

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

THE HAGUE WORKING GROUP OF THE BUREAU

Complementarity

Second meeting

16 October 2023

Summary

The meeting was chaired by the representatives of the ad country co-focal points, Ambassador Mirjam Blaak (Uganda) and Ambassador Greg French (Australia).

Ambassador French invited Mr. Flavio Bellio, Research Fellow at the Siracusa Institute, to brief the facilitation on the symposium held on 12-13 October 2023 in Siracusa (Italy), titled “Strategic Vision for the Next Decade: How to Ensure Consistent and Sustainable Support for the International Criminal Court (ICC)”, which was organized as part of the process of commemoration of the 25th Anniversary of the adoption of the Rome Statute. The Symposium featured four panel discussions, focusing on: reinforcing Rome Statute crimes; the future of complementarity; strengthening accountability for atrocity crimes; and enhancing the Court’s institutional framework. The Symposium also featured a presentation of the Ethical Principles for International Criminal Judges recently developed and published as the result of a collaboration between the Siracusa International Institute, the Nuremberg International Principles Academy, and the Ecole Nationale de la Magistrature of France.

Mr. Bellio’s presentation focused on the second panel on “The future of complementarity: domesticating the Rome Statute values and revitalizing the principle of complementarity”, which provided an opportunity to reflect on the lessons learned over the past 25 years in implementing this pivotal principle. The discussion yielded valuable insights into the challenges and opportunities associated with complementarity and its implications for global justice. The speakers at the panel included H.E. Ms. Beth Van Schaack, US Ambassador-at-Large for Global Criminal Justice, Department of State; Ms. Priya Gopalan, International Criminal Law Lawyer; Chair, Working Group on Arbitrary Detention, United Nations Human Rights Council (UNHRC); Mr. Matevž Pezdirc, Head of EU Genocide Network Secretariat, Eurojust; Mr. Eduardo Cifuentes Muñoz, Judge and former President, Special Jurisdiction for Peace, Colombia; Mr. Ousman Njikam, Deputy Registrar, Central African Republic Special Criminal Court. The panel was moderated by Mr. Rod Rastan, Legal Advisor, Office of the Prosecutor (OTP), ICC.

The US representative emphasized that the United States, as a major non-State party to the ICC, holds a defensive yet supportive stance towards the Court. She highlighted the two main aspects of complementarity, namely, that it respects the sovereignty of each state in prosecuting international crimes committed within their jurisdiction, and that it facilitates burden-sharing to prevent the ICC from being overwhelmed by the sheer volume of cases it might otherwise need to handle. She underscored the importance of establishing specialized war crimes units within national prosecution and police institutions. The US representative also highlighted her country’s commitment to investing in special jurisdictions, such as the Special Court in the Central African Republic. The US representative emphasized the necessity of creating a community of practice and the use of technology, such as open-source investigations, as well as the importance of setting up cooperative mechanisms to create a comprehensive ecosystem that extends beyond the jurisdiction of the International Criminal Court and even includes non-State parties.

The representative from the UNHRC stressed the importance of contextual understanding when addressing international crimes and balancing the pursuit of justice with the needs and expectations of affected populations. In this vein she highlighted the value of bringing justice closer to home for victims, as international criminal justice imposed solely by international actors can hinder peace processes. She also raised practical concerns surrounding domestic prosecution of international crimes, noting that the lack of political will to prosecute perpetrators may result in impunity, while politically motivated prosecutions could also be used as a tool of retaliation against former governments. She also noted the importance of the application of Article 21(3) of the Rome Statute, which insists on the consistency of international criminal law with internationally recognized human rights. She also stressed the importance of an intersectional approach to international criminal justice and commended the OTP's policy papers on gender-based violence in armed conflict and violence against children. She also spoke on the complexities of using evidence gathered during human rights investigations in other contexts, such as international criminal trials, including the need for consent of victims and witnesses for the sharing of this information, adding to the intricacies of gathering evidence.

The representative from Eurojust provided an overview of the European Union's range of tools for international cooperation in international criminal justice matters, such as the Joint Investigation Teams (JITs), European Investigation Orders (EIOs), European Arrest Warrants (EAWs), and freezing orders. A significant accomplishment highlighted was the first major JIT on Syria, and its cooperation with various institutions, including the International, Impartial and Independent Mechanism (IIIM), showcasing the power of collaborative efforts in the pursuit of justice. He also highlighted the significant challenge of the large amount of material produced by Commissions of Inquiry of the UN Human Rights Council that often ends up being underutilized, failing to lead to meaningful actions or prosecutions. He also brought attention to the new Ljubljana-The Hague Convention, which is set to define horizontal relationships between states regarding collaboration in international crimes matters. He noted that the new convention will cover situations that might not fall under the scope of conventions such as the United Nations Convention against Transnational Organized Crime (UNTOC). He also underscored the importance of incorporating international crimes into domestic criminal legislation.

