SECRETARIAT OF THE ASSEMBLY OF STATES PARTIES TO THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

THE HAGUE WORKING GROUP

Complementarity

1 October 2021

Summary

Representatives of the ad country co-focal points, Ambassador Matthew Neuhaus (Australia) and Ambassador Mirjam Blaak (Uganda), chaired the meeting.

Amb. Neuhaus welcomed the States Parties to the fourth meeting on complementarity. He also welcomed Observer States, representatives of the Court, in particular the Deputy Prosecutor Mr. James Stewart, and Mr. Rod Rastan, Legal Advisor and Acting Head of the Preliminary Examination Section of the Office of the Prosecutor ("the Office"), Mr. Christian Nygård Nissen, Advisor at the Royal Danish Embassy to the Kingdom of the Netherlands, as well as Ms. Elizabeth Evenson from Human Rights Watch, alongside other members of civil society.

Amb. Neuhaus noted that the meeting provided an opportunity to engage in important provisional discussions on the gravity threshold and complementarity, including positive complementarity, with the Office, as the new Prosecutor starts to look into these matters. In that vein, he recalled that the IER heard concerns regarding the Office's approach towards the gravity threshold and recommended the Prosecutor to consider adopting a higher threshold concerning the crimes alleged to have been perpetrated. He also noted that the IER indicated there was a sense that the Office has engaged in activities that go beyond its mandate during some Preliminary Examinations, and that positive complementarity should not delay the opening of an investigation.

Deputy Prosecutor, Mr. James Stewart, provided an introductory remark, and Mr. Rod Rastan, provided details on the institutional approach and guiding case law on the gravity threshold and complementarity to set the context for further discussion.

Mr. Stewart noted that the Office considers the topics of gravity and complementarity, and the corresponding IER recommendations, to be important ones for discussion. He indicated that these issues have been under the Office's consideration since before the IER, and emphasized that the IER recommendations raised some issues that could benefit from clarification. He emphasised that the OTP is currently engaged in a significant process of transition, with the new Prosecutor re-examining policies and practices, and that the Prosecutor needed time and space in which to accomplish this process of re-examination, transition and change. Nonetheless, Mr. Stewart stated that in assessing the relevant recommendations now, it would be useful to establish a baseline understanding of the concepts of gravity under the Rome Statute, and how this concept has evolved in the ICC's jurisprudence and practice. Finally, on the matter of complementarity as well as "positive complementarity", he suggested that it may be useful to recall what States Parties themselves had in mind when they considered the concept of complementarity at the Kampala review conference back in 2010.

Mr. Rod Rastan reiterated that the Prosecutor is in the process of reviewing all of the Office's policies, building on the existing policies with improvements and changes where appropriate. The remarks offered were therefore preliminary considerations that the Office was assessing in examining how IER recommendations could be implemented.

On the question of the gravity threshold, Mr. Rastan recalled that there is a difference between gravity as a legal threshold and gravity as a policy consideration. Specifically, the gravity test under article 17(1)(d) of the Statute and existing case law from Chambers has to date set a low threshold for determining whether cases are inadmissible before the Court. This same approach had also been adopted by Chambers for decisions on opening investigations, when ruling on the gravity of 'potential cases' that would arise from an investigation into a situation. By contrast, far greater latitude was available when considering gravity as a function of the Prosecutor's discretion in matters of case selection and prioritisation, where the Office could adopt and apply a much higher gravity threshold. There was also the consideration that raising the gravity threshold under article 17(1)(d) of the Statute, in order to reduce the number of situations under consideration by the Office, could inadvertently have a negative effect. This is because the legal threshold would be raised not only for situations, but also for cases – since in both instances the same provision, article 17(1)(d), applied. This might in turn inadvertently reduce the Prosecutor's discretion, operational flexibility and independence in a manner that was contrary to other recommendations contained in the IER report. By contrast, focussing on the application of Prosecutorial discretion might allow the Office to consider how best to implement the recommendation of the IER as a function of prioritisation among cases selected for investigation and/or prosecution.

