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**Report of the Bureau on cooperation**

**Note by the Secretariat**

Pursuant to paragraph 23 of resolution ICC-ASP/11/Res.5 of 21 November 2012, 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.

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### I. Background

1. Operative paragraph 23 of resolution ICC-ASP/11/Res.5 entitled “Cooperation”, adopted by the Assembly of States Parties (hereinafter “the Assembly”) on 21 November 2012, 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 twenty-first meeting on 5 December 2012.

### II. Organization of work and general findings

3. In 2013 The Hague Working Group (“working group”) held a total of nine informal consultations on the issue of cooperation with representatives of States Parties and organs of the Court. Meetings were held on 13 February, 6 and 19 March, 14 May, 3 July, 6, 23 and 30 September, and 3 October 2013. Meetings and consultations have been held with a number of stakeholders, including States, Court officials, representatives of the European Commission, Justice Rapid Response and civil society.
4. On 14 May 2013, the facilitator organized a one-day meeting on cooperation at the premises of the Court. Participants to the meeting included representatives of States Parties, observer States, representatives of the Court, civil society, as well as representatives of the United Nations Office of Legal Affairs and Interpol. The meeting, which was held under the Chatham House rule, had three topics on its agenda, namely: a) «non-essential contacts»; b) arrest strategies; and c) privileges and immunities. The discussion served as an important input to the further deliberation by the working group, not least in the drafting of the cooperation resolution. A report of this meeting can be found in annex II.
5. In addition, from 25-26 June 2013, a high level seminar on witness protection was held in Dakar, Senegal. The seminar organized by the facilitator for cooperation, Ambassador Anniken Ramberg Krutnes (Norway) and sponsored by Norway, the Netherlands and Estonia, in cooperation with the Court, gathered Ministers of Justice and

other high ranking officials from nine francophone African States Parties to the Rome Statute. A report of this seminar can be found in annex III.

6. A similar seminar on witness protection is scheduled for 29-30 October 2013 in Arusha, United Republic of Tanzania.

7. At its first meeting, held on 13 February 2013, the working group identified the following set of issues on which to focus its efforts, pursuant to the mandate deriving from resolution ICC-ASP/11/Res.5:

(a) The review of the sixty-six recommendations annexed to resolution ICC-ASP/6/Res.2;

(b) The issue of “non-essential contacts”;

(c) The issue of Privileges and Immunities, including the ratification of the Agreement on Privileges and Immunities of the International Criminal Court (“APIC”);

(d) Strategies for arrest; and

(e) The bilateral agreements or arrangements with the Court (voluntary cooperation).

8. In addition, the Court highlighted the importance of other areas of cooperation, such as the issue of freezing of assets and properties, and recommended to follow up on the recommendations made at the 1 October 2012 workshop on this issue.<sup>1</sup>

#### **A. Review of the sixty-six recommendations annexed to resolution ICC-ASP/6/Res.2**

9. The working group undertook a review of the sixty-six recommendations on cooperation, annexed to resolution ICC-ASP/6/Res.2, with a view to identify those areas of particular relevance for enhancing the cooperation of States with the Court, which could be discussed further in the context of this year’s cooperation facilitation.

10. In the course of the review process, and in consultation with the Court, the working group agreed to focus its discussions on the implementation of those recommendations having direct operational value for the Court. The facilitator also noted that recommendations pertaining to the issues of arrest, privileges and immunities, and witness protection, would be discussed in the context of the 14 May 2013 meeting, as well as the Africa seminars scheduled later in the year.

