

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

THE HAGUE WORKING GROUP OF THE BUREAU

Complementarity

Third meeting

7 October 2022

Summary

The meeting was held in a hybrid format and was chaired by the representatives of the ad country co-focal points, Ambassador Matthew Neuhaus (Australia) and Ambassador Mirjam Blaak (Uganda).

Ambassador Neuhaus indicated that last year's omnibus resolution encouraged the Bureau to engage with interested States Parties and other relevant actors to identify ways to support Court efforts with respect to Sexual and Gender Based Crimes (SGBC). He added that the complementarity facilitation had again taken up this task, as its overall mandate also extends to assisting "on issues such as witness and victim's protection and SGBC". He noted that last year the facilitation explored ways to support the ICC Judges to further develop the Court's jurisprudence on SGBC, and that the focus this year was on enhancing effective cooperation between the Court and national authorities to achieve accountability for SGBV crimes.

Professor Kim Thuy Seelinger (Research Associate Professor, JD, New York University School of Law) reflected on the meaning of complementarity beyond the existing definition in the Rome Statute, which encompasses a rich diversity of national systems with different levels of experience in the field. She indicated that the key to overcoming challenges and reaching positive results with complementarity is mutual respect when working with national actors, from prosecutors and judges to victims and their advocates, building relationships at the personal and at the institutional level. She noted that while developing the technical aspects of complementarity was important, a relationship of trust remained fundamental.

Professor Thuy Seelinger noted that while the ICC needs and deserves support, it has limitations. She highlighted the important role of national courts in accountability for SGBC. In this regard, she described the evolution of local and hybrid international responses to international crimes as well as the increased use of the universal jurisdiction model in the last years. In spite of these positive developments, many challenges endemic to SGBC remain in both the national and international jurisdictions. Some challenges have unique aspects in national systems, such as insufficiencies in the legal framework, for example procedural misalignments, different definitions of offences and retroactivity issues, among others, even in countries where the Rome State has been domesticated. She highlighted a particular challenge where temporal gaps exist between the national statutory framework and the Rome Statute jurisdiction. She noted that these issues represent a significant challenge particularly for SGBC and that complementarity plays an important role in this regard.

Professor Thuy Seelinger noted that for this purpose, an online practice database is being developed that would allow national actors to match the facts of their case, determine the time-line, and bring up all the relevant jurisprudence up until that point in time. This would enable practitioners to be more secure when bringing charges, as well as in deliberation. She indicated that the database would be ready by next year. She also noted the work carried out by a UN team of experts that had released model legislation related to SBGC.

She also highlighted the importance of reflecting on how gender norms and bias affect our perceptions and processes, as gender analysis informs and broadens the scope and understanding of SBGC.

She noted other challenges such as the lack of political will, amnesties and reliance on international donors that may require frank assessment. She highlighted a serious challenge from an ethical standpoint, namely that accountability cannot work unless victims and witnesses receive the proper support and protection before they step into the courtroom. She concluded noting that an additional challenge in national systems is the late addition of SGBC charges to the indictment or investigation strategy. Sometimes SGBC charges are brought once the case is already underway. One of the reasons for this is that not every survivor is interested in justice at the same time, and the readiness to share what happened to them depends on who/where they are, security concerns and the personal or family situation. In this respect, she noted that national systems with their proximity to local populations might play an important role, with the support of civil society to liaise with communities.

Ms. Dianne Luping (Head of the Gender and Children Unit - GCU - OTP) noted that her unit, the GCU, was established in 2003 and was charged with assisting OTP in legal, investigative and strategic issues related to SGBC and crimes against and affecting children. She noted that the work of the GCU is seen as a key priority for the OTP, in particular because these types of crimes are often insufficiently investigated or prosecuted and the severe impact upon vulnerable persons who need to be engaged in an appropriate manner.

Ms. Luping noted that the Rome Statute itself was an achievement as it was the first clear international articulation of a wide range of explicit SGBC (eg, rape, sexual slavery, enforced prostitution, enforced sterilisation, forced pregnancy). Additionally, the rules of procedure and evidence regarding cases related to SGBC are relatively progressive (e.g. you cannot infer consent to sexual relations if there is a coercive environment; and a person's prior sexual history is irrelevant). She indicated that these rules have made a massive difference to the individuals who come to testify before the Court, where there is a different environment in the courtroom. There is great emphasis on protecting the dignity and privacy of individuals and their testimony, ensuring respectful methods of questioning with a trauma informed approach. There are often agreements in advance between the OTP and the Defence teams to avoid re-traumatisation of survivors. She referred to landmark decisions such as *Prosecutor v Ntaganda*, where Mr. Ntaganda was convicted for the rape and sexual slavery of members of the same armed group (those below age 15).

Ms. Luping indicated that the mandate of the GCU was changed from a more logistical role and ad hoc legal support to a more involved and embedded role in the work of the OTP, working closely with teams to improve how to look at victims and survivors from an SBGC perspective. The unit also provides support and training to teams, necessary for the better understanding of these kinds of crimes but also the intersectionality within the OTP.

Ms. Luping stated that Complementarity is important for the OTP, noting that the Court cannot address these crimes alone. Ensuring that these crimes are tackled effectively at the national level is important too. She highlighted the existing good cooperation with Uganda which has benefited from the experience of the Court. She also noted that the OTP can also profit from the support from State Parties to the Court, for example, her office has benefited from seconded staff. She indicated that the OTP is also benefiting from the recently established Trust Fund, from not only the witness management perspective but also specifically in support of the work on SGBC, with training and building capacity within the Office. She referred to examples of support in training from France (head of the anti-terrorism unit of magistrates) and Germany (head of the international crimes section of the Federal Prosecutors).

