

SECRETARIAT OF THE ASSEMBLY OF STATES PARTIES

THE HAGUE WORKING GROUP OF THE BUREAU

Cooperation

Second meeting (via Zoom)

4 November 2021

Informal summary

The meeting was chaired by the co-facilitator for cooperation, Ambassador Luis Vassy (France).

Ambassador Vassy welcomed the participants and noted that unfortunately the co-facilitator Ambassador Momar Guèye (Sénégal) was unable to attend the meeting due to other conflicting commitments. Ambassador Vassy, thanked the Registry for providing English and French interpretation during the meeting. Ambassador Vassy recalled that the work program of the facilitation, presented during the 13 July meeting and containing the co-facilitators' approach to the assessment of the Independent Expert Review recommendations, did not elicit any particular reactions or objections and thus was considered as a relevant working basis to carry out their work. He noted that the objective of the meeting was twofold; on the one hand, the Court would give a brief presentation of its report on cooperation, and on the other hand, a discussion in order to assess some of the recommendations resulting from the report of independent experts who have been allocated to the facilitation on cooperation.

Item 1 - Presentation of the Report on Cooperation by the Court

Ms. Anne-Aurore Bertrand, External Relations and Cooperation Officer at the Registry, gave a brief overview of the Court's report on cooperation. In her presentation, Ms. Bertrand indicated that the report covered the period between 16 September 2020 and 15 September 2021. She emphasized that cooperation work remained important during the ongoing challenging period of the Covid19 pandemic. She noted that the Office of the Prosecutor made 387 requests for judicial assistance; the Registry made 467 requests for cooperation, and noted that this figure took into account more operational support requests made by offices located in situation countries. She clarified that requests for legal assistance in the strict sense amounted to 124. Ms. Bertrand also noted that on average, States respond within two to three months of sending the request. She noted that these deadlines vary greatly depending on the nature of the request.

Ms. Bertrand noted that in general, the cooperation received by the Court was good but some difficulties were still present. For example, the office of the Prosecutor encountered difficulties with regard to requests to obtain large amounts or very technical of information. The Registry faced difficulties with respect to voluntary cooperation for example to support family visits to detainees.

Ms. Bertrand welcomed the positive development of the signature of two cooperation agreements: one Between France and the ICC Presidency on the execution of sentences, and the 25th relocation agreement with the Court. She also welcomed a donation of 20,000 euros by Avocats Sans Frontières for family visits of detained persons.

Ms. Bertrand noted that the report welcomes positive results over the period covered with regards arrest and surrender procedures. For example, she noted that Mr. Paul Gicheru surrendered to the Dutch

authorities on 2 November 2020; and that Mr. Mahamat Said Abdel Kani was handed over to the Court in Bangui on 24 January 2021, following his arrest in the Central African Republic.

Ms. Bertrand indicated that the report highlighted the crucial importance of cooperation supporting financial investigations and asset recovery as well as cooperation with the defense. She also updated on three other priorities, namely legal mechanisms allowing the implementation of the Rome Statute, diplomatic support and cooperation between states. With regards the establishment of States legal mechanisms to implement the Rome Statute and to cooperate with the Court, Ms. Bertrand indicated that regrettably, due to pandemic some events like the roundtable with the Court's national focal points had to be canceled. She also noted that these in-person meetings are extremely important and hoped they would resume soon. She also added that the Court worked with States to strengthen its capacities, for instance by establishing a network of focal points specialized in asset recovery, thanks to the financial support of France.

With regards diplomatic support to the Court, Ms. Bertrand noted that other events took place virtually, such as the roundtable with the United Nations and another one with NGOs. Ms. Bertrand used the opportunity to thank once again support the Court received from States following the sanctions imposed by the United States, and noted that the Presidential Decree 13928 was revoked on 2 April 2021.

In her concluding remarks, Ms. Bertrand encouraged direct dialogue between States, and noted that the Office of the Prosecutor in particular continues its engagement with national jurisdictions, especially within the framework of a strategy of coordinated investigations and prosecutions aimed at bridging the impunity gap for the crimes of the Rome Statute.

Item 2 - Assessment of the Independent Expert Review recommendations related to Cooperation

Ambassador Vassy indicated that the facilitation had been allocated a total of 47 recommendations by the Review Mechanism on the follow-up to the review in its Comprehensive Action Plan adopted in July by the Bureau. He noted that the facilitation work plan proposed to group the recommendations, not by chronological order of the recommendations, but by coherent thematic groups in order to streamline the discussions. In this regard, this organization by clusters and workload distribution does deviate somewhat from the Comprehensive Action Plan of the Review Mechanism with regard to deadlines and that the discussion of certain recommendations would be postponed until the first half of 2022. In addition, this organization of work would give the Prosecutor additional time to put in place certain measures relating to the organization of his office. Ambassador Vassy underlined that this approach was presented to the representatives of the Review Mechanism who took note and recognized the need for flexibility.