11. The recommendations relating to the issue of national focal points for cooperation, as well to national central authorities, were discussed on several occasions. One delegation agreed to consult informally with the Court and interested delegations and report to the working group, on the prospects for the establishment of a permanent coordinating mechanism for national focal points, with a view to enhance information and experience sharing among States Parties. Further to these consultations, a proposal was presented to the working group, aiming at requesting the Bureau to present a report on the establishment of a network of national authorities, for consideration by the Assembly at its thirteenth session. The working group agreed to include the proposed language on this issue in the draft stand-alone resolution on cooperation to be presented to the twelfth session of the Assembly.<sup>2</sup>

#### **B. “Non-essential contacts”**

12. Pursuant to its mandate deriving from resolution ICC-ASP/11/Res.5,<sup>3</sup> as well as from the Bureau decision of 12 February 2013, confirming that the issue of “non-essential contacts” would be further discussed in the context of the cooperation facilitation, the working group considered this issue at several meetings. Views from the relevant organs of the Court on the issue of non-essential contacts were obtained through the participation of representatives of the Court in meetings of The Hague Working Group.

<sup>1</sup> Report of the Bureau on cooperation, ICC-ASP/11/28, annex II.

<sup>2</sup> Annex I, para. 17.

<sup>3</sup> ICC-ASP/11/Res.5, preambular paragraph 4 and operative paragraph 5.

13. The facilitator presented to the working group a background paper on the issue of “non-essential contacts”, referring to the following three sources: a) resolution ICC-ASP/11/Res.5 on cooperation; b) the updated version of the United Nations guidance on contacts with persons who are the subject of arrest warrants or summonses issued by the Court<sup>4</sup> and c) the Office of the Prosecutor Prosecutorial Strategy 2009-2012, dated 1 February 2010. The background paper and proposed language on “non-essential contacts” was subject to extensive discussions among the working group members.

14. A number of delegations expressed support for an operative paragraph on “non-essential contacts”, while recognizing that States need flexibility to define “essential contacts” in their specific conduct of international relations. Some delegations voiced concerns over a language that might be construed to entail new legal obligations for States Parties.

15. This issue was further debated during the 14 May 2013 meeting,<sup>5</sup> as well as during subsequent working group informal consultations, where several alternative language proposals were discussed for the operative paragraph on “non-essential contacts”.

### C. Voluntary agreements

16. When establishing its priorities for the year, and based on operative paragraphs 16, 17, 18 and 19 of resolution ICC-ASP/11/Res.5, the working group recognized that the issue of bilateral agreements or arrangements should be discussed with the Court on a continuous basis.

17. A specific emphasis was given to the issue of witness relocation and protection, with the organization of two high level seminars in Africa<sup>6</sup> to address this issue in details with Ministers of Justice and other high ranking officials from the targeted region - to which the Court took an active part. These seminars allowed for a very fruitful and privileged exchange of views between African States Parties representatives and the Court on the system of protection in place at the Court, the challenges faced by States and the Court in ensuring the protection of witnesses, the relocation agreements and the Special Fund for relocations, and the complementary role of national systems of protection.<sup>7</sup> On these occasions, several participating States pledged to consider entering into relevant bilateral agreements with the Court in the area of witness protection and relocation.

18. The Court also presented to the working group a new model framework agreement on the release of persons, in the case of acquittals. The Court noted that this agreement, as other agreements, would only provide a framework for a case-by-case decision by the signatory State when confronted to a specific request from the Court. The rationale for such a framework agreement was found in the necessity to avoid situations where an acquitted person who cannot return to his/her home country has no other options than remaining in detention or applying for asylum in the host State.

### D. Arrest strategies

19. The issue of the arrest and surrender of persons against whom arrest warrants have been issued by the Court was the subject of the keynote speech in the plenary session on cooperation at the eleventh session of the Assembly and was identified as one of the key topics meriting further discussions among States Parties in the context of the working group. The Office of the Prosecutor presented a contribution paper on the issue of arrests at the 19 March 2013 meeting, reminding that 13 suspects subject to arrest warrants by the Court remained at large,<sup>8</sup> while it would be essential for States Parties to engage in active steps to contribute towards achieving arrests.