In this context, Mr. Rastan recalled that the IER's recommendation R227 arises from the report's discussion of the Phase 1 initial filtering stage of the Office's Preliminary Examinations and therefore primarily appeared to address decisions on the opening of preliminary examinations, rather than decisions on opening investigations, which were subject to a statutory based test. The recommendation therefore appeared directed to the Office's policy and practice at the initial filtering stage before preliminary examinations were opened.

In relation to the issue of complementarity, including positive complementarity, Mr. Rastan noted that the Office agreed with the notion expressed in the IER report that complementarity should be considered as part of a situation's entire life cycle. He indicated that complementarity was relevant during preliminary examinations, at the start of an investigation, when investigations are ongoing, or at a situation's completion stage, and provided examples from the Office's ongoing and past practice. He also noted that the Office has increasingly come to consider its role when facing long-term accountability and justice processes. Specifically, and to assess, in the light of the admissibility test under article 17, when the Office could step back because States have stepped up to conduct relevant and genuine domestic proceedings; and whether in doing so, the Office and the State concerned could commit to a set of clear conditions and undertakings to ensure that domestic proceedings remained on track.

Mr. Rastan concluded by contrasting the Office's narrower approach to complementarity, which formed a natural part of its admissibility assessment, and the broader role of States Parties within the ASP context. For example, the Office needs to engage and interact with States and other stakeholders in order to apprise itself of the status of national proceedings – in order to conduct its statutory based admissibility assessment. But this was different to other broader capacity building and technical assistance efforts. The latter were areas which the Office did not and could not practically play a role, but which States Parties could facilitate among themselves, together with other international actors, in line with the approach adopted by the ASP in 2010 in Kampala.

Mr. Christian Nygård Nissen, Advisor at the Royal Danish Embassy to the Kingdom of the Netherlands, began his presentation by explaining that in the run up to the Kampala Review Conference, States Parties to the Rome Statute decided to conduct a stocktaking exercise, in addition to considering

the crime of aggression, on peace and justice, victims and complementarity. He indicated that such exercise resulted inter alia in the Kampala resolution on complementarity.

Mr. Nissen stated that the most important idea arising from the Kampala stocktaking exercise was viewing the Court and States as components of the broader Rome Statute system, rather than separate individual parts. He noted that Article 17 created a closed system of International Criminal Justice whereby both the Court and the States Parties are all trying to achieve the same goal and which should have no gaps. He indicated that this system also forms part of broader rule of law and development cooperation systems.

He noted that while no universally agreed definition of what positive complementarity exactly means was adopted during Kampala, the States Parties understanding of the term is slightly different from the way the Office of the Prosecutor has been using it. In this vein, Mr. Nissen indicated that the concept of complementarity from the Kampala stocktaking exercise builds on the same concepts of the States' ability and willingness, but more in a political sense rather than a legal sense. He also indicated that although positive complementarity was more concerned with the notion of inability than that of unwillingness, there could be crossover between the two.

Mr. Nissen noted that rather than focusing on the relationship between the ICC and States Parties in situations where crimes have been committed, States should come together in supporting domestic investigations and prosecutions of crimes, particularly where a State is unable to do so. He noted that the thinking at the time was that such an approach would complement the Office's approach of inducing or catalysing domestic proceedings.

He indicated that focusing on a State-to-State cooperation scheme has several perceived benefits, the first and foremost being the way the Rome Statute itself is constructed. In that vein, he noted that States themselves should conduct investigations and prosecutions, while the Office would step in only if the State Party is unwilling or unable to do so.

He further noted that prosecution proceedings that take place domestically could have a much higher impact on victims, national reconciliation and justice processes, and have a positive impact on the ICC's budget, as they would reduce the Court's workload. He also indicated that State-to-State cooperation, information and knowledge sharing could strengthen States efforts to tackle organized crime and other issues.

