

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

THE HAGUE WORKING GROUP

Complementarity and Cooperation

Joint Meeting

The division of labour between the Court and ASP on complementarity and cooperation

29 March 2022

Summary

The meeting was chaired by the representatives of the ad country co-focal points, Ambassador Matthew Neuhaus (Australia), Ambassador Mirjam Blaak (Uganda), and the co-facilitators for cooperation, Ambassador Momar Gueye (Senegal) and Ambassador Luis Vassy (France).

Ambassador Neuhaus recalled that the facilitation on complementarity in mid-2020 organised informal consultations with the Court and relevant stakeholders to discuss the priority review topic “*Complementarity and the relationship between national jurisdictions and the Court*”. He indicated that during that meeting, Professor Carsten Stahn – an invited guest speaker – suggested that the best way to strengthen complementarity was through dialogue and consultation, suggesting a more structured forum inside the Assembly, such as an “ASP Task Force on Complementarity”. Such a specialized structure could consult or co-ordinate collectively on the systemic dimensions of complementarity, galvanize support for capacity building strategies or facilitate communications between the Court and non-States Parties in a sustainable manner.

Ambassador Blaak noted that the IER Report made a number of observations and a recommendation on the issue of the ‘division of labour between the Court and ASP on complementarity and cooperation’. In this regard, she indicated that paragraph 736 from that report said: “*the ASP could play an important role in facilitating partnerships between the OTP and the States Parties, non-States Parties, and other organisations. It could, for instance, facilitate judicial requests from States Parties to the OTP; act as a forum for dialogue between the States Parties (especially the situation states) and other regional or international bodies. The ASP could also assist in relation to developing national and regional responses to criminal incidents and the development of the rule of law and assist in monitoring the implementation of completion strategies.*”

In addition, Ambassador Blaak noted that in a separate part of the report, regarding completion strategies, the IER made a series of recommendations on what should be included in the OTP’s then draft paper on completion. One of those recommendations – 247(ii) – was that: “*The ASP should consider establishing a working group to assist and support the Court in addressing impunity gaps and facilitating partnerships to develop domestic justice processes and maintenance of the rule of law*”. She added that recommendation 247(ii) was quite similar to the idea proposed by Professor Stahn at the 2020 meeting.

Ambassador Blaak noted that as part of the review process, the facilitations must indicate to the Review Mechanism whether the recommendation is positively assessed or not. If through the discussions the recommendation is positively assessed then she suggested that the co-focal points on complementarity and the co-facilitators on cooperation prepare some options on possible implementation, for further discussion in due course.

The reason for coordinating with the co-facilitators on cooperation was that recommendation 247 (ii) goes beyond the scope of complementarity and intersects with a number of cooperation issues, namely: information and evidence sharing between national jurisdictions and the Court; facilitating judicial requests from States Parties to the Court; and, facilitating partnerships for cooperation more generally between states and the Court.

Ambassador Gueye noted that the Assembly has given the facilitators on cooperation the mission and the responsibility to implement initiatives and actions likely to meet the many challenges that arise in this area and improve cooperation between the Court and other actors, mainly States and international organizations. He also noted that the ASP has identified a series of priority themes such as the effectiveness of investigations and prosecutions, the execution of arrest warrants, requests for surrender, the adoption by States Parties of implementing legislation of the Rome Statute, financial investigations and the freezing of assets, as well as voluntary cooperation through the promotion of the conclusion of voluntary cooperation agreements.

In this regard, Ambassador Gueye recalled the 2018 seminar organized by the facilitation on the theme of arrests that brought together eminent experts from various regions of the world to exchange ideas on the difficulties encountered in this area and to propose possible solutions. In the context of the review of the Court, Ambassador Gueye also recalled the assessment exercise of the IER recommendations that took place during the two meetings of the cooperation facilitation last year, and which will continue this year.

