



## COOPERATION TEAM

COALITION FOR THE INTERNATIONAL CRIMINAL COURT (CICC)

### COMMENTS AND RECOMMENDATIONS<sup>1</sup> TO THE 11<sup>th</sup> SESSION OF THE ASSEMBLY OF STATES PARTIES

13 - 22 NOVEMBER 2012, THE HAGUE

8 NOVEMBER 2012

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The ability of the Court to execute its mandate and to deliver justice is fully dependent on the cooperation it receives from states parties and other actors such as international and regional organisations. The Coalition's Cooperation Team (Team) views the annual sessions of the Assembly of States Parties (ASP) as an important opportunity to encourage stronger and more consistent cooperation while also reflecting on challenges and best practices.

The Team urges states parties to incorporate statements and provisions on cooperation in the General Debate, relevant side events and the agenda item on cooperation, and to adopt a comprehensive, stand-alone resolution on cooperation, in order to enhance cooperation to the Court. The General Debate and the agenda item on cooperation scheduled for 15 and 16 November, respectively, will provide opportunities for states to reaffirm the importance of, and their commitment to, meaningful and consistent cooperation with the Court. They also provide opportunities for states to report on how they have fulfilled, and intend to fulfill, their cooperation obligations or pledges made at or since the 2010 Kampala Review Conference—as well as to provide bilateral assistance to other states in fulfilling their own obligations. States parties should also take this opportunity to describe how they have avoided or responded to instances of non-cooperation.

The Team recalls in particular the importance of building capacity and expertise within the ASP in order to ensure that it is a forum that can deal substantively and strategically with enhancing cooperation. The Team welcomes the work of the Cooperation Facilitator (Ambassador Anniken Krutnes - Norway) and supports the Bureau's recommendation that the Assembly continue this facilitation on cooperation and include an agenda item at the 12<sup>th</sup> ASP session.<sup>2</sup>

The ASP should also take several additional measures —outlined below—that would improve its institutional support to the Court.

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<sup>1</sup> While the work of the Cooperation 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 Coalition. 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.

<sup>2</sup> Report of the Bureau on cooperation ICC-ASP/11/28, Annex I, para 22 and 23.

## I. IMPROVING INSTITUTIONAL SUPPORT FOR COOPERATION

### *j) The ASP should further strengthen its inter-sessional work on cooperation*

#### a) Inter-sessional Mechanism or Standing Committee on Cooperation

The Team commends the achievements to date of the Cooperation Facilitator within the limits of a The Hague Working Group. However, the Team believes that the critical area of cooperation necessitates greater and detailed focus not presently possible through a facilitation taking place in The Hague. In this respect the Team wishes to reiterate its advocacy in previous years that the ASP's cooperation facilitation would be greatly assisted and bolstered by the work of a dedicated inter-sessional mechanism or standing committee on cooperation. Under the guidance of a Facilitator or Chair, the mechanism or standing committee could, among other things, promote the exchange of best practices on cooperation, identify challenges to cooperation including implementation of the ASP's 66 recommendations on cooperation and facilitate the provision of expert advice on improving cooperation among states parties and other stakeholders.<sup>3</sup> Experts designated by states parties to serve as national focal points for ICC matters - more of which are needed - would be important participants in such a mechanism.

The Team further notes that the creation of such a body would not be unprecedented given that the ASP has established subsidiary or expert bodies that assist it in ensuring focus and expertise in its decision making capacity insofar as the budget (Committee on Budget and Finance); elections (Advisory Committee on Nominations) and amendments to the Rome Statute and Rules of Procedure (Working Group on Amendments) are concerned.

The mechanism or committee would also provide a platform for states to share lessons learned and report on, challenges encountered in implementing Court requests for cooperation. In the long-term, this information could form a valuable source of information for states parties in their cooperation endeavours.

Recognising that states parties have varying levels of resources to commit to certain issues, the mechanism or committee could be composed of experts or a selection of states parties representatives, with the mandate to report on the discussion and outcome of its meetings. The meetings, however, would be open to all states parties and civil society organisations. Moving outside the framework of The Hague and New York Working Groups could permit the involvement of state representatives who are responsible for processing requests for mutual/international legal assistance as well as designated ICC focal points in situation countries and beyond as well as other stakeholders and experts in the field such as international and regional organisations and law enforcement officials. Furthermore, the mechanism/committee could submit regular reports of its work to states parties and ultimately to the Assembly at its annual sessions, so that the forum would benefit from the input of different states parties and stakeholders who may not be able to actively participate at every inter-sessional meeting due to resource or geographic constraints.

The establishment of such a forum need not entail significant budgetary implications and could in fact be an efficiency measure ultimately contributing to institutional knowledge and capacity within the Assembly enabling it to adequately respond to issues of cooperation and assistance. Ideally, the mechanism would facilitate a more comprehensive and candid dialogue with stakeholders, including the Court. The long term impact would represent an important investment on the part of the Assembly, particularly given the costs incurred by the court in the absence of effective cooperation, in addition to the inability of the Court to conduct trials and fulfil its mission without the arrest of suspects.

