



ASP OVERSIGHT TEAM

COALITION FOR THE INTERNATIONAL CRIMINAL COURT (CICC)

COMMENTS AND RECOMMENDATIONS¹ TO THE 11th SESSION OF THE ASSEMBLY OF STATES PARTIES

14-22 NOVEMBER 2012, THE HAGUE

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The ASP Oversight Team (Team) of the Coalition for the International Criminal Court was established in 2011 to monitor the crucial statutory function of the Assembly of States Parties (ASP)² in its management oversight of the major organs of the International Criminal Court (Court) regarding the administration of the Court and in the establishment of subsidiary bodies as may be necessary, including an independent oversight mechanism. The Team seeks to ensure that the ASP as a body can deal substantively and strategically with these statutory functions which are fundamental to the success of the Court and the Rome Statute system of justice.

In this regard the Team notes the extensive discussions that took place in The Hague this year on oversight by the ASP - especially in the Study Group on Governance - which will be addressed during the 11th session of the ASP in November 2012, and to which the Team wishes to offer comments and recommendations.

In this paper, the Team makes recommendations concerning (a) strengthening the oversight role of the ASP, (b) the Study Group on Governance, including a commentary on expediting the judicial process and the budget process; and (c) the Independent Oversight Mechanism (IOM).

A. STRENGTHENING THE ROLE OF THE ASP

As the Court approaches its tenth year of operations, the challenges this specialized international organization faces become more technical and consequential to its success.

Therefore it is essential that the ASP builds further institutional and technical expert capacity to strengthen its oversight role and better contribute to the successful functioning of the Court in administering justice and in enhancing its efficiency. To this end the ASP needs to assess its functioning to date with regard to its oversight of the Court, in order to establish an enhanced oversight structure with necessary expertise. This assessment would benefit from a review of the adequacy of current ASP mechanisms and the establishment of expert subsidiary bodies.

The Team recommends the ASP at its 11th session to request that the ASP Bureau presents recommendations on establishing an enhanced and comprehensive subsidiary ASP body structure in a report to be submitted for action by the 12th ASP session in 2013. The Team believes that these discussions should be aimed at concrete outcomes, as well as taking into account the considerations set out below.

¹ While the work of the ASP Oversight Team reflects the positions of those Coalition members most active on particular issues, and while this paper has been prepared in consultation with other Coalition teams, this paper cannot be construed to represent the views of all organizations/members of the CICC. Since the Rome Diplomatic Conference, Coalition members have organized themselves into teams, one to follow each working group or theme of the intergovernmental process. Coalition teams now follow issues addressed by the Assembly of States Parties or its subsidiary mechanisms and by the International Criminal Court. Teams provide a forum within which interested members discuss issues, follow developments, elaborate relevant research and positions in response to developments, and elaborate and implement advocacy strategies in relation to those positions. All Coalition members are welcome to join any teams and all Coalition members are regularly apprised of the work of the teams.

² Article 112 of the Rome Statute.

Reviewing the adequacy of the current ASP mechanisms

The establishment of an enhanced and comprehensive ASP structure with adequate institutional and technical expert capacity should be informed by a review of the adequacy of the current ASP mechanisms, in fulfilling their mandates in supporting the ASP.

Currently, the only subsidiary bodies which report to the ASP and thus formally provide the oversight envisioned by the Rome Statute are the ASP Bureau, the Committee on Budget and Finance (CBF), the Oversight Committee on the Permanent Premises (OC), the Working Group on Amendments (WGA) and the Advisory Committee on Nominations (ACN). Only two of these are composed of independent experts. Aside from these bodies, the current mechanisms in place to assist the ASP in its policy setting and decision making processes are the ASP Bureau's Working Groups in New York and The Hague and its subsidiary Study Group on Governance.

The need for more technical expert capacity in the current structure of the ASP becomes apparent in that it leads to over-reliance on the Committee on Budget and Finance. The CBF is composed of experts "of recognized standing and experience in financial matters at the international level"³ but is now asked to pronounce on issues beyond its specialized expertise. The current structure also leads to overburdening The Hague and New York Working Groups, comprised of members of the diplomatic corps and who may not necessarily have expertise in certain specific areas that are the subject of ASP discussions.