20. The issue of arrest strategies was further discussed during the 14 May 2013 meeting on cooperation,<sup>9</sup> where several recommendations were made on the way forward, including a) to prepare a report on lessons learnt and best practices in implementing and executing

<sup>4</sup> UN document A/67/828-S/2013/210, annex.

<sup>5</sup> Annex II.

<sup>6</sup> In Dakar, Senegal, from 25 to 26 June 2013, and in Arusha, United Republic of Tanzania, from 29 to 30 October 2013.

<sup>7</sup> Annex III.

<sup>8</sup> At the time of the presentation.

<sup>9</sup> Annex II.

arrest warrants, based on the experiences of the *ad hoc* tribunals, where persistent political pressure in private and public diplomacy had played a critical role; and b) to mandate the Bureau, in consultation with relevant stakeholders, including the Office of the Prosecutor and States Parties, to prepare such a report, drawing from the experiences of the *ad hoc* tribunals.

21. At subsequent meetings, the working group agreed to recommend that the Assembly looks into the matter of arrest strategies in a more structural manner, taking into account the input of the Court, as well as the experience other international tribunals having implemented a successful arrest strategy. A roadmap, together with a concept paper and language to be included in the draft resolution on the issue of arrest strategies were presented by one delegation to the working group at its 23 September meeting. It was agreed to retain the proposed language in the draft resolution, and to append the roadmap and concept paper to the present report.<sup>10</sup>

### **E. Privileges and Immunities**

22. Pursuant to operative paragraphs 7, 8 and 9 of resolution ICC-ASP/11/Res.5, the working group remained seized of the issue of adequate implementation of the Court's privileges and immunities. At its third meeting, on 6 March 2013, the working group agreed to put the issue of privileges and immunities on the agenda of the 14 May 2013 meeting.

23. On this occasion, the Court presented a discussion paper on privileges and immunities, aimed at assisting to identify the most relevant areas where States Parties' assistance was needed to secure the respect of privileges and immunities of the Court's staff and officials. The importance of the universal ratification of the Agreement on Privileges and Immunities ("APIC"), as well as of the adequate implementation of the Rome Statute (in particular article 48 of the Statute), and APIC, was stressed.

24. As regards the promotion of accession to and ratification of APIC, it was suggested to organize a pledging ceremony for States that had not yet ratified APIC to do so by the twentieth anniversary of the Rome Statute (July 2018). Pursuant to the Bureau decision at its ninth meeting, it was agreed that it would be preferable to take up this issue at the following session of the Assembly, in 2014. A suggestion was also made to extend this pledge by requesting States Parties that had already acceded to and ratified APIC to pledge to provide assistance to those States that haven't ratified the agreement yet. It was further suggested that the Secretariat prepare a questionnaire regarding the challenges faced by States Parties with regard to the ratification of APIC.

25. The working group acknowledged the need for enhancing and mainstreaming diplomatic and political support to the Court, in particular from those regional organizations already providing valuable assistance to the Court.

## **III. Recommendations**

26. The working group recommended that the Assembly continue to monitor cooperation with a view to facilitating States Parties in sharing their experiences and considering other initiatives to enhance cooperation with the Court, and to include cooperation as a standing agenda item for future sessions of the Assembly, pursuant to paragraph 22 of resolution ICC-ASP/11/Res.5.

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

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<sup>10</sup> Annex IV.

## 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, ICC-ASP/11/Res.5 and the sixty-six recommendations annexed to ICC-ASP/6/Res.2,

*Determined* to put an end to impunity by holding to account the perpetrators of the most serious crimes of concern to the international community as a whole, and *reaffirming* that the effective and expeditious 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 and that States Parties have a general obligation to cooperate with the Court in its investigation and prosecution of crimes within its jurisdiction, and are obliged to cooperate fully with the execution of arrest warrants and surrender requests, as well as provide other forms of cooperation set out in article 93,

*Welcoming* the report of the Court on cooperation, submitted pursuant to resolution ICC-ASP/10/Res.2 as well as resolution ICC-ASP/11/Res.5,<sup>1</sup>