Mr. Nissen indicated that such State-to-State systems, together with the ICC and the Rome Statute, take place in a wider rule of law community and development programs, which are bigger and more comprehensive than the Court and the ASP themselves. He noted that not all the assistance and capacity building activities that are ongoing could be managed holistically from The Hague, as many of those programs are run either from or in capitals, or by actors that are not related to the ICC nor the ASP.

He indicated that the Court is not in a position to provide those forms of assistance, because it is not a development agency. He further noted that even in terms of knowledge transfer the Office would have to be very careful, as it could be supporting domestic efforts while assessing the States' ability and willingness in admissibility proceedings at the same time.

He concluded by emphasizing the importance of establishing synergies and linkages with the aim of ensuring that efforts at the national level match the broader efforts of investigating and prosecuting Rome Statute crimes. He noted there are many different ways of doing that, as it has already happened in Uganda, the Balkans and many other different places. He stated that the topic needed to be

looked into a bit more carefully, as there is a bit of tension between what complementarity means for States Parties and the Court.

Ms. Elizabeth Evenson stated that the IER directed its recommendations on complementarity and positive complementary to the OTP, and thus the Office should remain the decision maker when it comes to their assessment. She indicated that positive complementarity is fundamental for the success of the Rome Statute in achieving broad impact and welcomed the experts' clear recommendation that positive complementarity be factored into all phases of the OTP's work. She noted that there is also a role for other court actors, as well as the critical role that States Parties have in the success of positive complementarity efforts.

Ms. Evenson stated that while the Court is not a development agency, Court officials remain key resources in promoting positive complementarity. Bearing in mind the focus of the recommendations under discussion, she indicated that there are unique opportunities for the Office during preliminary examinations to have a necessary positive complementarity effect. She noted that this is because governments may avoid the Court's intervention into a situation by showing they are conducting genuine proceedings domestically. This, she stated, provides the Office with an important leverage to serve as a pressure point to deliver justice nationally. She stressed that Preliminary Examinations' primary goal should be a timely determination of whether the ICC would activate its jurisdiction concerning the relevant situation, and that positive complementarity approaches may only be applicable in certain preliminary examinations. Nonetheless, efforts by the OTP to encourage national justice efforts should be an important and secondary policy goal.

To date, Ms. Evenson stated that she was only aware of the Office applying a positive complementarity approach in the situations of Colombia and Guinea. In spite of these efforts, which could be further strengthened, this has so far been insufficient to justify concluding the Office's engagement in these situations in deference to national proceedings. She indicated that, if there are obstacles to justice at the national level, all other jurisdictional requirements are met, and there are no prospects of genuine domestic proceedings, Preliminary Examinations would have to proceed to investigations. But where there are opportunities to engage national authorities on genuine domestic proceedings, the OTP can take a number of steps, including setting benchmarks (as suggested in IER Recommendation R263), expediting its analysis, bringing greater transparency to its preliminary examinations, and work together with other partners, including other States Parties, to support national authorities.

She concluded by stating that IER Recommendations R262 and R264 should be read carefully with the IER findings. In particular, IER Recommendation R262 is linked, in part to their findings that in the absence of a timeline for States to comply with OTP requests during complementarity assessments opens up space for national authorities to manipulate the principle of complementarity – that is stalling or generating just enough domestic activity to make it difficult for the OTP to conclude that cases are admissible, but not sufficient activity to actually result in genuine proceedings.

She stated this is particularly important in situations where the State has carried out some activities domestically, but not sufficient to show that genuine investigations are ongoing. Ms. Evenson noted that the Office should be open to dialogue with States, but with the determination to proceed if States Parties do not. She further noted that what at a point in time might seem genuine could change at a later stage, and in this sense prospective proceedings do remain relevant. Lastly, she indicated that where there are proceedings that seem genuine the Office should keep the Preliminary Examination open and consider genuineness continuously and to engage in a manner directed at bringing about positive complementarity until such time as it is clear that effective domestic proceedings have taken place.

