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

THE HAGUE WORKING GROUP

Complementarity

30 April 2021

Summary

Representatives of the ad country co-focal points, Ambassador Matthew Neuhaus (Australia) and Ambassador Mirjam Blaak (Uganda), chaired the meeting.

Amb. Neuhaus welcomed Amb. Blaak as the representative of the new ad-country co-focal point on complementarity, having taken over from Romania who had finished in the role at the end of 2020.

In her introductory remarks, **Amb. Blaak** noted that she was honoured to be a co-focal point on complementarity, a topic close to her heart throughout her involvement with Court matters since 2003. She added that Uganda, as the first State Party to refer a case to the Court, had relevant experience to share. She also noted that complementarity was crucial to the work of the Court, as stipulated in the preamble of the Rome Statute which affirmed that States have the first responsibility to prosecute.

Amb. Neuhaus indicated that the resolution creating the Review Mechanism tasked the co-focal points, as Mandate holders, to continue the work on issues already under active consideration, in coordination with the larger review process. In this vein, he noted that one of the four streams of work for the complementarity facilitation was: "to continue dialogue with the Prosecutor and the OTP on the forthcoming (policy) papers on complementarity and completion, and any revisions to its existing policy papers, including on preliminary examinations, as appropriate".[1] This had also been endorsed in the Assembly mandate for complementarity adopted at the nineteenth session.[2]

Amb. Neuhaus noted that the meeting was an opportunity for dialogue with representatives of the Office of the Prosecutor ("the Office") on its draft "Policy on Situation Completion" which had been circulated and published for consultation on 25 March 2021. He also noted that the Office had indicated in its recently published response to the Independent Expert Review (IER) report that certain recommendations, including on completion strategies, would "command the attention, especially, of the incoming Prosecutor for implementation". In this regard, the co-focal points were looking forward to continuing dialogue on the draft, including once the incoming Prosecutor took office.

Deputy Prosecutor, Mr. James Stewart, made some introductory remarks, and the detail of the draft policy was presented by Ms. Helen Brady, Head of the Appeals and Prosecution Legal Coordination Section, and Mr. Matthew Cross, Appeals Counsel in that Section. Ms. Cristina Ribeiro, Investigations Coordinator, and Mr. Rod Rastan, Legal Advisor and Acting Head of the Preliminary Examinations Section, also joined the meeting as members of the working group that had drafted the policy.

[1] Report of the Bureau on complementarity (ICC-ASP/19/22), para. 41 (1).
[2] Resolution ICC-ASP/19/Res.6, annex I, para. 14.

The Deputy Prosecutor thanked States Parties and civil society for their valuable and constructive feedback, which would help the Office to further shape the policy and give it greater clarity and impact. In his presentation, he highlighted three main points.

First, he noted that the Policy on Situation Completion was part of Prosecutor Bensouda's legacy, attempting to capture the lessons of experience to shape a policy on situation completion that could be used now and in the future. The draft policy was designed to complete a trilogy of policy papers, that included the Policy Paper on Preliminary Examinations and the Policy Paper on Case Selection and Prioritisation – all of which aimed to increase the transparency of the Office's working methods and help structure its operations efficiently and effectively.

Second, he indicated the approach adopted by the Office was a flexible one, taking into account the policy's applicability in practice, with room for improvement and possible re-evaluation and revision if necessary in the future. In particular, he indicated that the policy did not bind the hands of the incoming Prosecutor-elect, who would have the opportunity to adjust the policy on the basis of practical experience and his own vision for the Office if he so wished.

Third, the draft policy was a technical legal document that focused on the completion of situations based on the Office's core mandate to investigate and prosecute Rome Statute crimes, and as such, it aimed at providing a general framework, within which the Office would apply completion strategies, adapted to the circumstances of the particular situations under investigation.

Ms. Helen Brady introduced the draft policy including some background and its main features and key concepts. She also touched on some aspects of the policy that may require further consideration, largely stemming from the comments received by the Office from States Parties and civil society.