*Noting* that contacts with persons in respect of whom an arrest warrant issued by the Court is outstanding should be avoided when such contacts undermine the objectives of the Rome Statute,

*Further noting* the guidelines of the Office of the Prosecutor for the consideration of States on non-essential contacts with individuals subject to an arrest warrant issued by the Court, [and *requesting* States to abstain from such contacts],

[*Welcoming*] [*Noting*] the redrafted and redistributed guidelines setting out the policy of the United Nations Secretariat on contacts between United Nations officials and persons who are the subject of arrest warrants or summonses issued by the Court, as annexed to a letter dated 3 April 2013 by the Secretary General of the United Nations to the President of the General Assembly and the President of the Security Council,

*Recognizing* that requests for cooperation and the implementation thereof should take into account the rights of the accused,

*Recalling* the pledges relating to cooperation made by States Parties at the Review Conference in Kampala and *noting* the importance of ensuring adequate follow-up with regard to the implementation of pledges,

1. *Welcomes* the report of the Court on cooperation, submitted pursuant to resolution ICC-ASP/10/Res.2 as well as resolution ICC-ASP/11/Res.5;
2. *Expresses* serious concerns that arrest warrants or surrender requests against 14 persons remain outstanding,<sup>2</sup> and *calls on* States to cooperate fully in accordance with their obligation to arrest and surrender to the Court;
3. *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 stresses that protracted non-execution of Court requests has a negative impact on the ability to execute its mandate, in particular when it concerns the arrest and surrender of individuals subject to arrest warrants;

<sup>1</sup> ICC-ASP/12/35.

<sup>2</sup> As at 2 October 2013.

3 bis. *Acknowledges* that concrete steps and measures to securing arrests need to be considered in a structured and systematic manner, based on the experience developed in national systems, the international ad hoc and mixed tribunals, as well as by the Court;

4. *Adopts* the annex concerning a roadmap for achieving an operational tool to enhance the prospect that requests of the Court for arrest and surrender are expeditiously executed, *endorses* the appended concept document prepared by The Hague Working Group, and *requests* the Bureau to report thereon to the Assembly at its thirteenth session;

5. *Emphasizes* also the on-going 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 continue improving its practice in transmitting specific, complete and timely requests for cooperation and assistance;

[6. [*Urges*] [*Invites*] [*Encourages*] States Parties to focus on the [need] [importance] to support the effectiveness of international criminal justice when considering [the need for] specific contacts with persons subject to a warrant of arrest issued by the Court, while *recognizing* that the conduct of international relations between States falls exclusively within the competence of States Parties, subject to international law;]

7. *Welcomes* the continued 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, including with regard to ensuring early notification to States Parties of opportunities to work together to avoid non-cooperation;

8. *Reiterates* the serious concerns regarding the detention of four officials of the Court from 7 June to 2 July 2012 and *continues to stress* 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;

9. *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, [if such steps are required for them to give effect thereto in their domestic legislation, and also to adopt relevant domestic legislation if required];

10. *Welcomes* the increased cooperation between the Court and the United Nations, and other international and regional organizations, and other inter-governmental institutions;

11. *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;

12. *Urges* 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 diplomatic and financial support; cooperation by all UN Member States and follow-up of 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 bis. *Notes* with concern that, to date, expenses incurred by the Court due to referral by the Security Council have been borne exclusively by States Parties, and in that regard *urges* States Parties to explore means to ensure proper implementation of article 115 (b) of the Rome Statute;]

13. *Urges* States Parties to cooperate with requests of the Court made in the interest of Defence teams, in order to ensure the fairness of proceedings before the Court;

14. *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;

