

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

THE HAGUE WORKING GROUP OF THE BUREAU

Complementarity

First meeting

16 June 2023

Summary

The meeting was chaired by the representatives of the ad country co-focal points, Ambassador Mirjam Blaak (Uganda) and Mr. James Buttigieg, Chargé d'affaires (Australia).

Mr. Buttigieg indicated that the new Australian Ambassador, Dr Gregory French, would be taking up the role as co-facilitator after his arrival to the Netherlands at the end of June. He then presented a short overview of the facilitation's work plan for this year, which included a continuation of the dialogue with the Court and other stakeholders on complementarity and the implementation of the IER recommendations, a continuation of discussions on implementing complementarity in practice – including on capacity building activities by the international community to assist national jurisdictions on complementarity-related issues, and promoting the use of the Complementarity Platform, including the exchange of information and capacity building needs. He added that the facilitation would also host additional meetings later in the year on the practical implementation of complementarity by engaged actors, and the Court's work and practice related to sexual and gender-based crimes. Mr. Buttigieg recalled that all complementarity related recommendations had been positively assessed and were now being implemented.

Mr. Mamadou Racine Ly (focal point from OTP) provided an update on implementation of the IER recommendation, indicating that the OTP had been engaged for the past 2 years in a significant process of reorganisation on the basis of a new vision while taking into account the recommendations assessed positively in 2022.

Regarding recommendations on initial situation and case selection (R226 to R229), he noted that the OTP has made significant efforts to reduce the number of long-pending situations under preliminary examination (currently only two: Nigeria, and Venezuela II, and newly opened DRC II following the second DRC referral). The OTP continues to consider the function of the initial filtering stage (formerly known as 'phase 1') of preliminary examinations and the criteria it applies and while recognising the difference between gravity as a legal threshold respecting the opening of investigations, and gravity as a policy factor.

With regards selection and prioritisation of cases and perpetrators (R230 to R242), he indicated that the OTP's approach was fully reflected the existing criteria in the OTP's Policy Paper on Case Selection and Prioritisation that are linked to case selection, notably, gravity and degree of responsibility of potential suspects, with criteria that are linked to case prioritisation, notably, strength and diversity of the evidence, as well as considerations of strategic and operational relevance. He added that a case-by-case analysis remains the general approach, rather than the application of an absolute rule and the OTP will continue its consideration for a better implementation of the policy.

Concerning recommendations related to situation prioritisation, hibernation, and closure (R243 to R250), implementation is ongoing through the new policy on situation completion adopted on 15 June 2021, with the introduction of the concept of completion of the investigation phase and completion of prosecution phase. The OTP is actively reviewing the implementation of the situation completion policy across all situations and gave the example of the first two situations that were implemented for the first time under a completion strategy – namely the announcement by the Prosecutor in December 2022 of

the conclusion of the investigative phase of the situations in CAR and Georgia. He noted that the OTP will continue prioritize situations and cases systematically and objectively according to factors such as their relative gravity and prospect of success, as well as implementation of completion strategies, with the overall goal of reducing the total number of situations, thereby ensuring increased focus and resources.

Regarding the Preliminary Examinations Section (R251 to R253), he indicated that the unified teams within the Pillars, as part of the new structure of the OTP, takes into consideration the recommendations raised in this regard as it achieved the main objective to ensure an embedded staff organisation. In addition, the harmonisation of working methods and products is well ongoing with the new structure.

Concerning the length of preliminary examinations activities (R254 to R261), the Preliminary Examinations Section has been considering options and suggestions on how a reasonable duration could be part of the general plan at the opening of each preliminary examination, since we also have to consider how best to give complementarity and the Court's own mandate effect.

In terms of complementarity, Mr. Ly indicated that his colleague Rod Rastan (Legal Advisor and Head of Preliminary Examinations Section, OTP) would give a more detailed account on implementation of R262 to R265. He added that in this regard, the OTP wished to establish itself as a central operational partner for national authorities in their efforts to investigate and prosecute Rome Statute crimes and other serious crimes under national law. As an initial step, the OTP will establish a permanent function within its structure to effectively map ongoing domestic proceedings relating to core international crimes. In parallel, the OTP will seek to establish a forum or platform for the sharing of information and expertise between the OTP and national authorities, including with a view to identifying areas in which the OTP may be able to provide support to ongoing investigations and prosecutions. This network will enhance harmonization and cohesion of the work, operational standards and protocols of the OTP. The OTP will also increase its participation in relevant Joint Investigation Teams, as is the case with the national authorities of seven countries in relation to Ukraine under the auspices of Eurojust, as well as its work with the Joint Team with a number of national authorities under the auspices of Europol aimed at supporting the investigating of crimes against migrants and refugees in Libya. Technology will allow the OTP to expedite the collection and processing of greater volumes of information.

The OTP will also strive to develop and implement tailored complementarity programmes in situations in which the OTP has closed preliminary examinations or announced the closure of the investigative stage, as well as at other stages of its work. The secondment of personnel by the Court's States Parties to the OTP offers an additional and significant opportunity to exchange knowledge and expertise and to assist in refining operating practices.

With regards transparency of preliminary examinations (R266 to 267), Mr. Ly noted that the OTP is engaged on identifying ways to best strike a balance between the need for communication and updates, with the duties of confidentiality and due discretion that guide our work.

In response to a question regarding the recent new DRC situation and its relationship with the existing DRC situation, Mr. Rastan indicated that, as a preliminary matter, the Office intended to promptly assess whether the scope of the two situations referred by the DRC Government are sufficiently linked to constitute a single situation. He also recalled the Office's standard practice whereby if a referral is accompanied by supporting documentation or a request to investigate particular armed forces and groups, the Office will inform the authorities that the scope of the referral will be assessed in line with the principles in the Statute. Consequently, all alleged crimes committed within the scope of the referred situation by any person, irrespective of affiliation or nationality, will be analysed.