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<sup>3</sup> Recommendations on Cooperation, Annex II Resolution ICC-ASP/6/Res.2.

The Team recommends that at the upcoming session the ASP consider establishing an inter-sessional mechanism or standing committee on cooperation. If this does not occur, the ASP should request the cooperation facilitator to develop a proposal for such a mechanism on cooperation with a view toward its adoption at the twelfth session of the ASP.

#### b) Expert Workshops

The Team welcomes the focused efforts of the Cooperation Facilitator on issues of particular importance, including the convening of a workshop in October 2012 focusing on cooperation in the identification, freezing and seizing of financial assets belonging to ICC suspects. The workshop brought together experts from capital; ICC officials; officials from international tribunals and organisations as well as diplomats from states and non-states parties.<sup>4</sup> The outcome of the workshop was a set of recommendations to both states and the Court, including specific reference to the role and impact of the UN Security Council and the recommendation that states appoint a national focal point and/or central authority, which the Team notes is also one of the ASP's 66 recommendations.<sup>5</sup> The Team views the workshop as a constructive effort to turn the attention of the ASP to goal-orientated discussions and ensuring the involvement of technical expertise, as well as facilitating the sharing of lessons learned. The Team would therefore encourage the ASP through its cooperation facilitation to consider institutionalising this as a regular forum in which to identify and respond to the cooperation challenges that the Court continues to face. These workshops could be integrated into the work of an inter-sessional mechanism or committee on cooperation.

#### c) Multiple Facilitations

Notwithstanding the Team's recommendation on an inter-sessional mechanism or standing committee on cooperation, the Team is mindful of other means in which to strengthen ASP mechanisms on cooperation, including co-facilitations. Recognising that cooperation is an issue that extends beyond The Hague and involves multiple actors, the ASP should consider expanding its cooperation facilitation to other bases that can play role in strengthening support to the Court. New York and Geneva, for example, with their UN presences, are important hubs to explore fostering greater cooperation and political support to the Court. The Team notes that such an attempt was made previously in preparation for the Review Conference with Focal Points appointed in New York and The Hague, encouraging broader consultation and participation. The ASP could also explore a sharing of that burden where one state is appointed in The Hague, another in New York and a third in Geneva, where resource issues are a factor. These multi-location facilitations would not be duplicative, but complementary, tackling cooperation as it pertains to their respective areas as well as provide an opportunity to mainstream the work of the Court. Thus, cooperation and support at a broader UN level, including the UN Security Council (New York); cooperation and mainstreaming of the Rome Statute principles, including encouraging implementation of legislation, as well as human rights investigations (Geneva) and cooperation on a technical level (The Hague). This multi-faceted approach would ultimately contribute to strengthening the ASP overall and provide an opportunity for further reflection at its annual sessions through a dedicated agenda item.

#### d) Future Focus

The Team is concerned that some 5 years after their adoption by the ASP, the 66 recommendations on cooperation adopted by the ASP at its 6<sup>th</sup> Session, appear to have been neglected, with very little discussion or information available as to how or whether states parties have implemented them.<sup>6</sup> The 66 recommendations act as an important blueprint for states on the steps it can take to facilitate cooperation, including the appointment of focal points, the importance of implementing legislation,

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<sup>4</sup> Ibid, Recommendation 7.

<sup>5</sup> Report of the Bureau on cooperation ICC-ASP/11/28, Annex II.

<sup>6</sup> Supra 3.

and arrest and surrender. The Facilitation and in consultation with other stakeholders could identify specific recommendations that could form the basis of further goal-orientated discussion throughout the year and involving relevant experts as necessary and through the medium of the institutionalized workshop as discussed above.

***ii) Cooperation should feature as a regular item on the agenda of the annual Assembly sessions***

In order to engage effectively on cooperation-related topics, states parties must discuss them in a collective fashion at the annual sessions of the ASP.<sup>7</sup> The Team welcomes the addition of a plenary discussion on cooperation at the upcoming ASP session and calls on states to establish a formal, standing item on cooperation on the agenda of the ASP at each annual session. This agenda item could be handled by both the plenary and a new inter-sessional mechanism or standing committee on cooperation, as suggested above. Discussions during plenary sessions of the ASP, as well as attracting high-level representatives and decisions makers, could then provide a results-orientated framework for the inter-sessional discussions enabling the ASP to build on the work carried out over the course over the year.

In this regard, the Team welcomes and strongly urges the ASP to adopt the recommendation contained in the Bureau report on cooperation and its corresponding draft resolution, that a specific item on cooperation be included in the agenda of the 12<sup>th</sup> session of the ASP.<sup>8</sup> The Team notes however, at this juncture an agenda item for future ASP sessions has not been proposed. The Team calls for a consistent approach to structuring dialogue at the annual ASP sessions, which would include a regular agenda item for discussions on cooperation. Concretising discussions on cooperation at ASP sessions would also create a culture of focused discussions inter-sessionally.

