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## *Concept note for BREAK-OUT TECHNICAL SESSION 3: Voluntary cooperation: Cooperation agreements, diplomatic and public support, judicial networks – 5 April 2017*

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The purpose of this technical session is to follow on the discussions of Break-out technical session 2 (“General Cooperation with the Court: modalities, cooperation with investigations, arrest and surrender, freezing of the assets”) and discuss the various forms of voluntary cooperation that are not expressly covered by the Rome Statute, but that are essential, in the Court’s experience, in order to operationalize successful cooperation between the Court and States Parties, and ensure the proper functioning of the Court.

Voluntary cooperation covers, inter alia, the following areas:

1. **Cooperation agreements** (witness relocation, interim release and release, and enforcement of sentences (the Court refers here to **priority 5** of the Flyer on the 66 Recommendations on Cooperation));
2. **Diplomatic and public support** for the mandate and the work of the Court (the Court refers here to **priority 6** of the Flyer on the 66 Recommendations on Cooperation);
3. **Cooperation between the States, as well as between the States, the Court and other relevant actors** in the context of the Rome Statute system (the Court refers here to **priority 7** of the Flyer on the 66 Recommendations on Cooperation).

**Cooperation agreements** that may be concluded between the Court and States Parties are critical to **facilitate important forms of voluntary cooperation**, including the relocation of witnesses under threat, enforcement of sentences, hosting suspects or accused during interim release, or accepting persons released due to acquittal, non-confirmation of charges or other reasons. The signature of framework agreements presents several advantages. Framework agreements provide legal certainty to States with respect to the obligations and entitlements of the Court. They also significantly expedite the process of consultations between the Court and States Parties in concrete situations where cooperation is requested.

**The critical need for witness protection related agreements:** Both the Office of the Prosecutor (“OTP”) and the Defence depend heavily on witnesses in the course of their investigations and for building their case. The Court works in difficult environments, either in post conflict situations or where conflicts still exist. In this context, the ability for the Court to be able to protect its witnesses is vital. In certain circumstances, the relocation of witnesses to another country is the only way to protect them against serious threats. To be able to do this, the Court relies on the voluntary assistance of States willing to accept witnesses under threat. The Court has concluded relocation agreements with 18 States Parties, including one with an Eastern European State. It should be noted that the conclusion of a relocation agreement does not necessarily require that the State has a



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national witness protection programme in place: in many instances granting residence to the witness under threat provides sufficient protection.

In recent years, the Court has made extensive efforts to facilitate the signature of such agreements. The relocation agreements are flexible as they can be adapted in order to reflect the national legislation of States. States Parties are also under no obligation to accept a witness for relocation; the final decision always lies with the State. There are also possibilities for States that are willing to consider concluding witness relocation agreements with the Court but that do not have the means to fund the relocation of individuals. In such cases, the Court can use the Special Fund for Relocations established by the Registry in order to assist States, which offers a cost-neutral solution.

In addition, States can also benefit from capacity building projects thanks to the Court's developing partnerships with rule of law agencies. The Registry has lead discussions with several partners, including the United Nations Office on Drugs and Crime ("UNODC"), as an important capacity-building partner of the Court, with a view to increasing the capacity of States Parties in various domains of importance for cooperation with the Court. The increased capacity of States in the area of witness protection, for instance, is expected to enable the relevant national actors to provide more effective cooperation to the Court, while at the same time reinforcing their national capacity to carry out judicial proceedings concerning mass atrocities and other serious crimes.

**States Parties need to share responsibility for enforcement of sentences:** Pursuant to article 103 of the Rome Statute, the Court relies on the cooperation of States for the enforcement of sentences of imprisonment imposed by the Court. States Parties that are willing in principle to accept sentenced persons are asked to conclude a framework agreement for this purpose with the Court.

Since the Court's establishment, the Presidency has actively pursued the conclusion of framework agreements on the enforcement of sentences with States Parties. These address the issues that might arise in case of possible future enforcement of sentences in the prison facilities of the State Party in question. It should be noted that the agreements do not create an obligation for the State Party to accept the enforcement of any specific sentence in the future; in other words, a State Party that enters into a framework agreement with the Court retains the right to refuse the enforcement of any individual sentence imposed by the Court.

Currently, nine States Parties have concluded agreements on the enforcement of sentences with the Court. Five of these States are from Western Europe (Austria, United Kingdom, Belgium, Denmark, Finland, Norway), one is from Eastern Europe (Serbia), one is from Africa (Mali) and one is from Latin America (Colombia; agreement not yet in force).

It is of particular concern that a very limited number of States Parties outside of Western Europe have expressed willingness to accept convicted persons into their prisons, which would leave the Presidency with minimal choice in terms of geographical considerations for instance in relation to the cultural or family ties of the convicted person.



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In September 2014, of a Memorandum of Understanding was signed between the Court and the United Nations, on Building the Capacity of States to Enforce, in Accordance with International Standards on the Treatment of Prisoners, Sentences of Imprisonment Pronounced by the Court. The Memorandum of Understanding establishes a framework for the Court and UNODC to cooperate in assisting those States Parties desiring to build their capacity to receive sentenced persons in accordance with international standards. To this end, it includes provisions on mutual consultations and exchange of information, as well as the possibility of UNODC providing technical assistance related to the treatment of prisoners and the management of facilities to States Parties.