She indicated that given resource and other constraints, the need for the Office to develop a policy on concluding its work in situations had become increasingly pressing. In this regard, the 2019-2021 Strategic Plan emphasized the need for the Office to develop a completion strategy for the situations under investigation, something which had been advocated by States Parties for some time. She noted that this was recently echoed by the IER, especially in recommendations 243-250 of their report. She indicated that some of the IER recommendations had already been captured in the draft policy (e.g. R244 (in part), R245, and R247 (in part)), while others may be better situated in a broader Court-wide protocol (e.g. R247 (in part)), and several others were still being internally discussed (in particular R243-244, R249 and R250) to see whether and how the Office could better address them in the policy.

Ms. Brady acknowledged that drafting the policy was quite a complex exercise, as it had to be suitable for present situations, but also "fit for purpose" for those that may be opened in the future. This partly explained why the draft focused on broader principles and the basic processes the Office intended to follow for closing situations, rather than setting out a detailed checklist of a minutiae of considerations which might be encountered in individual situations.

She also noted that the policy did not address the issue of completing preliminary examinations, because a different process for that issue was presently underway in the Office and the two matters involved quite different considerations. Ms. Brady indicated that the policy paper only addressed the Office's own internal processes and operations on situation completion, and did not try to tackle aspects of situation completion that the wider Court might need to deal with in a Court-wide protocol, such as how the Court as a whole would disengage from a situation, and the Court's wider legacy initiatives, to which of course the Office might contribute.

She noted that the policy addressed the key question of how the Prosecutor would decide, in the exercise of his or her discretion, that "enough" had been done such that a situation could be closed. She indicated that this question was further complicated by the fact that, while the Office seeks to recognize from the outset how an investigation might satisfactorily be concluded, it must also refrain from prejudging the outcome of an investigation before it takes place. It must follow the evidence, and adapt to changing circumstances.

Ms. Brady stated that the policy was framed around the two main phases in a situation: an Investigation Phase and a Prosecution Phase. These two phases would not always occur in a linear fashion, and could overlap in time. However, despite this potential overlap, it was more effective for the policy to discuss them as two discrete stages, so as to clearly articulate what is expected to be achieved in each phase, and in doing so, move effectively towards completion of the whole situation.

With regard to the Investigation Phase, which is the phase most under the Office's control, the draft policy provided that the Prosecutor may conclude the phase once arrest warrants had been obtained for all the cases in that situation which the Prosecutor wished to prosecute – this docket of cases is called the "Prosecutorial Program". In terms of the completion of a situation as a whole, this stage was a critical milestone, because from then on, the Prosecutor would not seek any more arrest warrants for article 5 crimes, save in exceptional circumstances.

The situation strategy, which was initially based on analysis done in the Preliminary Examination for any given situation, was dynamic. As the investigation progressed, it would be regularly reviewed, adapted and refined, enabling the Prosecutor to decide whether to pursue additional lines of inquiry and thereby select additional cases with a view to prosecution. Ms. Brady noted that following the feedback received, the Office was considering ways to "flesh out" the concept of the "Situation Strategy" in the draft policy: first, by making the connection between the Situation Strategy, and the factors for selecting and prioritizing cases contained in the Case Selection Policy, clearer and more explicit; and second, by including in the Situation Strategy – even if only in general terms at the start – what the Office aimed to achieve in the situation before completion (taking on board IER R249). She added that this would be done without introducing any idea of "target-based investigations", but rather keeping "open investigations", which was a hallmark feature of investigations under this Prosecutor's term.

Ms. Brady noted that the policy also addressed the question of concluding a situation when there are "de-prioritized cases" – i.e. the scenario where the Office has been prevented by external circumstances from carrying out or continuing its investigation into a particular case or cases (para 35). In such a scenario, the Prosecutor might decide that the deprioritized case(s) demand proper investigation and therefore suspend the investigation of the whole situation until circumstances change, or conclude the Investigation Phase for the situation as a whole if the strategic and operational factors that had led to de-prioritizing the case(s) were likely to continue.

