



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 22 February 2013

6783/13

COJUR 1
JAI 137
COHAFA 29

COVER NOTE

from: Secretary-General of the European Commission,
signed by Mr Jordi AYET PUIGARNAU, Director

date of receipt: 31 January 2013

to: Mr Uwe CORSEPIUS, Secretary-General of the Council of the European
Union

No Cion doc.: SWD(2013) 26 final

Subject: Joint Staff Working Document on advancing the principle of complementarity
- Toolkit for bridging the gap between international and national justice

Delegations will find attached the document SWD(2013) 26 final.

Encl.: SWD(2013) 26 final



HIGH REPRESENTATIVE OF THE
EUROPEAN UNION FOR
FOREIGN AFFAIRS AND
SECURITY POLICY

Brussels, 31.1.2013
SWD(2013) 26 final

JOINT STAFF WORKING DOCUMENT

ON ADVANCING THE PRINCIPLE OF COMPLEMENTARITY

**Toolkit for Bridging the gap between
international & national justice**

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I. INTRODUCTION

This Joint Staff Working Document **aims to contribute to putting an end to impunity for the perpetrators of the most serious crimes which are of concern to the international community as a whole**: genocide, crimes against humanity and war crimes threaten peace, security and the well-being of the world.¹ Millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity.² The entry into force of the Rome Statute establishing the International Criminal Court (hereinafter 'ICC') on 1 July 2002 was a paramount step in the fight against impunity. The ICC is a permanent international court established to investigate, prosecute and try individuals accused of committing the crimes of genocide, crimes against humanity and war crimes. The Rome Statute provides that it is the duty of every State to exercise its criminal jurisdiction over those responsible for the crime of genocide, crimes against humanity and war crimes. The effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.³

The ICC is complementary to national criminal jurisdictions.⁴ A case is admissible before the ICC **only when a State is unwilling or unable** genuinely to carry out the investigation or prosecution of these crimes. **The ICC is a court of last resort.**⁵

This is what **the 'principle of complementarity'** means and is the starting point of this Document. In line with this principle, **national States carry the primary responsibility to investigate, prosecute and bring to judgement perpetrators of genocide, crimes against humanity and war crimes**, and the ICC should be regarded as a fundamental safety net. The ICC cannot deal with all cases of genocide, crimes against humanity and war crime. Therefore, without strengthening domestic prosecution of the most serious crimes, there is a high risk that the culture of impunity will prevail and victims will not have access to justice.

The purpose of this Document is therefore to **contribute to bridging the gap between international justice and national justice systems**, which are still too often disconnected. An effective and efficient interplay between national justice systems and the ICC is pivotal to give full effect to the Rome Statute. This Document provides practical guidance to European officials, Delegations and Member States on steps that can be taken support and reinforce justice systems in third countries so they have capacity to fully exercise criminal jurisdiction over those responsible for the crime of genocide, crimes against humanity and war crimes. By supporting third country efforts to reinforce justice systems EU aid can contribute to bridging the gap between the capacity of states and the ICC. **With the development instruments at its disposal, the European Union and its Member States are in a strong position to help identify and deliver change with partner countries** where their justice systems may need support.

The Document provides an overview of all the different efforts and measures which may be taken to foster such interplay, while respecting the integrity of the Rome Statute. The Document considers firstly the relevance of the principle of complementarity to ensuring justice and accountability for the crime of genocide,

1 See article 6, 7 and 8 of the Rome Statute of the ICC for the respective definitions of these crimes.

2 Preamble of the Rome Statute of the ICC.

3 Preamble of the Rome Statute of the ICC.

4 Article 1 of the Rome Statute.

5 Article 17 of the Rome Statute.

crimes against humanity and war crimes, before considering the issues that should be taken into account when considering whether prosecution should take place under the umbrella of the national legal system or the ICC. The Document then considers the issues, both short and long term, that must be addressed and the steps that could be taken to ensure justice is both done and seen to be done, hence why this Document can be considered a Toolkit.

Moving beyond the obligation for states to prosecute cases, this Toolkit also considers issues such as the defence council and legal aid systems, as all states are obliged to respect the rule of law and fundamental rights of suspects, accused persons and convicted persons.

The Document **aims to provide guidance to the staff of EU Institutions, relevant ministries of EU Member States, and EU Delegations as well as embassies of EU Member States around the world**, which they can also use in contacts with third countries at all levels. As **the implementation of the principle of complementarity has a political, legal and development dimension**, this Document targets all these areas. The Toolkit sets out a range of areas that could be relevant to all situations, however for those applying these measures **in practice it is also vital to take into account the situation in the partner country, including its judicial system, and to adapt the advice as necessary** to fit the needs and desires of the country.

II. SITUATING THE PRINCIPLE OF COMPLEMENTARITY

(a) EU policy framework

In its action on the international scene, **the European Union seeks to advance the principle of democracy, the rule of law, the universality and indivisibility of human rights** and fundamental freedoms, respect for human dignity, equality and solidarity, and respect for the principles of the United Nations Charter and international law.⁶

As underlined by the Council of the EU, the ICC – for the purpose of preventing and curbing the commission of the serious crimes falling within its jurisdiction – is an essential means of promoting respect for international humanitarian law and human rights, thus contributing to freedom, security, justice and the rule of law as well as contributing to the preservation of peace, the prevention of conflicts and the strengthening of international security, in accordance with the purposes and principles of the Charter of the United Nations.⁷

The principles of the Rome Statute as well as those governing the functioning of the ICC are fully in line with the principles and objectives of the EU. Furthermore, **all Member States of the European Union ratified the Rome Statute and the EU was the first regional organisation to sign an agreement on cooperation** and assistance with the ICC in April 2006.⁸

⁶ Article 21 of the Treaty on European Union.

⁷ Article 1 of the Council Decision 2011/168/CFSP of 21 March 2011 on the International Criminal Court and repealing Common Position 2003/444/CFSP, OJ 2011 L 76/56.

⁸ Agreement between the International Criminal Court and the European Union on cooperation and assistance, OJ L 115/50 of 28 April 2006.

The Council Decision of 21 March 2011 on the ICC⁹ **and its subsequent Action Plan** set out the five objectives of the relevant EU policy:

- 1) **Co-ordination of EU activities** to implement the objectives of the Decision;
- 2) **Universality and integrity of the Rome Statute**;
- 3) **Independence of the ICC and its effective and efficient functioning**;
- 4) **Co-operation with the ICC**;
- 5) **Implementation of the principle of complementarity**.

The implementation of the principle of complementarity has been added as a new objective. As reaffirmed by the EU Action Plan on the ICC: "**The EU and its Member States will give high priority, where appropriate, to the fight against impunity in development cooperation and technical assistance to third countries within the broader framework of strengthening the rule of law and advancing legal and institutional reforms (for instance, in post-conflict peace building processes). The EU and its Member States shall, as appropriate, promote the implementation of the Rome Statute in third countries.**" This Document contributes to this objective, in line with the EU Action Plan which provides that "**the EU will carry out work to establish a complementarity toolkit which will describe how the application of the principle of complementarity can be strengthened through existing and future justice and rule of law assistance**".¹⁰

ICC is already often raised in political dialogues and demarches and the EU systematically seeks the **inclusion of a clause supporting the ICC in negotiating framework agreements with third countries**, such as the Cotonou agreement, Partnership and Cooperation Agreements, Trade Development and Cooperation Agreements and Association Agreements.¹¹ **The ICC clause in the Cotonou Agreement**,¹² which applies to 76 African, Caribbean and Pacific countries, is of particular relevance as it is legally binding and outlines the need for an effective two-ways communication: "*In promoting the strengthening of peace and international justice, the Parties reaffirm their determination to: share experience in the adoption of legal adjustments required to allow for ratification and implementation of the Rome Statute of the International Criminal Court; and fight against international crime in accordance with international law, giving due regard to the Rome Statute. The Parties shall seek to take steps towards ratifying and implementing the Rome Statute and related instruments.*"

In 2009, the EU also adopted updated **Guidelines on Promoting Compliance with International Humanitarian Law**,¹³ which is intended to alleviate the effects of armed conflict by protecting those not, or no longer taking part in conflict and by regulating the means and methods of warfare.¹⁴

In addition to its political role, the **EU is also the biggest provider of official development assistance**. In 2010, €11.107 billion of the EU budget managed by the European Commission was committed to external assistance.¹⁵ A considerable amount of development funds are allocated to strengthen the rule of law and to

⁹ Council Decision 2011/168/CFSP, supra note 7.

¹⁰ EU Action Plan to follow-up on the Decision of the ICC, 12 July 2011, 12080/11, p. 16.

¹¹ For an overview, see 'The European Union and the International Criminal Court', General Secretariat of the Council, May 2010, p. 12 -13, available at http://www.consilium.europa.eu/uedocs/cms_data/librairie/PDF/ICC_may_10_internet.pdf

¹² Article 11(7) of the Cotonou Agreement, as last modified by OJ L 287 of 4 November 2010.

¹³ Updated European Union Guidelines on promoting compliance with international humanitarian law (IHL), OJ C 303 of 15 December 2009.

¹⁴ See also <http://www.consilium.europa.eu/uedocs/cmsUpload/QC8308123ENC.pdf> for an overview of all EU Guidelines.

