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Report of the Bureau on cooperation

Note by the Secretariat

Pursuant to paragraph 15 of resolution ICC-ASP/10/Res.2 of 20 December 2011, the Bureau of the Assembly of States Parties hereby submits for consideration by the Assembly the report on cooperation. The present report reflects the outcome of the informal consultations held by The Hague Working Group of the Bureau with the Court and other stakeholders.

I. Background

1. Operative paragraph 13 of resolution ICC-ASP/10/Res.2 entitled “Cooperation”, adopted by the Assembly of States Parties (hereinafter “the Assembly”) on 20 December 2011, requested the Bureau to establish a facilitation for cooperation to consult with States Parties, the Court and non-governmental organizations, as well as other interested States and relevant organizations, in order to further strengthen cooperation with the Court.
2. The Bureau appointed Ambassador Anniken Ramberg Krutnes (Norway) as facilitator for cooperation at its seventh meeting on 28 February 2012.

II. Organization of work and general findings

3. In 2012 The Hague Working Group (“working group”) held a total of 7 informal consultations on the issue of cooperation with representatives of States Parties and organs of the Court. Meetings were held on 29 March, 26 April, 15 May, 31 May, 19 June, 18 September, and 10 October 2012. Meetings and consultations have been held with a number of stakeholders, including States, Court officials, the Chair of the International Criminal Court sub-area of the public international law working party (COJUR–ICC) of the European Union and representatives of civil society. In addition, on 1 October 2012, the facilitator organized, with valuable practical support from the Court and at its premises, a workshop on cooperation for invited experts and practitioners.
4. The first meeting of the working group on cooperation was held on 29 March 2012. Informal consultations were held with representation of States Parties and all Court organs, with a view to identifying a set of key issues on which to focus the efforts of the working group. Mindful of the wide scope of pertinent subjects to address in the area of cooperation, there was agreement among States and the Court to focus on the following issues:
 - (a) The identification, freezing and seizure of assets;
 - (b) The channels of communication and domestic procedures for dealing with Court cooperation requests;
 - (c) The identification and sharing of best practices; and
 - (d) Developing databases on implementing legislation and on national focal points
5. In addition, the Court highlighted the importance of other areas of cooperation, such as the execution of warrants of arrest, as well as voluntary cooperation agreements and diplomatic and political support. Following the events in Zintan, Libya, in June/July 2012, the need for greater clarity with regard to privileges and immunities of the Court’s staff arose as an additional important topic for discussion.

A. Communication between the Court and States Parties

6. In discussing the matter of communication between the Court and States Parties for the purpose of cooperation, it was agreed to focus discussions on practical experiences and considerations, rather than conducting conceptual discussions. For this purpose, and recalling operative paragraph 8 of ICC-ASP/10/Res.2, communication relating to the assistance rendered by States in identification, freezing and seizing of property and assets of suspects and accused was identified as a particular priority, both by delegations and by the Court.
7. The topic of identification, freezing and seizure of assets and property was discussed in several of the meetings held. On 26 April 2012, the Court presented two discussion papers on priorities for the identification, freezing and seizure of proceeds, property and assets, and on channels of communication/domestic procedures for dealing with Court cooperation requests, respectively. The meeting of 15 May 2012 heard a presentation of the European Union Genocide Network by EUROJUST by the Network Secretariat Coordinator, describing the Network’s structure and functioning, with a special focus on the identification, freezing and seizure of property and assets.

8. On 1 October 2012, a workshop was organized by the facilitator, in cooperation with the Court, on cooperation between the Court and States with a special focus on requests for assistance in identification, freezing and seizing of assets and property. Participants in the workshop were representatives of States Parties from all regional groups, non-States Parties with a history of cooperation, officials of all organs of the Court, as well as international tribunals, and international organizations. One main objective was to identify key challenges faced by the Court and States in the communication and work processes surrounding the Court's requests for assistance, and to discuss recommendations addressing these challenges that would be practicable within the existing legal framework. Another main objective was to facilitate the exchange of experiences, ideas and "lessons learned" between, inter alia, contact points in national agencies, and of the Court. Examples from the experiences of other treaty-body were explored. Participants were presented with a case study, consisting of a set of scenarios prepared in order to explore possible challenges and opportunities for further improvement of practices, both on the part of the Court and States. The workshop also addressed the issue of competing claims regarding the same assets. The facilitator prepared a report which contains a list of proposals and suggestions from participants in the workshop, made under the Chatham House Rule.¹ As stated in that report, proposals and suggestions contained therein "were not subject to any form of endorsement". However the list may facilitate possible further work on cooperation by the working group, or in other fora.

