



COOPERATION TEAM
COALITION FOR THE INTERNATIONAL CRIMINAL COURT (CICC)

COMMENTS AND RECOMMENDATIONS¹
TO THE TENTH SESSION OF THE ASSEMBLY OF STATES PARTIES
12-21 December 2011, New York

2 December 2011

The ability of the Court to execute its mandate and to deliver effective global justice is fully dependent on the level of cooperation it receives, principally from states parties, but also other actors such as international and regional organisations. The Coalition's Cooperation Team ('Team') welcomes the cooperation provided to date to the International Criminal Court ('Court') and the Court's own endeavours in galvanising and enhancing international cooperation through the use of bilateral and multilateral fora.

Challenges remain, however, in securing the full cooperation of States Parties, as illustrated, for example, by outstanding arrest warrants and the visits by ICC suspect, Omar Al-Bashir to the states parties of Chad, Djibouti; and Malawi - without arrest - since the ninth session of the Assembly of States Parties ('Assembly'). These visits *inter alia* are an affront to the rule of law and accountability and highlight the impact that a lack of cooperation in general and non-compliance with court decisions in particular, can have on the perception and authority of the Court. This is one example of why greater efforts are needed by states parties to fulfil their obligations to cooperate with the Court. Those efforts also include cooperation through the conclusion of framework agreements and to provide other forms of assistance to the Court as it undertakes investigations and cases.

The Team urges states parties to use opportunities during the Assembly session, including the General Debate, relevant side events, informal consultations on cooperation, and the adoption of a resolution on cooperation, to enhance cooperation to the ICC. The General Debate, for example, will provide an opportunity for States to reaffirm the importance of, and their commitment to, cooperation with the Court. It would also provide a key opportunity for states to report on how they intend to (or have), fulfill(ed) their cooperation obligations—including pledges made at or since the Kampala review conference—as well as to provide bilateral assistance to other States in fulfilling their own obligations. States parties may also take this opportunity to describe how they have avoided or condemned 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 cooperation, including as to how cooperation between states parties and the Court can be further strengthened. The Team welcomes the work of the Cooperation Facilitator (Ambassador Mary Whelan – Ireland) and supports the recommendation that the Assembly continue this facilitation on cooperation.² The

¹ 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 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 Paragraph 13, Annex 1 [‘Draft Resolution on Cooperation’] – Report of the Bureau on Cooperation, 22 November 2011 (ICC-ASP/10/28).

ASP, however, should also take several additional measures—outlined below—to ensure its development of an adequate forum for regular and consistent exchanges on cooperation, both inter-sessionally and at the annual sessions of the Assembly, as well as address non-cooperation and use the annual sessions to make tangible commitments to further cooperation through formal pledges as was the case at the Kampala Review Conference in 2010.

A. Improving Institutional Support for Cooperation

i) The ASP should further strengthen its inter-sessional work on cooperation

As noted above, the Team commends the work that the Cooperation Facilitator has undertaken this year, including informal consultations within The Hague Working Group on various issues of particular importance as articulated in the cooperation resolution from the eighth session of the Assembly including; interim release, sentence enforcement; and implementing legislation.³

Based on the court's identification of its needs and experience to date, the Team recommends that the next Cooperation Facilitator focus on strategic priorities, including facilitating the arrest and surrender of persons subject to arrest warrants; the identification, tracing, freezing and seizure of assets; witness protection and support, defence related issues and interim release. These priorities should also be identified in the Bureau's draft resolution on cooperation as issues to be addressed by the cooperation facilitation next year.

The Team notes however that the aforementioned consultations undertaken thus far have been restricted to The Hague, where participation has not always been consistent or involved broad geographic representation. Notwithstanding the progress thus far, the Team considers that the Facilitator would be greatly assisted and bolstered by the work of a dedicated inter-sessional mechanism on cooperation. Under the guidance of the Cooperation Facilitator, the mechanism could take forward targeted initiatives, by for example, identifying ways in which to encourage the conclusion of framework agreements, and the implementation of domestic procedures to operationalise parts 9 and 10 of the Rome Statute as well as the Agreement on Privileges and Immunities ('APIC').⁴ The mechanism 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 not all states parties have the resources required to take an active interest in all issues, the mechanism could be composed of a representative from each geographical grouping so as to ensure adequate and broad representation and with the mandate to report on the discussion and outcome of its meetings. The meetings of the mechanism, however, would be open to all states parties and civil society organisations. In addition, rather than just involving diplomatic

³ Resolution ICC-ASP/8/Res.2, 26 November 2009

⁴ The Team welcomes in this regard the adoption in 24 June 2011 of comprehensive legislation incorporating the Rome Statute in Mauritius, which includes relevant provision on cooperation on the basis of Part 9 of the Rome Statute. The team calls upon the ASP and its states parties to intensify efforts to achieve universal implementation of effective provision on cooperation with the ICC.

The Team also welcomes the recent ratifications to the APIC by Czech Republic (4 May 2011) and by Malta (21 September 2011) establishing the entire EU region as one granting the Court with the necessary privileges and immunities necessary for the conduct of investigations. The team recognises also the recent accessions in other regions, such as those by Costa Rica (28 April 2011), Tunisia (29 June 2011), Chile (29 September 2011), but calls on the 68 states parties to the ICC that have not yet done so to accede or ratify the APIC.

representatives in The Hague, discussions could involve 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 should be required to 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.

The Team recommends that at the upcoming session the Assembly establish an inter-sessional mechanism on cooperation; or in the alternative, mandate the new cooperation facilitator to develop a proposal for such a mechanism on cooperation with a view toward its adoption at the eleventh session of the Assembly.

