



KEY RECOMMENDATIONS ASSEMBLY OF STATES PARTIES 16

New York, 4-14 December 2017



COALITION FOR THE INTERNATIONAL CRIMINAL COURT

Introduction

Coming at a time of great challenges for the International Criminal Court (ICC) and the Rome Statute system, and for the world more broadly, and mindful that international institutions are only as powerful as their members allow them to be, the 16th annual session of the Assembly of States Parties (ASP) to the Rome Statute from 4-14 December 2017 in New York, USA, will serve as a vital forum for states and civil society actors to commit to maintaining the integrity of the Rome Statute and to consistent, strategic, and forward-looking actions.

The Coalition for the ICC—a network of more than 2500 non-governmental organizations working in partnership to achieve justice for victims of genocide, war crimes, and crimes against humanity—facilitates the participation of civil society at the annual ASP session. More than 300 representatives of civil society are expected at the 16th ASP session, with many of them producing papers and advocacy materials to assist delegates in their deliberations.

In an effort to inform these commitments and the discussions taking place at this year's ASP session, and ahead of the 20th anniversary of the Rome Statute, the Coalition has prepared the following key recommendations and comments for States Parties' consideration. The recommendations and comments build upon long-term and continuing excellent cooperation between the ASP, States Parties, and non-governmental organizations of global civil society.

Use the 20th anniversary as a framework for recommitment

The unique opportunity of the 20th anniversary of the adoption of the Rome Statute should be embraced by States Parties to build upon two decades of lessons learned and significantly revitalize commitment to international justice.

One way to do so is to advance the Coalition's key advocacy principles— as formulated within the current recommendations—during discussions on the outstanding resolution negotiations, as well as during the General Debate, the special plenary session on the 20th anniversary, side-events, and all other discussions around the 16th ASP session. Governments can demonstrate their revitalized commitment even more concretely by using the 16th session as a forum to identify and arrive at decisions on relevant events, policies, and initiatives in 2018, and to foster new like-minded partnerships with state, international organization, and civil society actors toward this end.

Unite to deliver ICC justice to victims around the globe

In light of the tremendous challenges facing the ICC and the Rome Statute system, and the world more broadly, the Coalition for the ICC considers demonstrations of unity and support for the international justice system more vital than ever before. This year's ASP session comes at a time when demands for justice and accountability for grave crimes have become inextricable from calls for strengthened rule of law worldwide, as set out by UN Sustainable Development Goals in 2015. Shifts in the global political landscape since the Rome Statute's adoption in 1998 have highlighted the inherent value of an independent Rome Statute system in achieving the UN Charter's goals of peace, security, and human rights for all amid rising tides of hostility, discrimination, and repression.

The Coalition regards the General Debate segment of the 16th ASP session as an opportunity for governments to encourage one another and the ASP as a whole to protect the international justice system and to continue building on two decades of efforts to end global impunity and strengthen related human rights norms. In reaffirming their support for and confidence in an ICC and Rome Statute system that can deliver accountability for the most egregious crimes and contribute to strong rule of law, governments can raise their voices against unconstructive and divisive attitudes and reinforce their own positive contributions to the fight against impunity.

High-Level Political Support and Commitment

Recognizing the serious threats and challenges confronting the ICC, as well as the unique opportunity afforded by consultations and events at the 16th ASP session bringing together the full range of stakeholders in the Rome Statute system, the Coalition calls on the highest levels of State Party governments to reaffirm their political support for the Rome Statute and the ICC. Entering its 20th year, the Rome Statute system can greatly enhance its reach through high-level reminders of the central and unique role for the Court in building peaceful and inclusive societies. Support from government leaders will not only revitalize existing commitment to the Statute, but also bolster the Court's capacity to deliver justice, provide redress to victims, and rebuild resilient post-conflict societies. When the most vocal on ICC issues have too often been anti-ICC leaders and groupings, it is vital that states and the international community show resolve and support, in national, regional, and international fora, the Rome Statute system they joined.