***iii) The ASP should ensure the effectiveness of its non-cooperation procedures***

The Team takes note that the ASP's non-cooperation procedures were implemented for the first time this year following their adoption at the 10<sup>th</sup> session of the ASP and in relation to Pre-Trial Chamber I's decisions in the Dafur situation regarding 2 instances of non-compliance with the arrest warrant against Omar al Bashir by Malawi and Chad, pursuant to article 87(7).<sup>9</sup> In this respect the Team notes the report of the Bureau on Non-Cooperation and its reference to that fact that Malawi had responded positively to the overtures of the ASP President pursuant to the procedures, but that conversely with respect to Chad, there "are no indications that the application of the Assembly procedures on non-cooperation have had any effect."<sup>10</sup>

While the Team recognizes the political sensitivity of this issue, it would urge the ASP to address this matter as recommended by the Bureau, especially the lack of adequate response from the Chadian authorities. In addition the ASP should not tolerate non-compliance with Court decisions. The Team would also encourage the ASP to use this opportunity of the 11<sup>th</sup> session to address the effectiveness of the procedures and the lessons learned following their implementation, with a view to improving the procedures.

The Team also welcomes the efforts of the ASP President to engage the UN Security Council on the article 87(7) referral, but notes with disappointment that "Security Council action was not likely to be forthcoming" and that "no Security Council action on this matter was to be expected." The Team is

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<sup>7</sup> The Team notes that while various side events organised by various stakeholders including civil society have contributed to the overall discussion on cooperation over the years and should continue, a formal plenary session would assist in mainstreaming this issue.

<sup>8</sup> Paragraph 14, Annex 1 [Draft Resolution on Cooperation] – Report of the Bureau on Cooperation, page 2, 22 November 2011, ICC-ASP/10/28.

<sup>9</sup> <http://www.icc-cpi.int/iccdocs/doc/doc1384955.pdf> (Chad) / <http://www.icc-cpi.int/iccdocs/doc/doc1287184.pdf> (Malawi).

<sup>10</sup> Report of the Bureau on non-cooperation, para 17, ICC-ASP/11/29.

dismayed at the indifference shown thus far by the UN Security Council with respect to the failure to arrest an individual accused of committing genocide crimes, against humanity and war crimes and following an investigation facilitated by a UN Security Council referral pursuant to Article 13(b) of the Rome Statute. The Team would urge states parties who hold permanent or rotational membership to the UN Security Council to ensure that this or any future matters are adequately addressed by the Security Council, pursuant to its obligations under Chapter 9 of the Rome Statute and given that “[Security Council action is dependant on one of its members initiating action concerning this issue].”<sup>11</sup>

## **II. COOPERATION AT THE 11<sup>th</sup> ASP SESSION**

### ***i) Agenda Item***

The Team welcomes the fact that the agenda item on cooperation encourages maximum engagement by States and also welcomes the participation of other actors such as civil society organisations. Focusing on specific areas of particular importance, namely arrests; and identification, tracing, freezing and seizure of assets, will also ensure targeted discussion, which should include addressing how the ASP and the Court will ensure implementation of its recommendations from the October workshop, but also how the ASP will meet the challenge of outstanding arrests.

### ***ii) Pledges***

The Team also welcomes the fact that the agenda item will provide an opportunity for states to make further pledges and undertakings. Indeed, the Team is of the view that pledging should be a permanent feature of annual ASP sessions. While the Team would strongly urge states to make concrete outcome-oriented pledges that are measurable at the eleventh session, it would also urge those states who have made pledges in the past, particularly during the Review Conference in Kampala, but also the recent High Level Rule of Law event during the 67<sup>th</sup> session of the UN General Assembly, to use the opportunity of the agenda item and the general debate, to report on the progress made in implementing those pledges.

### ***ii) Resolution***

The Team notes that the principal outcome of the agenda item will be a stand-alone resolution on cooperation. The Team takes particular note of language in the draft resolution encouraging states parties to explore opportunities for further cooperation between the Court and international and regional organisations and the importance of ensuring support and cooperation in the follow-up to UN Security Council Referrals. The Team finds the resolution to be on the whole a useful tool to reaffirm critical issues and urges states parties to retain the currently bracketed language encouraging states parties to avoid non-essential contacts with persons subject to an arrest warrant. All states party to the Rome Statute are under an obligation to execute decisions of the Court, including judicial decisions ordering the arrest of persons accused of committing Rome Statute crimes. The Team notes that the concept of avoiding non-essential contacts has been recognised as such in the EU Action Plan, the ICC Prosecutorial Strategy and has become *de facto* practice for many states parties. The ASP and states parties should also recognize that other states may often these difficult situations and encourage them to cooperate with the Court, and when they do act, praise their courage and offer direct political support.

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<sup>11</sup> Report of the Bureau on non-cooperation, para 3, ICC-ASP/11/29.