¹⁵ Annual Report 2011 on the European Union's development and external assistance policies and their implementation in 2010, COM(2011) 414 final, p. 174.

support national justice systems. For example, within the context of the geographic cooperation with African, Caribbean and Pacific countries, 65 programmes were funded between 2000 and 2009 for an amount of approximately €590 million, including 12 post-conflict zones.

The EU's Agenda for Change¹⁶ underlines that development, democracy, human rights, good governance and security are intertwined. It further **underscores that EU action will centre on the development-security nexus and on democracy, human rights and rule of law**. Support for judicial systems in partner countries is outlined as one of the focal areas.

The EU policy in this area also has a strong internal dimension, as the EU legislators have adopted several legal instruments in the area of Justice and Home Affairs, with a view to strengthening co-operation among Member States on the fight against impunity of those individuals accused of crimes of genocide, crimes against humanity and war crimes. To this end, a European network of EU Member States' contact points has been established within Eurojust (<http://eurojust.europa.eu/Practitioners/networks-and-fora/Pages/genocide-network.aspx>) in order to improve cooperation in combating genocide, crimes against humanity and war crimes.¹⁷

(b) No sustainable development without fighting impunity

During the twentieth century and the last decade, atrocities have taken place causing the death and great suffering of millions of people. It has been estimated that since the end of World War II, 244 armed conflicts have been recorded in 151 locations worldwide.¹⁸ **Contemporary conflicts have caused much more civilian than military casualties**: during modern warfare it became more dangerous to be a civilian, especially a woman, than a soldier.

The 2011 World Development Report of the World Bank clearly states that more than **90 per cent of civil wars in the 2000s occurred in countries that already experienced a civil war in the previous 30 years**. The lack of accountability has led to great levels of impunity and repeated cycles of violence. The Report also confirms that: *"One-and-a half billion people live in areas affected by fragility, conflict or large scale, organised crime. People living in fragile and conflict-affected states are more than twice as likely to be undernourished as those in other developing countries, more than three times as likely to be unable to send their children to school, twice as likely to see their children die before the age of five and more than twice as likely to lack clean water. Repeated cycles of conflict and violence cause human, social and economic costs that last for generations."*¹⁹ Other findings are equally striking: *"A country making development advances (...) loses an estimated 0.7 per cent of GDP every year for each neighbour in conflict. The average cost of civil war is equivalent to more than 30 years of GDP growth for a medium-size developing country. Trade levels after major episode of violence take 20 years to recover. (...) In other words, a major episode of violence, unlike*

¹⁶ 'Increasing the impact of EU Development policy: an Agenda for Change', COM(2011)637 of 13.10.2011 and Council Conclusions 14 May 2012.

¹⁷ Council Decision 2002/494/JHA of 13 June 2002, OJ L 167 of 26 June 2002

¹⁸ Lotta Harbom & Peter Wallensteen (Uppsala Conflict Data Program), "Armed Conflicts, 1946–2009", *Journal of Peace Research*, 2010 - 47(4), p. 501–509. An armed conflict is a contested incompatibility that concerns government and/or territory where the use of armed force between two parties, of which at least one is the government of a state, results in at least 25 battle-related deaths in one calendar year.

¹⁹ 2011 World Development Report of the World Bank, p.11.

natural disasters or economic cycles, can wipe out an entire generation of economic progress.²⁰

A prevailing culture of impunity not only hinders holding perpetrators responsible for their actions, but it also hampers the development of countries on a much broader scale. Serious crimes do not only damage the victims directly affected by the violence, but also cause many indirect effects, with disastrous consequences for the entire population.

(c) Evolving international criminal justice

After the Nuremberg and Tokyo trials, which dealt with the atrocities committed during the Second World War, several decades passed before new steps were taken in the field of international criminal justice. It was only **in the 1990s and later on that the international community created international and hybrid tribunals** including:

- **The International Criminal Tribunal for the former Yugoslavia (ICTY)** was established by the UN Security Council in May 1993 in response to mass atrocities then taking place in Croatia and Bosnia and Herzegovina. It was the first criminal justice court created by the UN and the first international tribunal since the Nuremberg and Tokyo tribunals;
- **The International Criminal Tribunal for Rwanda (ICTR)** was also established by the UN Security Council for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda between 1 January 1994 and 31 December 1994. It can also deal with the prosecution of Rwandan citizens responsible for genocide and other such violations of international law committed in the territory of neighbouring States during the same period;

Both ICTY and ICTR have primacy over national justice proceedings and were established by the Security Council in accordance with Chapter VII of the UN Charter ("*Action with Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression*").

- **The Special Court for Sierra Leone** was set up jointly by the Government of Sierra Leone and the United Nations in 2000 to try those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the country since 30 November 1996. The Special Court for Sierra Leone is a so-called hybrid tribunal because it operates outside the national justice systems while being situated in the country;
- **The Extraordinary Chambers in the Courts of Cambodia (ECCC)** was established by an agreement between the UN and the Royal Government of Cambodia which aims to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979. The Extraordinary Chambers in the Courts

²⁰ 2011 World Development Report of the World Bank, p.5-6.

of Cambodia applies the national law while there is joint control between the UN and the Royal Government of Cambodia;²¹

- **The Special Tribunal for Lebanon** was created by an Agreement between the UN and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon, pursuant to Security Council Resolution 1664 (2006) of 29 March 2006 to try all those who were found responsible for the terrorist crime which killed the former Lebanese Prime Minister Rafiq Hariri and others.

Contrary to the ICC, the jurisdiction of the **ad hoc courts is limited in time and place; their jurisdiction is retrospective and limited for certain duration of time** to try crimes that occurred within a certain territory. Most of the current **ad hoc courts will be closing down** in the near future.²²

Building on this momentum and after several years of international negotiations, the international community gathered in Rome on 17 July 1998 to take a decisive step in the fight against impunity by adopting the Rome Statute of the International Criminal Court, the essential elements of which will be outlined in the following section.

(d) Essential elements of the Rome Statute system and the ICC

The International Criminal Court is:

- **Permanent:** bearing in mind that some international or hybrid courts will close down, it is even more evident that the national judicial system and the ICC will remain the key actors in the future.
- **Independent:** it has been established by an international treaty, the Rome Statute. The ICC cannot receive a special mandate from the UN or other existing organisations. The Judges and the Prosecutor of the ICC cannot receive instructions or be subject to any interference or influence from states or any other entity.
- **Limited in the exercise of its jurisdiction,** meaning the ICC can only exercise jurisdiction in clearly defined situations. The ICC is a treaty-based court, which means countries can decide whether to become a party to the Rome Statute. The ICC can only exercise jurisdiction over crimes that were either (1) committed on the territory of a State Party; or (2) committed by nationals of a State Party; or (3) referred to the ICC by the United Nations Security Council. The ICC can also exercise its jurisdiction over situations when both (1) a non-State Party has accepted the exercise of jurisdiction by the ICC with respect to the crimes in a given situation;²³ and (2) the alleged crime either took place in the consenting country's territory or was committed by a national of that country. To obtain the Court's ad hoc jurisdiction, the

21 Other initiatives have also been taken including the establishment of the War Crimes Chamber in the State Court of Bosnia and Herzegovina, which was fully established within the Bosnian legal system but brings in international civil servants to serve roles as prosecutors, defence lawyers, judges, investigators and court managers.

22 The Security Council established a residual mechanism in Resolution 1966 (2010), with branches in Arusha for Rwanda and the The Hague for the former Yugoslavia, opening on 1 July 2012 and 1 July 2013 respectively, which will ensure essential residual functions such as the monitoring of the enforcement of the sentences and ongoing witness protection. A Residual Special Court for Sierra Leone will also carry out the residual functions of the Special Court for Sierra Leone once the Charles Taylor case is concluded.

23 Article 12.3 of the Rome Statute, as integrated by Rule 44 of the Rules of Procedure and Evidence.

country seeking it must lodge a declaration with the ICC Registrar and cooperate with the Court accordingly.

- **Limited in its material jurisdiction to the most serious crimes of concern to the international community as a whole:** genocide, crimes against humanity and war crimes.²⁴
- **Only dealing with individual criminal responsibility:** the ICC prosecutes and tries individuals, including Heads of State or Government, not groups or states. Granted amnesties or immunities at national level cannot be used to bar the Court from exercising its jurisdiction, in line with the increasing trend of prosecuting heads of state and government. Recent research shows that not less than 65 former heads of state or government have been prosecuted since 1990 both by national and international courts.²⁵ Until present, the Office of the Prosecutor has been focusing its investigations and prosecutions on those who, having regard to the evidence gathered, bear the greatest responsibility for such crimes.

The Assembly of States Parties (hereinafter 'ASP')

The ASP, which is composed of representatives of the states that have ratified and acceded to the Rome Statute, **is responsible for the management oversight and is the legislative body of the ICC.** The ASP decides on various items, such as the adoption of possible amendments to the Rome Statute and other normative texts, the budget, the election of key positions such as the judges and the Prosecutor, as well as matters of non-cooperation of states with the court

The first Review Conference of the Rome Statute took place in Kampala (Uganda) in 2010 to adopt possible amendments to the Rome Statute. It was also an opportunity for States to reflect on the achievements of the ICC in four areas: complementarity, co-operation, impact of the Rome Statute on victims and affected communities, and peace and justice. Additionally, states had the opportunity to reaffirm their pledges to combat impunity for the most serious crimes of concern to international community.

