

## STATEMENT

# Statement to the 13th Session of the Assembly of States Parties New York, December 2014

Mr. President, Your Excellences:

The Open Society Justice Initiative welcomes discussions within the Assembly of States Parties on improving the effectiveness of the International Criminal Court. We are aware that part of this discussion among various stakeholders, including the court itself, has focused on the development of performance indicators and benchmarks. Indeed, we have been involved in some of those discussions. Carefully crafted indicators can be useful in measuring progress toward strategic goals. As the court's ultimate governing body, this assembly is justified in expecting accountability for the court's performance, while respecting prosecutorial and judicial independence.

But the ICC's performance is dependent in many ways on state support, so any realistic and useful assessment cannot measure the institution in isolation. True accountability requires disentangling internal from external factors, including the quality and consistency of state cooperation. Further, the court – while a linchpin of the Rome Statute system – is not its only element. States retain the primary obligation to investigate and prosecute crimes under the statute. For both of these reasons, as the court, states, and civil society contribute to the development of indicators for the ICC's performance, the Assembly of States Parties should undertake a broader, more holistic effort at gauging the performance and progress of all elements of the Rome Statute system. This broader review would be permissible under Article 112 of the treaty,<sup>1</sup> read together with the Preamble and provisions on complementarity and cooperation.

What might a holistic set of indicators of the Rome Statute system's performance look like? It could be helpful to consider three broad measures affected by the actions of the court, states, and other stakeholders: the system's reach, depth, and core strength.

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<sup>1</sup> "The Assembly shall: [...] perform any other function consistent with this Statute or the Rules of Procedure and Evidence." Rome Statute, Article 112 (2)(g).

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### System Reach

At first blush the system's reach is a straightforward assessment of progress toward universality of the Rome Statute. There are an impressive 122 states parties throughout the globe. The Bureau and some states have made the goal of universality a priority, as have the European Union and civil society organizations. Under outgoing President Song, the court itself has played an important role. But how effective and consistent are these efforts? Indicators might include the number of states that pledge to urge non-states parties to ratify or accede to the statute. They could also measure the consistency with which such pledges are pursued, and register setbacks, such as recent reports that some states parties have tried to dissuade Palestine from ratifying the statute.

Beyond the goal of universality, how effective have states been in extending the court's reach when horrendous atrocities demand justice, but the statute requires a Security Council referral?

### System Strength

Under core strength, we might bundle measurements of states' support for the court itself, as well as for the Trust Fund for Victims.

- Are states cooperating with the court, in compliance with Part 9 of the Rome Statute? This could be measured by the percentage of cooperation requests from the court receiving favorable responses each year, from situation and non-situation countries alike.
- How many states have signed agreements with the court on witness relocation, enforcement of sentences, or agreement to take in individuals who are acquitted in ICC proceedings but unable to return home?
- To what extent are states providing the court with resources adequate to the task of implementing its core mandate, including the investigation of complex crimes in the most difficult situations around the world and outreach to the communities the statute was foremost designed to serve? Are Security Council referrals accompanied by requisite supplementary funding?
- How many states have pledged to support the TFV, and are they doing so in practice?

And within this bundle of indicators, we could also place the many measures under discussion, including through the Swiss-led initiative, to gauge the court's performance in making the best use of the support it does receive.

### System Depth

Under depth, we might understand advances in promoting accountability for Rome Statute crimes at the national level.

- How many states have domesticated Rome Statute crimes?
- Of states in which national human rights institutions, UN bodies, and other credible actors have found good reason to believe crimes under the statute have been committed, how many states have investigated and prosecuted those crimes?
- How many have the capacity to conduct such investigations and prosecutions, and try such cases fairly?

- How many have necessary prerequisites in place, including with regard to prosecutorial autonomy, judicial independence, and witness protection? Pre-existing indicators in these areas could be incorporated into the broader effort.

Metrics for the statute's depth should also consider the strength of efforts by states parties and others to support affected states in overcoming political hurdles and building capacities. We have seen a number of such efforts, including the development of forthcoming guidance for the UN from the Secretary General, and a complementarity toolkit launched by the European Union. Assessing the depth of support for positive complementarity should take stock of how many bilateral and multilateral institutions have developed such frameworks, and also incorporate measures of their implementation, and consistency in applying the policies.

### Recommitting to the Vision

Establishing a set of indicators for the effectiveness and impact of Rome Statute system would be a daunting task. It would also require clarification of this assembly's commitment to the holistic view of the statute, which was clearly intended by its founders and reflected in its language. Some states have recently suggested that the court should have no mandate to assist national jurisdictions to address Rome Statute crimes. More startling has been the suggestion that the statute has no implications for state responsibilities; that this body has no role in positive complementarity; and that states parties should not even be encouraged to support one another in expanding the statute's effective reach through domestic jurisdictions.

Such a cramped view of the Rome Statute is all the more shocking coming just a few years after states meeting at the Review Conference issued such a clear vision of a Rome Statute – one stressing that true fulfillment of the statute could only be realized through expanded domestic justice. At the Review Conference, this Assembly reaffirmed that effective prosecutions for crimes under the statute “must be ensured by taking measures at the national level and by enhancing international cooperation”.<sup>2</sup> In furtherance of these goals, the Review Conference resolution on complementarity explicitly recognized roles for the Court, the ASP Bureau, and its Secretariat.<sup>3</sup> With direct reference to the principle of complementarity, the consensus language adopted by the Assembly stressed “the obligations of States Parties flowing from the Rome Statute.”<sup>4</sup> Surely nobody thought in 2010 that the job of building domestic will and capacity would be complete by now. This assembly should unambiguously rededicate itself to the vision and mission of building up a far-reaching Rome Statute system grounded in functioning domestic justice systems.

### Conclusion

The treaty founded in Rome imagined a world in which eventually there would no longer be impunity for war crimes, crimes against humanity, or genocide. Today, we remain far from that goal. Measuring the effectiveness of one part of the system is a good start, but insufficient. As the only body with specific responsibility for the system as a whole, the Assembly of States Parties should establish the guideposts by which we can measure advances, take stock of setbacks, and remain confident that we are headed in the right direction.

Thank you.

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<sup>2</sup> Resolution RC/Res.1, Preamble.

<sup>3</sup> Resolution RC/Res.1, paras. 8-10.

<sup>4</sup> Resolution RC/Res.1, para. 2.

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