Accordingly, ambassador Vassy proposed to address the following two groups of recommendations during the meeting:

- Recommendations which deal with cooperation between the ICC and international organizations, in particular the UN and its agencies: R149, R152, R153, R272 and R275.
- Recommendations which deal with cooperation (modalities of interactions regarding judicial assistance) between the ICC and States: R272, R273, R274, R276, R277, R279, R280, R281, R285

Ambassador Vassy proposed to postpone until next year the discussion on other recommendations, which had also been entrusted to the facilitation on cooperation by the Comprehensive Action Plan of

the Review Mechanism. These relate to Investigative strategies, investigation techniques and tools, the field presence of the Office of the Prosecutor, the resources of the Office of the Prosecutor and internal cooperation capacities, specific issues dealt with separately which involve Assembly of States Parties such as New York Liaison Office review (R150 and R151), establishment of a reward program (R289), establishment of a focal point for arrests (R284).

Mr. Matias Hellman, External Relations Adviser at the ICC Presidency, presented the Court's view for the first group of recommendations identified, namely those relating to cooperation relations with the United Nations and international and regional organizations. He noted that his presentation was based on the Court's Overall Response, which was issued on April 2021. Mr. Hellman, noted in relation to recommendation 149 that the Court fully agreed on the paramount importance of UN-ICC cooperation. He noted the existence of a frequent, positive and constructive communication between the two organizations, and highlighted a virtual UN-ICC roundtable held in May-June 2021. With regards the specific recommendation to appoint a single focal point in The Hague, Mr. Hellman affirmed that the Court is not in a position to support it as such, as the ICC already has a Court-wide channel of communication to the UN in the form of the New York Liaison Office, which is within the Registry structure but services the Court as a whole. Mr. Hellman further explained that the different roles and independence of the Court organs, as well as associated confidentiality aspects, require the involvement of different persons at the Headquarters end. He noted that the Court does agree with the underlying rationale to explore possible ways to improve the existing model of interaction between the Court and the UN, and that the Court was ready to engage with the UN with a view to discussing this issue. In this vein, Mr. Hellman indicated that the President of the Court would be meeting with the UN Legal Counsel in New York the following week and that he intended to raise this matter at that meeting.

Mr. Hellman continued with recommendation 152, indicating that the Court supported this recommendation. He noted that high-level contacts and leadership level consultations were crucial for maintaining and where possible enhancing the invaluable cooperation of the UN with the ICC. This is particularly the case in relation to the Court's operations in the field, and the assistance required in that context. He concluded by stating that the Court already uses all available opportunities for high-level consultations, and the already mentioned upcoming meeting with the UN Legal Counsel would be an opportunity to explore ways to establish more frequent and regular consultations at leadership level.

Concerning this group of recommendations, Deputy Prosecutor Mr. James Stewart, noted that in addition to the Court approach, the OTP intended to complement it on matters belonging to its mandate by direct and regular interaction between the OTP and the UN, noting the usual and active engagement that already exists at the operational level for a more efficient implementation of cooperation requests. He indicated that the OTP also has a regular and very smooth interactions with the Office of the Legal Counsel, our focal point within the UN system. He added that regular briefings to the UN Security Council, as well as ad hoc meetings under the Arria formula, have also proved very useful in improving cooperation. Another way the OTP interacts with the UN officials is by way of regular meetings with relevant UN Officials such as the UN Secretary General's Special Advisors on Children in Conflict, Sexual Violence and Genocide Prevention, noting how these interactions have also created greater synergy of action between and beyond the two institutions. Finally, Mr. Stewart noted that high-level engagements with other UN accountability mechanisms, including those based in Geneva, have allowed for the identification of best practices for cooperation. He concluded by stating that the OTP remains open to dialogue and continues explore partnerships with regional organizations, such as the African Union.

Concerning R272 a State Party noted, that while not opposing the recommendation per se, assistance rendered by a State or an intergovernmental organization should be preferable, if is not excessive and if it can provide the same level of secured enforcement.

A State Party commented in relation to R149, that while understanding the statutory limitations regarding a unified communication of the Court vis a vis the UN Secretariat, links between this recommendation with the overall recommendations on the One Court Principle and unified governance of the Court should be taken into account.

In response to a question regarding the interaction with the regional organisations, Mr. Stewart indicated that the Office of the Prosecutor has tried to develop links with African Union for a long time with limited success, noting however that currently there seems to be an opportunity to improve the relationship with that institution in the near future. With regards to Asian region, he noted that despite challenges faced, the OTP would maintain their efforts to develop relations which are very important for several situations of the Office. Concerning Europol, Mr. Stewart indicated that the Office has active relationship with Europol similar to that with Eurojust and its Genocide network.