15. *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;
16. *Encourages* States to establish 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;
17. *Requests* the Bureau to report to the thirteenth session of the Assembly on the feasibility of establishing of a coordinating mechanism of national authorities dealing with cooperation with the Court, for sharing knowledge and know-how, on a voluntary basis;
18. *Acknowledges* the importance of protective measures for victims and witnesses for the execution of the Court's mandate, and while welcoming the relocation agreements concluded with the Court in 2013, *stresses* its serious concern that thus far only a small number of States Parties have entered into agreements or established sufficient arrangements with the Court for the expeditious relocation of victims and witnesses;
19. *Calls upon* all States Parties and other States, 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 victims and witnesses, their families and others who are at risk on account of testimony given by witnesses;
20. *Acknowledges* that, when relocation of witnesses and their families proves necessary, due account should be given to finding solutions that, while fulfilling the strict safety requirements, also minimize the humanitarian costs of geographical distance and change of linguistic and cultural environment and *urges* all States Parties to consider making voluntary contributions to the Special Fund for Relocations;
21. *Commends* and *further encourages* the work of the Court on framework agreements or arrangements, or any other means in areas such as interim release, final release, and sentence enforcement which may be essential to ensuring the rights of the accused in article 67 of the Rome Statute and guaranteeing the rights of convicted persons and *urges* all States Parties to consider strengthening cooperation in these areas;
22. *Recognizes* that effective and expeditious cooperation with regard to the Court's requests for the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes, is crucial to the provision of reparation to victims and for potentially mitigating the costs of legal aid;
23. *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 Rome Statute;
24. *Calls on* all States Parties to put in place effective procedures and mechanisms that further enable them to cooperate with the Court in relation to the identification, tracking, freezing or seizure of proceeds, property and assets as expeditiously as possible;
25. [Placeholder ASP13];
26. *Requests* the Bureau to maintain 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;
27. *Recognizing* the importance of the Court's contribution to the Assembly's efforts to enhance cooperation, *requests* the Court to submit an updated report on cooperation to the Assembly at its thirteenth session and annually thereafter;
28. *Requests* the Bureau to report to the Assembly at its thirteenth session on the progress made by States Parties on the implementation of pledges made at the Review Conference in Kampala.

## Annex II

### Summary of the 14 May 2013 meeting on cooperation

1. On 14 May 2013, the facilitator for cooperation, Ambassador Anniken Krutnes (Norway), organized a one-day meeting on cooperation at the premises of the International Criminal Court. Participants to the meeting included representatives of States Parties, observer States, representatives of the Court, civil society, as well as representatives of the United Nations Office of Legal Affairs and Interpol.
2. The meeting had three main topics on its agenda, namely: a) «non-essential contacts»; b) arrest strategies; and c) privileges and immunities.
3. The meeting was held under the Chatham House rule.