B. Implementing legislation of particular importance to cooperation

9. The meeting of 19 June 2012 was dedicated to the issue of national implementing legislation relevant to cooperation and a presentation of the ICC Legal Tools Project by the Project Coordinator.

10. Recalling operative paragraph 4 of ICC-ASP/10/Res.2 and previous resolutions and declarations, the importance of implementing legislation was underlined both by States and by the Court. The need for facilitation of exchange of information relating to implementing legislation was raised by some parties. In this regard, it was suggested that the National Implementing Legislation Tool of the Court's Legal Tools Database could be further developed to facilitate the retrieval of information about national implementing legislation relevant to States' obligations to cooperate with the Court. It was suggested that such a function could be beneficial both for the Court in its communication with States, and also for States in the drafting of new implementing legislation. Moreover such a function could help identify and share information about best practices.

C. Voluntary agreements

11. Recalling operative paragraphs 6, 7 and 9 of ICC-ASP/10/Res.2, and a clear indication from the Court on the importance of the topic, the topic of bilateral cooperation agreements and/or arrangements between the Court and States, including agreements/arrangements regarding enforcement of sentences, witness relocation, temporary relocation of witnesses and interim release was discussed in several of the meetings in the Working Group. The Group also had an initial discussion on agreements on relocation of acquitted persons.

12. Mali concluded an agreement on enforcement of sentences, as the first African State to conclude such an agreement with the Court. Despite efforts by the Registry, no relocation agreements were signed in 2012.² This is despite the existence of a Trust Fund for Relocations which allows for relocation agreements and/or arrangements to be entered into on a cost-neutral basis. The Court describes this absence of new agreements as an alarming shortfall in its ability to protect victims and witnesses potentially under threat.

¹ Annex II.

² As of 3 October 2012.

D. Privileges and immunities of the Court's staff

13. After the events in June/July 2012, which highlighted the need to clarify and raise awareness of the applicable obligations of States Parties and other States with regard to privileges and immunities for the Court's staff members, the working group convened a meeting for preliminary discussions on this topic on 18 September 2012. An informal paper, which is annexed to this report for informational purposes, was circulated by the facilitator prior to the meeting.³ The President of the Court, Mr. Sang-Hyun Song, expressed his support to the working group's efforts in this regard at the diplomatic briefing held by the Court on 19 September 2012.

14. Following a presentation of the informal paper at the meeting on 18 September 2012, the Court briefed delegations about its internal review process and the preparation of a policy document on privileges and immunities. While mindful of the different roles and mandates of the Court and the working group, both the Court and several States noted the need to coordinate, as appropriate, discussions held in the working group and the internal process of the Court. At the same time, it was noted by some States that discussions in the working group should be mindful of and without prejudice to ongoing proceedings before the Court.

15. The need to consult with non-States Party to the Rome Statute was raised by several delegates. Such consultations could be particularly relevant when discussing privileges and immunities of staff operating in non-States Party to the Rome Statute pursuant to a United Nations Security Council (hereinafter UNSC) resolution or acceptance of jurisdiction in accordance with article 12, paragraph 3, of the Rome Statute. The working group agreed that further discussions on the topic should be held before the twelfth session of the Assembly of States Parties, in dialogue with the Court and, where appropriate, with the United Nations and other international organizations.

16. The working group agreed that there is a need for further ratifications of the Agreement on Privileges and Immunities of the Court.⁴

III. Recommendations

17. The working group recommended that the Assembly continues to monitor cooperation with a view to facilitating States Parties in sharing their experiences and considering other initiatives to enhance cooperation with the Court.

18. The working group further recommended that the draft resolution in annex I be adopted by the Assembly following the plenary session on cooperation.

³ Annex III.

