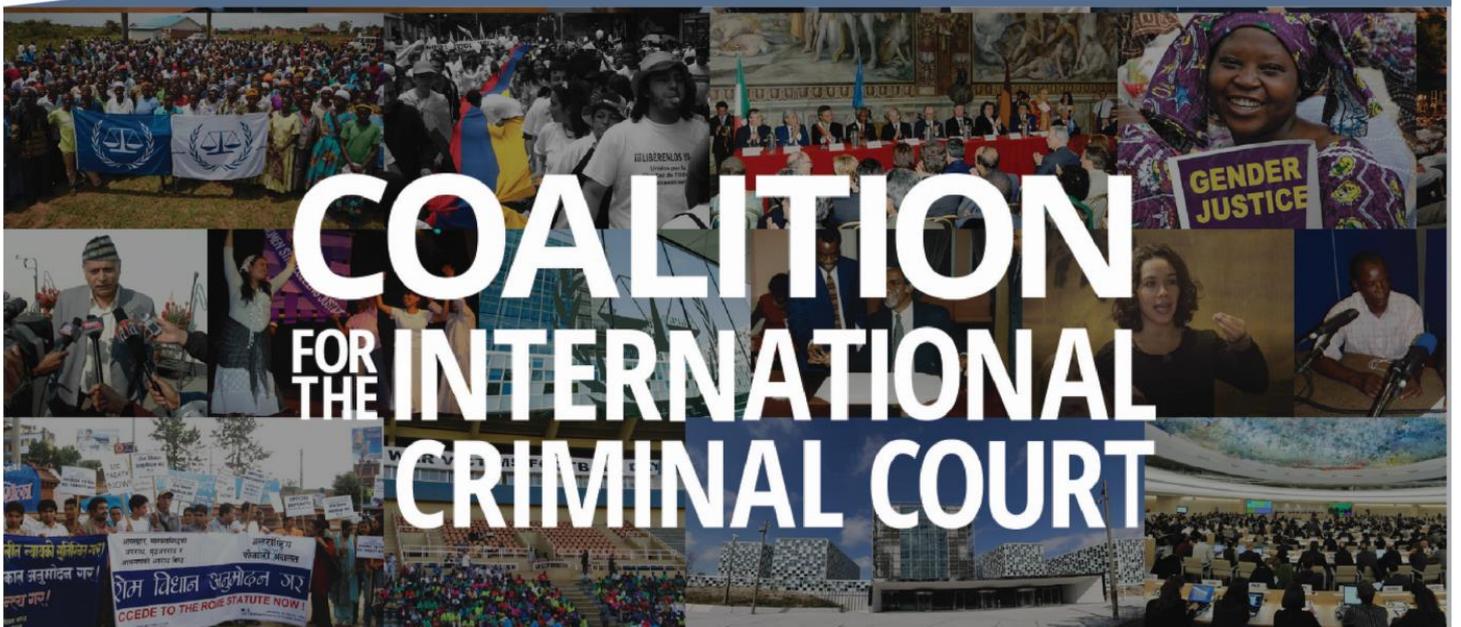




KEY RECOMMENDATIONS

ASSEMBLY OF STATES PARTIES 17

The Hague, 5 - 12 December 2018



COALITION

FOR THE INTERNATIONAL

CRIMINAL COURT

The Coalition for the International Criminal Court (CICC) includes 2,500 non-governmental organizations around the world working in partnership to strengthen international cooperation with the International Criminal Court; ensure that the Court is fair, effective and independent; make justice both visible and universal; and advance stronger national laws that deliver justice to victims of war crimes, crimes against humanity, and genocide.

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Introduction

2018 marks the 20th anniversary of the Rome Statute of the International Criminal Court (ICC) – a milestone in the history of international multilateralism. Yet the anniversary comes at a time of great challenge for the ICC, the Rome Statute system, and for the world more broadly.

Mindful that international institutions are only as powerful as their members allow them to be, the 17th annual session of the Assembly of States Parties (ASP) to the Rome Statute, taking place from 5 - 12 December 2018 in The Hague, The Netherlands, will serve as a vital forum for states, regional and international organizations, and civil society actors to (re-)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 2,500 non-governmental organizations working in partnership to achieve justice for victims of genocide, war crimes, crimes against humanity, and the crime of aggression — facilitates the participation of civil society at the annual ASP session. More than 600 representatives of civil society are expected at the 17th 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 at the close of the Statute's 20th anniversary year, the Coalition has prepared the following key recommendations and comments for States Parties' consideration. The recommendations and comments build upon a history of long-standing and robust cooperation between the ASP, States Parties, and non-governmental organizations of global civil society.