During the Review Conference, a Resolution was adopted by **the State Parties reaffirming the principle of complementarity and re-stating the primary responsibility of States to investigate and prosecute the most serious crimes** of international concern and underscoring the need for additional measures at the national level. The Secretariat of the ASP has been requested, within existing resources, to facilitate the exchange of information between the Court, States Parties and other stakeholders, including international organisations and civil society.²⁶

²⁴ The Review Conference of the Rome Statute, which took place in Kampala in 2010, adopted by consensus a definition for the Crime of Aggression, but the ICC could possibly only have jurisdiction regarding this crime after 1 January 2017: State Parties will have to make a positive decision by two thirds to activate the jurisdiction after 1 January 2017 and the amendment will only enter into force after 30 states have ratified it.

²⁵ See 'Prosecuting Heads of State' by Ellen L. Lutz, edited by: Caitlin Reiger, International Center for Transitional Justice, New York, 2011, Cambridge University Press, available at http://www.cambridge.org/gb/knowledge/isbn/item2427944/?site_locale=en_GB

²⁶ Resolution RC/Res. 1

III. MAKING COMPLEMENTARITY WORK IN PRACTICE

(a) **Relevance of the principle of complementarity**

Putting the principle of complementarity into practice through the investigation, prosecution and bringing to judgement of genocide, crimes against humanity and war crimes on a national level would magnify the reach and impact of the Rome Statute and is essential to bridge the impunity gap. The ICC is a court of last resort, which does not replace national courts. **The success of the Rome Statute system should not be judged by the proceedings taking place at the ICC alone.**

Implementing the complementarity principle through the reinforcement of national prosecutions of serious crimes is important for many reasons, including:

- **First, criminal justice is inherently linked to moral values and has a deterrent effect.** Holding perpetrators of genocide, crimes against humanity and war crimes accountable at national level or at the ICC contributes to bringing about justice, sustainable peace and security. When conducted at the national level, the delivery of justice is particularly visible and therefore this contribution to justice, sustainable peace and security is reinforced.
- **Secondly,** according to the Rome Statute it is **the primary duty of every state to exercise its criminal jurisdiction over those responsible for genocide, crimes against humanity and war crimes,** which inflict horrendous suffering on large parts of the population and have devastating effects on a country's overall development. Where impunity prevails there is a high risk of a vicious cycle of violence.
- **Thirdly,** national justice proceedings are much **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 crime scenes. National proceedings tend to be **faster and cheaper** as well. In cases where there is no need for extradition, **enforcement of arrest warrants is easier** and less complex than in cases of international justice.
- **Fourthly,** reinforcing the national capacity to investigate, prosecute and try the crime of genocide, crimes against humanity and war crimes **can have several positive spill-over effects.** These crimes often affect large numbers of victims and communities and tend to be committed by high level individuals, from the government's side and/or the armed opposition. Ending impunity for these powerful individuals can play a significant role to **strengthening a culture of the rule of law and legality without which other phenomena such as corruption, trafficking in human beings, drug trafficking, political violence and other crimes may continue to prosper.** For example, the International Criminal Tribunal for Rwanda (ICTR) referred a case to the Rwandan national justice system for the first time when it was convinced that Rwanda had the capacity and willingness to enforce the highest standards of international justice.
- **Lastly,** the ICC can only exercise its jurisdiction in very clearly defined cases. Therefore, the Rome Statute makes it clear that **the number of proceedings**

at the ICC will always be rather modest, also taking into account the practical and financial constraints the ICC is facing.

(b) National justice systems and the ICC: two sides of the same coin

While not every country will experience the crime of genocide, crimes against humanity or war crimes, every State Party has a role to play in the Rome Statute system, and the importance of this role must not be overlooked. Even for State Parties that have not experienced these crimes, **investing in a solid criminal justice system has a deterrent and preventive effect**. What is more, these countries play an important role in the Rome Statute system as they might be looked upon **to enforce arrest warrants**, which require the necessary normative framework, in conformity with their obligations to cooperate with the ICC. Moreover, it cannot be excluded that nationals of stable and peaceful countries may be involved in crimes falling within the jurisdiction of the ICC.

Whenever such crimes take place, **two scenarios are possible: the events take place in a country which has ratified the Rome Statute or not**. In the first case, it can lead to a **referral by the State Party or own initiative by the Office of the Prosecutor**. In the latter case, the **UN Security Council acting under Chapter VII** (*'action with respect to threats to the peace, breaches of the peace and acts of aggression'*) can refer the situation to the Prosecutor of the ICC, or in cases where a national of a State Party is accused of committing such crimes in the state that has not ratified the Rome Statute, the ICC Prosecutor could initiate a case against that person.

When the ICC may exercise its jurisdiction, two phases can be distinguished before the trial stage: a preliminary examination can be opened by the Prosecutor which could be followed by an investigation.

Preliminary examinations

During this phase, the Office of the Prosecutor ('hereinafter OTP') assesses the jurisdiction of the Court, whether crimes falling under the ICC jurisdiction may have been, or are possibly being, committed in a given situation. If the conditions are met, the OTP will **analyse if genuine investigations and prosecutions are being carried out by the competent authorities in relation to these crimes**; and whether the possible opening of an investigation by the Prosecutor would not go against the interests of justice.

The OTP proactively evaluates all information on alleged crimes from multiple sources, including communications from individuals and parties concerned. Often, information of the OTP could be made available to further support national investigations and prosecutions, which can also be described as 'positive complementarity'. This illustrates the clear interplay between national and international justice.

One of the crucial elements in the preliminary phase is the assessment of if a State is willing and able to carry out genuine investigations and whether prosecutions are being carried out. **Only when the State is unwilling or unable can the ICC step in**. The willingness and ability of the State are key concepts to assess if the principle of complementarity can be realised. Complementarity is one of the admissibility criteria and it is looked upon as an empirical (and not hypothetical) question related to specific cases.

It is **in this phase that maximum political pressure can be exerted in order for a particular state to take up its responsibility and start up domestic proceedings**, when it does have the ability to do so, as it is being put under close scrutiny. In other words, this could be the last moment for a state to fully realise the principle of complementarity and this leverage should be used in the best way by all actors involved.

At present, situations in the following countries are being examined in this preliminary phase: Afghanistan, Colombia, Georgia, Guinea, Honduras, Nigeria, and the Republic of Korea. The triggering of a preliminary examination does not imply that an investigation will be opened in a later phase.

Investigations

If the Prosecutor concludes during the preliminary phase that there is a reasonable basis to proceed with an investigation, he or she submits a request for authorisation of an investigation to the Pre-Trial Chamber. The Court will also only grant admissibility if the case is of sufficient gravity (so-called '**gravity threshold**').²⁷ These investigations may then lead towards the issuing of **arrest warrants or summonses to appear**.

Even when an official investigation has been started up, **the principle of complementarity remains of crucial importance**. Not only because of the limited capacity of the ICC to handle a great number of alleged perpetrators of genocide, crimes against humanity, war crimes but also because of the described 'gravity threshold' and connected 'selectivity' of the ICC interventions.

An important distinction to be made between the preliminary phase and the investigation phase is that **hypothetical domestic investigations and proceedings are no longer sufficient to suspend or stop the latter phase**. Promises made are not enough: the ICC will look at the concrete reality on the ground.²⁸

All these elements highlight the relevance to have an effective functioning criminal justice system at the national level, realising the principle of complementarity and therefore ensuring the correct relationship between national and international justice systems is maintained.

(c) Paramount importance of political will

Without political will, fighting impunity in particular regarding genocide, war crimes and crimes against humanity is bound to fail. These types of crimes often involve state authorities and rebel groups and have profound effects on the entire functioning of the state system and imply an underlying political dimension. When the ICC may exercise jurisdiction, political willingness to investigate and prosecute cases is a clear criterion during the preliminary phase as has already been described, or to cite article 17 of the Rome Statute: "*...a case is inadmissible where: the case is being investigated or prosecuted by a State which has jurisdiction over it, **unless the State is unwilling or unable genuinely to carry out the investigation or***

²⁷ Article 17(1)d of the Rome Statute.

²⁸ Also confirmed in Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute regarding Situation in the Republic of Kenya in the case of the Prosecutor v. William Samoeiruto, Henry Kipron Kosgey and Joshua Arap Sang.

prosecution...". One should underscore the importance of genuine political will. The fact of having proceeded with some investigations, prosecutions and trials in an impartial manner will not in itself stop the ICC from intervening. It should be clear that **the principle of complementarity can never be used as a shield to shy away from possible ICC proceedings by organising some domestic proceedings which are not in line with international standards.**²⁹

Too often, lack of sufficient political will hampers genuine investigations, prosecutions and fair trials. Short term power battles often predominate over bringing justice. An independent justice system is unlikely to exist in a country which has been confronted with large scale violence.

Diplomatic actions, in particular the various political and human rights dialogues and demarches offer an excellent opportunity to keep the pressure high on the various countries to address impunity for these crimes. In addition, **the various ICC clauses in EU framework agreements with third countries are essential.**

It is crucial **to keep monitoring the political will throughout the entire process and for a long time after the crimes are committed.** Rebuilding the justice system in post-conflict situations is a lengthy process which is more likely to take several decades rather than several years. Political momentum and good intentions at the aftermath of the conflict might fade away quickly if the political pressure is not maintained.

Stabilization and post-conflict recovery efforts may lead to the reintegration (or continuation) in key power positions of the same individuals who were involved in the escalation of previous crises into violent conflict(s) entailing criminal attacks against persons protected under international law. Therefore, it is important to avoid promises of impunity for these individuals, who may become again direct or indirect perpetrators of gross human rights abuses if their past crimes are condoned. Political will is essential to ensure that a transition and stabilization process does not result in widespread impunity.