The judge from the Special Jurisdiction for Peace in Colombia noted that this jurisdiction was established based on the Colombian government's commitment to ensuring accountability for the crimes committed by the Revolutionary Armed Forces of Colombia (FARC) and to provide solace to the victims of these crimes. He noted that most cases are handled within the context of macro-cases to address the staggering caseload. To illustrate the magnitude of the challenge, he noted that one case alone encompassed 3000 crimes. As a result, efforts focus on the most significant and relevant cases. This selective approach allows for a more efficient use of resources while still upholding the principles of justice. The judge also highlighted that even in cases where suspects were not ultimately sentenced, many admitted their responsibility for the crimes and that this admission of guilt brought a sense of relief to the victims. He also praised the Office of the Prosecutor for following the process closely, which also played an important role in ensuring the process's success. This formula played a crucial role in bringing accountability, especially in a context where formidable political forces opposed the trials in the aftermath of the Colombian armed conflict. He stressed that there is no one-size-fits-all approach in these complex matters of transitional justice, and that flexibility is essential in addressing the specific needs of each situation.

The representative of the Central African Republic Special Criminal Court discussed the distinctive hierarchy of international jurisdictions. The Special Criminal Court takes precedence over national courts, while the ICC holds priority over the Special Criminal Court. This reversed hierarchy is seen positively by national practitioners because it ensures oversight over the national courts and the Special Criminal Court. However, this approach also presents challenges as it may increase the workload on the judicial system, with the same case potentially navigating through several jurisdictions. In this respect, coordination and efficient case management become essential to mitigate this complexity. The Special Criminal Court's

unique attributes include a dedicated police unit, and it mandates cooperation with national authorities to carry out its mission effectively. He also indicated that hybrid jurisdictions demonstrated their effectiveness, evident from their statistics on detentions and convictions. However, the discussion also acknowledged the potential security concerns, particularly regarding the transportation of individuals and the protection of witnesses as well as the complications emanating from scarcity of resources. He pointed out that the national market for defense lawyers presented challenges and that the court is actively involved in providing training and guidance to address these issues.

With regards the Complementarity policy paper, Ambassador Blaak indicated that it had been shared on 29 September with States and civil society and that the OTP had given the deadline of 13 November to receive comments. In his presentation, Mr. Jonathan Agar, Special Assistant to the Prosecutor, indicated how the paper aimed at explaining how the OTP intends to play a role in an emerging and more dynamic ecosystem of international criminal justice. He noted that the Office intended to be of more value through its investigations and prosecutions, but also in other ways, primarily in the form of a hub at the center of that ecosystem, not as an apex but rather as a partner to national authorities, special jurisdictions, transitional justice mechanisms, and any initiative that seeks to advance justice within the context of the Rome Statute.

Mr. Agar highlighted examples of how this could work, noting for example that the Special Advisor to the Prosecutor on gender prosecution, Ms. Lisa Davis, was in Bogota providing training, and that subsequent to that, the Special Jurisdiction had announced the opening of macro-case 11, with respect to sexual and gender-based crimes and crimes against the LGTBI community. He noted the relationship between the technological reform in the office which would allow the Office to collect and share more evidence and become more useful to national authorities. He noted also that it's connected to other policy initiatives in terms of how the Office can harness its expertise and new policy frameworks to provide training and support. He noted that there is a place for the OTP to have a role as a partner in providing support and assistance, and that is also beneficial to its investigations and prosecutions work but also to have a deeper dialogue with national authorities, in particularly in contexts where the Office has open investigations. He invited stakeholders to send questions and comments on the policy paper by the set deadline but indicated that the Office remained open to engage in a continued dialogue based on the comments received.

In response to a question regarding the process, Mr. Agar noted that the Office had held informal consultations prior to the circulation of the paper and was now seeking formal input to finalize the draft. In response to a question related to a community of practice and situation briefs he indicated that these are interlinked for the Office when reviewing a cooperation activity more generally, whether there is a great value with operational partners to develop a piecemeal bilateral dialogue, and also a collective understanding showing how the Office can be of assistance to them, but also create opportunities when authorities may not be aware of the assistance they can provide in relation to the OTP's own investigations. The operational objective of the forum is to raise the collective understanding amongst national authorities about where the Office is in terms of key investigations, where the Office would need assistance, but also the opportunities where the OTP can potentially share information and evidence to domestic proceedings., Mr. Agar noted that there was a distinction but also a connection with the existing ASP complementarity platform. The proposed objective of the forum, which is planned to launch in 2024, is to have an overall increase in knowledge amongst the Office's operational partners and national authorities about what the OTP is doing in general terms in a context of judicial cooperation. This will be done as a proactive gesture of the OTP to cooperate with national authorities. He noted that the forum is an operational space for the Office to enhance its cooperation with national authorities in the area of complementarity and the ASP complementarity platform is more specific to providing technical assistance.