Ms. Brady indicated that the draft policy did not address the somewhat more difficult question of whether an entire situation may be de-prioritized or suspended from the start (as some comments had noted, and as suggested in IER Recommendations 243-244 (in part)). While the practical considerations behind these suggestions – not least, resources – were understandable, it was not a simple matter given article 53 of the Statute, which stipulates that "the Prosecutor shall open an investigation upon being satisfied of the statutory criteria". She also queried whether this issue was appropriately placed in the draft policy – dedicated to situation completion – or whether it could be better addressed elsewhere.

As regards the Prosecution Phase, Ms. Brady noted that the main aim was concluding all proceedings before the Court for the cases in the Prosecutorial Program. The speed of this phase would

depend on how quickly arrest warrants could be executed, the speed of cases in trial, appeal and post-appeal proceedings, etc.

She concluded by stating that once the Office had concluded its work in the Investigation and Prosecution Phases (including any residual activities), its work in the situation could finally be considered "complete". Once all the Court's activities for that situation had been concluded, the Court's exercise of jurisdiction would be terminated – the formalities for that would be for the Chambers/Presidency.

Mr. Matthew Cross noted that the question of situation completion was a unique strength of the Court, but also a unique challenge, as the ICC was the only international court with an open-ended mandate to investigate and prosecute in situations within its jurisdiction. He noted that the ICC was unlikely to ever be able to deliver a high quantity of caseload, and that prosecutions would always be selective and not exhaustive – focused on cases representative of the criminality in a situation, but not the entirety of that criminality. He noted that the Office would face an additional resource challenge as the docket of situations continued to expand, unless situations could also be completed. He added that the completion of a situation was likely, generally speaking, to be an act of great symbolism, raising questions not only with regard to completing the Office's core work, but also residual activities and "legacy". He also noted that completion meant many things to many people and for that reason, the draft policy addressed questions of law and practice while also attempting to reconcile matters of effectiveness, good financial stewardship, and the overall objective of delivering justice to affected communities.

Mr. Cross noted that the draft policy was based on the following key principles: first, that the jurisdiction of the Court continued as long as organs of the Court have statutory functions arising from the situation; second, that the policy must remain in a narrow space, which can be set by the Prosecutor's policy (e.g., the Prosecutor cannot make determinations for other organs of the Court); and third, that the policy must be consistent with the Preliminary Examination and Case Selection policies. Mr. Cross highlighted that one of the key challenges in framing the policy was to identify the key issue(s) determining the scope of Office activity in a situation.

Mr. Cross noted that the draft policy introduced the so-called "funnel model", with a wide entry point representing the overall aim of the Office to investigate those allegations of crimes in a situation which represented the entirety of the criminality taking place. As a case developed, the Office might start new lines of inquiry and it was most likely that the focus would narrow to a certain number of key cases. This approach was consistent with the approach of the ad hoc tribunals. Once the Investigation Phase had been completed, the Office could move to prosecuting those cases. The draft policy suggested making this step a public landmark to show that the Office was moving forward, even if the details might remain confidential. This approach also aimed at focusing State cooperation on executing arrests, and enabling a more predictable use of resources. In the end, following the completion of prosecutions, the Office would also need to carry out residual activities under the Statute, potentially for many years. However, the staffing and other resources associated with those functions were anticipated to be minimal in most cases.

Mr. Cross noted that the most difficult concept in the draft policy was determining the scope/duration of an investigation, which was a matter of law based in prosecutorial discretion (articles 42 and 54 of the Statute). This was where the draft policy began to define the notion of a situation strategy: based on the allegations and information available, the Prosecutor would decide the number of cases that he or she should prosecute. Discretion would be more limited in deciding whether to complete prosecutions already initiated, and whether to prosecute cases investigated. The key inflection

point therefore was the number of cases investigated. The case selection policy had explained how cases might be selected and prioritised, but did not fully explain how the Office would decide when enough cases had been selected in the factual context of a particular situation.

