



## Explanatory note on the significance of effective and full implementation of the Rome Statute of the International Criminal Court

### I. The importance of the principle of complementarity

The creation of the Rome Statute system rests on the premise that the primary competence and authority to initiate investigations of international crimes rests with States national jurisdictions. This recognition is reflected in the principle of complementarity (Rome Statute, Preamble, Art. 1)

Under the principle of complementarity, states have the primary obligation to investigate and prosecute those responsible for international crimes, but also that the International Criminal Court (ICC) will only intervene when states do not have the genuine will and/or the capacity to do so. Therefore, the principle of complementarity recognises the primary responsibility of prosecution to national courts, but allows the ICC to review the exercise of jurisdiction if the conditions on jurisdiction and admissibility specified by the Rome Statute are met. Given that the ICC cannot perform its role of guardian of the duty to prosecute outside situations falling under its jurisdiction, it is essential that States adhering to the principle of complementarity ratify or accede to the Rome Statute. Hence, universal acceptance of the Rome Statute is inter-connected with the policy-goal of guaranteeing the effective functioning of the principle of complementarity.

Giving effect to complementarity, starting with the duty to prosecute international crimes through domestic jurisdictions,<sup>1</sup> requires adoption of provisions on international crimes and principles of international law as well as provisions on cooperation with the ICC. The importance and advantages of effective implementation of both of these parts is explained below.

#### ***1.1 Implementation of international crimes and principles of international criminal law***

(1) By enacting legislation on international crimes and principles of international criminal law, the States are able to pursue their own domestic justice proceedings, which, apart from enabling them to assert their domestic jurisdiction over the crimes, has other important advantages:

- Domestic proceedings are closer to the victims and affected communities and enable more easily the participation of the victims in the proceedings.
- Evidence gathering is also easier given territorial proximity between the investigative and prosecutorial offices and the crimes' scenes.
- National proceedings tend to be faster and less costly.
- Enforcement of arrest warrants is easier and less complex, unless alleged perpetrators have been able to escape to countries not bound by any extradition-arrangement with the territorial State.
- Ending impunity for these powerful individuals can play a significant role in strengthening a culture of the rule of law without which other phenomena such as corruption, drug trafficking,

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<sup>1</sup> It must be stressed that the duty to prosecute is binding for "every State", as recognised in the 6th paragraph of the Rome Statute' preamble, which was unanimously adopted by the Rome Diplomatic Conference on 17 July 1998 ("Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes"). However, when a State fails to fulfil this obligation in respect of a situation, the complementary exercise of jurisdiction by the ICC can exclusively take place in respect of crimes committed in the territories or by nationals of States that: (I) have ratified the Rome Statute (Article 12.1, RS); (II) have accepted the *ad hoc* jurisdiction of the ICC (Art. 12.3, RS); (III) have been the subject-matter of a Chapter VII Resolution by the UN Security Council, which referred a given situation to the ICC jurisdiction (Art. 13.b, RS, and Arts. 39 and 41, UN Charter).

political violence and other crimes may continue to prosper, unless domestic justice would be meted out and perceived as “one-sided justice”.

- The most serious crimes not only damage the direct victims, but also cause many indirect effects with disastrous consequences for the entire population.

(2) In addition, effective operation of the principle of complementarity reinforces international justice. From the long- term perspective, domestic proceedings are the most feasible and durable means to effectively fight against the impunity for international crimes. This is due to the limited resources of the Court, which do not allow it to intervene in all situations where international crimes are committed.

To this effect, the first and minimal condition enabling States to abide to this obligation of accountability for genocide, crimes against humanity, war crimes and crime of aggression is the existence of legislation that incorporates in their domestic legal orders the crimes and general principles of law contained in the Rome Statute.

All States parties will therefore need to modify their national law in some way to meet this obligation, even monist States. Indeed, although for “monist” States, the ratification of an international treaty is sufficient to be considered as part of the domestic law, it may not be sufficient to meet the obligations of the Rome Statute and allow in practice judges to apply it in Court as it contains a number of legal obligations that require the adoption of legislative and executive measures, as well as judicial practice. PGA’s experience showed that there is no legal system in the world that can incorporate the Rome Statute norms and standards without adapting its internal system to the requirements of the Rome Statute system.

### ***I.II Implementation of provision on Cooperation with the ICC***

In addition, there is an entire set of provisions in the Rome Statute that are specifically not self-executing, and which could not in any case be of direct application: those are the provisions on cooperation, under part 9 of the Rome Statute: articles 86, which creates an obligation of result for States (to cooperate fully with the ICC) and 88, which creates an obligation of conduct for States (they have to have “available procedures” on cooperation).

The particular importance of incorporating the provision on cooperation with the ICC stems from the fact that the ICC depends on State cooperation because it does not have its own police or law enforcement structures. It relies entirely on national law enforcement systems to serve as arms of the international system. States need to change their procedural laws and permit national authorities to recognize and enforce requests and orders emanated by the ICC. Adopting the necessary legislation for cooperation is the first step to fulfil this obligation. The second step relies in ensuring this legislation is effectively enforced. As such, **purposes of the cooperation legislation** are to (i) ensure recognition of request and decision of issued by the ICC, (ii) remove constitutional obstacles or other legal obstacles for cooperation with the ICC, e.g. and to (iii) create mechanisms of judicial cooperation with the ICC.

## **II. What are the benefits of implementing legislation?**

When States decide to implement fully and effectively the provisions of the Rome Statute in their national law, they immediately achieve two important requisites of the Rome Statute, essential to an effective system of the ICC, and thus to the global fight against impunity: The principle of Complementarity, and the obligation to cooperate fully with the Court.