**Interim release:** The cooperation of States is required when a suspect or an accused person is granted interim release from detention by a judicial decision of the Court, but for security reasons or another reason the person cannot go to his or her home country or country of residence during the interim release period. A model agreement was distributed to States in May 2011, and adjusted in 2012, taking into account comments made by States. On 8 April 2014, Belgium became the first State to enter into an agreement on interim release with the Court. Other States have been approached on an *ad hoc* basis in the context of the judicial proceedings. The Court encourages States to consider entering into this type of agreement, which would facilitate the smooth and diligent implementation of the decision of a Chamber to grant a person's request for interim release.

**Agreement in case of release of persons (acquittal, non-confirmation of charges, etc.):** The possibility for the Court to relocate released persons in the event that they cannot return to their State of residence is critical, as the absence of such agreements would mean that these persons would remain detained despite having been acquitted or needed to be released for a different reason by the Court. The Court has been holding consultations with specific States in order to find *ad hoc* solutions in concrete cases. In order to facilitate such discussions, a model agreement was prepared in September 2013.

To this date, no State has signed such an agreement.

Regarding both interim release and release of defendants, the exercise of this right can be hampered if the Court makes an order for interim release or release and no State will accept the defendant's presence on its territory. The Court must then rely on a State to temporarily host the person. The International Criminal Tribunal for Rwanda, for example, has had great difficulty finding States willing to accept acquitted persons on their territory. The consequences for acquitted persons are serious, as individuals who cannot be successfully released may remain detained, despite having been acquitted. This would have an enormous negative impact on the individual, on the Court, and on the Rome Statute system.

**Diplomatic and public support:** Political will from States Parties in cooperating timely and fully with the Court, in adopting the necessary domestic changes to ensure this cooperation is effective and efficient, as well as in consistently supporting the mandate and integrity of the Court and of the Rome Statute, are and remain of fundamental importance.



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The Court sees the importance of these activities as not only contributing to a better understanding and the strengthening of the Rome Statute system of international criminal justice, but also and more critically as a tool to protect and enhance cooperation with the Court.

As the Court operates today in highly sensitive and complex situations, where many interests are at play, it believes it is crucial, for its legitimacy and also for its efficiency in carrying out its judicial and prosecutorial activities, to create a framework of public and diplomatic support for the Court and the Rome Statute system, strong enough to ensure that States Parties that are under a legal obligation to cooperate with the Court, but that face challenges in doing so because of political, economic, security or capacity-related matters, do not have to carry alone the pressure that could result from these situations.

**Cooperation between the States, as well as between the States, the Court and other relevant actors:** While concrete cooperation requests are usually addressed by each State individually, helping the Court to fulfil its mandate is the collective responsibility of the community of States Parties. Progress on many of the cooperation priority areas identified in the Flyer on the 66 recommendations on cooperation will benefit from further exchanges of experience and mutual assistance where appropriate between States, the Court and other relevant partners, including civil society.

The capacity of the Court to fulfil its mandate, and in particular with regards to the investigations conducted by the OTP and its capacity to identify and obtain access to relevant evidence for its cases, and to the financial investigations conducted by both the OTP and the Registry in coordination, is greatly facilitated by its inclusion in relevant law enforcement and other practitioners' networks active around the world.

Identifying early enough where there might be information on crimes relevant to the ICC mandate and other crimes connected to these crimes – that do not happen in isolation from other types of criminality – or on incidents or individuals of interest to the OTP investigations is of crucial importance for it to conduct and facilitate its evidence collection. The smooth and diligent exchanges of information, best practices and expertise that comes with being involved and active in such networks is crucial to the success of the Court. It is also, as experience shows, an important tool for States' judicial authorities to be better aware of our work and able to assist and to be in a position to request and obtain assistance from the Court in return.

***Suggested preparations ahead of break-out session 1 discussions:***

- Review the **model agreements** shared in advance by the Court on witness relocation, enforcement of sentences, interim release and release of persons, and discuss particular questions or concerns they might have during the workshop or in bilateral exchanges;
- Prepare to share national experiences and particular challenges of existing domestic **witness protection programmes** (if not, share experiences on relevant domestic provisions on witness protection);

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- Consider the possibility of **sharing expertise and relevant experience** with regional partners in the areas identified by these framework agreements;
- Prepare to discuss possibilities in the area of **capacity building and complementarity** with national, regional and international partners (including having in mind the MoU signed between the Court and UNODC referred to above);
- Prepare to share national experiences and strategies regarding **public and diplomatic support towards the Court** (in which fora, through which means, in what contexts, etc);
- Prepare to discuss efforts to **mainstream ICC issues in national, regional and international fora and interactions** (including regarding topics such as rule of law, justice reform, sexual and gender-based crimes, children's rights, peacekeeping operations, etc);
- Prepare to share national and regional experiences regarding **judicial networks and mutual legal assistance**, and to discuss how the ICC and its cooperation framework and needs could be further integrated.