#### A. “Non-essential contacts”

4. Several documents served as a basis for discussion on the issue of “non-essential contacts”(“NEC”), i.e. the United Nations guidelines on contacts with persons who are the subject of arrest warrants or summonses issued by the International Criminal Court,<sup>1</sup> and a background paper dated 29 April 2013 containing draft proposed language on NEC.
5. It was noted that the United Nations (“UN”) had started to articulate a policy regarding contacts with persons indicted by the Court upon the entry into force of the UN-ICC relationship agreement in 2004. The rationale behind this policy, reiterated in the letter dated 3 April 2013 sent by the United Nations Secretary General to the President of the General Assembly and of the Security Council, lies in the requirement of the UN-ICC relationship agreement that the UN refrain from any actions that would frustrate the activities of the Court or undermine the authority of its decisions. Based on this prerequisite, the UN has established a framework policy, which differentiates between contacts with persons subject to warrants of arrests, and contacts with persons subject to summonses to appear and cooperating with the Court.
6. It was stressed that the UN guidelines recommend that contacts with persons subject to an ICC arrest warrant be limited to those which are strictly necessary for carrying out essential UN mandated activities. This implies that UN officials do not participate in meetings or ceremonial events, nor make courtesy calls; when contacts are deemed absolutely necessary at the operational level, every effort should be made to liaise with alternative representatives.
7. Contacts with persons subject to summonses to appear and who are cooperating with the Court may take place, under the UN guidelines, without restrictions. When the person ceases to comply with the summons and to cooperate with the Court, the same restrictions as in the case of a person subject to an arrest warrant apply. It was noted that the UN Office of Legal Affairs (“UNOLA”) had expressed concern whenever this policy had been ignored by senior officials in the field.
8. Questions were raised concerning the way in which the UN would in practice determine the cooperation and non-cooperation of the persons subject to summonses. It appeared the UNOLA relies in fact on the assessment made by the Office of the Prosecutor of the Court; the issuance of an arrest warrant by the Court would in any event trigger a determination of non-cooperation by the UN.
9. The value of the UN guidelines for the purpose of defining a policy of the Assembly of States Parties to the Rome Statute on NEC was questioned. It was recalled that the UN guidelines were applicable to the staff members of the UN, and could not be transposed to States Parties as such. It was further noted that contrary to the UN, States Parties were under an obligation to implement the Court’s cooperation requests, including arrest warrants; therefore if a State Party had to maintain “essential contacts” with a person subject to an arrest warrant issued by the Court, these contacts had to take place outside of that State’s territory.

<sup>1</sup> UN document A/67/828-S/2013/210, annex.

10. Several participants stressed the importance of establishing a policy on NEC at the level of the Assembly of States Parties, with a view to ensure that States Parties meet their obligations under the Rome Statute.

11. As to whether the UN guidelines could be reviewed and strengthened at some point, it was noted that the guidelines were presently deemed sufficient to address the issue of UN officials' interaction with persons subject to arrest warrants or summonses to appear before the Court, without excluding a further review of the guidelines at a later stage.

## **B. Arrest strategies**

12. Participants debated the main challenges attached to the 13 outstanding arrest warrants before the Court. It was noted that in many instances, the whereabouts of the fugitives were well-known, stressing that the political will of States Parties to cooperate with the Court was key.

13. In some cases, the consistent implementation of an isolation strategy had proved successful, like in the case of Bosco Ntaganda who voluntarily surrendered to the Court on 22 March 2013. In the less frequent situations where the whereabouts of the fugitives at large remained unknown (as for Sylvestre Mudacumura), participants agreed that concerted efforts and increased cooperation among all stakeholders were vital to overcome the operational challenges of the execution of outstanding arrest warrants.

14. Contrary to other international tribunals, the Court had not yet established tracking mechanisms, due to the fact that the whereabouts of fugitives had been largely well-known so far. Some specific support, such as the inclusion in the US War Crimes Reward Program of information pertaining to ICC fugitives, was deemed very useful.

15. In relation to the mandate and work of Interpol, participants welcomed the close working relationship between the Court and Interpol at the operational level. At the more technical level, States and other entities, such as the ICC, could provide direct and indirect support through *inter alia* information sharing, training sessions and awareness raising campaigns.

16. A number of guidelines were presented to participants, as potentially relevant for States and for the Court in working towards the implementation of arrest warrants:

- (a) Preparedness to invest in the search activity;
- (b) Proper administrative preparations, including relevant language versions of the arrest warrant, proper identification of the fugitive, using proper communication channels as well as formulating clear and concise arrest warrants;
- (c) Establish and maintain appropriate contacts with the State having jurisdiction over the fugitive, as well as with the State issuing the arrest warrant; and
- (d) Maintain a high level of investigation as well as public campaign strategies throughout the process.

17. It was stressed that the proper identification of fugitives was crucial, as in most instances the sole name would not prove sufficient to securely identify the fugitive.