The concept of political will is, of course, not easy to describe in detail, let alone to quantify, but **answering the following concrete questions can help indicate whether impunity has been properly addressed:**

- Has amnesty been provided to combatants, including those at the highest level of the chain of command?
- Can military personnel only be judged by superiors, thus creating de facto immunity for highest military commanders?
- Has a vetting procedure within the police and armed forces been put into practice?
- Has a truth seeking process been established with genuine will from power holders?
- Are the independence, impartiality and effectiveness of the judiciary guaranteed by law and respected in practise?
- Is the existing normative framework (constitution, penal code, procedural code...) in line with the international standards on justice?
- Have high ranking commanders been brought to justice or only the lower level suspects?

²⁹ Article 17(2) of the Rome Statute.

- Have all sides of the conflict been equally put under investigation, prosecution and on trial?
- Are sufficient financial resources allocated to the justice sector?

When sufficient political will exists in principle, **the EU should seize the opportunity by remaining engaged and assisting wherever it can.** Most of the countries affected by the most serious crimes are often unable to rebuild the justice system without assistance from the international community.

To achieve sustainable and tangible results is to combine diplomatic and political action with development assistance.

(d) Lessons learnt from development assistance

The EU and its Member States is a key actor in the field of rule of law and justice, being also **the largest provider of official development assistance.** It fully subscribes to the Paris Declaration on Aid Effectiveness, the Accra Agenda for Action and the mutually reinforcing ground principles of Ownership, Alignment, Harmonisation, Managing for Results and Mutual Accountability.

It must be recognised that a justice system cannot be set up overnight as several areas need to be in place in order to have an effective, functioning justice sector, including for example the legislative framework, the separation of powers (executive, legislative and judicial), the role of police forces, especially during investigation phases,³⁰ and the independence of the judiciary as well as the enforcement of court decisions. **Addressing genocide, crimes against humanity and war crimes requires very specific efforts due to the inherent complexity in investigating and prosecuting them.**

Despite the necessity of the long term approach, there is **always a sense of urgency to provide justice** due to the suffering of the affected population, the possible residual hatred and internal division. It is often the case that the focus lies in bringing the perpetrators to justice and to a lesser extent addressing victims' needs and introducing reconciliation mechanisms that could pave the way towards restoring public trust in the justice system. In a post-conflict context, many former combatants will participate in DDR (Disarmament, Demobilisation and Reintegration) programmes but local populations need to know that the worst perpetrators will not be entered into such programmes. Without meaningful justice, countries are likely to suffer violent phases again in the near future.

No magic formula exists, but **rapid assistance to countries** which suffered from genocide, crimes against humanity and war crimes, and are genuinely willing to carry out investigations and prosecutions, **should always be combined with more long term efforts aimed at building up and consolidating the justice system as a whole.**

The large-scale nature of these crimes means that they often cannot be processed through the ordinary criminal system, generating an impunity gap. Effective prosecution strategies for large-scale crimes often focus on the planners and organizers of crimes, rather than those of lower rank or responsibility. Therefore

³⁰ An accountable and impartial investigatory police is essential for an effective and fair justice sector. Authority to instruct investigatory police shall be given to independent Prosecutors. Other police functions (e.g. public security) shall be kept separate from this delicate law-enforcement mandate.

prosecutions cannot achieve meaningful justice in isolation. Implementing prosecution strategies with other initiatives, such as reparations programmes for victims, reconciliation and institutional reform - including vetting procedures and truth-seeking - can help fill the impunity gap by addressing crimes with large numbers of victims and perpetrators.

The EU has various financial instruments and aid modalities at its disposal, ranging from budget support, the sector wide approach and project based support. The recent **Communication from the European Commission on the Future approach to EU budget support to Third Countries³¹** underlines that **commitment to the fundamental values of human rights, democracy and rule of law is essential for the establishment of any partnership and cooperation between the EU and third countries.**

The specific modality should be based on a careful assessment of the political, economic and social environment in a specific country. Practise has shown that **a good mix of different financial instruments and aid modalities produces the best results.**

For example, the EU support within the geographic instruments usually aims at supporting institutional and legislative reforms. The thematic European Instrument for Democracy and Human Rights (EIDHR) enabled interventions mainly aimed at improving rights holders' capacities to access justice; strengthening the monitoring role of civil society on the independence of the judiciary; addressing sensitive legal issues; providing direct support to human rights defenders; and to the ratification and implementation of international treaty standards.

This also applies to the principle of complementarity: budget support can be necessary to assist the country in rebuilding basic infrastructure, the sector wide approach can be a useful vehicle to support police and judiciary, whereas project based support could be used to support civil society in its efforts to ensure victim's rights are protected and to promote and sustain legislative reforms.

The development and justice world often still use different terminology to describe the same situations: fragile, unstable, post-conflict countries are often used by development experts whereas 'ICC' experts would speak about 'unwilling or unable countries', 'situation countries' and so forth. Realising we often talk about the same things, but in different jargon, can already be a small step towards realising the common objectives.

(e) Designing successful programmes

Given the sensitivity of the justice sector, **the political will of the beneficiary country should be secured from the beginning.** The most successful programmes were those in support of national reform agendas that were put in place through active participation and consultation of various stakeholders within and outside the justice system, including civil society and academia. In this way, **national ownership and the sustainability of interventions are embedded in the project design.**

³¹ COM(2011)xxx of 13.10.2011, available at http://ec.europa.eu/europeaid/how/delivering-aid/budget-support/documents/future_eu_budget_support_en.pdf and related Council Conclusions of 14 May 2012.

Addressing the justice sector in a comprehensive way involves many aspects, including safeguarding the independence of judiciary, including Prosecutors; more effective and transparent court operations; modernising criminal investigations, forensics and court procedures; access to justice and the right of defence; the use of baseline data (statistics, surveys, round-tables, sector assessments, thematic evaluations). **It is vital to have an in-depth understanding and analysis of the sector** and its vulnerabilities.

Without **a detailed needs assessment**, programmes are bound to fail. Such assessment should identify and ascertain what kind of assistance is needed in order to address the vulnerabilities and deficiencies detected and who is best placed to provide the assistance. It is crucial for the legitimacy of the process that victims are consulted when conducting the exercise.

The response strategy should be designed so as **to tackle the root causes** of often structural problems in the sector or, through technical cooperation actions, to effectively transfer know-how so that old practices can be aligned with current international trends, and more sensitive towards human rights standards or international justice issues.

An overall recommendation is **to apply a problem solving and service delivery approach** in the support to the justice sector, focusing on addressing the justice needs of the people, as well as to combine institutional building support with legal empowerment of people and strengthening accountability mechanisms of the justice sector by increasing support to oversight mechanisms. When designing programmes and initiatives fighting impunity and implementing the principle of complementarity, **it is essential to realise the need for a comprehensive justice and accountability approach to strengthen the transition to a more peaceful society where the rule of law prevails.** Beyond criminal prosecutions, one should not overlook the importance of reforming state institutions (including the political structures, justice sector, army and police) and addressing legislative/normative gaps, as well as investing in ways of understanding the root causes of the conflict and establishing the truth and the provision of systematic reparations of the victims who have suffered in a direct or indirect manner (restitution, financial compensation, public apologies, memorials etc.).

Donor coordination and possibly even joint programming are important factors for achieving the best results by reducing fragmentation and increasing impact. Ideally, the setting up of a donor coordination group would be led by the partner country. The situation in Uganda offers an interesting example of where the EU has also played an instrumental role. The Justice, Law and Order Sector was set up to act as the government body for justice issues, including 15 government agencies, whereas the most important donors were gathered in a development partners group, serving as government's counterpart.³²

The concrete kind of assistance provided to judicial domestic systems can take many forms, including training programmes targeting national officials such as prosecutors, investigators and prison guards; transfer of knowledge from the specialised institution to national institutions; provision of technical and logistical support; and raising awareness about the importance of international criminal law through extensive outreach efforts.

³² OS Foundations, *Putting complementarity in Practise: domestic justice for international crimes in DRC, Uganda and Kenya*, 2011, p. 79 -80.

(f) Mapping the different actors

(1) National level

Ensuring that a state carries out national investigations and prosecutions and proceeds with fair trials of those suspected of committing genocide, crimes against humanity and war crimes is a complex process. Understanding the root causes that spurred the conflict is the first priority. For example, a general failure of a very biased criminal justice system could have been one of the causes of the conflict itself.

It is also **important to look at all three branches of power**: executive, legislative and judiciary. Understanding all the different power-relations between these branches and within each branch is essential, and a political economy analysis can be a useful tool in this regard.

In the past, most of the attention has been dedicated to the Executive (Ministry of Foreign Affairs, Justice, Defence, law enforcement agencies...), but **the Parliament also plays an essential role through legislative measures**, for example as to the ratification and implementation of the Rome Statute, approving the budget of the justice sector and its role of general oversight role of the Executive. The Speaker of Parliament often plays an important role in its daily functioning, together with the leadership of relevant Committees. It goes without saying that the judiciary, including both prosecutors and judges, also plays a pivotal role. A fairly common feature of post-conflict countries is the high turn-over of political figures and government officials, which complicates the start-up and continuation of the dialogue.