With regard to recommendation 247 (ii) he highlighted that the effectiveness of the fight against impunity necessarily depends on the improvement of cooperation but also through the strengthening of the domestic judicial systems of States. He concluded by stating that when devising new approaches it should be done while bearing in mind the importance of making better use of the already existing tools, such as the secure digital platform on cooperation, accessible to all States Parties.

Ambassador Vassy recalled that cooperation and complementarity are both faces of the same coin. He noted that the Court was at a special point in time, referring to the joint-referral by 41 states of the situation in Ukraine. He indicated that a crisis, such as the situation in Ukraine, revealed the importance of cooperation and complementarity. In this regard, he noted that there were increased coordination and cooperation efforts by many actors in terms of investigation and the collection of evidence, and that this could serve both the Office of the Prosecutor and national jurisdictions in the application of the principle of complementarity. He praised the atmosphere of confidence and cooperation among stakeholders in The Hague, such that stakeholders were not territorial in respect of jurisdiction. Rather, there were continuous efforts to better understand and support national jurisdictions, who are better equipped to carry out proceedings.

With regard to recommendation 247(ii), he indicated that the creation of new structures such as a new working group must be viewed with caution. He noted that States themselves and collectively have a role to play with regard to the fight against impunity and international criminal justice as a whole by ensuring a well-functioning dialogue between all the actors involved in a situation. Ambassador Vassy recalled the action taken recently with regards the situation in Ukraine by bringing closer the European Union Agency for Criminal Justice Cooperation (Eurojust) and the Office of the Prosecutor to increase cooperation between national jurisdictions and the ICC. He proposed to organise at a later stage a meeting with Eurojust and EU Member States to get some feedback on the main operational and technical challenges and opportunities in their cooperation.

Ambassador Vassy also invited States to use existing tools such as the secure digital platform on cooperation, financial investigations and the freezing of assets. These tools serve to strengthen the capacity of States to cooperate with the Court and, at the same time, to strengthen their own national capacities to investigate and prosecute within the framework of their national justice system.

Ms. Gaile Ramoutar (Legal Officer at the Secretariat) noted that at the Review Conference in 2010 by resolution RC-Res.1 the Assembly mandated the Secretariat “*within existing resources, to facilitate the exchange of information between the Court, States Parties and other stakeholders, including international organizations and civil society, aimed at strengthening domestic jurisdictions*”. As the Secretariat’s focal point on complementarity, she had, in close consultation with the Complementarity focal points at the time, Denmark and South Africa, adopted a two-track approach to carrying out this mandate. The Secretariat maintained and updated a list of complementarity actors that could be contacted to assist with capacity-building needs identified by States Parties. In addition, the Secretariat, together with the focal points, created an online Complementarity Platform for the exchange of ideas, projects, and opportunities for cooperation among stakeholders in the areas of capacity building that were available to States, e.g. implementing legislation, infrastructure, facilities, witness protection, activities in situation countries.

She recalled that the Secretariat, in consultation with the focal points, circulated on an annual basis a note verbale inviting States Parties to indicate areas in which they require technical assistance. Once the Secretariat receives a request, the focal point in the Secretariat (legal officer) coordinates with the requesting State, with a view to sharing information with actors that may be in a position to assist, drawing on the existing Assembly Secretariat complementarity web platform.^[1] The Secretariat focal point acts as a liaison between requesting States and donor States or organizations. The Secretariat works with the requesting State in proceeding with the request, including on any specific confidentiality requirements.

Ms. Ramoutar noted that to date, the limited responses submitted to the Secretariat had traditionally hampered it in carrying out its mandate. She emphasized that this was not necessarily a matter of resources of the Secretariat, and that while all actors have a role to play, the complementarity platform relies to a large extent on States Parties’ active participation. She concluded that in order to effectively carry out this mandate, the Secretariat must receive information from States Parties on the assistance that is required, as well as on available assistance offered by States and other actors. Ms. Ramoutar suggested that through the complementarity facilitation, States Parties were encouraged to approach the Secretariat regarding their available assistance or needs.