In response to a question concerning regular interactions with the UN agencies and the potential role of the Deputy Prosecutors taking on this role, Mr. Stewart noted that the Prosecutor is restructuring the Office to include an Office and Director of External Relations and part of its job will be that kind of interaction. He did not wish to go further in commenting any role of the Deputy Prosecutors, in particular, in this context.

In response to a question related to virtual communication with regional organizations during the pandemic, Mr. Hellman noted that the Court held a virtual meeting with the EU earlier in the year, but that for some other organisations such type of meetings have proved to be challenging.

Ambassador Vassy then proposed to move on to the second group of recommendations, which was more substantial, as it included the modalities of interactions between the Office of the Prosecutor and States Parties in the context of requests for judicial cooperation or RFA (Requests for assistance) which are the subject of numerous recommendations. He also noted that some recommendations address the possibility of concluding Memoranda of Understanding or even propose a uniform framework for cooperation. Ambassador Vassy added that certain recommendations outline interesting avenues, such as R277, which proposes to organize joint training courses for agents of the Court and investigators from States Parties in order to build capacities but also to consolidate networks of contacts. He proposed that the Court could elaborate further on this issue and propose specific actions, with the support of the States Parties.

Mr. Stewart indicated that based upon the Court's overall response, he would present these recommendations divided into 3 sub-groups:

- 1) *Cooperation tools relating to States Parties, international and intergovernmental organizations, and private companies (R272 and R275)*

Mr. Stewart noted that through the International Cooperation Section of JCCD, the Office negotiates agreements and arrangements with States, especially situation countries. The Office also seeks with States, the United Nations and other partners, the possibility of concluding specific arrangements, through an exchange of letters, to facilitate a mission or the execution of a specific measure. The OTP also actively tries to maintain and explore ways of reinforcing existing partnership agreements as much as possible as well as to develop new partnerships thanks to the specific focal points in each country. He also added that the OTP remains flexible in its approach to operational needs because it believes that not all partnerships need to be translated into agreements and arrangements, but there are other ways to formalize and maintain them more effectively. He concluded by stressing the importance of taking into

account the existing framework agreement between the UN and the ICC as well as the support of the UN Office of Legal Affairs (OLA), to increase its interaction with UN programs, funds and offices as well as its role as a facilitator to enable the effective implementation of the framework agreement. With regard to R272 and R275, Mr. Stewart noted that these were actionable recommendations that should be positively assessed for on-going implementation.

2) Partnership with the ASP to develop cooperation networks (R273 and R274)

Mr. Stewart indicated that the OTP continues to explore and promote standard practices and procedures, where possible. The Office also continues its efforts towards greater integration with regional partners, an important part of the Prosecutor's new approach. He noted that the Office would continue to rely on The Hague Working Group, which has a facilitating role in cooperation and priority areas remain financial investigations, difficulties in locating and arresting fugitives and access to certain national immigration files. The Office also continues to support and contribute to initiatives by some States to conclude mutual legal assistance treaties, but also to efforts to establish uniform practices in mutual legal assistance at the regional level. In sum, R273 and R274 should be positively assessed as, within certain practical constraints, susceptible of implementation.

2) Judicial Assistance for evidence collection (R276 to R279, R281 and R285)

Mr. Stewart noted that for the implementation of R276, the Office collects relevant information on national laws, procedures and policies on co-operation that are useful in the development of co-operation plans and in interactions with States. This information is also made available to the integrated teams. The Office also engages in regular pre-submission consultations with States to ensure that draft requests for assistance meet national requirements.

Mr. Stewart asserted that R277 was also to be positively embraced, although its implementation would require time and resources. With the support of the generous grant from the European Commission, the OTP, together with Registry, has organized such trainings and seminars on specific topics, such as on financial investigation and the freezing of assets as well as on witness management. The Office, in partnership with the Court, also conducted periodic annual trainings and seminars with national focal points for cooperation in situation countries and other third States with which it has a high volume of requests. Mr. Stewart added that the OTP, in collaboration with the Court, continued to organize or contribute to regional training courses for legal professionals, such as magistrates or law enforcement staff. The office also participated in coordinated events with other international organizations, such as Interpol, Eurojust and Europol. He also noted that since taking office, the Prosecutor has attached great importance to this recommendation, which he has raised at every opportunity, particularly during his visit to France, where the possibility of an exchange of good practice between the National Terrorism Prosecution Office (Parquet national anti-terroriste – PNAT) and his office was envisaged.