The rights of victims of these atrocities **must be upheld**. The rationale of the justice system should be to provide justice to the victims of the most serious crimes, who have a right to reparation. While this may be evident, there is always a risk of becoming too focused on processes and strategies. The Rome Statute itself clearly establishes victims as independent actors of justice.

Civil society plays an instrumental role both at national level and international level in many pertinent areas related to national proceedings for the crime of genocide, crimes against humanity and war crimes, ranging from technical assistance during legislative process (ratification, national implementing legislation), fact-finding on the crimes which took place as well as assisting in victims' representation.

(2) International level

Besides those at the EU level, other important tools and expertise in fighting impunity have been developed at the international level:

- **The Secretariat of the Assembly of State Parties** has created a 'Complementarity Extranet' which will serve as an important tool for exchange of information

amongst relevant stakeholders, including donor States, organisations, civil society and recipient States.

- **ICC Legal Tools** equip users with legal information and an application to work more effectively with crimes of genocide, war crimes and crimes against humanity. The Tools serve as an electronic library on international criminal law and justice, providing a comprehensive overview of national and international cases, and national implementing legislation. **The Case Matrix** is a law-driven case management application, made for the investigation, prosecution, defence and adjudication of factually complex cases such as genocide, crimes against humanity and war crimes. It is an open-source application that can be adapted to any criminal justice system and to different user groups such as judges, investigators, prosecutors, defence counsel, victims' representatives and NGOs. The application can be used for legal reference, legal training and competence-building, and information or evidence database purposes.³³
- **The United Nations**, in particular **its Rule of Law Coordination and Resource Group** (<http://www.unrol.org/>) is responsible for the overall coordination of the UN's rule of law work and is supported by the UN Rule of Law Unit, which leads the coordination and coherence among the UN entities engaged in rule of law activities, developing system-wide strategies, policy direction and guidance, and enhancing partnerships between the United Nations and other rule of law actors. The **UN Rule of Law Indicators' Implementation Guide and Project Tools** are an excellent tool to monitor changes in performance, transparency & accountability, the treatment of vulnerable groups and the capacity of the criminal justice sector in conflict and post-conflict situations.³⁴ The UN Office on Drugs and Crime (UNODC) developed a '**Criminal Justice assessment document**' which is a useful practical guide intended for use by those charged with the assessment of criminal justice systems and the implementation of criminal justice reform.³⁵ The UN has also developed **Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice**.³⁶
- The **Commonwealth adopted a Revised Model Law** to Implement the Rome Statute of the ICC in the 54 Member Countries of the Commonwealth. As will be further explained in Chapter 3, states parties should ideally enact national legislation that incorporates the Rome Statute into domestic legal order. This Model Law can serve as a starting point to enact national legislation, adapting to national specificities where needed.³⁷
- **INTERPOL** has expanded its role in providing international co-ordination and support for law enforcement agencies in member countries and international organisations responsible for the investigation and prosecution of genocide, war crimes, and crimes against humanity. INTERPOL also assists investigations at national and international level through the publication of **Red Notices**, or

33 See also <http://www.legal-tools.org/en/what-are-the-icc-legal-tools/>. The Texts in Legal Tools does not necessarily represent views of the ICC, any of its Organs or any participant in proceedings before the ICC or any of the ICC States Parties

34 Available at http://www.un.org/en/events/peacekeepersday/2011/publications/un_rule_of_law_indicators.pdf.

35 Available at <http://www.unodc.org/unodc/en/justice-and-prison-reform/Criminal-Justice-Documents.html>.

36 See Annex I of General Assembly Resolution 65/228.

37 Available at [http://www.thecommonwealth.org/files/238381/FileName/LMM\(11\)17PICCStatuteandImplementationoftheGenevaConventions.pdf](http://www.thecommonwealth.org/files/238381/FileName/LMM(11)17PICCStatuteandImplementationoftheGenevaConventions.pdf).

international wanted persons' notices, with more than 800 notices issued for genocide, war crimes and/or crimes against humanity.³⁸

- **Justice Rapid Response Mechanism (JRR)** is an innovative multilateral stand-by facility to deploy rapidly professionals in criminal justice and related areas, trained for international investigations and at the service of States and international institutions. It provides support for compliance with and the effective enforcement of international criminal justice, thus helping to make justice an integral and constructive part of conflict resolution and post-conflict peace-building. At the request of a State or international institution with jurisdiction, JRR experts can deploy quickly to identify, collect and preserve especially the most perishable information about crimes under international law and massive human rights violations.³⁹

IV. AREAS OF INTERVENTION

(a) **Overview**

The following sections provide a basic and non-exhaustive overview of some key areas of intervention. This section has been inspired by the recent Open Society Justice's Initiative's publication '*International Crimes, Local Justice - A Handbook for support*' (2011)⁴⁰ where more in-depth information and a detailed list of relevant organisations can be found.

While **the scope of this Document has been limited to criminal justice**, it is obvious that criminal justice is only one branch of the justice sector and a needs assessment may indicate that a long-term investment in the entire justice sector is needed before sustainable results can be achieved to tackle the most heinous crimes.

Informal justice systems are still very present in the daily life of countless individuals but this goes beyond the scope of this Document. The investigation and prosecution of the crime of genocide, crimes against humanity and war crimes should always fall within the remit of the formal criminal justice system. All legal systems of the world have a criminal law branch.

Even in countries where criminal justice would be efficiently functioning, it is unrealistic to expect that each perpetrator of these crimes will be held accountable especially given the great number of human rights violations which lead to genocide, crimes against humanity and war crimes. This underscores **the importance of non-judicial measures and a global "transitional" justice strategy**, but this Document focuses on criminal justice.

An interesting example in this context is the **International Commission Against Impunity in Guatemala (CICIG's)**⁴¹ which has been largely supported by the EU. It was established by an agreement between the UN and Guatemala (operational since 2008) with the unique objective of assisting Guatemala in investigating and dismantling violent criminal organisations believed to be responsible for widespread crime and the paralysis in the country's justice system. It has many of the attributes

³⁸ Available at <http://www.interpol.int/Public/CrimesAgainstHumanity/default.asp>.

³⁹ See also <http://www.justicerapidresponse.org/>

⁴⁰ This does not imply any kind of official endorsement.

⁴¹ See also <http://cicig.org/index.php?page=about>

of an international prosecutor, but it operates under Guatemalan law and in the Guatemalan courts. It also works to strengthen the country's relevant public policy framework and fortify Guatemala's own justice sector institutions and makes proposals for legal reforms, works closely with selected staff from the Public Prosecutors Office and the National Civilian Police to enhance expertise in criminal investigation and prosecution and provides technical assistance to these and other justice sector institutions.

Focus at **proceedings at national level does not prevent there being some international dimension**. As described earlier, several international and hybrid courts have been established but the international dimension could also be limited to the assistance of international experts to national justice systems, as conflicts often wipe out a country's elite. Such assistance could increase the perceived objectivity of the judicial proceedings. In any of these cases it should be clear from the start that **these measures should be temporary and an exit-strategy is best designed right from the start**.

Efforts to fight impunity for genocide, war crimes and crimes against humanity can be built into general rule of law programmes, but **very few results will be obtained without specifically dedicated efforts to work on these crimes specifically, mainly because it is a highly complex matter** at all levels, in particular regarding:

- **Legal framework:** the applicable law differs and the definitions of the crime of genocide, crimes against humanity and war crimes need to be integrated into national penal codes;
- **Investigations:** high security risks often arise because of the nature of these crimes and the power of the individuals involved, for both the investigators themselves and the victims, but possibly also for the suspects. Also, because forensic evidence tends to be very scarce because of time lapse between crime and investigation, physical infrastructure and documents may be destroyed, leading to the important role of witnesses who are often traumatised after the horrific events. Issues around interpretation and translation can also play a role in the investigations phase;
- **Prosecutions:** independence of prosecution is often limited because of the power dimensions related to these crimes, including the possibility that corruption is pervasive at all levels of the state. These crimes are often more difficult to prove: for example, a high ranking official will often not have physically committed the crimes himself. International legal assistance can be needed as these crimes could have a cross-border dimension;
- **Judges:** given the high profile of such cases judges are often under severe pressure; they often lack experience in dealing with the substantive law related to crimes of genocide, crimes against humanity and war crimes, and the management of lengthy trials;
- **Court management:** many different linguistic communities are often affected by the conflict requiring more interpretation and translation than in other criminal cases. The long duration of trials, an often high number of witnesses, and media attention necessitate detailed court management and sufficient infrastructure.
- **Management of detention and prison facilities:** the lack of effective enforcement of sentences can be seriously detrimental to the credibility of criminal justice. Penitentiaries should be safe and secure, avoid overpopulation and human rights violations. This can be achieved in part by ensuring that prison guards are sufficiently independent and well-trained.

- **Rights of victims and witness protection:** victims of genocide, crimes against humanity and war crimes are often traumatised; in many civil law countries, victims can play an active role in the legal proceedings but are often unaware of their rights. Witnesses at national proceedings are exposed at very high security risk whereas many countries do not have elaborated witness protection measures, which tend to be expensive. Witnesses often play a crucial role and the security threat to or death of one witness can demoralise the other witnesses;
- **Outreach:** in comparison to other types of crimes, much larger segments of a population will have been affected by these crimes, either directly or indirectly. Hence, it is very important to promote two way communication channels between the general public and the judicial systems from the very beginning of the criminal proceedings;
- **Defence counsel and legal profession:** the stakes in these cases often go beyond the rights of the defence. The legitimacy of the entire justice system may be at stake. Legal professionals may lack training to deal with such complex cases. More resources are needed to provide proper counselling given the complexity while provision of legal aid could make no distinction between different cases and impose flat fees.