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.⁵ The Team believes that the issue of cooperation and assistance to the Court should feature as a formal, standing item on the agenda of the Assembly at each annual session. Discussions during plenary sessions of the Assembly, as well as attracting high-level representatives and decisions makers, could then provide a framework for the inter-sessional discussions as described in paragraph (i) above, enabling the Assembly to build on the work carried out over the course over the year.

In this regard, the Team welcomes and strongly urges the Assembly to adopt the recommendation contained in Bureau report on cooperation and its corresponding draft resolution, that a specific item on cooperation be included in the agenda of the eleventh session of the Assembly.⁶ The Team notes however, at this juncture an agenda item for the twelfth and thirteenth sessions and beyond has not been proposed.⁷ The Team calls for a consistent approach to structuring dialogue at the annual Assembly sessions, which would include a regular and annual agenda item for discussions on cooperation.

iii) The Assembly should adopt procedures that would address instances of non-cooperation

The Team has consistently called on the ASP to adopt procedures that would not only enable it to respond to specific findings of non-compliance by the Court under Article 87(5) and (7) and as per Article 112(2)(f) of the Rome Statute, but also general instances of non-cooperation that have not

⁵ The Team notes that while various side events organised by various stakeholders including civil society have contributed to the overall discussion on cooperation and should continue, a formal plenary session would assist in mainstreaming this issue.

⁶ Paragraph 14, Annex 1 [‘Draft Resolution on Cooperation] – Report of the Bureau on Cooperation, page 2, 22 November 2011 (ICC-ASP/10/28).

⁷ At the upcoming tenth session of the ASP, two Informal consultations on non-cooperation and cooperation have been tentatively scheduled for a period of 30 minutes each and will only provide an opportunity to address the language in prospective resolutions to be adopted.

resulted in a finding of non-compliance.⁸ In this respect the Team welcomes the Bureau report proposing procedures to strengthen the Assembly and enable it to play a much greater oversight role in this pressing issue.⁹

The Team strongly urges the Assembly to adopt the suggested procedures at the upcoming tenth session. The Team also recommends, however, that in doing so, the Assembly keep the procedures under constant review in order to assess their suitability in responding to instances of non-cooperation and adapt them accordingly.

iv) Pledging should be a permanent feature of annual sessions of the Assembly

Pledges made during the Kampala Review Conference provided a tangible indication of support for the Court. The Team recommends that the Assembly establish a follow-up framework to make pledging a regular feature of Assembly's annual sessions and to provide an opportunity for states parties and observer states to report on the implementation of pledges made at or since the Review Conference.

B. International – Regional Cooperation

The Team notes the role that states parties can play in their membership of international and regional organisations in mainstreaming and encouraging greater cooperation with the ICC. Membership of such organisations provides an important opportunity for Rome Statute states parties to push the international justice agenda and the importance of diplomatic support to the Court through these organisations. In this respect the Team welcomes the revised EU Decision on the International Criminal Court and its Action Plan as well as the recent European Parliament Resolution as examples of how membership of a regional body can strengthen the Rome Statute system.¹⁰ The team also notes and welcomes the exchange of letter between the President of the ICC and the Secretary General of the OAS to establish a Framework Cooperation Arrangement between the Court and the regional organisation, an agreement made possible by the support of OAS members who are also Rome Statute states parties. The team calls upon all states parties to replicate these efforts in the relevant organisations they belong to by promoting the institutionalization of support to the ICC through the conclusion of similar agreements.

In this same respect the Team encourages the court to maintain its external relations efforts, engaging with regional organizations and promoting broader awareness of the Court, which can be key to enhanced cooperation. The Team urges the Assembly to ensure sufficient resources are available in the court's travel budget for this purpose. The Team urges the court and all states parties to continue their engagement with the African Union ('AU') with a view toward promoting more support in AU decisions for the Court, including Rome Statute states parties' obligations to cooperate with the court, notably in the surrender of suspects, and the establishment of the Court's AU Liaison Office. The Team also notes the important statements made by a number of AU Member States who are party to the Rome Statute affirming their support to the Court since the last Assembly session. Burkina Faso, Mali, and Niger, for example, clearly indicated that they would abide by their commitments as Rome Statute states parties in response to possible efforts by suspects in the

⁸ See CICC Cooperation Team 'Comments and Recommendations to the Ninth Session of the Assembly of States Parties, 6 – 10 December 2010' [25 November 2010] and 'Comments and Recommendations to the Eighth Session of the Assembly of States Parties, 18 – 26 November 2009' [Undated]

⁹ Report of the Bureau on potential Assembly procedures relating to non-cooperation (ICC-ASP/10/37)

¹⁰ European Parliament resolution on EU support for the ICC: facing challenges and overcoming difficulties (2011/2109(INI)) 17 November 2011 unnoticed

Court's Libya investigation to enter their countries, including former Libyan leader Muammar Gaddafi. Such statements should be encouraged and given due attention.

The Team also recommends further efforts by the Court and states parties to improve cooperation at the UN. The ICC Prosecutor has in this respect annually informed the UN Security Council of the lack of cooperation in the Dafur investigation, but to no avail. Rome Statute states parties who retain a seat on the UN Security Council, both permanently and rotationally should be obliged to ensure that international justice and accountability issues are mainstreamed throughout the UN. This should include ensuring that peacekeeping missions, for example, are not contradictory but complementary of the international justice agenda – including reference to the importance of arrests in their mandates—as well as encouraging national accountability efforts and ensuring that such efforts are on the agenda of bilateral discussions.