must engage with other stakeholders such as the Office of the United Nations High Commissioner for Human Rights (OHCHR), investigative and judicial mechanisms, and CSOs to complement accountability efforts.

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<sup>34</sup> Article 86, Rome Statute, International Criminal Court.

<sup>35</sup> Article 87(7), Rome Statute, International Criminal Court.

<sup>36</sup> 2023 Draft Policy on Complementarity and Cooperation (n 3), para. 124.

<sup>37</sup> 2023 Draft Policy on Complementarity and Cooperation (n 3), p. 8.

<sup>38</sup> Article 57(3)(d), Rome Statute, International Criminal Court.

<sup>39</sup> See Article 89(1), Rome Statute, International Criminal Court.



In Asia, the principles of sovereignty and non-interference are often deployed to prevent international accountability. The Office’s vision to locate justice “closer to the communities”<sup>40</sup> is a much-needed and welcome move as it accords national ownership “by the region, for the region” and legitimacy to the criminal process.

The Policy Paper and its implementation must advance the vision of sustained engagement with non-States Parties. The Office would have to be creative, open, and inclusive in its policies and outreach while engaging with these States, especially in Asia.

### **B) Security and Safety of Victims & Witnesses**

The proposed “Global Complementarity and Cooperation Forum”<sup>41</sup> is an important initiative to strengthen cooperation with States. It would include practitioners and specialised experts from both States Parties and non-States Parties alike. The Forum will provide a platform for practitioners to “share expertise and jointly discuss and develop common standards”.<sup>42</sup> It would also allow for the “two-way sharing of information between the Office and national authorities with the objective of identifying areas in which the Office and States may be able to provide each other support and assistance on cases under investigation or prosecution”.<sup>43</sup> The Forum will also make it possible to share “updates on current and anticipated lines of action with respect to core international crimes”.<sup>44</sup>

However, the Policy Paper is silent on the modalities and risks of sharing information and evidence with States, especially non-States Parties. The risks of the information being abused to shield perpetrators or delay justice efforts must be factored into any such calculation.

The security of witnesses and victims is paramount and must be sufficiently safeguarded within the framework of the Forum.

Similarly, the new proposal of the Office to issue *Situation Briefs* – a substantive report on the cases in a situation, including updates on the collected evidence, key line of

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<sup>40</sup> 2023 Draft Policy on Complementarity and Cooperation (n 3), pp. 9-10.

<sup>41</sup> 2023 Draft Policy on Complementarity and Cooperation (n 3), para. 33.

<sup>42</sup> 2023 Draft Policy on Complementarity and Cooperation (n 3), para. 34.

<sup>43</sup> 2023 Draft Policy on Complementarity and Cooperation (n 3), para. 33.

<sup>44</sup> *Ibid.*

investigation, and the next procedural steps wherever possible.<sup>45</sup> These Briefs will be shared with States on a case-by-case basis and at the discretion of the Office subject to information security and witness protection. We appreciate the sensitivity and concern of victims and witness protection being factored in by the OTP. We believe the Draft Policy would benefit from clarity regarding the following:

- a) whether Briefs are to be shared even with the non-States Parties;
- b) whether Briefs are to be translated into the local situation-language, besides the Court's official languages;
- c) whether Briefs are to be shared with CSOs to monitor the progress of the case and supplement witness protection;

With this background, the Policy Paper could benefit from further detail regarding the outlook of the Office on engagement and cooperation with the non-States Parties, factoring in concerns of victims and witness security.

## **Conclusion**

The ICC has a unique place within the international justice ecosystem as a permanent international criminal judicial institution providing for individual criminal responsibility. The Rome Statute provides a strong foundation to hold perpetrators of the most serious international crimes to account across the globe without distinction. The Draft Policy on Complementarity and Cooperation provides a comprehensive insight into the vision of the Office of the Prosecutor. The OTP's initiative to position itself at the centre of the international justice ecosystem by renewing and strengthening its relationship with national authorities and accountability mechanisms is appreciated. We welcome the OTP's recognition of civil society as "critical actors"<sup>46</sup> and "crucial complementarity and cooperation partners"<sup>47</sup> in its work. The Office's continuous and increased engagement with the CSOs is highly valued. We look forward to continuing our discussion and engagement with the Office going forward.

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<sup>45</sup> 2023 Draft Policy on Complementarity and Cooperation (n 3), para. 36.

<sup>46</sup> 2023 Draft Policy on Complementarity and Cooperation (n 3), para. 70.

<sup>47</sup> Ibid.

## **About the Asia Justice Coalition**

The aim of the [Asia Justice Coalition](#) is to ensure justice and accountability for grave crimes in Asia, and to strengthen capacity and collective advocacy of Asian civil society actors, legal actors and their allies in regard to international accountability for serious violations of international human rights and humanitarian law committed in Asia. The AJC secretariat is central to and supports the Coalition's work.