Unite to deliver justice to victims around the globe

In light of the tremendous challenges and threats facing the ICC and the Rome Statute system, and international law and multilateralism 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 international undertakings are being challenged by moves towards isolationism and where key support for human rights, justice, and accountability mechanisms is all the more necessary to prevent and address instances of grave crimes and mass atrocities. Shifts in the global political landscape since the Rome Statute's adoption 20 years ago 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. Yet as we close out the 20th anniversary year and look ahead to 2019 – when UN Sustainable Development Goal (SDG) 16 (*"Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels"*) will be part of the SDG review undertaken by the High-level Political Forum on Sustainable Development – all stakeholders should not only reflect on their contributions to-date but also on the tangible impact their actions going forward can have on ensuring the Rome Statute system delivers on its promise to provide justice to victims around the world.

High-level political support and commitment

Recognizing that serious threats and challenges confronting the ICC are intensifying, the Coalition calls on heads of states/governments and ministers of State Parties to attend the 17th ASP session to robustly reaffirm their political support for, and commitment to, the Rome Statute and the ICC as cornerstones of the fight against impunity and critical elements of a rules-based international order, and express determination to work together to oppose efforts to undermine the Court’s independence and legitimacy.

Entering its third decade, 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, inclusive, and more just 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 for the Rome Statute system they joined in all relevant national, regional, and international fora. Support from government leaders will not only revitalize existing commitments to the Statute, but also bolster the Court’s capacity to deliver justice, provide redress to victims, and contribute to rebuilding resilient post-conflict societies.

The General Debate segment of the 17th ASP session as well as the three dedicated plenary segments on cooperation, the 20th anniversary, and victims' participation provide opportunities for governments to encourage one another and the ASP as a whole to protect the international justice system and to continue building on more than two decades of efforts to end global impunity and strengthen related human rights norms. In reaffirming support for and confidence in an ICC and Rome Statute system that can deliver accountability for the most egregious crimes and contribute to the rule of law and a sustainable peace, governments can raise their voices against divisive attitudes and threats and reinforce their own positive contributions to the fight against impunity. The Coalition therefore strongly encourages ASP17 delegates to take the following recommendations into account in the preparation of their interventions during the General Debate and plenary segments, and throughout the 2018 session.

Elections at the 17th ASP session

The Coalition for the ICC has consistently called on States Parties to elect only the best leaders to the ICC, the ASP and its subsidiary bodies, and the Trust Fund for Victims' Board to ensure they 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 17th ASP session, States Parties will elect five members to the Board of the Trust Fund for Victims (TFV), and nine members to the Advisory Committee on Nominations, yet these will be “clean slate” elections, as only as many nominations as positions available were made.

In all ICC-related elections, States Parties should ensure that sufficient numbers of nominees are put forward in order to enable the selection of the most highly-qualified and independent candidates through fair, transparent, and merit-based processes. States should not engage in reciprocal political agreements (“vote-trading”).

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 look ahead to the election of the ICC Prosecutor scheduled for 2020, to ensure an holistic, well-informed, and merit-based search, 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's 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 has called on states to revisit the recommendations contained in those reports, as well as related civil society advocacy, and welcomes the recent Bureau discussions and the ASP President's proposal to establish a "Prosecutor Search Committee (PSC)" to assist the Bureau and the ASP in the election of the next ICC Prosecutor. The Coalition further calls on states to engage in constructive discussions on the Prosecutor election process during the 17th ASP session with a view to establishing new procedures for the search, assessment, and recommendation process well ahead of the election in 2020.

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. States Parties should commit to continue exploring legal and political avenues to advance cooperation within the Rome Statute system.

In light of the special attention States Parties paid in 2018 to the issue of the arrest and surrender of persons suspected of having committed crimes within the Court's jurisdiction, States Parties should use the 17th session's special plenary segment on cooperation on Friday 7 December 2018 to encourage legislation and policies favoring increased cooperation with the Court, including through enhanced efforts to execute the ICC's 16 outstanding arrest warrants; the conclusion of voluntary cooperation agreements with the ICC; and ratification of the Agreement on Privileges and Immunities of the ICC (APIC).

