



COOPERATION TEAM
COALITION FOR THE INTERNATIONAL CRIMINAL COURT (CICC)
COMMENTS AND RECOMMENDATIONS¹
TO THE TWELFTH SESSION OF THE ASSEMBLY OF STATES PARTIES
20 - 28 November 2013, The Hague

6 November 2013

The Coalition's Team on Cooperation submits the following recommendations to the Assembly of States Parties at its twelfth annual session. From the outset the Team notes the important achievements made this year in the Bureau's cooperation facilitation, including the continuing use by The Hague Working Group of external expertise to inform the Assembly's decision making, most notably during the one-day workshop on cooperation as well as progress made in other areas that will be addressed in 2014, specifically the *roadmap* on arrest strategies, which should also draw on external expertise. The Team also commends the efforts of the Cooperation Facilitator, the Netherlands and Estonia as well as participating African states in convening meetings on witness protection in Dhaka and Arusha that were hugely important in expanding the cooperative role of states parties beyond The Hague Working Group.

1) COMMENTS TO DRAFT RESOLUTION ON COOPERATION

The Team welcomes adoption at the Assembly session of the stand-alone resolution on cooperation. While the Team is of the view that the resolution as a whole is a positive step forward and builds on the gains of last year, it wishes to draw attention to the following specific paragraphs:

1.1) Discussions on non-essential contacts should continue next year [OP6]

Where states parties do not have the authority or capacity to execute an arrest, for example where the accused may be outside the territory of the State obliged to arrest or beyond the reach of its law enforcement agencies, any engagement or "contact" with persons who are the subject of an ICC arrest warrant should be avoided. The Team encourages the Assembly, regional organizations, and individual states parties to adopt policies proscribing *non-essential contacts* with such persons. Avoiding such contacts with a view to isolating the fugitive is essential to long-term strategies of arrest by maintaining the authority of the court's arrest warrants and signaling that there can be no *business as usual* with ICC fugitives. Such contact also contravenes the spirit and purpose of the Rome Statute and sends the wrong message to victims and their families.

Nevertheless the Team is of the view that the draft operative language on contacts fails to set a clear policy on limiting contacts with such persons short of an arrest and is therefore inadequate to deal with the importance of the issue. The Assembly should continue to work toward putting in place adequate guidance, but if clearer language is not possible this year, then the matter should be taken up over the course of 2014 for further discussion.

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.

1.2) The ASP should reaffirm the importance of signing APIC [OP8 & 9]

The Team notes that previous resolutions on cooperation have reaffirmed the importance of states and non-states parties signing Agreements on Privileges and Immunities with the ICC as a means to give effect to Article 48 in the Rome Statute, not least in light of the detention of ICC staff in Libya in 2012. The Team therefore believes that language reaffirming this from previous resolutions should be retained together with the instruction that domestic legislation be amended should it prove to be a barrier. Unfortunately, the bracketed language as it appears in the draft does not meet that standard and the Team therefore recommends its deletion.

1.3) The Team welcomes discussions on a prospective coordinating mechanism [OP17]

The Team welcomes the proposal that the Bureau report to the next ASP session on the feasibility of establishing a coordinating mechanism of national authorities dealing with cooperation. The Team has consistently raised the importance of discussions that *inter alia* draw on the expertise and experience of persons in capital and who are responsible for processing requests for cooperation. The Team, therefore, welcomes discussion in the coming year as to how such a mechanism could be established in order to contribute to the exchange of best practices and lessons learned and help enhance cooperation, for example, assistance to enable more states to enter into bilateral framework agreements.

The Team has also recommended previously that the Assembly establish a standing committee or working group on cooperation, to augment the capacity of the cooperation facilitation and provide additional, inter-sessional opportunities for focused, expert discussion. There have been positive developments in the past two years, for example, the convening of seminars on cooperation issues that have sought the expertise of experts and which have moved the Assembly toward a model in which cooperation is given the priority and sustained attention it requires. A prospective coordinating mechanism could further equip the Assembly with the tools it needs to address cooperation on an inter-sessional basis. In assessing the establishment of a coordinating mechanism of national authorities, the Bureau should give consideration to the relationship between the mechanism and the current cooperation facilitation, and evaluate whether there still remains a need to establish, in addition, a standing committee or working group, to ensure the full range of court cooperation needs, whether in judicial assistance or in diplomatic and political support, can be addressed.