The review of the adequacy of the current ASP mechanisms could be carried out under the leadership of the ASP President.

Moreover, the Study Group on Governance should resume discussions held in 2011 on the role of states parties in governance and management within the institutional framework of the Rome Statute system. Drawing from suggestions highlighted during these discussions and set out in the ASP Bureau report on the Study Group on Governance of 2011,⁴ the Study Group should, amongst others, consider how to enhance the quality of information exchange between representatives of states parties in The Hague and those in New York. This could include holding ASP Bureau meetings by teleconference and co-facilitating certain issues between The Hague Working Group and the New York Working Group, where appropriate as was the case in the preparation for the 2010 Review Conference. Also, the Study Group could review the effectiveness of current Working Group facilitations and whether alternative mechanisms are required to address certain specific areas that are the subject of ASP discussions.

Establishing expert subsidiary bodies of the ASP

Further to a comprehensive review of the adequacy of the current ASP mechanisms, the Team submits that there is scope to consider the establishment of other expert subsidiary bodies. This would assist the ASP in its oversight by understanding the root causes – and not just through a budgetary lens - of obstacles to the fulfillment of the Court's mandate such as failures to execute judicial decisions or ensure effective legal representation.

One example where the ASP could consider strengthening its institutional capacity is that of the cooperation of states parties and other states and entities with the Court. In this respect the Team aligns itself with the views of the CICC Cooperation Team⁵ and recommends that the ASP consider establishing an inter-sessional mechanism/committee on cooperation. The mechanism/committee could, among other things, promote exchange of best practices on cooperation, identify challenges

³ ICC-ASP/1/Res.4, Establishment of the Committee on Budget and Finance, para. 2.

⁴ Report of the Bureau on the Study Group on Governance, 22 November 2011, available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-30-ENG.pdf.

⁵ See also the CICC Cooperation Team Comments and Recommendations to the 11th session of the Assembly of States Parties.

to cooperation including implementation of the 66 recommendations⁶ and provide expert advice on improving cooperation among states parties and other stakeholders. Experts designated by states parties to serve as national focal points for Court matters - more of which are needed - would be important participants in such a mechanism/committee. The Team therefore welcomes the inclusion of formal discussions on cooperation and complementarity on the agenda of the Assembly session for the first time this year.

B. THE STUDY GROUP ON GOVERNANCE

The Team considers that the Study Group on Governance is an important forum for discussing ways to strengthen the institutional framework and efficiency of the Rome Statute system. The Study Group has in the past year successfully sought to enhance the dialogue between the ASP and the Court, which is of great importance in building trust between the two. In this regard, the Team welcomes the dialogue with Court officials at the centre of discussions of the Study Group and urges that this should continue next year. The Team also welcomes the openness of the Study Group and the focal points for each cluster to consider input from civil society on the issues under discussion. The Coalition has provided substantive input to Study Group discussions and will continue to do so in the coming year.

The Team welcomes the recommendation to extend the mandate of the Study Group for a further 12 months in 2013. However, the Team cautions against the Study Group becoming a *de facto* permanent subsidiary body of the ASP Bureau. Successive renewals of its mandate could lead to burdening it with contentious issues that should be addressed by different - or new - ASP subsidiary mechanisms of adequate standing and expertise that report directly to the ASP. In this regard, the Team is pleased that the Study Group limited the number of issues it considered this year and strongly encourages it to limit considerably the number of issues it will address within its clusters over the coming year, to ensure efficient and outcome-oriented discussions.

The Team takes note of the report of the Bureau on the Study Group on Governance⁷ and the recommendations contained therein, and makes the following observations on the issues discussed by the Study Group on Governance in 2012.

Cluster 1 – Expediting the judicial process

The Team welcomes the recommendation of the Study Group to establish a consolidated process to engage in a structured dialogue between all stakeholders within the Rome Statute system to consider proposals aimed at expediting the criminal process of the Court.