⁴ http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-13&chapter=18&lang=en

Annex I

Draft resolution on cooperation

The Assembly of States Parties,

Recalling the provisions of the Rome Statute, the Declaration on Cooperation (RC/Dec.2) agreed by States Parties at the Review Conference in Kampala and previous resolutions and declarations of the Assembly of States Parties with regard to cooperation, including ICC-ASP/8/Res.2, ICC-ASP/9/Res.3, ICC-ASP/10/Res.2, and the sixty-six recommendations annexed to ICC-ASP/6/Res.2,

Determined to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole, and *reaffirming* that the effective prosecution of such crimes must be strengthened, inter alia, by enhancing international cooperation,

Stressing the importance of effective and comprehensive cooperation and assistance by States Parties, other States, and international and regional organizations, to enable the Court to fulfil its mandate as set out in the Rome Statute,

1. *Welcomes* the acknowledgement in paragraph 80 of the Report on the activities of the Court that “[t]he Court’s cooperation with States Parties has been generally forthcoming”;¹
2. *Emphasizes* the importance of timely and effective cooperation and assistance from States Parties and other States under an obligation or encouraged to cooperate with the Court pursuant to Part 9 of the Rome Statute or a United Nations Security Council resolution, as the failure to provide such cooperation in the context of judicial proceedings affects the efficiency of the Court, and *underlines* the negative impact that non-execution of Court requests can have on the ability of the Court to execute its mandate, in particular when it concerns the arrest and surrender of individuals subject to arrest warrants;
3. *Emphasizes also* the ongoing efforts made by the Court in providing focused requests for cooperation and assistance which contribute to enhancing the capacity of States Parties and other States to respond expeditiously to requests from the Court, and *invites* the Court to also continue improving its practice in transmitting specific, complete and timely requests for cooperation and assistance;
4. *[Encourages* States Parties to avoid non-essential contacts with persons subject to a warrant of arrest issued by the Court, and *welcomes* the efforts of States and regional organizations in this regard;]
5. *Welcomes* the efforts of the President of the Assembly in implementing the non-cooperation procedures adopted by the Assembly in ICC-ASP/10/Res.5, and *encourages* the Assembly to keep said procedures and their implementation under review in order to secure their effectiveness;
6. *Expresses* serious concern regarding the detention of four officials of the Court from 7 June to 2 July 2012 and *notes with appreciation* the assistance provided by States Parties, other States, and international organizations in connection with securing their release;
7. *Stresses* the importance of respect for the privileges and immunities of the Court’s staff and officials in accordance with article 48 of the Rome Statute, and the necessity of securing the respect for such privileges and immunities in all situations, inter alia by adopting relevant national legislation;
8. *Calls upon* States Parties as well as non-States Parties that have not yet done so to become parties to the Agreement on Privileges and Immunities of the International Criminal Court as a matter of priority and to incorporate it in their national legislation, as appropriate;

¹ ICC-ASP/11/21, para. 80.