All these different components are mutually reinforcing and have multiplier effects. A comprehensive approach to all of these issues is ideal, but as resources tend to be limited, the prioritisation should be done following the needs assessment.

(b) Legal framework

As a first step, it can be interesting to look at the **relationship between international and national law in a specific country**. First, one can ask whether a treaty needs to be transposed into a national bill in order to have legal value (the so called *dualist system*) or if it can have a direct applicability into the national legal order (the so called *monist system*). While such distinction may seem theoretical and not so useful in the delicate area of criminal law, it can still be important especially in the absence of national implementing legislation. For example, the Rome Statute has been applied by military tribunals in DRC without a national implementing legislation being put in place as DRC's military justice system is a rather monist system.⁴² Instead, to empower civilian penal courts, implementing legislation is necessary in the DRC.

Another fundamental distinction between legal systems is the **difference between civil and common law systems**. The distinction is rather blurred in many contexts, but the nature of the overall legal system does have an impact on the judicial system. For example, the judiciary in civil law countries tends to be more hierarchically organised and victims can participate more actively during proceedings, whereas judges in common law system are more bound by the theory of 'precedent'. The Rome Statute contains elements of both legal traditions, as well as some innovative solutions to procedural issues.

While a State Party to the Rome Statute should ideally have good implementation legislation at national level, it should not be forgotten that a crime like genocide

⁴² See for more details, Avocats Sans Frontières case study: The application of the Rome statute of the international criminal court by the courts of the Democratic Republic of Congo available at http://www.asf.be/publications/ASF_CaseStudy_RomeStatute_Light_PagePerPage.pdf

can also be prosecuted under customary international law, even though the absence of provisions on penalties in the Convention on Genocide of 1948 and in the correspondent customary norm concerning the prohibition of genocide renders domestic implementation always a necessity in the national penal systems of countries that require the pre-determination of a minimum and/or a maximum applicable penalty to each existing crime on the basis of the principle of legality.

Besides the Rome Statute, several **other international treaties** are of particular relevance in this context and date back long before the entry into force of the Rome Statute, including but not limited to:

- The **four Geneva Conventions and their Additional Protocols** which are at the core of international humanitarian law, which regulate the conduct of armed conflict and seek to limit its effects;⁴³
- The **Convention on the Prevention and Punishment of the Crime of Genocide**, which imposes inter alia the prevention and punishment of genocide;
- The **International Covenant on Civil and Political Rights**, including its article 14 regarding the right to a fair trial.
- The **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**.
- The **International Convention for the Protection of All Persons from Enforced Disappearance**.

Of particular importance within the context to investigate and prosecute crimes of genocide, crimes against humanity and war crimes at national level are the following issues:

- **Implementing legislation of the Rome Statute of the International Criminal Court:** the norms and general principles of the Rome Statute must be translated into the national level through a comprehensive national legislation, thus adapting the domestic context to international obligations. Such national implementing legislation serves several purposes, including both substantive provisions regarding the definitions of the crimes, the sanctions and the general principles of law relating to international crimes (e.g. non-applicability of statutes of limitation), as well as the procedural provisions implementing the obligation of a State Party to cooperate fully with the ICC.

It is equally important to introduce in national law all the provisions which are necessary for the national criminal courts to establish and exercise their jurisdiction. The adoption of legal provisions establishing extensive extra-territorial jurisdiction, or even universal jurisdiction, will reduce the risk of impunity. No State Party to the ICC Statute should accept to host on its territory someone who is suspected of having committed a crime falling within the jurisdiction of the ICC, wherever this crime has been committed.

This implementing legislation should ideally enable a State party to co-operate fully with ICC, including regarding arrest and surrender of suspects to the ICC or to foresee other forms of assistance (e.g. freezing of the assets of an accused). In this sense, **implementation of the Agreement on Privileges and Immunities at national level is also important**.⁴⁴ In order to foster an effective cooperation with

⁴³ See also <http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/index.jsp>. Similarly to the Convention on Genocide, also the penal provisions to the four Geneva Conventions of 1949 do not contain specific provisions on applicable minimum or maximum penalties.

⁴⁴ Available at <http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Official+Journal/Agreement+on+the+Privileges+and+immunities+of+the+ICC.htm>.

the ICC, **a bilateral agreement between the State and ICC on cooperation** can also complement national legislation.

A particular issue to look at regarding national implementing legislation is to see if the law is retrospective, covering the entire conflict period, or not.

Another important element to look at is the penalties in the implementing legislation.

The maximum penalty defined under the Rome Statute is life imprisonment. **The death penalty can never be applied at the ICC** and one can argue genuine implementing legislation of the Rome Statute should follow this example.⁴⁵ However, reality shows that the death penalty is still part of implementing legislation in several countries. The momentum of implementing the Rome Statute at national level could also lead to the general abolition or de facto moratorium of the death penalty, also as to avoid inconsistencies in penalties. As confirmed in the EU Guidelines on the Death Penalty,⁴⁶ **the universal abolition of the death penalty is a key priority of the EU.**

Article 27 of the Rome Statute makes it clear that an **official capacity as a Head of State or government or a member of Government or Parliament shall in no case exempt a person from criminal responsibility** under the Rome Statute. This should also be the rule in national law as there should be no exceptions in the fight against impunity. This point is particularly sensitive as very often, high level officials are involved in the crimes of genocide, crimes against humanity and war crimes. In some countries, constitutional issues may need to be resolved, either by interpretation or amendment.

- **Bi- or multilateral agreements on mutual legal assistance** are crucial due to the international nature of the conflicts which entailed these crimes. In the absence of such agreements, the collection of evidence, the deployment of investigators to other countries, the execution of arrest warrants by other states, and the extradition of suspects or accused, the tracking of assets, and the transfer or reallocation of witness might be very difficult or impossible.
- **A Constitution** does not only regulate the separation of powers, but often also provides some guidance on the independence of the judiciary and the organisation of the judicial system. Research shows that the simple fact of having a formal constitution reduces the risk of renewed conflicts by not less than 64 per cent.⁴⁷
- **National substantive criminal law** should have definitions of genocide, crimes against humanity, and war crimes. Even when these crimes are already defined in national law, these definitions may need to be updated through good implementing legislation, ensuring they cover at least the conduct described in the provisions of the Rome Statute. It is important that also the general principles of law relating to international crimes become applicable before domestic courts. In addition to the principle of “No Immunities” (irrelevance of official capacity), these include: the non-applicability of statutes of limitation (“imprescriptibility” of international crimes), the limited availability of the

45 In line with the Sixth Protocol to the ECHR.

46 See also http://eeas.europa.eu/human_rights/guidelines/index_en.htm

47 2011 World Development Report of the World Bank, p.85.

defence of superior orders, command responsibility of military or civilian superiors, individual criminal responsibility for complicity and co-perpetration, the jurisdictional principle of "aut dedere, aut judicare" (the obligation to prosecute or extradite or surrender to the ICC).

- **National procedural criminal law** will outline the different competences of the civilian and possibly even military courts of criminal justice, witness and victims' protection, and possible victims' participation in criminal proceedings.
- **Legislation on the status and functioning of the legal profession** govern the structure and organisation of legal professions, in particular judges, prosecutors and lawyers.⁴⁸
- As mentioned before, the **general budget provisions** should also be considered as they define the overall allocations to the justice sector and give a good and concrete indication of the overall picture.

(c) Investigations and prosecutions

Investigating crimes of genocide, crimes against humanity and war crimes **is difficult** because of the possible long time lapse between the time the crime was committed and the time the investigation was opened, because of overall security risks and lack of forensic evidence and capacity. Prosecuting these crimes is difficult because many elements need to be proven, for example: genocidal intent (*mens rea*) is required to be proven within the framework of genocide; crimes against humanity can only occur when they are widespread or systematic; war crimes imply that an armed conflict took place; the concept of command responsibility requires that a crime can be linked to a superior (difficulty of linkage).

The police play a crucial role in the investigative phase and many support programmes have already targeted police reform. Countries do not always express a need for specific training of police officers, but one could consider building training into larger programmes, keeping in mind that victims of these crimes, in particular victims of gender-based violence, are often highly traumatised and that witnesses' statements need to be properly recorded and carefully preserved. Equally, training programmes for prosecuting staff should be considered, to ensure high standards throughout the investigation and prosecution process.

Sufficient attention should be paid to financial investigation and asset recovery investigation, leading to possible freezing of assets of the suspects, which requires specialised skills. This also illustrates that reinforced investigative capacity can have positive spillover effects in other criminal investigation areas such as organised crime, money laundering, drug trafficking, fraud etc.

Other bodies, such as national human rights commissions may also have some investigative powers and play an important role, as in the case of the Kenya's National Human Rights Commission. Nevertheless, such bodies can and should not replace the formal criminal investigations.

⁴⁸ In some legal systems, the law allows for a limited intervention by the Executive in the mandates of Judges and Public Prosecutors. In this respect, self-governing judicial bodies are important to guarantee judicial independence.

Possible prosecution of suspects of genocide, crimes against humanity and war crimes always **touches upon political interests given the very nature of these crimes** provoked by large scale violence. Hence, the need for independence of prosecutorial offices becomes evident.