He also highlighted the importance the Office gives to integrating numerous policy priorities and connecting them together, for example the use of new technology can be connected to the forum for complementarity, in the sense that through the implementation of new processes and systems the Office is now able to ingest and use information and share it in a very different way. In this regard, he noted that the Office can now receive much more evidence and information from information providers and analyze it more effectively, particularly video and audio material. This tool allows the OTP to automatically transcribe the content of video and audio materials, automatically translate into 140 languages, identify objects and locations, and the Office can make that tool available to national authorities and become more relevant as an interface to domestic jurisdictions.

Regarding security concerns and cloud storage, Mr. Agar noted that since the recent cyberattack the Office has accelerated the transition of evidence to the Cloud system because the OTP considers it to be the most secure approach, due to not only to the ring-fencing but the monitoring within the system. In terms of the companies and contractual arrangements, he noted that the Office was following the UN International Computer Centre (UNICC) approach to create this system.

The point was made regarding the inherent intertwined relation between complementarity and cooperation that both facilitations on these topics were keen to continue working together, as it had been done for example during the Dakar seminar in 2022, and that the OTP's policy paper would provide useful updates and food for thought to continue this line of work.

Ms. Kim Thuy Seelinger, Senior Coordinator for Sexual and Gender Based Crimes and Crimes Against and Affecting Children, noted that the Office had been undertaking a process of reviewing and revising the existing OTP policies, namely the 2014 policy on sexual and gender-based crimes and the 2016 children policy, to catch up with developments in best practice and awareness of how to take a survivor-centered and trauma-informed approach to these issues. The idea was to create policies that are useful to the work of the OTP but also to national systems, and that we reflect and learn from developments in the national systems.

The process included involvement of different sections, review of existing documents, internal consultations, and also various waves of external input with a call for submissions for both policies earlier in April and several roundtables with external experts and civil society. She noted that there was also a consultation in July, adding regional consultations to reach all the regions of the world in different languages, to have more diverse representation beyond Western perspectives. She indicated that the Prosecutor is currently reviewing these policies and that the Office was looking forward to sharing them on December 4 and December 7 respectively.

She then explained some of the main key takeaways from these proposed policies. For example, with regards to the Sexual and Gender Based Crimes policy, she noted that one major change they were proposing was to change the name to simply gender based crimes to reflect current acknowledgement and understanding of gender-based crimes as an umbrella term that included crimes and violence of a sexual nature, reproductive violence crimes and other types of gender-based crimes. She also indicated that this policy was encouraging the Office to look beyond Article 7(1)(g) of the Rome Statue list of crimes and to start bringing a more intersectional and gender competent analysis to all of the events before the OTP, to really understand how gender was playing into motivation, the form of violence, the impact of violence, the meaning of that violence, and whether the OTP could charge it specifically as a gender based crime or not. She also noted that the policy addressed common myths and misconceptions that had affected OTP's ability to effectively pursue these types of crimes in the past, including, for example, media fixation on rape or the assumption that all survivors were a homogenous group, which they were not.

With regards to the Children's Policy she indicated that the OTP is also taking a more intersectional lens, and looking at how every crime in the Rome Statute could be affecting children as direct victims or in other ways. She noted that this needs to be made possible because of the OTP's own competence and ability to assess the child's best interests, how the Office can engage with them and represent them, making their experience more visible and, where relevant, engage them as witnesses. The new policy emphasizes what it means to take a child's rights, child competent and child sensitive approach through all the practical steps at every stage of the OTP's work. Similarly to the gender violence policy, the Children's Policy also aims at debunking the assumption that children are a homogenous group, as it makes no sense to apply a blanket approach to a 5-year-old and a 15-year-old.

Ms. Thuy Seelinger indicated that the OTP will also be aligning its internal guidelines to these policies and that a lot of work will continue in the implementation, monitoring, evaluation, and oversight of the policies. She added that the language used in the policies was as clear and as direct as possible to make it easy to translate into other languages and make it as accessible and practical as possible.

In response to a question regarding the tension between addressing each specific traumatic experience of individual victims while at the same time addressing the justice needs of such a large number of individuals, Ms. Thuy Seelinger noted that at the micro level the teams can make individual assessments on a case by case basis regarding a child's cognitive and developmental capacity to provide a reliable response and what kind of protection they may need. At the macro level, the Office will apply an intersectional lens in assessing how the violence is affecting people of different genders and ages throughout all stages of its work when addressing populations within a specific context.

The point was made to that it was important to improve information and knowledge sharing within the Hague Working Group and the Court, including the respective experiences from national authorities.