Question and answer session

States Parties welcomed the presentations and participants were encouraged by the facilitators to provide their views and feedback on ideas for future meetings of the complementarity facilitation.

Support was expressed for those IER recommendations dealing with positive complementarity. It was noted that Preliminary Examinations should be taken solely to consider whether to move forward with an investigation, and that positive complementarity should not delay opening investigations. Hope was expressed to see the implementation of the relevant IER recommendations move forward. There was also interest in renewing discussions on situation completion, which were started earlier in the year.

A point was made that the Review process provides for an opportunity both to improve the OTP's approach regarding complementarity as established in the Rome Statute and to correct abuses that have allegedly been occurring by what is perceived as an incorrect interpretation of positive complementarity. It was indicated that it is a very serious burden for States to show continuously that the national justice system is working and that it is indeed willing and able to prosecute the crimes. It was stated that the Court should focus on prosecuting individuals responsible for Rome Statute crimes and not placing the State itself and its institutions on trial. A point was made that the Office used its interpretation of positive complementarity as a way to pressure States on improving their performance to prosecute the crimes themselves. It was suggested that positive complementarity activities should be moved away from the Office and placed within the remit of the relevant cooperation office under the ICC's Registry to act as a 'clearing house' for requests and contact with other organisations. This approach would remove a lot of stress from the Office, so that it can devote the limited resources it has to what is really needed.

Support was expressed towards the IER recommendations, particularly those that seek establishing benchmarks and time frames for the Office to be able to work more efficiently at the different phases of the ICC process. A point was made that capacity building at the domestic level is a goal that would be appreciated. It was stated that this is a matter that has been worked on by the cooperation facilitation by sharing knowledge and experiences. It was noted that, in accordance with the principle of prosecutorial independence, it is for the Office to determine its own policy priorities. This principle should be taken into account in reviewing the IER recommendations.

The point was emphasized that the different IER recommendations under discussion are at the heart of the Office's independence and are only for the OTP to implement. It was noted that the adopted Comprehensive Action Plan allocates recommendation R227 within the Court's remit only. Appreciation was expressed for the OTP sharing their views on the recommendations under discussion.

Amb. Blaak noted that Uganda's domestic judicial proceedings have implemented a model that has been celebrated by several countries and associations. She noted that Uganda is receiving funds from donor related countries to manage its law and justice sector, which has worked very well although with very limited resources. She indicated that the model is highly regulated, but gives a lot of independence to the key domestic legal actors.

Amb. Blaak emphasized that it would be positive if such a model could be implemented in other countries to see how some complementarity issues could be addressed. She noted that Uganda developed a witness protection program, which was discussed with relevant key stakeholders and then presented to parliament. In this vein, she noted that engaging experts also involved the organization Justice Rapid Response with national prosecutors and judges on how to deal with gender-based crimes. She concluded by stressing the importance of positive complementarity.

A point was made that judicial and prosecutorial independence should always be respected, including during review and implementation of IER recommendations.

Mr. Stewart stated that, in a practical sense, the approach the Office has taken, and particularly in relation to Colombia, is to explain to the States Parties that the OTP has a number of responsibilities under the Rome Statute, and to communicate to States Parties involved in a Preliminary Examination which circumstances might trigger an ICC investigation. He noted that the Office never puts States' institutions on trial, but rather reviews if the institutions are dealing with the cases that the ICC would focus on. He indicated that as the Court's jurisdiction is complementary, it is the Office's obligation to make sure that they intervene only in those situations where the Court does have jurisdiction. He stated that the Office is prepared to share its knowledge and experience, and remains open to exchange information with States, because that can help one another achieve common goals.