Ambassador Blaak briefed the facilitation on a second monitoring visit to Uganda organised by the Trust Fund for Victims (TFV), the Irish embassies in The Hague and Kampala from 13 to 17 September 2022 with 48 members of delegations and a total of 14 countries represented. She noted that a previous monitoring visit took place in 2018. Ambassador Blaak indicated that the objective of the monitoring visit was to provide delegates with the opportunity to witness first-hand the work of the TFV in northern

Uganda, focusing on the lasting impact of the conflict and the individuals and communities affected by the many atrocities committed. Participating delegates also gained insight into the ongoing TFV's reparation implementation programmes in the Democratic Republic of the Congo, as they listened to the experience of three beneficiaries who received reparation awards in the Lubanga and the Katanga cases. The victims of these cases came to northern Uganda to brief delegates on how they received reparative justice through the ICC, TFV and its implementing partners. In this regard, she also highlighted the importance of mental health and counselling, particularly for victims of SGBV who are severely traumatised, given that the healing process for these individuals can take several years. She also emphasized that male victims should not be overlooked when addressing these types of crimes.

Ms. Franziska Eckelmans (Acting Executive Director of the TFV) thanked Ambassador Blaak for the support provided by Uganda for these monitoring visits, as well as for the ongoing cooperation since the TFV started projects in Uganda in 2008. She highlighted the TFV's numbers from last year with respect to two of their projects in Uganda that supported 1,033 victims of SGBV with physical and physiological rehabilitation as well as providing socio-economic measures. Ms. Eckelmans also thanked the government of Australia for its donation for SGBV victims in the Ntaganda case. Thanks to this donation, the TFV has a small project providing support for victims of SGBV that currently continues even if the Chambers' main reparations order had been reversed in September 2022.

She stated that the TFV could only be active if there is State cooperation, to work together with governments. She noted that in Central African Republic, in particular the TFV had reached 4,845 SGBV victims within two years, in particular victims of rape following the acquittal in the Bemba case. She also indicated that the TFV trained 94 social workers to provide psychological services, and put in place 20 collective psychotherapists. She noted that the TFV also provided support to 378 women with serious medical issues, and treated 378 victims of rape and HIV.

Ms. Eckelmans concluded, noting that the TFV approach is a victim-centred approach in all Court ordered reparation cases, working with communities in designing and implementing reparations to see where the real needs are. She added that establishing and implementing the programme with community involvement is essential and that she looks forward to finding a Court wide approach from the initiation of a case.

In response to a question regarding protection of prisoners of war, Ms Luping noted that the Rome Statute already provides for this making it possible to prosecute individuals for any act of violence, including SGBV, against prisoners of war, as war crimes in international and non-international armed conflicts; and as crimes against humanity (but an 'attack' on the wider civilian population must be proven; and the numbers of combatants should not change the status of the civilian population).

In response to a question concerning the effectiveness of complementarity given the different SGBC definitions under international and national law, Ms. Luping indicated that while different practices exist they could complement each other. She highlighted the example of Uganda where they relied on the Rome Statute. She also noted the examples of France and Germany with their domestic experience regarding Syria and other cases, which has been useful for the Court.

Professor Thuy Seelinger added that when there are different definitions of rape across national jurisdictions law reform may be important, as they sometimes do not fully match with the Rome Statute. Going forward, she added, it is important to look at the characterisation of the acts, where the exact provision may not exist in the national legislation.

Ambassador William Roelants de Stappers (Belgium) highlighted some important points from a side event on impunity and sexual violence, co- chaired by the Foreign Minister of Belgium and minister of gender, family, and children of the DRC during the High level week in UN General Assembly. As a first observation, the point was made that the adoption of the Rome Statute itself and the first conviction that the Court issued were capital milestones in the fight against impunity and in particular against SGBC. He noted that the protection of civilians remains the responsibility of states and that this was at

the heart of complementarity. The point was also made that SGBC are still the least condemned crimes, which deprives victims of justice. In this regard, early collection and preservation of evidence is a priority, and awarding meaningful reparations is key. He highlighted the need for a victim centred approach where learning from and working with survivors is essential. Ambassador Roelants de Stappers with a larger consideration, indicating that Belgium has the firm conviction that SGBC can only be stopped if it is taken from the root in the fight for gender equality where everyone has a role to play.

A representative of the Swedish delegation highlighted the challenge SGBC represents as these crimes are not apparent and take a lot of work. The importance and necessity of training law enforcement, prosecutors and the judiciary was emphasized, and the exchange with ICC was characterized as extremely useful. The point was also made of the importance of using structural investigations, collecting evidence and then identifying witnesses. The delegate noted one investigation carried out in Sweden related to crimes committed in Ukraine and another one for crimes committed in Syria. The delegate added that while it is work intensive, SGBC can be prosecuted successfully. The delegate indicated that there are also joint investigation teams in Eurojust, that have investigated crimes committed in Syria and Iraq. These joint investigation teams are a good instrument for coordination and conducting interviews.

A representative of the Irish delegation called for a more humanitarian approach to this issue in general and noted that Ireland has a strong reputation as a leader on the Women, Peace and Security agenda at the UN Security Council. The delegate noted that the prevalence of SGBC in conflict has wide-reaching consequences to the detriment of the entire global community.. Ireland firmly believes that there should be a holistic and comprehensive approach to these crimes in both the domestic and the international sphere. In 2021, Ireland pledged to provide regular funding for the comprehensive, gender sensitive, survivor centred, non-discriminatory, problem-solving services for survivors of SGBC.

Ambassador Neuhaus concluded by bidding farewell as this would be his last meeting.