Safeguarding the integrity of the Rome Statute

The question of immunity for sitting heads-of-state and high-level government officials has been a main driver of the frustrations expressed by a minority of States Parties to the Rome Statute. With immunity for sitting heads-of-state and government remaining a challenge for some domestic jurisdictions, the Coalition urges States Parties at the 16th session to reiterate the fundamental goals of the Rome Statute in relation to accountability gaps at the national level. The Coalition calls on States Parties to recall that by ratifying or acceding to the Rome Statute, their governments have agreed to Article 27's cornerstone prohibition on immunity for heads-of-state and senior government officials. In their General Debate statements and in other discussions during the ASP session, States Parties should remain steadfast in reiterating the importance of upholding this principle, including insofar as it stands to influence the long-term inclusiveness of peace processes.

ICC independence and States Parties' oversight

The ASP is inextricably linked to States Parties' oversight role within the Rome Statute system and the ICC. Mindful of genuine attempts to clarify the respective ASP and ICC mandates, the Coalition notes that some States Parties and other governments have inappropriately interpreted the ASP oversight responsibilities and have attempted to have the ASP interfere with judicial and prosecutorial functions. Challenges to cases before the ICC must only be made before the judges and at all times in compliance with the Rome Statute. The Coalition calls on governments to reaffirm that 20 years of experiences have highlighted that the legitimacy of the Statute and the

Court as a legal institution depends on the ASP's scrupulous respect for the independence of the Office of the Prosecutor and of the Judiciary.

Elections at the 16th ASP session

The Coalition for the ICC calls on States Parties to elect only the best leaders to the ICC and the ASP to ensure both bodies function effectively and impartially. The Coalition itself does not endorse or oppose individual candidates, but rather advocates for the integrity of the nomination and election procedures. At the 16th ASP session, States Parties will elect six ICC Judges, six Committee on Budget and Finance members, the ASP Presidency, the ASP Bureau, and provide recommendations to the ICC judges in advance of the 2018 ICC Registrar elections. States Parties should elect highly-qualified and independent candidates through fair, transparent, and merit-based processes. States should not engage in reciprocal political agreements ("vote-trading").

Election of six new judges

States should elect only the most highly qualified candidates in the judicial elections taking place at the 16th ASP session. In the election of six new judges to join 11 male and one female judges remaining, States Parties should pay particular attention to equitable gender representation on the ICC judicial bench, to ensure the ICC continues to serve as a gold standard among international tribunals in this regard. The ASP should similarly pay due regard to geographical representation. Before casting their votes, the Coalition encourages States Parties to consider the Coalition questionnaire to candidates and the Coalition panel discussions with all 12 candidates, available for viewing on its website at www.coalitionfortheicc.org, as well as to give due consideration to the recommendations of the Advisory Committee on Nominations of Judges (ACN).

Election of six members on the Committee on Budget and Finance

The Court's ability to conduct its work as an independent justice mechanism can hinge just as much on the Committee on Budget and Finance's (CBF) annual recommendations as on the composition of the financial expert body. The Coalition urges States Parties to elect only the most highly qualified candidates to the CBF. The Coalition further calls upon States Parties to promote competitive CBF elections in the future, including by avoiding 'clean-slate' appointments to vacancies. While the ASP resolutions governing CBF elections encourage consensus candidates, the Coalition urges governments to warn against applying this practice at the expense of a competitive field of nominees, as well as against questionable practices such as vote-trading. In doing so, States Parties would enable fresh insight and expertise to enter the Court's critical budget review process.

Election of the ICC Registrar in 2018

The Registry is the largest organ of the ICC and indispensable to the workings of other organs of the Court, including the Presidency, the Judiciary, and the Office of the Prosecutor. When the ICC judges elect the next Registrar in March 2018, they will do so taking into consideration ASP recommendations on a short-list of candidates prepared by the ICC Presidency in 2017. As part of its campaign, the Coalition has contacted each short-listed candidate with a comprehensive written

questionnaire, which requests a broad range of information regarding the candidate's background, qualifications, experience, and views relating to her or his candidacy. The questionnaires will be made available on the Coalition's website. The Coalition questionnaire will be a vital tool and source of information upon which judges base their votes during the election and goes to the heart of ensuring a transparent elections process.