Mr. Rastan noted that there is a lot of consistency in the thinking behind the IER recommendations and the Office's own trajectory. He noted that while there are some nuances, complexities as well as tensions between some of the IER recommendations, the Office has already experience in seeking to implement them. On timelines for the Office' assessment, he recalled that deadlines might not necessarily lead to reduced workload, but might equally increase the volume of activity assumed by the Office. For example, in many situations, conducting a swift complementarity assessment might result in more situations being opened, because the relevant State(s) had not taken sufficient concrete and tangible steps to progress relevant proceedings. There was thus a need for balance between the benefits of an early determination and the risks of a premature determination. He stated that, in the past, the Office had given some time and space for States to engage national accountability processes where this appeared genuine, but that a different approach was also possible, for example by earlier recourse to Chambers for provisional rulings on admissibility.

On positive complementarity, he stated that the term had come to mean different things for the Office and for the ASP. He indicated that for the Office it meant that it does not intend to engage in a competitive attitude; that the Office does not aim to rush in making a decision on a State's unwillingness or inability; that the Office remains open to engage, to provide the national authorities time and space to initiate cases at the national level, if they can be encouraged to do so genuinely; and that it remains ready to step back if States are willing and able to step up to initiate genuine investigations into those same cases. He indicated that practically, the way this operates is that the Office seeks information from States on whether they are conducting domestic investigations on specific allegations – this is information that the Office needs to carry out its due diligence duties under the Statute to satisfy itself that any cases or potential cases it is investigating would be admissible. But the secondary effect of seeking such information is that it also provides early notice to that State which might also galvanise the State itself to investigate and prosecute, in which case the Office would seek to practically encourage relevant and genuine national proceedings.

By contrast, Mr. Rastan observed that for the ASP 'positive complementarity', as discussed in the ASP's 2010 Kampala stocktaking exercise, had a more programmatic meaning related to capacity building, technical assistance and rule of law donor engagement. He noted that such activities were very different to what the Office did. He stressed that this was not a role for the Office to play, as it had neither the mandate nor capacity to engage in those types of activities. As such, he observed that there appeared to be broad convergence between the understanding and approach of the Office and the States Parties on their mutual but different roles in this context.

In response to this last statement, concerns were raised on the Office interpretation of positive complementarity expressed its appreciation for these explanations and indicated that they were useful in giving more context to their initial comment. The HWG complementarity facilitation was also

thanked for providing the forum and opportunity for allowing such forms of clarification and understandings between the Court and States Parties.

The point was made that the African Group noted the importance of the IER recommendations on these issues and will express its views at a later stage. It was underlined that there need to be a discussion on the division of labour between the ASP and the Court.

Ms. Evenson emphasised that it is important to pay strict attention to respecting the Office's independence. She stated that while these issues are in the hands of the Office, States Parties can still play a very crucial role in supporting a range of positive complementarity efforts.

A delegation noted that the key issue is that there are two different understandings of a single term. It was indicated that the ASP's views and perception of positive complementarity is oriented towards strengthening national capacities through international cooperation, to enhance the role of the ICC. It was further stated that the other sense of the term, as understood by the Office, refers to the way the OTP handles its responsibility when exercising the principle of complementarity itself, without additional objectives.

The point was made that while the Office does not make any judgement on the capacities of any given State Party when making a determination on complementarity, there is a political consequence for a country being subject to a Preliminary Examination, which is the perception that the country is either unwilling or unable to genuinely investigate or prosecute. He noted that in the eyes of the international community that State might be considered as having a second rate judiciary. He concluded by saying it would be better to focus on the ASP's interpretation of positive complementarity by moving it away from the Office and placing it under the Registrar's office.

Amb. Blaak thanked the speakers for their presentations and all participants for their engagement. She noted that the facilitation might hold another meeting in late October to discuss further complementarity and the division of labour between the Court and the ASP, as well as to kick-start discussions on Recommendation R247.

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