The Team recognizes that the Study Group, in its consultations, has suggested that it be an integral part of the 'road map' on how to move forward on amendment proposals to the Rules of Procedure and Evidence. The Team notes this role would overlap with the ASP's Working Group on Amendments, a standing subsidiary body which currently meets in New York. Instead of creating another layer of review to an already complex arrangement and adding to the burden of the Study Group's work, the Team suggests that the ASP uses its existing body, the Working Group on Amendments, to carry out the review of amendments. This promotes good governance and transparency, and furthers the participation of the greatest number of states parties - as well as outside experts and civil society - in the process. The Team urges the involvement of such actors in the process when an amendment to a Rule of Procedure and Evidence is being reviewed, beyond the involvement of experts called on an *ad hoc* basis by the Advisory Committee on Legal Texts.

⁶ Recommendations on Cooperation, Annex II Resolution ICC-ASP/6/Res.2.

⁷ Report of the Bureau on the Study Group on Governance, 23 October 2012.

Cluster 2 – The Budget Process

The Team notes the efforts by the Study Group to enhance the transparency and predictability of the budgetary process and welcomes the constructive recommendations by the focal point for Cluster 2. Clarity regarding the Court’s budget process may have the potential benefit of expediting and facilitating the discussions on the Court’s yearly budget. This will allow the ASP to turn its attention to and consider more thoroughly other substantive issues at its annual sessions and throughout the year, thus improving its oversight capability.⁸

The recommendations contained within the report deserve further consideration and study. The Team welcomes the Study Group’s efforts to improve the Court’s budget process by discussing how to increase the transparency of budget allocation and cost-drivers; to increase understanding of the resource needs of the Court as its level of activity changes; and to increase the interaction with the CBF to better understand its recommendations and achieve greater efficiency as the Court matures. This could lead to a more transparent and stable budgetary process, as well as to a better understanding by the ASP of the Court’s mandate and consequential resource needs. The Team also notes the Study Group’s examination of biennial budgeting and supports further exploration of it.

At the same time, however, care should be taken to ensure that any future implementation of the report’s recommendations respects the court’s independent preparation of its budget proposal, as well as the CBF’s independent consideration of that proposal and related matters. The Team especially welcomes the report’s statement with regard to the earlier involvement of the ASP in the budget process that “The task of the Assembly would not, however, be to approve the Court’s assumptions but to improve states parties awareness.” This is indeed of pivotal importance: to safeguard the independence of the Court by allowing it, and not hindering, its ability to best determine its own assumptions.

C. THE INDEPENDENT OVERSIGHT MECHANISM

The Team underscores the important role that an effective oversight mechanism, respecting the independence of all the organs of the Court, will play in enhancing the transparency and accountability of the Court, as well as the public confidence that such a mechanism engenders. Taking note of discussions in The Hague Working Group in 2011 and 2012, the Team welcomes the comprehensive approach recommended to the ASP for the operationalisation of the inspection and evaluation functions in conjunction with the investigation function of the IOM. However, the Team is dismayed that discussions in 2012 did not lead to a proposal to operationalise the IOM shortly, and strongly urges the ASP to ensure full operationalisation of the IOM as soon as possible. Indeed, as the operationalisation of the IOM is explicitly provided for in the Rome Statute in article 112(4) and as it is clearly identified as a crucial instrument of the ASP to carry out its oversight mandate, it would be of particular importance for The Hague Working Group to reach consensus in 2013 with a view to operationalising the IOM no later than at the 12th ASP session. The operationalising of the IOM should ensure both the judicial independence of the Court and the independence of the Office of the Prosecutor, as well as providing meaningful and effective oversight.

Anti-retaliation and whistleblower protection policy

The Team welcomes the development of an anti-retaliation and whistleblower protection policy by the Court. The only effective way for it to provide protection to whistleblowers is through strict confidentiality requirements and processes to protect those individuals who report misconduct. The Team urges the ASP to ensure that the Court implements the policy as soon as possible, to shield such individuals from retaliation.

⁸ See also the CICC Budget and Finance Team Comments and Recommendations to the 11th session of the Assembly of States Parties.