Both in the investigative and prosecutorial phase, the case management or overall management of information becomes crucial as there is always more information available than may be possible to handle.

After having collected sufficient information during the investigative phase, a prosecutor will need to decide upon which cases will be put forward and selected for prosecution. **It would be an illusion to believe that all cases can be handled by the judicial system.** This is simply impossible within the context of crimes of genocide, crimes against humanity and war crimes, in which such a high level of violence, murder or rapes might have occurred, committed by a vast number of perpetrators. Faced with this uncomfortable situation, it is important that prosecutors think carefully about objective (pre-determined) criteria they will use in this selection process, and not just go for a 'first come first served' practice.

The specific content of the criteria depends on the specific national legal framework regulating the discretion of public prosecutors and might include, among others: gravest crimes in terms of victimisation and continued risks/threats of reoccurrence, strongest and most numerous evidence available, senior position(s) of the suspect, or the likelihood of execution of an arrest warrant. The most important thing to stress is that those prosecutors should be aware of the long process of setting the criteria, and **if criteria of the prosecutorial strategy are established, it might be very useful to communicate them to the public** fostering common understanding.

As described before, the mere **opening of domestic investigations and prosecutions is not necessarily enough to avoid the ICC's Office of the Prosecutor stepping in.** Nor do ongoing investigations by ICC's Office of the Prosecutor prevent the national authorities from equally undertaking investigations and prosecutions. However, in order to prevent duplication, increase efficiency of efforts and ultimately avoid parallel prosecutions, the different authorities should liaise closely with each other.

Secondment of international personnel should be considered carefully as international experts might lack a thorough understanding of the national context and may not speak the local languages, although they may also bring benefits in terms of independent expertise and the capacity to train national officials.

(d) Judges

The role of judges in proceedings involving crimes of genocide, crimes against humanity and war crimes does not substantially differ from their role in other criminal proceedings. Beyond the trial and possible appeal stage itself, judges also rule on pre-trial proceedings (including for example confirmation of indictments and pre-trial detention). As for prosecutors, **the independence of judges is essential to ensure fair justice**, while the continued political support for the fight against impunity remains crucial to sustain the outcome and societal legacy of judicial activities.

The main difference for the judges is the substantive law they need to apply, which also underlines the importance of good and comprehensive national implementing legislation. This different set of rules they must apply should not be underestimated as **the legal interpretation of these crimes is difficult and requires regular training**. Modest investments in this target group could already lead to a substantial impact.

From this perspective, **specialisation of judges in specialised courts or chambers is to be welcomed**. Recent examples have shown that instead of setting up a dedicated court to try suspects of crimes of genocide, crimes against humanity and war crimes, several countries opted for the creation of a special chamber embedded in a court, like for example the War Crimes Chamber in the State Court of Bosnia and Herzegovina and the International Crimes Division in Uganda's High Court. This can be an efficient solution and facilitates specific capacity building for the judges involved. On the other hand, such an option prevents positive spillover effects across the country and also limits the number of experts to a great extent. Again, the **decision which system works best should be carefully assessed with regard to the specific needs and characteristics of the given country**.

Peer-to-peer exchanges or assistance of international experts have shown great results in the past. For example, the EU has sponsored two international experts to advise judges of a trial chamber in Colombia that is responsible for implementing the Justice and Peace Law (Law 975). These experts offered advice on substantive, procedural and evidentiary elements that distinguish the investigation and prosecution of these crimes in scenarios of mass atrocities as well as on issues related to the reparation for the victims of the crimes. The project resulted in a substantial improvement of the quality of the chamber's decisions. Whereas the Colombian Supreme Court had rejected some of its earlier decisions, recent decisions have been upheld. A key contributing **success factor has been the combination between the long term stay of the experts** allowing intensive and continuing support **and the low visibility of operation**.

(e) Court management

Translation and interpretation of local languages, if allowed under national law, could become quite substantial given the large quantity of documents and various ethnicities often involved. Nevertheless, those who do not speak or understand the language of the proceedings should have access to free interpretation and translation with a view to ensuring their right to a fair trial.⁴⁹

Archiving should not be neglected. As in many countries the IT infrastructure may still be limited, it is even more important to devote necessary attention to this as archives can be more easily damaged. The archives must ideally be accessible to the public and could play an important role in seeking to establish a common history of the events later on.

A system of **mobile courts may work in certain developing countries with vast territories**, for example in DRC, and this option could be assessed as part of the country specific situation. On the one hand, mobile courts do often have the advantage of bringing justice closer to the people, especially in remote areas, and operating faster. On the other hand, they cause additional costs and can cause backlogs at the normal seat of the court, as well as prolonged pre-trial detention of

⁴⁹ Article 67(1)(f) Rome Statute.

suspects waiting between hearings of the same mobile court that will inevitably have to move to another location and leave behind pending procedures. The jurisdiction of a mobile court tends to be limited to some type of crimes, for example gender based crimes, which might lead to the perception of a two-track justice system. Again, the specific needs and characteristics of the partner country and the nature of the crimes committed, as well as the geographical spread of the crimes, will need to be considered.

(f) Management of detention and prison facilities

Any lack of **effective enforcement of sentences** can quickly lead to general distrust of the justice sector, in particular when it concerns high level persons convicted of the crime of genocide, crimes against humanity and war crimes. There are no fundamental differences regarding the management of detention and prison facilities for these crimes except for an **increased security risk** due to the seniority of the persons accused (or convicted) of genocide, crimes against humanity and war crimes.

Support to detention and prison facilities has often been limited to providing the necessary hardware or physical infrastructure, sidelining necessary training and education programmes for penitentiary guards. It is advisable that a detention facility is available a short distance from the court itself facilitating the transport and reducing the security risks. It is also necessary for the territorial state to make the proper investments to maintain safe and secure penitentiaries: experience shows that, for instance, the rate of escape from prisons can be so high that all other investments in the justice sector are undermined and general public distrust for the prison system leads to a strong resurgence of political support for the imposition and concrete application of the death penalty.

In many countries, detention and prison facilities have been severely underfunded and are in a dreadful situation leading to, inter alia, **enormous levels of overcrowding**. Sufficiently **high salaries of prison guards** are equally important, **reducing the possible risk of corruption**.

The UN Standard Minimum Rules for the Treatment of Prisoners⁵⁰ and the Council of Europe's European Prison Rules⁵¹ provide a very general framework outlining some of the basic rights of prisoners.

(g) Rights of the victims and witness protection

Due to its nature, there are generally many victims affected by crimes of genocide, crimes against humanity and war crimes. Even the most efficient judicial system will probably not be able to handle each single case affecting every victim. This presents problems with the right to reparation, which is a well-established principle of international law and as such, an integral part of the justice sector. In line with the UN Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Law,⁵² states are obliged to provide reparation which can be offered under forms of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. As a general principle, it is crucial to take into

50 <http://www2.ohchr.org/english/law/treatmentprisoners.htm>

51 Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, 11 January 2006.

52 See <http://www2.ohchr.org/english/law/remedy.htm>.

account the needs of victims, in particular children, elderly persons, persons with disabilities and victims of sexual and gender violence.⁵³

The ICC's Trust Fund for Victims aims to provide support for victims and their families in situations where the Court is active with physical rehabilitation, material support, and/or psychological rehabilitation. In any case, there will also be a considerable time lapse between the dates of the crimes and the possible ordered reparation. For all these reasons, the importance of other national reparation programmes/measures should not be underestimated. These Programmes should not only be linked to the judicial processes, but should also be open to all victims of crimes whose perpetrators have not been identified and/or brought to justice, so to avoid any discrimination among victims and groups of victims.⁵⁴

A final goal of every investigation, prosecution and trial is to provide justice for the victims. While this seems obvious, the victims themselves are sometimes sidelined in debates regarding justice which often tend to focus more on processes and technicalities. The Rome Statute offers the possibility for victims to play an active role during the proceedings, but each national justice system has its own rules and practices regarding this. Often it is only possible in civil law countries to actively participate in criminal proceedings with a view to claiming damages (so called '*partie civile*'). Here again, it is important to look at the country specific situation but it is equally **essential to ensure that the victims are properly informed about their rights**, underlining the need for effective outreach. While victims might be grouped together, one should not think they are always a coherent group. Different individuals might have different expectations, especially regarding reparation.

Victims also play an important role by providing the witness testimonies necessary to convict perpetrators. As mentioned before, **investigations and prosecutors must be trained in dealing with such witnesses in order to avoid secondary victimisation**. In addition, **measures may need to be taken in order to protect these witnesses from external coercion or violence**. However, not all witnesses are victims.

These measures should also apply to those witnesses that played a role in the crimes of genocide, crimes against humanity and war crimes. These so-called 'insider witnesses' can play a pivotal role by linking the crime to a suspect and, as a result, may be susceptible to even more extreme pressure and severe security risks. A possible attack or murder of a witness can have devastating effects on the entire process. Particular attention should be paid to the following:

- **proportionality**: possible protection measures should be guided by this principle and be case specific
- **witness protection measures** should be looked upon at the investigative and prosecutorial phase and the trial phase, but also after the trial phase. It is crucial to have a long term view and plan ahead regarding what will happen to witnesses afterwards. Will they be able to go back to their daily life or did the testimony expose them too much?
- **status of witness** (defence witness or not) should not play a role in protection measures

⁵³ Cf. Article 85 Rules of Procedure and Evidence. While victims might be grouped together, one should not think they are always a coherent group. Different individuals might have different expectations, especially regarding reparation.