Mr. Cross explained that the situation strategy represented the lines of inquiry – initially identified in the Preliminary Examination, but re-assessed during the Investigation Phase – which, in the exercise of prosecutorial discretion, were considered to represent the true extent of alleged criminality, and form the context from which cases would be selected and prioritised. In that context, there were a number of important factors, such as national investigations and prosecutions in the situation countries. The prosecutorial discretion would be informed by developments in this area, as this would affect the admissibility of potential cases. The number of cases might also be different depending on whether national actors were also carrying out investigative and prosecutorial functions, or whether they were absent. Therefore, the question of complementarity was built into the situation strategy. The situation strategy would then be completed once there was a Prosecutorial Program – i.e. when the Prosecutor had decided that enough cases would be prosecuted (successful article 58 applications). As such, a defined 'Prosecutorial Program' completed the Investigation Phase, with no new article 5 cases likely to be brought in the situation.

Mr. Cross noted that in the Investigation Phase, **r**esources were primarily dedicated to investigating selected and prioritised cases and, as appropriate, identifying new article 5 cases. The Prosecutor would decide to prosecute when there was a sufficient basis under article 53(2) and reasonable prospect of conviction (prosecutorial discretion). Some prosecutions could then already begin if early arrest opportunities arose. One of the key challenges was dealing with what the Office called 'selected but de-prioritised' cases (i.e. cases which had not reached the point of a proper decision to prosecute or not). These would require active management by either mitigating factors causing de-prioritisation, suspending investigation of a situation as a whole, or dropping the de-prioritised case(s). The Investigation Phase would conclude when the Prosecutorial Program was defined – i.e. when the Prosecutor considered that no more article 5 prosecutions were required.

Mr. Cross indicated that once the Investigation Phase had concluded, a public notification would be made but without specific details as the Office would be subject to confidentiality obligations (warrants under seal, etc); this notification would be aimed at satisfying the external need for transparency. It would be a public notification and not a judicial notification. Concluding the Investigation Phase would not mean concluding all investigative activities, which may be necessary to support the Prosecution Phase, although it would mean no new article 5 prosecutions, unless exceptionally new or resurgent crimes with sufficient link to the situation forced the Investigation Phase to be reopened. New prosecutions under offences against the administration of justice (article 70) would always remain possible, as these were necessary to safeguard the continuing work of the situation.

Mr. Cross noted that the Prosecution Phase included two main components: on the one hand completing the Prosecutorial Program with potentially significant resource impact, and on the other hand the residual activities with minimal resource impact. He added that completing the Prosecutorial Program would depend significantly on State cooperation (executing arrest warrants, etc) and that residual activities in a situation would continue for a very protracted period (complete sentences of convicted persons, etc). In this sense, the required resources were expected to reduce dramatically as the Prosecutorial Program was completed, and would transfer to residual activities in practice, with staff likely to be re-deployed to active situations.

Mr. Cross indicated that in completing the Prosecutorial Program, the work focused on: executing outstanding arrest warrants; preserving evidence, cooperation, and judicial assistance to national prosecutions; concluding legal proceedings against all suspects and accused; conducting additional investigative activity, as required; evaluating (inadmissible) domestic cases within jurisdiction, as required by article 19(10), as they may be prosecuted in national jurisdictions; securing the administration of justice (including article 70 investigations or prosecutions); and monitoring new or resurgent criminality in the situation (with potential to re-open the Investigation Phase if appropriate).

Mr. Cross concluded by describing the residual activities, which may include: monitoring; service of sentences and other post-conviction measures; potential interference with the administration of justice (especially retaliation against victims, witnesses and other persons); new or resurgent criminality in the situation (with potential to re-open the Investigation Phase if appropriate); new facts relevant to article 84 of the Statute (revision of conviction); cooperation and judicial assistance; support to other Court activities if required (e.g., reparations, and "legacy" projects); and archiving.

Question and answer session

States Parties welcomed the presentations and the opportunity to engage on the draft policy.

A query was raised as to whether it was appropriate for the Office to take into account the likelihood of suspects appearing promptly before the Court when reviewing the Situation Strategy (as provided in paragraph 20 of the draft policy). Ms. Brady noted that this was one operational factor which the Office would consider along with many others. Mr. Rastan highlighted the link to the Case Selection and Prioritisation Policy, and the list of strategic and operational factors which might warrant prioritization as outlined in that policy. He emphasized that none of the factors were exclusive, and a balance would always be required between the different considerations.