Planning for the election of the ICC Prosecutor

The election of the ICC prosecutor is a crucial decision, impacting almost every aspect of the ICC. The Coalition encourages States Parties to begin looking ahead to the election of the ICC Prosecutor scheduled for the 18th ASP session in 2019, to improve this nomination and election process. Following its first time in operation ahead of the 2011 elections, the ASP's *Search Committee for the position of the Prosecutor of the ICC*, as well as the ASP Bureau co-facilitators on the Prosecutor election and the Secretariat of the ASP issued separate reports evaluating the process of electing the ICC Prosecutor in 2010. The Coalition calls on states to revisit the recommendations contained in the mentioned reports, as well as related civil society advocacy, and to call upon the ASP President and/or Bureau to implement new procedures for the search, assessment, and recommendation process well ahead of the next election.

Financial commitment to the Rome Statute system

States Parties should oppose arbitrarily limiting the Court's 2018 budget, which would undermine the Court's ability to deliver fair, effective, and efficient justice. A tendency by a minority of States Parties to impose zero nominal growth or minimal growth policies has also severely frustrated the optimal functioning of the ICC. States Parties have mandated the Court to enforce the Rome Statute and to respond to demands for justice from victims and the global community. States cannot expect and demand the Court to do more each year, while simultaneously reducing its resources. States should reject a "zero nominal growth" approach to the Court's budget; reject efforts of governments to use the budget to improperly exert political control of the Court; recognize that the CBF recommendations already reflect a reduction of the Court's requested budget; oppose the setting of a "financial envelope" in any discussion, including on the legal aid review scheduled for 2018; and recognize that a reduced budget does not equal enhanced efficiency. Furthermore, the Coalition calls on all states in arrears to pay all outstanding contributions without further delay. The issue of states in arrears—or states that have not yet paid in full their assessed contributions to the Court's budget—has an impact on the Court's work when it cannot access its full allocated budget. Arrears of contributions to the Court's budget currently stand at over 32 million Euros.

The crime of aggression

The diversity of goals and mandates of Coalition members was reflected in members' distinct views concerning the adoption of specific provisions on the crime of aggression, both in Rome or at the Kampala Review Conference in 2010. The Coalition encouraged states, both before and during the Review Conference, to approach the consideration of proposals concerning the crime of aggression on their merits and in a constructive and cooperative manner. At the 16th ASP session, the Coalition is calling on States Parties to take a similar approach: to work toward a decision on activation of the

Court's exercise of jurisdiction over the crime of aggression within the parameters of the collective agreements reached in Kampala and Rome. The Coalition urges States Parties to recall during the session—and before any such decision—that by ratifying the Rome Statute, which has listed the crime of aggression as the fourth core international crime since 1998, they have agreed to the criminalization of aggressive war as one of the primary objectives of the Rome Statute system of international justice.

Universality and full implementation of the Rome Statute

With a view to advance Rome Statute ratification efforts and the reach of international justice in the year of the Statute's 20th anniversary, the 16th ASP session should continue to serve as a key forum to encourage non-states parties to join the Rome Statute system. States Parties from under-represented and well-represented regions in the Rome Statute system alike can speak to specific contextual advantages of joining the system, which include advancement of the rule of law, sustainable development, and good governance. States Parties can also offer political support and, as appropriate, technical assistance to states wishing to work toward the goal of ratification. States Parties should further use the ASP session to report or exchange on progress made toward full domestic implementation of national obligations under the Rome Statute, including legislative reform and integration of the treaty's provisions and principles of law into all facets of government, such as through the appointment of dedicated ICC focal points in state agencies and departments.

Support for outreach and communications

States should reaffirm support for and emphasize the pivotal importance of the Court's outreach work. A robust public information strategy that coordinates public information and media efforts is more important than ever ahead of the 20th anniversary of the Rome Statute, when a lack of visibility around the Court's work and mandate continues to exist and misinformation abounds. Outreach efforts are crucial to creating an environment conducive to the ICC undertaking its work in situation countries, including by managing victims' expectations and enabling communities most affected by serious international crimes to follow and understand the international criminal justice process. Efforts to reach the wider public can also prove invaluable in generating public support, and in turn, political will. Investment in communications and outreach, including through a strengthened field presence, contributes to the Court's overall visibility, enhances cooperation and support received, and promotes the ICC's institutional accountability, international legitimacy, and local relevance—allowing the true story of the Rome Statute system to be heard amidst anti-ICC media campaigns.

