



**COUNCIL OF
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NOTE

From: International Criminal Court Sub-area of the Public International Law Working Group (COJUR-ICC)

To: Delegations

Subject: The EU's response to non-cooperation with the International Criminal Court by third states

Delegations will find below, for information, the text of the Information note on the discussions of the COJUR-ICC Working Party on the EU's response to non-cooperation with the International Criminal Court by third states

1. The European Union (EU) and its Member States are staunch supporters of the International Criminal Court (ICC) and are committed to full co-operation on the prevention of serious crimes falling under the jurisdiction of the ICC and to the ending of impunity for the perpetrators. The principles of the Rome Statute of the ICC, as well as those governing its functioning, are fully in line with the principles and objectives of the EU.

2. The European Union and its Member States are committed to the effective functioning of the International Criminal Court. Full cooperation with the ICC is a prerequisite for the Court's effective functioning and the promotion of principles of freedom, security, justice and the rule of law as well as contributing to the preservation of peace, the prevention of conflicts and the strengthening of international security, in accordance with the purposes and principles of the Charter of the United Nations. Accordingly, the EU and its Member States have decided to address the issue of non-cooperation with the Court in specific legal instruments. In 2006, the EU became the first regional organization to enter into an agreement on cooperation and assistance with the Court. In 2011, the Council of the European Union adopted a Decision *"determined to put an end to the impunity of the perpetrators of those crimes by taking measures at national level and by enhancing international cooperation to ensure their effective prosecution"*.¹ The accompanying Action Plan, updated in 2011, recalls the obligations deriving from the Rome Statute and provides further that *"the EU and its Member States will undertake consistent action to encourage full cooperation of States with the ICC, including the prompt execution of arrest warrants. The EU and its Member States should avoid non-essential contacts with individuals subject to an arrest warrant issued by the ICC. They will monitor and address developments that may hamper the ICC's work."*²
3. As a consequence of internal discussions, the International Criminal Court sub-area of the Public International Law (COJUR-ICC Working Party) notes that non-cooperation constitutes one of the most serious challenges to the effective functioning of the ICC. In its view, non-cooperation can be defined as the omission of an act by a state which is under a legal obligation to take certain action vis-à-vis the ICC. This omission can concern different actors (a Rome Statute State Party or a state not party), different forms of cooperation (such as the execution of an arrest warrant or seizure of assets) and can occur at different points in the proceedings (before or after the confirmation of charges).

¹ Council Decision 2011/168/CFSP, 21 March 2011, para. 6.

² Council Document ST 12090/11 Action Plan to follow-up on the Decision on the International Criminal Court, 12 July 2011 (p. 14)

4. The COJUR-ICC Working Party also observes that all States that have ratified the Rome Statute are under a legal obligation to "cooperate fully with the Court in its investigation and prosecution of crimes" (Art. 86 of the Rome Statute). This applies to various types of cooperation with the Court, including the execution of arrest warrants. Non-cooperation by a Rome Statute State Party not only undermines the Court but also constitutes a breach of a legal obligation.
5. As regards the states not parties to the Rome Statute, it should be remarked that they have no such obligation unless one of the following three scenarios applies: first, the UN Security Council has referred a situation to the Court by means of a resolution based on Chapter VII of the UN Charter, specifically deciding on the cooperation of a given state; second, a state not party to the Rome Statute has accepted the exercise of jurisdiction by the Court (Art. 12 (3) ICC Statute); and third, a state not party to the Rome Statute has entered into an agreement with the Court to provide assistance (Art. 87 (5) of the Rome Statute).
6. The COJUR-ICC Working Party observes that in some instances, non-cooperation has turned into an established practice where arrest warrants are repeatedly or persistently ignored and the state in question explicitly refuses to abide by its obligations. The situation can escalate further, when this non-cooperation continues after a determination of non-cooperation by the Court. Whenever non-cooperation occurs or is impending, the EU and its Member States will call for cooperation with the ICC and respond to non-cooperation.
7. The COJUR-ICC Working Party notes that the European Union and its Member States can turn to various measures to respond to cases of non-cooperation with the ICC. For example, the Spokesperson of the EU High Representative has issued statements calling on relevant states to respect their obligations under international law to cooperate with the Court. Individual Member States have responded to instances of non-cooperation by calling for bilateral meetings with the state in question to discuss the matter or by official statements, for example at the ASP, calling for cooperation with the Court.

8. The internal approach taken by the COJUR-ICC Working Party is to consider various options as to how the EU and its Member States could further systemize and strengthen their response to cases of non-cooperation with the Court. The operationalization of these options should allow for more consistency and timeliness when the EU and its Member States are confronted with cases of non-cooperation by third states.
9. The discussions of the COJUR-ICC Working Party specifically reflect upon how the EU and its Member States can respond to impending instances of non-cooperation, to persisting or repeated cases of non-cooperation, and when to avoid non-essential contacts with individuals subject to arrest warrants issued by the ICC, as provided for in the 2011 EU Action Plan. The COJUR-ICC Working Party has considered that essential contacts could be further defined as those which are strictly required for carrying out core diplomatic, consular and other activities and/or those activities which are UN-mandated or which arise from a legal obligation (e.g., under headquarters agreements), and has noted that the specific circumstances of a particular case would be relevant when determining what is an essential contact for these purposes.
10. The COJUR-ICC Working Party has agreed that current developments and updates concerning instances of non-cooperation will become a regular item on the agenda of the Working Party. Discussions on the subject will be communicated by the Chair to other relevant Council Working Parties assisted by the EU Focal Point for the ICC, as appropriate. In turn, other Council Working Parties will be encouraged to convey relevant information to the COJUR-ICC Working Party to enable an informed and effective response. Information on non-cooperation and subsequent developments may also, as appropriate, be sought from relevant EU delegations in third countries, EU Member States and EU Special Representatives working in relevant countries.