9. *Welcomes* the increased cooperation between the Court and the United Nations, and other international and regional organizations, and other inter-governmental institutions;
10. *Emphasizes* the importance of States Parties enhancing and mainstreaming diplomatic, political and other forms of support for, as well as promoting greater awareness and understanding of the activities of the Court at the international level, and *encourages* States Parties to use their capacity as members of international and regional organizations to that end;
11. *Encourages* States Parties to explore possibilities for facilitating further cooperation and communication between the Court and international and regional organizations, including by securing adequate and clear mandates when the United Nations Security Council refers situations to the Court, ensuring support and cooperation to follow up such referrals, as well as taking into account the Court's mandate in the context of other areas of work of the Security Council, including the drafting of Security Council resolutions on sanctions and relevant thematic debates and resolutions;
12. *Recalls* that the ratification of the Rome Statute must be matched by national implementation of the obligations emanating therefrom, in particular through implementing legislation and, in this regard, *urges* States Parties to the Rome Statute that have not yet done so to adopt such legislative and other measures so as to ensure that they can fully meet their obligations under the Rome Statute;
13. *Acknowledges* efforts by States and by the Court, including through the Legal Tools Project, to facilitate exchange of information and experiences, with a view to raising awareness and facilitating the drafting of national implementing legislation;
14. *Encourages* States to consider the establishment of a national focal point and/or a national central authority or working group tasked with the coordination and mainstreaming of Court-related issues, including requests for assistance, within and across government institutions;
15. *Acknowledges* the importance of protective measures for witnesses for the execution of the Court's mandate, and *notes with concern* that despite continuous efforts, the Court has not succeeded to establish sufficient arrangements or ensure other measures for the expeditious temporary relocation of witnesses facing imminent threat;
16. *Calls upon* all States Parties and other States, where possible, to consider strengthening their cooperation with the Court by entering into agreements or arrangements with the Court or any other means concerning, inter alia, protective measures for witnesses, their families and others who are at risk on account of testimony given by witnesses, and sentence enforcement;
17. *Encourages* all States Parties to consider making voluntary contributions to the Special Fund for Relocations and to consider entering into relocation agreements or arrangements with the Court, including on a cost neutral basis;
18. *Commends* the work of the Court on framework agreements or arrangements or any other means in areas such as interim release, final release, witness relocation, and sentence enforcement, *encourages* the Court to continue its work in this regard, and *urges* all States Parties to consider strengthening voluntary cooperation in these areas;
19. *Underlines* the importance of further improving communication through established, and possibly new, channels, with a view to facilitate cooperation between the Court, States Parties, other States and international organizations on the identification, tracing and freezing or seizure of proceeds, property and assets, and the corresponding obligation of States Parties, and other States under an obligation to cooperate with the Court pursuant to Part 9 of the Rome Statute or a United Nations Security Council resolution, to comply with such requests by the Court, as envisaged in article 93, paragraph 1(k), of the Statute;
20. *Emphasizes* the advantage of transmitting requests for assistance to States and organizations to identify, track, freeze or seize proceeds, property and assets as expeditiously as possible;
21. [Placeholder]*Notes* the discussion/outcome/recommendations of the agenda item on cooperation at the eleventh session of the Assembly;

22. *Requests* the Bureau to establish a facilitation of the Assembly of States Parties for cooperation to consult with States Parties, the Court and non-governmental organizations as well as other interested States and relevant organizations in order to further strengthen cooperation with the Court;

23. *Decides* that the Assembly of States Parties shall continue to monitor cooperation with a view to facilitating States Parties in sharing their experiences and considering other initiatives to enhance cooperation, and, to this end, *decides* that the Assembly will include a specific item on cooperation on the agenda of its twelfth session;

24. *Recalls* the request to the Court by the Assembly of States Parties at its tenth session to submit an updated report on cooperation to the Assembly at its twelfth session, in accordance with operative paragraph 15 of resolution ICC-ASP/10/Res.2.

Annex II

Summary of the 1 October 2012 workshop on cooperation, including proposals and suggestions from the participants

On 1 October 2012, a workshop was organized by the facilitator, in cooperation with the Court, on cooperation between the Court and States with a special focus on requests for assistance in identification, freezing and seizing of assets and property. Participants in the workshop were representatives of States Parties from all regional groups, non-States Parties with a history of cooperation, officials of all organs of the Court, international tribunals, and international organizations. One main objective was to identify key challenges faced by the Court and States in the communication and work processes surrounding the Court's requests for assistance, and to discuss recommendations addressing these challenges that would be practicable within the existing legal framework. Another main objective was to facilitate the exchange of experiences, ideas and "lessons learned" between, inter alia, contact points in national agencies, and of the Court. Examples from the experiences of other treaty-bodies were explored. Participants were presented with a case study, consisting of a set of scenarios prepared in order to explore possible challenges and opportunities for further improvement of practices, both on the part of the Court and States. The workshop also addressed the issue of competing claims regarding the same assets. A number of proposals and suggestions were put forward by the participants under the Chatham House Rule. The following list of recommendations, which were discussed but not subject to any form of endorsement, may facilitate possible further work on cooperation by the working group, or in other fora:

A. To the International Criminal Court ("the Court")

1. The Court should, if possible, consider issuing separate requests for identification and seizing of assets. Such separate requests could facilitate some States' handling of the requests and help to shorten the amount of time needed by States to respond to the Court.
2. The Court should transmit requests for identification of assets and seizure and freezing of assets as early as possible, preferably before the time the arrest warrant is delivered in public or is unsealed.
3. The Court should, if possible, explicitly incorporate in the decision rendered by the Court on identification, seizing and freezing of assets, a reference to assets which could enter in the ownership of the accused in the future, i.e., after the decision on freezing has been taken. An example of such assets would be inheritance.
4. The Court should, if possible, include in its request for assistance in identification, freezing or seizing of assets, that the same States investigate the possibility of "straw persons" and/or "shell companies" and request States concerned to transfer to the Court any piece of information relating to potential "straw persons" or "shell companies". Such information could be shared with other relevant States involved in tracing the assets of the same accused/defendant, and by piecing together information from several State's investigations, a more complete picture of potential "straw persons" and/or "shell companies" would emerge, which could provide the basis for further action to identify or freeze assets, either by States or by the Court.
5. The Court should explore further the possibilities for exchange of information with States and international organizations, including through the existing agreement between the Court and Interpol.
6. The Court should, in the first decision to identify, freeze and/or seize assets, permit the transfer for payment of fees based on Rule 21 of the Rules of Procedure and Evidence and authorize the Registrar to request reimbursement of legal fees advanced by the Court to the accused or defendant from States holding frozen assets.
7. The Court should, if possible, share, as appropriate, information gathered by different States with regard to freezing, seizing or identification of assets held by relatives of the accused and others who could play the role of "straw persons".

8. The Court should, when requesting States to identify, freeze and seize assets, include in the request sufficient information on the crimes allegedly committed by the owner of the assets, and where possible and relevant, on the link between the assets and the crime.

B. To States

9. States Parties should continue to provide political and diplomatic support to the Court, and, where possible, consider approaching the United Nations Security Council (hereinafter UNSC) and/or the sanctions committees, with a view to finding arrangements that would allow the UNSC and sanctions committees to share more information with the Court with regard to assets.

10. States should be mindful of how the wording of UNSC resolutions may affect the Court's execution of its mandate, and, where possible, try to influence the wording of such resolutions to take into account the operational needs of the Court. The possibility of adding provisions to resolutions allowing for (partial) unfreezing of frozen assets to allow for payment of Court-related legal fees could be explored.

11. In the case of conflict or concurrence between a UNSC resolution ordering the freezing of assets and a request for assistance from the Court, States should handle such requests on the basis of article 93, paragraph 9(b), of the Rome Statute, respectful of Article 103 of the United Nations Charter.

12. States taking action to freeze assets following a UNSC resolution should, when cognisant that the same assets could be requested to be frozen or identified by the Court, take necessary measures on the national level so that information gathered in connection with the implementation of the UNSC resolution could be shared with the national focal point or the relevant national authority for Court cooperation.

13. States should consider establishing national focal points and/or central authorities with responsibility for cooperation with the Court.

Annex III

Informal paper on privileges and immunities of the Court's staff*

1. The purpose of this informal paper is to outline features of the current regime on privileges and immunities for the Court's staff, and to set out points for further discussions in the working group on this subject, as appropriate. Adequate and unambiguous regulations for privileges and immunities for the Court's staff are arguably essential to the independence of the Court and efficient execution of the Court's mandate.

2. Unrelated to this paper, the Court has recently commenced work on the development of its policy with respect to privileges and immunities. This policy would aim at providing clarifications as to the Court's interpretation of relevant provisions governing privileges and immunities and its impact on the work of its staff members.

A. Legal framework

1. Rome Statute – distinction of groups

3. Article 48 of the Rome Statute, which establishes privileges and immunities of the Court, distinguishes between the following groups of Court officials and staff:

- (a) Judges, the Prosecutor, the Deputy Prosecutors and the Registrar;
- (b) The Deputy Registrar, the staff of the Office of the Prosecutor, and the staff of the Registry; and
- (c) Counsel, experts, witnesses or any other person required to be present at the seat of the Court.

4. Members of group a) shall, pursuant to article 48, paragraph 2, be provided with “the same privileges and immunities as are accorded to heads of diplomatic missions”, when engaged on or with respect to the business of the Court. After expiration of their terms of office they are accorded immunity from legal process for words and acts that were performed in their official capacity.

5. Members of group b) are to be provided with the privileges and immunities necessary for the performance of their functions, and members of group c) shall be accorded such treatment as is necessary for the proper functioning of the Court. In the case of members of groups b) and c), their privileges and immunities or their treatment is to be provided/accorded “in accordance with the agreement on the privileges and immunities of the Court.”