⁵⁴ The definition of victim under international law provides that "[a] person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted" [...], cf. UN Doc. A/RES/40/34, 1985 (*Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*).

- **witness re-location** to other countries might be needed, temporarily or permanently, involving higher costs, legal complexities and possible covert measures
- a dedicated **witness protection agency** might be a good way forward, but it is crucial to consider both staff composition and budget autonomy here
- need for **special training for staff** (specialised staff or general police) dealing with witnesses

(h) Outreach

Outreach entails providing **two way communication channels between the general public and the judicial system or courts**. Since many people are affected by the crimes discussed here, outreach in this context is even more crucial: affected communities and victims need to be informed about their possibility to participate in proceedings; the public's expectations need to be managed as they might be too high; broader national ownership can be fostered; overall public support for criminal justice proceedings should not be taken for granted.

Furthermore, outreach programmes also offer an opportunity to raise a more general awareness about the importance of the rule of law and general legal concepts. Outreach **can contribute to reconciliation processes**, seeking to establish a common history starting from the established facts in the court rooms. Even more significantly, outreach can strengthen the belief that perpetrators of the most serious crimes will not go unpunished, which, in combination with national criminal proceedings based on national criminal offences will have a deterrent effect.

It is important to start planning outreach programmes **sufficiently in advance and to maintain them also after the final trial** would take place in order to ensure proper legacy. Most effective outreach programmes go beyond public information, and it is crucial to establish a two way and meaningful communication, which is **adapted to the specific target groups**: general public, children, women, ex-combatants etc.

Far too often, outreach has been sidelined as an additional measure which could be forgotten. Many efforts have been undertaken by civil society actors around outreach, but national Ministries of Justice and Registries within Courts should also play a role in this. In this context, it is interesting to note that outreach has been **considered an integral part of the core mandate of the ICC, a good practice that can be followed by national justice systems**. Some dedicated funding for outreach is needed.

Specific attention should be given to involve the various media and journalists as they have an enormous impact on the public perception of the proceedings. Instead of reacting to possible criticism, **effective outreach is proactive towards the media**. Outreach programmes themselves should try to make use of modern technology whenever possible.

(i) Defence counsel and legal profession

Upholding fair trial standards is crucial and every accused person has the right to such a fair trial. Moreover, the overall perception of the justice system, including a possible perception of victor's justice, is at stake if the rights of an accused person are not properly upheld. A key aspect of **the right to a fair trial** is that the accused

has the right to defend himself in person or through legal assistance of his own choosing.⁵⁵

Legal assistance and legal aid schemes are already often part of general rule of law programmes, but some issues are worth taking into account within the context of crimes of genocide, crimes against humanity and war crimes:

- a sufficient number of qualified lawyers may not exist within a country because the conflict caused many casualties amongst the legal profession or many might have fled to other countries. It is important **to assess the base line** in which the legal profession finds itself.
- **legal aid schemes can be necessary**, not only for the accused person but also for the victims if they are allowed to participate in proceedings, but do often not exist in many countries.
- if legal aid schemes do exist, it is important to look to see if they are **adapted to the high complexity of these crimes and the usual long length of these trials**. Legal aid schemes based on flat rates not taking into account these factors are not sufficient. Reality illustrates that no legal aid scheme as such exists in many countries and it goes without saying that programmes should take on board this issue.
- **stricter licensing of the legal profession could enhance the quality of lawyers**, when they need for example to undergo compulsory training.
- specific attention should be paid to the **sufficient number of qualified female lawyers**, not only to ensure proper gender equality but also keeping in mind the high number of victims of gender based violence.
- **bar associations can often be a good interlocutor** for these issues or could be closely involved in training programmes for lawyers, whereas they have not always been sufficiently associated with support programmes in the past.
- in a more long term perspective, one can also look at **the legal education** which is offered at the universities. International criminal law does not always rank high amongst the priorities, causing a certain knowledge gap.

The List of Counsel before the ICC which gathers the lawyers who are authorised to practise at the ICC is publicly available and provides a good overview of experienced lawyers worldwide. Many of them still practice at national level as well.⁵⁶

V. CONCLUSIONS

In conclusion, the key messages of this Document can be summarised as follows:

- State Parties of the Rome Statute have the primary responsibility to exercise the criminal jurisdiction over those responsible for genocide, crimes against humanity and war crimes in their territories;
- The ICC is a court of last resort and the success of the Rome Statute system should not be judged by the proceedings taking place at the ICC alone;
- The implementation of the principle of complementarity has a strong political, legal and development dimension;

⁵⁵ See also article 55 of the Rome Statute and article 14 of the International Covenant on Civil and Political Rights.

⁵⁶ <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Defence/Counsel/>

- Without strong political will within the country concerned, fighting impunity in particular regarding genocide, war crimes and crimes against humanity is bound to fail;
- The prevailing culture of impunity is not only a barrier to holding the responsible perpetrators to account, but it equally hampers the overall development of countries on a much broader scale;
- The principle of complementarity can never be used as a shield to shy away from possible ICC proceedings by organising domestic proceedings which are not in line with international standards;
- During the phase of preliminary investigations commenced by the ICC Prosecutor, the state concerned should be strongly encouraged to start up genuine domestic proceedings;
- Investigating and prosecuting genocide, crimes against humanity and war crimes requires very specific efforts due to the complexity of the crimes and multiplicity of victims;
- Criminal prosecutions should be embedded in a more global transitional justice strategy, through directing resources to actions that reinforce the capacity to carry out timely and fair prosecutions in the partner country;
- A good mix of different financial instruments and aid modalities produces the best results when addressing the criminal justice sector, including regarding complementarity efforts;
- National ownership and the sustainability of interventions should be secured from the outset through the proper involvement of all relevant stakeholders, including those who may initially oppose accountability efforts;
- Actions implementing and supporting the principle of complementarity should take into account the legal framework and decision making, investigations and prosecutions, judges, court management and management of detention and prison facilities, the rights of victims and witness protection, outreach, and the defence counsel and legal profession.

VI OPERATIONAL STEER ON COMPLEMENTARITY

While supporting the overall objectives of development cooperation with partner countries, the following operational steer should be taken into account, alongside consideration of the country-specific situation. The following non-exhaustive list is based on best practice derived from this Toolkit in view of implementing the EU Decision and Action Plan on the ICC (2011).⁵⁷

First, sustainable development may not be achieved in societies in which impunity prevails for individuals who have perpetrated genocide, crimes against humanity or war crimes on a widespread or systematic scale. The lack of justice and accountability under the rule of law may bring about retaliation and the repetition of violence, and the resurgence of armed conflict and mass-scale victimisation of the civilian population. Justice, peace and development all intersect. Therefore the following **policy considerations** should be taken into account:

- Negotiations and political as well as sector-specific dialogues involving the EU, and all EU programmes and projects aimed at stabilisation, peace-making and sustainable development should address justice for the victims and accountability for the perpetrators of the most serious crimes, in accordance with the principle of complementarity.
- No blanket amnesty or other similar impunity measure should be endorsed or supported in respect of genocide, crimes against humanity and war crimes.
- In countries where impunity prevails, EU development cooperation programmes in the area of rule of law and criminal justice should address the fight against impunity for the most serious crimes, which – similarly to corruption – may be committed by state officials who have political and procedural means to escape justice and accountability.

Secondly, on the basis of the above policy considerations regarding the fight against impunity, the following **practical considerations** should be taken into account with regard to relevant projects in the field of rule of law and criminal justice:

STEP I – Consider:

- Whether the country concerned is a party to the Rome Statute and has taken the necessary steps under its national legislation to transpose the core crimes into national criminal provisions?
- If the country concerned is not a party to the Rome Statute, does it nonetheless have national criminal law provisions existing that can be applied to investigate and prosecute the most serious crimes of the Rome Statute?
- What is the stance of the country concerned vis-à-vis these crimes; is the country concerned also factually able and willing to investigate and prosecute such crimes?

⁵⁷ Council Decision 2011/168/CFSP of 21 March 2011 on the International Criminal Court and repealing Common Position 2003/444/CFSP and EU Action Plan to follow-up on the Decision of the ICC confirmed by Political and Security Committee of the Council on 12 July 2011.

- In a country where crimes of genocide, crimes against humanity and/or war crimes have occurred:
 - Is there an on-going investigation by the ICC related to the country?
 - Does the ICC have a case relating to the country concerned under preliminary analysis?
 - Are there other initiatives at the national level to promote accountability for the most serious crimes and what are they?

STEP II - Consider:

- Whether there are any initiatives or projects to fight impunity at the national level that are successful, and whether there are any lessons learned and best practise that could be disseminated within and outside the EU?
- If there are such initiatives that are however not progressing very well, what are the factors that can explain that (e.g. lack of consultation with civil society, judicial staff, political actors and other donors to evaluate the landscape)?
- If there are no such initiatives, what are the factors that explain that and how could they be remedied?

STEP III – In respect of both step I and II, consider:

- (a) Is there (a lack of) political will to fight impunity? (While doing so, consider the methods concerning how to analyse political will outlined in this Toolkit.)
- (b) Is there information available concerning the engagement of other donors and relevant actors in the area of rule of law/criminal justice/fighting impunity? If not, consider how to gather the missing information from other donor and actors and, as appropriate, recipients of development cooperation.