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 17th session. Short of executing these warrants, states should commit to avoiding non-essential contact with persons who are subject to ICC arrest warrants. States are also encouraged to underline the importance of arrest and surrender for the effective execution of the Court's mandate and for upholding the objectives of the Rome Statute system during the General Debate and during the ASP17 plenary segment on cooperation.

Non-cooperation

States should use the 17th session's General Debate and the dedicated segment on cooperation 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.

Voluntary cooperation agreements & APIC

The plenary segment on cooperation will also include a special pledging ceremony on voluntary cooperation agreements. 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 judicial institution that gives effect not only to the rights of victims and witnesses, but also to those of the accused. Such voluntary cooperation can also take the form of bilateral framework agreements on topics such as witness relocation, interim and final release, and enforcement of sentences. 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 dedicated 17th ASP plenary segment to pledge to conclude such “voluntary” cooperation agreements with the Court.

The Agreement on Privileges and Immunities of the ICC (APIC) 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. Only 76 States Parties and 1 non-state party to the Rome Statute have ratified the APIC. States already party to the APIC can likewise use the 17th session to exchange with others on the benefits of joining the APIC, and States not yet party to the APIC can pledge to join the APIC.

Use the 20th anniversary as a framework for recommitment

This anniversary year provided an unparalleled opportunity for States, regional and international organizations, civil society, and other actors around the world to take stock of the first two decades of the Rome Statute system of international justice; implement concrete measures to address the most pressing challenges facing the system as a whole; renew support of, and commitment to, the ICC; and, perhaps most importantly, look ahead to the future of the fight against impunity for international crimes in an increasingly complex global climate.

Indeed throughout 2018, many stakeholders embraced the unique opportunity of the anniversary to reinvigorate their support for the ICC and commitment to the Statute, and to international justice more broadly.

In order to maintain the momentum of support and engagement from the 20th anniversary year, states can demonstrate their revitalized commitment even more concretely by using the 17th session as a forum to recall policies, initiatives and events, undertaken this year, and to explore ways to strengthen the Court’s effective delivery of justice in the future, including through (re-)invigorating like-minded partnerships with states, international organizations, and civil society actors in the years to come. This can be done in part by advancing 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 segments on the 20th anniversary, on cooperation, and on victims; side-events; and all other discussions around the 17th ASP session.

Support the Court and its proponents against external interference and political threats

As the Court has engaged in new preliminary examinations and investigations, the institution and its supporters have come under increasing attack. During the General Debate and the special plenary segment addressing this issue on 7 December, in particular, states should resolutely condemn all efforts to interfere in the Court's investigations and prosecutions; all threats levied against the Court and its proponents; and the spread of misleading and false information about the Rome Statute system. States should commit to work together to oppose any and all efforts to undermine the Court's work and its independence and in particular threats made against the ICC, its officials, and those cooperating with the Court. States should continue to support civil society engaged in international justice efforts, including by ensuring their protection as defenders of human rights and their access to debates and discussions focused on strengthening the Rome Statute system and bringing justice to victims the world over.

Building on victims' participation and reparations

States Parties should underscore the centrality of victims' concerns, including the need to fully realize participation, representation, and reparations rights, in all discussions regarding the ICC. States should acknowledge the absolute importance and centrality 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. All actors within the Rome Statute system must continue to share the responsibility of guaranteeing that victims' participation at the ICC is meaningful. The right to reparations should be acknowledged in all instances where crimes are adjudicated to have been committed, with due consideration given to providing redress to victims in the absence of convictions.

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 face of perilous attacks from ICC opponents, the 17th 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 share lessons learned from their own experience; offer political support; and, as appropriate, technical assistance to states wishing to work toward the goal of ratification and/or implementation of the Rome Statute. States Parties and non-states parties to the Statute should further use the 17th ASP session to report on progress made toward full domestic implementation of the treaty's provisions, principles, and obligations, including legislative reforms and relevant training of officials, and practitioners, as well as any obstacles or remaining gaps.

The crime of aggression

The Coalition welcomes the activation on the Court’s exercise of jurisdiction over the crime of aggression at the 16th session of the ASP, and its subsequent entry into force on the date of the 20th anniversary of the signing of the Rome Statute, 17 July 2018. The Coalition urges States Parties to recall 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. States Parties that have not yet done so should ratify the amendment on the crime of aggression to give full effect to the Court’s now-activated jurisdiction over the crime.