18. Suggestions were made on the way forward: a) to prepare a report on lessons learnt and best practices in implementing and executing arrest warrants, based on the experiences of the *ad hoc* tribunals as well as the Special Tribunal for Lebanon, where persistent political pressure in private and public diplomacy had played a critical role; and b) to mandate the Bureau, in consultation with relevant stakeholders, including the OTP and States Parties, to prepare such a report, drawing from the experiences of the *ad hoc* tribunals.

## **C. Privileges and immunities**

19. Participants considered a discussion paper on privileges and immunities, presented by the Court with a view to assist identifying the most relevant areas where States Parties' assistance was needed to secure the respect of privileges and immunities of the Court's staff and officials. The importance of the universal ratification of the Agreement on Privileges

and Immunities (“APIC”), as well as of the adequate implementation of the Rome Statute (in particular article 48 of the Statute) and APIC, was stressed.

20. As regards the promotion of accession to and ratification of APIC, it was suggested to organize, at the twelfth session of the Assembly, a pledging ceremony for States that had not yet ratified APIC to do so by the twentieth anniversary of the Rome Statute (July 2018).

21. In addition, a suggestion was made to extend this pledge by requesting States Parties that had already acceded to and ratified APIC to pledge to provide assistance to those States Parties that haven’t ratified the agreement yet. It was further suggested that the Secretariat prepares a questionnaire regarding the challenges faced by States Parties with regard to the ratification of APIC.

22. Regarding the recommendations on the possible role of regional organizations, it was reminded that while a number of regional organizations, such as the European Union, the Commonwealth, la Francophonie and the Organization for the American States, were already providing valuable assistance to the Court, political support from these organizations was also key.

## Annex III

### Summary of the Dakar seminar on witness protection (25 - 26 June 2013)

On 25 and 26 June 2013, a high level seminar on witness protection was organized in Dakar, Senegal. The seminar, organized by the facilitator for cooperation, Ambassador Anniken Ramberg Krutnes (Norway) and sponsored by Norway, the Netherlands and Estonia, in cooperation with the Court, and receiving full political and logistical support by Senegal, was held at the Gorée Institute and gathered Ministers of Justice and other high ranking officials from nine francophone African States Parties to the Rome Statute, namely Senegal, Mali, Burkina Faso, Niger, Côte d'Ivoire, Tunisia, Republic of Congo, Burundi and Chad. Ministers of Justice of Senegal, Burkina Faso and Mali took an active part in the seminar, which focused on the reinforcement of national capacities in the area of witness protection and the sharing of best practices and experiences among participants and the Court in this crucial field.

Participants to the seminar included the President of the Assembly of States Parties, the facilitator for cooperation, the Dutch Ambassador to the ICC, representatives of the Secretariat of the Assembly of States Parties, the Registry and the Office of the Prosecutor of the Court. Representatives of the Extraordinary African Chambers within the courts of Senegal, created to prosecute international crimes committed in Chad between 7 June 1982 and 1 December 1990, took also part in the seminar and presented a case study in relation to the Habré case. The United Nations Office on Drug and Crime (UNODC) was also represented at the seminar.

Participants had privileged and fruitful exchanges of views on the system of protection in place at the Court, the challenges faced by States and the Court in ensuring the protection of witnesses, the relocation agreements and the Special Fund for relocations, and the complementary role of national systems of protection.

Thanks to its interactive format, the seminar allowed for an open and constructive dialogue among the participating States Parties and the Court on the challenges faced in the area of witness protection at the national level, and the respective national legislative frameworks, including areas where capacity building or technical assistance would be needed. The responsibilities and functioning of the witness protection units within the Court were clearly exposed to participants, who gained a better understanding of the operational issues at stake when seized with a cooperation request from the Court.