Strong response to withdrawals announcements

Even where such moves have not resulted in withdrawal taking effect, signals from a few States Parties to withdraw from the Rome Statute, as well as Burundi's withdrawal that took effect on 27 October 2017, undermine the international justice system and set back human rights progress worldwide. Opposition to the ICC has grown as it assumes the role for which it was established in 2002: to bring those individuals most responsible for grave crimes—including high-level

government officials—to justice. This mandate comes from an overwhelming majority of states which voted for the adoption of the Rome Statute in 1998. States Parties should use the General Debate and other avenues to counter misinformation about the ICC and defend the Rome Statute system as it faces serious political challenges to its fundamental objective and purpose.

Cooperation within the wider Rome Statute system

Though cooperation is a vital component of the international justice system set up by the Rome Statute, serious gaps remain in its enforcement ahead of the Statute's 20th anniversary. States Parties should commit to continue exploring legal and political avenues to advance cooperation within the Rome Statute system.

In light of special attention States Parties paid in 2017 to cooperation in the tracking, freezing, and recovery of defendants' financial assets, States Parties should use the 16th session's special plenary meeting on cooperation to encourage legislation and policies favoring increased cooperation with the Court. States Parties should address the Court's expressed need for national investigations of related financial crimes, particularly in view of the legal aid burdens associated with indigent defendants.

APIC & other cooperation agreements

States Parties and observer states at the 16th session should pledge to join the Agreement on Privileges and Immunities of the ICC (APIC), which elaborates the privileges and immunities that states should extend to Court officials and materials so that the ICC can carry out its work around the world in an independent and unconditional manner. States already party to the APIC can likewise use the 16th session to exchange with others on the benefits of joining the APIC.

The Court routinely calls upon States Parties to supplement their explicit Rome Statute obligations with forms of "voluntary" cooperation, which prove crucial to the ICC's functioning as a fair and effective legal institution that gives effect not only to the rights of victims and witnesses, but also to those of the accused. Recalling the low number of "voluntary" framework agreements concluded between the ICC and States thus far, the Coalition highlights that such agreements reduce burdens on not only the Court's activities, but also on its budget, and calls on States to use the 16th ASP session and the 20th Anniversary of the Rome Statute to sign "voluntary" agreements with the Court.

Non-Cooperation

States should use the 16th session's General Debate segment to describe how they have responded to instances of non-cooperation, and as applicable, how they have upheld their legal obligations to cooperate with the ICC in the face of competing relationships that undermine fundamental international law principles in relation to serious international crimes.

Outstanding arrest warrants

There is an absolute urgency for ICC arrest warrants to be executed. Without arrests, ICC cases cannot proceed and the Court's purpose to deliver timely justice is defeated. The execution of arrest warrants requires strong political will and diplomatic pressure, which States Parties should look to exert during the 16th session. Short of executing these warrants, states should commit to avoiding non-essential contact with persons who are subject to ICC arrest warrants.

Contributions to the Trust Fund for Victims

Ahead of the Rome Statute's 20th anniversary, States Parties should emphasize the unique and central role of restorative justice both within the Rome Statute system, and for the long-term development of international criminal law. In light of the first reparations plans approved by judges and ready for implementation by the Trust Fund for Victims (TFV) in the Democratic Republic of the Congo, as well as a TFV plan expected in early 2018 to restore victims of cultural heritage destruction in Mali, states should urgently increase their financial, political, and moral support for the TFV and commit to regular contributions in the future. With reparations related to the Court's first sexual and gender-based crimes conviction also on the horizon, States Parties should highlight specific donor appeals aimed at assisting victims of such violence.

Contributions to the Trust Fund for Family Visits for indigent detainees

The existing resources in the Trust Fund for Family Visits for indigent detainees are exhausted. The Coalition call on states to urgently provide voluntary contributions to ensure that the ICC can safeguard the human rights of its detainees and meet the highest possible standards of criminal administration.