Strong response to withdrawals announcements

The steps taken by some states to leave the Rome Statute – such as the Philippines (which announced its intent to withdraw from the Rome Statute on 17 March 2018) and Burundi (whose withdrawal came into effect on 27 October 2017) – undermines the international justice system as a whole as well as hope for accountability and redress at the national level, and sets 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 sitting 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 fora to call on States to continue to support the Rome Statute system from within and to review decisions to withdraw from the treaty.

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

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 principles of law, as well as related capacity and expertise within national legal systems.

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 including to redress; and to ensure the technical capacity and expertise to carry out domestic investigations and prosecutions of international crimes.

States Parties should recall—and particularly in light of more than 20 years of experience 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 17th 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 and willingness to investigate and prosecute sexual and gender-based crimes.

Support for outreach and communications

States should reaffirm support for and emphasize the pivotal importance of the Court’s public information and outreach, including in the field, and their crucial importance for raising the Court’s profile, creating environments conducive for the ICC’s work, and managing expectations. A robust communications strategy that coordinates public information and media engagement is more important than ever in the current climate of antagonism and misinformation as efforts to reach the wider public can also prove invaluable in generating public support, and in turn, political will. Investment in outreach, including through a strengthened and effective field presence, is crucial to creating an environment conducive to the ICC undertaking its work in situations under preliminary examination or investigation. Outreach contributes to the Court’s overall visibility, allows for the voices of victims and affected communities to be heard, and enables the communities most affected by serious international crimes to better follow and understand the international criminal justice process. Regular, consistent, and factual public information and outreach also promotes the ICC’s institutional accountability, international legitimacy, and local relevance—allowing the true story of the Rome Statute system to be heard amidst powerful anti-ICC media campaigns and political debates.

Financial commitment to the Rome Statute system

States Parties should oppose arbitrarily limiting the Court’s 2019 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 by 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 policy review commencing this year; 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. As of 4 September 2018, arrears of contributions to the Court’s budget stand at €36.9 million Euros.¹

Safeguarding the integrity of the Rome Statute

The question of immunity for sitting heads-of-state and high-level government officials before the ICC 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 17th 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 its potential to influence the long-term inclusiveness of peace processes.

ICC independence and States Parties’ oversight

The ASP sessions are 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 more than 20 years of experience have highlighted that the legitimacy of the Statute and the Court as a legal institution depends on the ASP’s scrupulous respect for, and vigorous defense of, the independence of the Office of the Prosecutor and of the Judiciary.

Contributions to the Trust Fund for Victims

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 Trust Fund for Victims (TFV) involved in three cases at the reparations phase in the Democratic Republic of the Congo and in Mali, states should urgently increase their financial and political support to the TFV and commit to regular contributions in the future. The Fund’s assistance mandate remains a crucial means for providing redress to victims and affected communities, including in situations where crimes have been adjudicated to have taken place, yet convictions do not ensue.

¹ “Report of the Committee on Budget and Finance on the work of its thirty-first session, 29 October 2018, Annex II, ICC-ASP17/15” https://asp.icc-cpi.int/iccdocs/asp_docs/ASP17/ICC-ASP-17-15-ENG-CBF-31-Report.pdf

Contributions to the Trust Fund for Family Visits for indigent detainees

All persons detained by the ICC are entitled to receive family visits, and the Court has long held it has an obligation to provide and fund family visits of indigent detainees. Financial support for such visits assists the Court in upholding its obligation to ensure the highest standards for the detained persons and their human rights as well as their families'. The Coalition calls on states to urgently provide voluntary contributions to the Trust Fund for Family Visits to ensure that the ICC can safeguard the human rights of its detainees and meet the highest possible standards of judicial administration.

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. 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, timing, and organization of ASP meetings, as well as of subsidiary bodies of relevant related 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 enters its third decade, the challenges the ICC faces are becoming more technical and consequential to its success. Therefore, it is essential that the ASP further builds its 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 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 often 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 United Nations and the ICC

The 17th 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 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. In that regard, the Coalition welcomes the Arria formula meeting held on 6 July 2018 on the topic of relations between the Security Council and the International Criminal Court. The Coalition also supports the ACT Code of Conduct and Mexico-France initiatives to oppose misuse of the veto in relation to situations where preventing or ending ICC crimes is under consideration.

States Parties are encouraged to 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.