Mr. Stewart affirmed that the implementation of R278 was desirable and had in fact been operationalized, in connection with several States Parties, but also is limited in its scope by the current statutory restrictions. He added that it was an important aspect of the Prosecutor's vision and was under active consideration in discussions with States Parties, such as France. Mr. Stewart indicated that internally, the Office, in collaboration with the other organs of the Court, was actively working on operationalizing the necessary steps to ensure that staff secondments were integrated into the standards applied by the Human Resources Section of the Court, without compromising the principle of recruitment based on representation and merit.

Regarding R279 and R281, he noted that the OTP had implemented ways to increase the speed and efficiency of the request for assistance process, improve the examination process and prevent bottlenecks. In addition, He mentioned that in a similar manner, the OTP had harmonized its requests for cooperation by developing model RFAs, standardizing its interactions with national law enforcement and justice actors and improving quality control while taking into account the variability of national laws and requirements in this regard.

On R281, Mr. Stewart indicated that the RFA database was accessible to members of all integrated teams. In addition, the Office of the Prosecutor had been able to reduce some of the delays by strengthening its French language capacity, given the language used by the authorities in many of the situation countries where it currently operated.

Mr. Stewart concluded his presentation noting that the OTP supported the implementation of R285 and was making efforts to increase the involvement of the Suspects-At-Large Tracking Team (SALTT) with national law enforcement agencies, but with the retirement of one of its investigators, it still suffered from insufficient capacity. The SALTT had organized meetings with relevant States Parties, to increase access to special investigative techniques; as authorized by these States, it had ongoing direct contacts with partners at the technical level. However, the SALTT would benefit from a more coordinated approach on the part of States Parties and the addition of an analyst or investigator to the team.

Mr. Stewart indicated that R276 to R279, R281 and R285 were all worthy of positive assessment, they were also already being implemented, or should be considered for implementation.

Concerning R285 a State Party indicated that the creation of an ASP focal point would be welcomed, but stressed the need to be cognizant of the operational limitations both legally and otherwise that States Parties operate under when trying to track witnesses or suspects. In addition, it was suggested that it would be beneficial to have a focal point with experience in the field, for example someone who has worked in the criminal prosecution service of a country.

A State Party raised an objection concerning R277, arguing that the implementation might be dangerous for the respect of the formal rules of cooperation and confidentiality. Further, the State Party expressed concern that this can only be achieved by a minority of States with the capacity to offer such training. Ambassador Vassy noted that the issue could be related to the interpretation of the recommendation and that additional consultations on a bilateral basis could be beneficial going forward. The suggestion by Ambassador Vassy to discuss the recommendation further was welcomed.

On behalf of the African Group, a representative from Cote d'Ivoire thanked the Organs of the Court for the useful presentations, of which the group took note. The representative indicated that Cooperation is very important for the African Group and that the Group was looking forward to these recommendations being tackled on the first half of 2022.

In response to a comment concerning R274 and narrowing the scope of RFAs, Mr. Stewart noted that the OTP has encountered some difficulties with the number of different laws and legal requirements in the different States Parties, and added that it was challenging to have a one-size fits all approach. He noted that the notion of having basic elements common to these cooperation frameworks, was a wise observation that could benefit the Office. In addition. Mr. Stewart noted regarding joint trainings, that the OTP's practical experience had been beneficial, for example when participating in trainings organized by the Institute for International Criminal Investigations, as it allowed for Court investigators to interact with investigators of domestic jurisdictions, and contribute with their respective and unique expertise, such as with SGBC. He added that this idea deserved more exploration.

Item 3 - Any Other Business

Ambassador Vassy presented the co-facilitators proposed modalities of their report on cooperation and the envisaged plenary session on cooperation scheduled for the morning of 8 December as part of the provisional program for the 20th session of the ASP.

Regarding the question of reporting, ambassador Vassy noted that some facilitations have chosen to prepare two reports, one on the assessment of recommendations of the independent expert review, and the usual annual report on activities of the facilitation. Ambassador Vassy indicated that, in agreement with the representatives of the review mechanism, the co-facilitators on cooperation had chosen to submit one report instead of two. This report, he affirmed, would include the usual annual facilitation report and a specific section addressing the assessment of recommendations, as well as the proposed resolution language.

Regarding the cooperation plenary session, ambassador Vassy stated that the co-facilitators in consultation with the organs of the Court agreed to devote to other issues identified in the framework of the program of work, namely cooperation agreements and the launch of a network of national focal points in matters of identification and freezing of assets. With regards the former, ambassador Vassy was pleased to recall that on October 11 the French Minister of Justice signed an agreement on the execution of sentences with the Presidency of the Court. Concerning the latter, ambassador Vassy indicated that the networking or joint training activities of the network could be based on the voluntary financial contribution paid at the end of 2020 by France and materially on a specific development of the secure electronic platform set up in 2020 and which was not yet optimally being used.

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