Appreciation was expressed for the prompt publication of the document in French, and for the efforts to reflect a balance between the major legal traditions in accordance with the spirit of the Rome Statute.

The point was made that the draft policy seemed to be focused more on explaining to external interlocutors the main principles adopted by the Office, rather than outlining operationally and in a concrete manner how the principles were implemented. As a result some elements appeared somewhat artificial, for example the distinction between the two phases of investigation and prosecution. The point was made that it would be useful for the policy to provide more indications as to how decisions and assessments were made in practice.

In response, Ms Brady noted that the policy was a framework, with the goal of setting out guiding principles that would be adopted in closing a situation. The intention was not to set out specific operational matters, as it was somewhat artificial to predict these in advance; the policy was intended to be "fit for purpose" for all situations. There might be room for more specificity, and the Office would look into this closely. The point about the dynamic nature of the process could also be elaborated and clarified. However it would always be a challenge to identify concrete terms that would be applicable across all situations. Ms. Ribeiro emphasized that it was difficult to pinpoint operational criteria, as different strategies would give rise to different operational matters depending on the specifics of the situation. Ms. Ribeiro outlined the challenges which arose as a result of addressing many different situations simultaneously, when they all had different contexts, challenges, and strategies. She noted that approaches could differ and flexibility was therefore necessary.

It was noted that it could be useful for the policy to include some indicative timelines and benchmarks. Ms. Brady indicated that the Office was not inclined to include timelines in the policy, as the timelines were often linked to a number of factors outside the Office's control. Ms. Ribeiro added that timelines, even if indicative, might imply statutory limitations which did not exist. The Office should certainly be responsible and accountable for the time taken, but the specific context of each situation would also be important. The point was made that it might helpful to include the timelines of previous situations, in order to provide some sort of framework.

In response to a query as to whether the development of the draft policy had prompted any revision of existing policies, Ms. Brady noted that the policies were closely linked and the working group had taken them into consideration.

A query was raised regarding the purpose of a public notification of the closure of an investigation, and its relationship with any national processes which might be underway. Ms. Brady indicated that the intention was to promote transparency, as there was a reasonable expectation that once a situation had been closed people would be informed. The Office would look again at the references to this element in the policy.

In response to a query as to how the completion strategy would be applied in situations where there was no end date and ongoing criminality, Ms. Brady indicated that the policy was dynamic and should be able to address all such situations.

It was noted that there would be interest in further discussions on the concept of a "life cycle" document.

A hope was expressed that the dialogue on the draft policy could continue, with additional opportunities for States Parties and civil society to engage with the Office.

A query was raised as to whether the OTP had a policy or strategy regarding the preparation and disclosure of evidence, including a timeframe, which could lead to benefits in terms of expediting proceedings. Ms. Brady noted that several parts of the policy dealt with that topic and the draft would be reviewed to see if those references could be elaborated or clarified.

It was noted that, in its preliminary response to the IER report, the Court had noted that recommendations 243 to 250 would command attention after the change in mandate to the incoming Prosecutor. This seemed a sensible approach, and it was noted that it could be beneficial for the draft policy to be addressed in the same way.

A query was raised in relation to paragraph 63 of the draft policy, which noted that the Office would evaluate domestic proceedings "for as long as necessary": how could the Office ensure that such assessments were not unnecessarily prolonged and were dealt with expeditiously? In response, Ms. Brady noted that the intention was simply for the evaluation to take as long as necessary, as mandated under the Rome Statute. In most cases the process would be one of passive evaluation, and would not require significant resources.

The policy paper was welcomed and a comment was made that it should be seen as a "work in progress" that can be addressed by the Prosecutor-Elect when his term of office begins, and hoped that it can address the IER recommendations more clearly.

Amb. Neuhaus and Amb. Blaak thanked the presenters and all participants for their active participation. They noted that it may be necessary to have another session to address some of the matters

raised in further depth. Work would also continue on the other aspects of the complementarity mandate for 2021.

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