2. The Agreement on the Privileges and Immunities of the Court

6. The Agreement on the Privileges and Immunities of the Court (hereinafter APIC) was established as a treaty separate from the Rome Statute. It entered into force in 2004, following the deposit of the tenth instrument of ratification. APIC is open to accession for all States, including States not party to the Rome Statute, and, moreover, States Parties to the Rome Statute are not required to be party to APIC. Of the 121 States Parties to the Rome Statute, 71 are party to APIC.¹ Ukraine is the only party to APIC who is not party to the Rome Statute. Four out of the eight current situation countries - Sudan, Kenya, Libya, Côte d'Ivoire – are not parties to the APIC, nor are they, except Kenya, parties to the Rome Statute.

7. Certain academics are of the opinion that despite the separation of APIC from the Rome Statute, APIC is binding on all Court's State Parties by virtue of the mention of

* Presented to informal discussions on cooperation held in the working group on 18 September 2012. The present version reflects three factual corrections announced during the presentation of the paper.

¹ Switzerland became the 71st State Party to the Rome Statute to ratify APIC on 25 September 2012.

APIC in article 48 of the Rome Statute. This understanding is based on the observation that APIC spells out the details and conditions of the immunities and privileges provided in article 48 of the Rome Statute, and that this article presupposes the existence of an operational agreement on privileges and immunities. Others consider such an interpretation to be in conflict with the Rome Statute State Parties' common intention, as ratification or accession to APIC is argued to be a matter that is entirely detached from the Rome Statute.

B. United Nations Security Council referrals and acceptance of jurisdiction by non-States Parties

8. As is well known, a delegation of four Court's staff (Registry) on a Court mission were arrested on 7 June 2012 in Zintan, Libya, and detained until 2 July 2012. The episode reveals a need for clarification of the legal norms regarding the immunities and privileges of the Court's staff on missions in States that are not party to the Rome Statute, when such States are under obligation to co-operate with the Court by virtue of a referral from the United Nations Security Council (hereinafter UNSC). There may be similar need for clarification in cases of acceptance of the Court's jurisdiction by not-States Party to the Rome Statute (i.e., Côte d'Ivoire) pursuant to article 12, paragraph 3, of the Rome Statute – which stipulates that the accepting State shall cooperate with the Court in accordance with Part 9 of the Rome Statute.

C. Suggested points and themes for further discussions

9. The purpose of this list of points and themes is to have a first discussion on the way forward, including possible additions to the list and the appropriate forum for discussion:

(a) The situations for groups b) and c) seem to leave more room for clarification than the situation for group a). It is therefore suggested that discussions focus on these groups;

(b) Are authorities of States that are referred to the Prosecutor by the UNSC, pursuant to article 13, paragraph (b), of the Rome Statute, and ordered by the UNSC to cooperate with the Court, bound by all Rome Statute provisions on cooperation? Are they bound by APIC? In the situations of Sudan and Libya, Pre-Trial Chamber I has consistently specified that the legal framework of the States' duty to cooperate under the resolution of the UNSC referring the situation to the Court should be the Rome Statute²: what is the impact of such determinations on the specific aspect of privileges and immunities?

(c) Should UNSC-referral resolutions explicitly provide for privileges and immunities for the Court's staff in their execution of the UNSC-given mandate?³

(d) Is there a need to raise awareness of the APIC and explore possibilities for further ratifications of and accessions to APIC by the Rome Statute States Parties and other States? Are there known constitutional or legal impediments that currently bar States Parties from becoming party to APIC?

(e) Is there a need to clarify the relationship between article 48 of the Rome Statute and APIC, and the scope of immunities and privileges of the Court's staff in the territory of States Parties who are not Party to APIC?

(f) What does triggering or acceptance of jurisdiction entail in terms of obligation to cooperate with the Court in general, and immunities and privileges of the Court's staff in particular? Should instruments of triggering or acceptance of jurisdiction by non-States Parties explicitly recognize "APIC immunities and privileges"?

² ICC-02/05-01/09-3, para. 45; and ICC-01/11-01/11-72, para. 12.

³ Cf. the Convention on the Privileges and Immunities of the United Nations, article VI, regarding experts on mission for the UN.