The Team would urge that discussions on a prospective mechanism also benefit from wider consultation with NY and capital and with a view to ensuring broad participation.

1.4) Follow-up to Kampala pledges should be prioritized in 2014 [OP28]

The Team welcomes the suggestion that the Bureau follow-up on the pledges made at the Review Conference in Kampala. The pledges at the Review Conference were a unique exercise on the part of the ASP, but there has been little follow-up to date to ensure the implementation of those pledges and to provide a clear framework for additional pledges. The Team further suggests that this follow-up be done either directly by the Bureau or through a designated focal point that would also develop a framework for follow-up in the future and receiving new pledges.

2) DISCUSSIONS AT THE ASP SHOULD LEAD TO GREATER VICTIM AND WITNESS PROTECTION

The efforts of the Cooperation Facilitator in convening forums in Dhaka and Arusha, were an important contribution to encouraging states in the Africa region toward signing relocation agreements. This is nevertheless an obligation that should be shared by all states and while the need may presently be to protect witnesses by relocating them in the region where the ICC is currently investigating – the ICC's attention may very well turn to other regions in the future, conversely

relocation in the region may not always be a viable option. It is therefore, imperative that the ICC cast its net as wide as possible in identifying states willing to relocate witnesses.

The Team considers the focus on witness protection and relocation in the plenary session as timely and hugely important – not least in light of the alleged interference with witnesses that has been claimed in the Kenya cases. As well as an opportunity to increase understanding of the court’s challenges, the Team hopes that the plenary discussion will be goal orientated. The Team encourages states to come prepared to actively participate in the session, and, where possible, to also commit to concluding agreements with the court in this area. It would also be appropriate in the plenary discussion for states to reflect on strengthening domestic capacity to protect witnesses and victims, which could benefit the ICC’s protection needs, but also benefit national efforts to prosecute such crimes under the principle of complementarity, providing a connection to the Bureau’s complementarity facilitation. In this respect the discussion should also address how the court can strengthen its own practice and whether other approaches beyond relocation agreements are needed to ensure the court has adequate systems for the protection and support of victims and witnesses as per the Rome Statute.

3) STATES SHOULD CONCLUDE BILATERAL FRAMEWORK AGREEMENTS OR ADDRESS OBSTACLES TO DOING SO

It is the obligation of all states parties to give effect to the rights of accused persons contained in the Rome Statute and bilateral framework agreements - which previous ASP resolutions have rightly promoted the conclusion of - are a crucial tool to give effect to the right of interim release and relocation following acquittal. There is however a regrettable absence of both agreements and while the Court has only recently circulated a model agreement for the relocation of acquitted persons, a model agreement for interim release has been in circulation since May 2011. While one state has shown an interest in concluding an interim release agreement according to the Court’s report on cooperation, it is unclear why no state has yet signed such an agreement.² The Team would therefore strongly urge states to consider and sign such agreements or address obstacles to doing so.

3) THE ASP’S NON-COOPERATION PROCEDURES SHOULD BE KEPT UNDER REVIEW

The Team takes note that in 2013, due to non-cooperation by an ICC state party, ICC judges once again issued a decision referring an instance of non-cooperation to the Assembly and Security Council that related specifically to the failure to arrest, but issued several other decisions that related to potential visits or actual visits of fugitives.³ The Team further notes the efforts of the ASP President who has not only condemned such incidents where they have occurred, but also called attention to the possibility of such incidents taking place and the opportunities for states parties to work together to avoid non-cooperation (as per the Assembly’s non-cooperation procedures). While the team welcomes the proposed Road Map on Arrest Strategies – necessarily leading to further instances of non-cooperation - it is also important that the Assembly address the effectiveness of its non-cooperation procedures and keep them under review. The Team also reiterates its dismay that the UN Security Council has failed to respond to these instances of non-cooperation that relate to its referred situations. Given that the next session of the Assembly will take place in New York, it may be appropriate to consider whether special attention to the relationship between the ICC and the UN, including the Security Council and its referrals as well as the role of states parties who hold permanent or rotational membership on the Council, could be a feature of discussions.

² http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-35-ENG.pdf, para 39

³ See <http://icc-cpi.int/iccdocs/doc/doc1573530.pdf>; also *inter alia* <http://icc-cpi.int/iccdocs/doc/doc1640857.pdf>; <http://icc-cpi.int/iccdocs/doc/doc1646291.pdf>; and <http://icc-cpi.int/iccdocs/doc/doc1645811.pdf>