Mr. Rastan continued to present an overview of the forthcoming draft policy paper on complementarity and cooperation, which would soon be circulated to States Parties and other stakeholders for external consultation. He noted that some additional time had been needed to implement the comments received as part of the first internal round of consultations with the Prosecutor's Special Advisors and staff. Mr.

Rastan noted that the paper was titled as a policy on both complementarity and cooperation, referring to the two aspects that guided the policy. He observed that both complementarity and cooperation had a legal aspect related to provisions of the Statute (such as article 17 and Part 9), as well as a policy aspect related to the overall strategy and policy of the Office. The policy paper seeks to engage with both tracks, and to show how they can be mutually reinforcing.

Mr. Rastan went on to discuss the Prosecutor's vision of complementarity and cooperation along these two simultaneous tracks, namely execution of the Prosecutor's mandate to investigate and prosecute Rome Statute crimes as well as working in partnership with national authorities to support and encourage genuine domestic proceedings. He noted that while those two tracks had been part of the OTP's strategy over the years, its implementation had experienced number of challenges. He noted that now, 20 years on, there was a situation where there are a large number of states sometimes assisted by joint mechanism or teams, hybrid or internationalized Courts, or investigative mechanisms were increasingly active in the accountability sphere. This landscape made it more possible to conceive of the ICC as a hub among a plurality of actors. At the same time, under the current Prosecutor, the OTP has sought to position itself to be able to offer tangible support and qualitative assistance to States in response to their request for cooperation, as well as on issues of operational coordination and technical and expert exchanges. A large part of this process was the overall approach of the Office its overhauling its information technology architecture as indicated by Mr Ly above, as well as the two track approach of the Prosecutor to assist others as it carried out its own mandate. The OTP was now able to concretely participate, encourage, offer its expertise and working alongside this large community of practitioners. He gave a number of examples from the current work of the OTP, which will also be reflected in the draft policy paper. He also said the paper outlined the OTP's legal understanding of complementarity and cooperation, however, noted that current litigation before the Court could change the legal interpretation once the decision has been issued.

He concluded by welcoming and encouraging the opportunity to engage with stakeholders on the draft paper which will be circulate shortly for comments, with an indicative return date of end July. However, in response to a question on whether an extension of the timeframe for comments would be permitted, Mr Ly said he would discuss with OTP colleagues and revert to the ASP.

In response to a question whether the policy paper would include the planned field presences of the OTP, and the likely beneficial long-term impact this could have in terms of increased efficiency and operational agility, the OTP confirmed that this was part of the intention of the proposed increased field presence, as well as bringing justice closer to communities, and indeed featured in the policy paper.

In response to another question regarding the budgetary impact of this two track approach and potential use of OTP resources, Mr Rastan recalled the approach adopted by States Parties in Kampala in 2010 and that the paper was consistent with it. He added that the Office would not be replicating the work of development organisations and where necessary would seek to build upon, buttress and contribute in partnership with others, adding that coordination and cooperation were key as part of a vision implementing complementary ICC and State.

In response to a question relating potential tensions or admissibility challenges in situations where the two-track approach to complementarity is active while there are ongoing cases at the Court, Mr. Rastan noted that the OTP was currently seized of such a scenario and experience to date indicated that both could be pursued simultaneously, with the appropriate balancing of partnership and vigilance. He noted that the policy paper would engage on this challenge.

With regards the complementarity platform, Ambassador Blaak noted that earlier in the year the ASP Secretariat had circulated a note verbal inviting state parties to indicate their technical legal assistance needs by completing the complementarity form. She noted that requests and use of the platform had been limited and encouraged all states interested to examine the platform. Ambassador Blaak also thanked all states who attended the recent informal discussions on complementarity organised by the focal points, and who highlighted the need for further discussion of the practical implementation of

complementarity, including what legal technical assistance is available through the platform. She noted that the facilitation would be hosting a meeting later in the year on the practical aspects of 'complementary in action', with presentations by engaged actors.

Mr. Aaron Matta (Legal Officer at the Secretariat of the Assembly of States Parties, focal point for the Complementarity Platform) presented the work and mandate of the Secretariat in facilitating the complementarity platform. Mr. Matta indicated that the Review Conference in 2010 adopted resolution RC-Res.1 by which 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". Since then, the Secretariat, in close consultation with the Complementarity focal points, maintains and updates a list of complementarity actors to be contacted to assist with capacity-building needs identified by States Parties, and facilitates interaction through the platform, between States Parties requesting technical assistance and actors that may be able to assist national jurisdictions in their efforts to investigate or prosecute Rome Statute crimes. Mr. Matta noted that some of the areas for submitting requests for assistance and capacity building include implementing legislation, judicial infrastructure, court management, witness and victims' protection, expertise on sexual and gender-based crimes, strengthening legal representation, among others.

Mr. Matta highlighted that while there is not necessarily an issue of resources, there are some limitations to the current approach, including the quality of information received by the requesting States as some times requests don't fulfill the criteria for assistance; the timing of the requests made which at times coincide with the Assembly period when the Secretariat has limited capacity to respond; keeping the list of actors up to date and capacity building actors engaged; financial expectations that go beyond the capacity or mandate of the platform; and appropriate follow up, albeit not in the mandate of the Secretariat, would be useful to assess the effectiveness of the platform. Mr. Matta indicated that he had organized virtual information sessions with requesting States and some of the actors providing assistance in order to clarify some of these issues. Mr. Matta concluded by encouraging States Parties to make use of this tool to facilitate technical assistance and meet their needs to fulfill their commitment to the Rome Statute System.