Additionally, domestic implementation of the crimes and principles of the Rome Statute carries important benefits for the States, such as:

- 1) An opportunity to **strengthen their own criminal justice systems** so they can prosecute the ICC crimes themselves.
- 2) It has a **deterrent effect**: detailed legislation indicates the behaviours that are sought to be avoided introducing thus an element of predictability: those who are prone to commit international crimes will be discouraged to commit crimes due to the risk they face of being prosecuted, arrested and adjudicated.
- 3) Protection of the **primacy of the national jurisdiction** over crimes of genocide, crimes against humanity, war crimes and crimes of aggression, and ensures the ultimate objectives of the Rome Statute, namely, the strengthening of the rule of law and the prevention of the most serious international crimes.
- 4) Effective legislation can also ensure **direct communication and cooperation** of national judicial and prosecutorial bodies with their counterparts at the ICC in The Hague, hence providing additional safeguards to protect the independence of organs of justice from risks of interference and manipulation by Executive or legislative organs of States.
- 5) It allows for explicit **definitions of crimes and penalties**, rather than the simple reference to international conventions, which will a) **facilitate the work of the judge** who shall simply refer to national law, b) provide **judicial certainty and protection** to individuals regarding which law is applicable, and c) avoid the necessity of adopting laws ex post facto that distort the **principle of legality**. The definition thus guarantees the respect for the principles of *nulla poena sine lege* and *nullum crimen sine lege*.
- 6) **Depoliticisation**: Even if legislating on crimes may be highly political, the exercise is worth undertaking as it helps to de-politicise domestic prosecutions and insulate the judicial branches from undue influence of Executive or legislative organs- as explained in point. 4-, thus, promoting the equal application of the law and the separation of powers.
- 7) It **reinforces the entire judicial system**, notably strengthening **victims' rights** and by ensuring that fair trials are conducted at the national law, not only for international crimes but also for all crimes prosecuted by the relevant State.

### III. The Scope of Implementing Legislation

The scope of the legislation should be as broad as possible and should incorporate at least some of the following points:

- 1) **Definitions of crimes** that are in line with the Rome Statute: the core crimes under international law stem from the Nuremberg Tribunal Statute and Judgement, as well as the Nuremberg principles, reaffirmed in 1946 by the UN General Assembly as part of customary (general) international law binding all States, regardless of their membership in the Rome Statute system. The core crimes under international law are:
  - 1) genocide (which was subsumed in the category of crimes against humanity in Nuremberg)
  - 2) crimes against humanity
  - 3) war crimes
  - 4) the crime of aggression (labelled as a “crime against the peace” in the Nuremberg Charter).

In addition, when adopting a national implementing legislation, States parties can go beyond the Rome Statute to reflect more protective definitions that may exist under general international law or other applicable treaties, notably by defining the crimes and principles of criminal

responsibility more broadly than in the Rome Statute and certain defences more narrowly. Furthermore, special attention needs to be taken to incorporate gender-based crimes, innovated by the Rome Statute, into domestic law.

- 2) **Incorporation of the general principles of customary international law** applicable to these core crimes under international law, which have a different legal regime from other international and/or transnational crimes:
  - (a) the irrelevance of domestic criminalization for their prosecution before a competent Tribunal (hence, the principle of legality that applies to these core international crimes differs from the principle of legality that applies to other crimes or offenses)
  - (b) the irrelevance of official capacity (no-immunities)
  - (c) the non-applicability of statutes of limitation or “prescription of crimes”
  - (d) the non-applicability of the defence of superiors’ order due to the manifest unlawfulness of orders to commit these crimes, with extremely limited exceptions relating to certain war crimes
  - (e) the applicability of the doctrine of “command responsibility”.

These general principles of law and the definition of the core crimes are the most important components of International Criminal Law, which is the area of International Law that had the most rapid development and consolidation in the last 25 years, since the fall of the Berlin Wall. Nevertheless, the internationalization of justice and the Rule of Law to secure prevention of these atrocity-crimes may not be compared with the phenomenon of globalization that has marked the global economy in the fields of financial transactions, trade and communication. Hence, the domestic implementation of International Criminal Law in general and the Rome Statute in particular are absolutely necessary steps towards the realization of the overall objective of fighting impunity.

- 3) Incorporation of **crimes against the administration of justice** that are punishable.
- 4) The bases for the **exercise of jurisdiction are sufficiently broad and effective** to minimize the “impunity gap”, where possible including the application of the jurisdictional criteria of **universal jurisdiction** (in line with international law, even if not included in the Rome Statute).
- 5) Detailed procedures for **cooperation** with the Court (its importance is explained above).
- 6) Protection of **due process and rights of the defence**.
- 7) Guarantee of **victim and witness protection**, with specific emphasis on women and children, in accordance with the high standard provided in article 68, paragraph 1 of the Statute.
- 8) National **reparations for victims**.
- 9) **Penalties**, including accessory penalties such as cessation of functions for government officials (e.g. ineligibility to public office), with maximum penalties possibly in line with those applicable by the ICC for individuals allegedly bearing the greatest responsibility for the most serious conduct.
- 10) Adequate **budgetary, infra-structural and human-resources** should be allocated to police/law enforcement and judicial authorities for the carrying out of effective and independent investigations, prosecutions, trials and reparations-proceedings, as well as for the enforcement of detention-sentences.
- 11) The Legislation and policies should aim at the reinforcement of the separation of powers and the **independence of judges and prosecutors**.