Ambassador Blaak noted the close cooperation of the OTP with Uganda as a situation country, and noted the visit of the Head of the International Crimes Division of the High Court of Uganda and the visit of the Registrar of the Court to Uganda. She highlighted the challenges faced by developing countries such as Uganda to emulate the ICC level of proceedings and standards at the national level, for example on matters of witness protection, interpretation issues and length of proceedings. She clarified that the Court is not a development organisation, which is why support from States and organisations through complementarity is paramount to close these gaps. She encouraged States to promote existing tools like the complementarity platform.

Ambassador Neuhaus indicated that the aim of the discussion was to get a sense of whether recommendation 247(ii) was to be assessed positively or not and whether changes would be needed in the existing mandates in order to strengthen the facilitations’ role as envisaged by the IER report.

A delegation concurred with Ambassador Vassy’s comments calling for caution with regard to the creation of a new working group to tackle this issue. In terms of the role that the ASP could play, it was noted that the IER recommendation seemed to call for a task force that would work with the Court and States on concrete aspects of cooperation and complementarity at the technical and expert levels. The delegation highlighted that such a dialogue should respect and not restrict the independence of the Court and its judicial functions, nor interfere with negotiations at the diplomatic level. The delegation

^[1] https://asp.icc-cpi.int/en_menus/asp/complementarity/List-of-Actors/Pages/default.aspx

noted that it would be useful to use existing structures and to assess whether the cooperation and complementarity platforms, which seemed to be underused, should be optimized to achieve better results.

Mr. Mamadou-Racine Ly (Legal Adviser, OTP) indicated that the process of transition was ongoing and that the Prosecutor was re-examining the Office's policies and practices with careful consideration of the IER recommendations, including in particular recommendation 247.

He noted that since taking office, the Prosecutor has already demonstrated in practice the consistency of his vision on complementarity by reaffirming that national jurisdictions have the primary responsibility for investigating and prosecuting the most serious crimes. He noted that this was the case for instance in Colombia and Venezuela. Concerning Colombia, the Prosecutor determined that the national authorities were neither inactive, unwilling nor unable to genuinely investigate and prosecute Rome Statute crimes, and accordingly, the preliminary examination was brought to a close. With regard to Venezuela, the Office reached its determination on admissibility on the basis of the facts as they exist. He noted that the Prosecutor stressed that, "the principle of complementarity is the foundation of the Rome Statute system and it remains an important principle during the investigation stage". This resulted in the signing of a Memorandum of Understanding (MoU) on 3 November 2021, in Caracas, with the Government of Venezuela. He added that the Statute and the Court's case law are clear that the admissibility assessment must be carried out on the basis of the facts as they exist.

He also emphasized the Office's regional approach as a new safety net by enhancing of readiness of national jurisdictions through positive complementarity, with particular attention to the Sahel region as well as to the coordination efforts of domestic prosecution services within the EU genocide network. He also noted the Office's efforts by building mutual legal assistance relations. In this respect, he indicated that the Prosecutor had appointed, for the first time, a Special Adviser on Mutual Legal Assistance, Mr Yoshimitsu Yamauchi (Japan).

Mr. Ly concluded by noting that the OTP remained committed to engage with the facilitators in order to strengthen complementarity and more effectively work towards closing impunity gaps.

A delegation invited stakeholders to an event organised together with the Office of the Prosecutor on Thursday, April 7 2022 at the Court to share the Swedish and German experiences on complementarity. Ambassador Gueye indicated that a seminar on the topic of cooperation would be organised in collaboration with the Court from 23-25 May 2022 in Dakar, Senegal.

Ambassador Blaak called for the organisation of a visit to Brussels with facilitators, members of the Office of the Prosecutor and the Secretariat to present the platforms to those delegations based there and encourage States to make better use of the existing tools for complementarity and cooperation.

The facilitators determined that no active support was expressed towards the creation of a new mechanism and that the conclusion was therefore that the use of existing platforms should be promoted and encouraged.