Complementarity

The primary obligation of States Parties to exercise their criminal jurisdictions in the investigation and prosecution of international crimes is a fundamental pillar of the Rome Statute system. This principle will only be fully realized with robust national prosecutions for grave crimes, which require the implementation of adequate and effective national legislation on Rome Statute crimes and general principles of law. Commitments to complementarity can also reflect efforts to sensitize and mobilize relevant national actors; to build political will to seek justice for grave crimes; to implement victims' rights; and to ensure the technical capacity to carry out domestic investigations and prosecutions of international crimes. States Parties should recall—and particularly in light of 20 years of evidence that the ICC as an institution must work in conjunction with domestic jurisdictions—that complementarity is crucial to ensure the full realization of the Rome Statute's promise. States should use the ASP session as an opportunity to highlight the importance of positive complementarity efforts by States Parties, the Court, regional and international organizations, and civil society. The ASP session also allows for substantively focused statements on critical issues relating to complementarity, with particular regard to enhancing national capacity to investigate and prosecute sexual and gender-based crimes.

Building on Victims’ Participation and Reparations

States Parties should underscore the centrality of victims’ concerns, including the need to fully realize participation and reparations rights, in all discussions regarding the ICC. States should acknowledge the absolute importance of victims and affected communities within the Rome Statute system, from the benefits that meaningful participation brings to the Court’s proceedings, to the dignity and physical and psychological well-being that such participation affords victims. Ahead of the Rome Statute’s 20th anniversary, all actors within the Rome Statute system must continue to share the responsibility of guaranteeing that victims’ participation at the ICC is meaningful.

Gender justice

States should express their commitment to gender justice, noting that sexual and gender-based crimes (SGBC) are particularly reprehensible insofar as they result from pre-existing gender inequalities and target, on a large-scale, those most vulnerable in society – in particular women and girls, but also men and boys, on the basis of their gender. States could highlight, where relevant, efforts made to incorporate gender-inclusive provisions when implementing the Rome Statute, including criminalization of the full range of SGBC within domestic legislation.

States should urgently ensure that the chronic imbalance in the representation of women in higher professional positions at the Court is addressed.

Organization of the ASP

Through administrative oversight and cooperation with the ICC, the ASP and its subsidiary mechanisms have a critical role to play in enhancing the effective functioning of the ICC. The 20th anniversary of the Rome Statute serves as an opportunity for the ASP to take stock of challenges and ways forward in executing this important mandate. States should use the General Debate during the 16th session to welcome and support the considered reforms to the ASP institutional structures initiated in 2013 and fully support continued discussions and concrete enhancements moving forward. States Parties should encourage the ASP Bureau to continue facilitating discussions with relevant stakeholders on maximizing the effectiveness and efficiency of the ASP, including by considering the working methods and timing and organization of ASP meetings, as well as of subsidiary bodies of relevant sister international organizations, assemblies, and conference of parties. Where ASP meetings are concerned, to have a more comprehensive overview of their tasks, challenges, and capacities States Parties can also encourage a review by the ASP Secretariat of its procedures.

Strengthening the expertise available to the ASP

As the Rome Statute approaches its 20th Anniversary, the challenges the ICC 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.

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 becomes apparent in that the current structure of the ASP leads to an over-reliance on the CBF. The CBF is composed of experts "of recognized standing and experience in financial matters at the international level" 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 specific areas that are the subject of ASP discussions.

The UN and the ICC

The 16th ASP session comes as demands for justice and accountability for grave crimes are growing worldwide. The adoption of the UN sustainable development goals in 2015 serves as formal acknowledgement by the international community that justice and the rule of law are essential elements for achieving the UN Charter's goals of peace, security, and human rights for all. While the ICC and UN remain separate and independent bodies, governments must emphasize the strong link between their respective mandates as well as their shared aim for global peace and security. The 20th anniversary of the Rome Statute serves as a fitting moment to revisit these overlapping goals. The Coalition welcomes efforts by State Parties to strengthen the relationship between the ASP, ICC, and UN General Assembly as well as other relevant bodies, organs, and agencies of the UN system.

The UN Security Council, as the entity having referred situations in Darfur, Sudan and Libya to the ICC, should be called upon to provide the Court with full and effective cooperation to enable it to conduct its investigations and prosecutions in these situations. The Coalition supports the ACT Code of Conduct and Mexico-France initiatives to oppose the misuses of the veto in preventing or ending ICC crimes.

States Parties can also request, with a view to enhancing efficiency, effectiveness, and resources at the Court and reflecting the singular judicial character of the ICC, that the ASP Bureau facilitate discussions on the benefits of a formal ASP review of the overall procedures of the UN system that were imported into the ICC.



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