In the course of the open debate on the national protection systems, participants identified a number of issues deserving further consideration:

(a) The need to establish clear channels of communication between the Court and States Parties, at the operational level. The establishment of national focal points, or the nomination of a responsible unit for matters relating to witness protection or relocation was recommended;

(b) The authority in charge of securing witness protection and relocation at the national level should be independent;

(c) Very few participants had adopted a specific legislation on witness protection and relocation; most of the States would apply specific provisions of their Criminal Code or Code of Criminal Procedure, together with the applicable refugee law instruments;

(d) A suggestion was made to establish a platform for practitioners from neighbouring States to exchange on their best practices and experiences in the area of witness protection;

(e) Having an appropriate legal framework for cooperating with the Court is crucial to allow for an effective implementation of positive complementarity – in order to facilitate the transfer of files or evidence to the national systems. It is particularly true for the very sensitive information relating to protected witnesses, and the need to ensure the appropriate level of confidentiality at the national level; and

(f) Some participants identified needs for training of judicial and police actors involved in witness protection and relocation, in order to enhance the national capacities in the area of witness protection, and provide an adequate response to the Court's requests for cooperation.

Several participants indicated their willingness to consider entering into relevant bilateral agreements with the Court in the area of witness protection and relocation, to facilitate the Court's mandate and reinforce their cooperation with the Court. The Court noted that it would follow up directly with those States having indicated their willingness to enter into relocation agreements, and would report to the twelfth session of the Assembly on the progress achieved.

## Annex IV

### Arrest strategies: roadmap and concept paper

#### Roadmap

This roadmap aims at achieving in 2014, by the thirteenth session of the Assembly of States Parties, an operational tool to enhance the prospect that requests of the Court for arrest and surrender are expeditiously executed. The final outcome of this process should be based on knowledge and practice in the area. The experience of relevant actors would drive the identification of concrete measures to facilitate the enforcement of the Court's requests for cooperation. Based on this structure, the development of arrest strategies needs to be addressed through a *Rapporteur*, who will further advance the following process to deliver concrete results in the period 2013-2014.

#### 1. Concept stage

As an initial step, a preliminary outlook of the elements which should be considered for arrest strategies would be based on general and publicly available information. Relevant elements would be organized with a preliminary consideration of existing variances in different situations and cases, depending on States' responsibilities and on qualities attached to the individuals sought by the Court. Fact-finding will be continued and completed as the following steps of the roadmap unfold.

Responsibility: The Hague Working Group ("HWG")

Timeline: ASP/12.

#### 2. Experience-based analysis

The practices, positive and negative, of States, Internationalized Tribunals, and of other International or Intergovernmental Organizations would be collected following the systematic approach illustrated in the concept paper. The measures undertaken by the different actors for the arrest of persons at large would be appraised in terms of success in the enforcement, challenges encountered, and time and resources committed.

Responsibility: HWG, with the assistance of external sources (including the *ad hoc* and hybrid Tribunals, their situation countries, and UN cooperating Member States), as well as of the Court.

Timeline: June 2014.

#### 3. Action Plan

Based on the above, the Assembly might consider the adoption of an Action Plan containing concrete measures that States Parties and other cooperating actors might pledge with the ICC to undertake.

Responsibility: HWG, in consultation with the Court.

Timeline: ASP/13.

## Concept Paper

### I. Presentation

1. The International Criminal Court (“the Court”) has to date issued arrest warrants against 21 individuals, of which only six have thus far resulted in surrender to the Court.<sup>1</sup> Arrest warrants against other 12 individuals remain outstanding.<sup>2</sup> As trials at the Court cannot be conducted in the absence of the accused,<sup>3</sup> this situation negatively affects the ability of the Court to carry out its mandate.<sup>4</sup>

2. The primary obligation of States Parties to cooperate with the Court is aimed at the execution of requests for arrest and surrender.<sup>5</sup> In that regard, it is for States Parties, individually or collectively, to consider what challenges hinder effective cooperation, and what initiatives might enable them to comply with their obligations.<sup>6</sup> On the other hand, the Court, as the requesting authority, also plays an important role for the outcome of his requests, as other State and non-State actors do. From this perspective, enhancing cooperation also means reducing the scope for non-cooperation, which calls for a holistic approach, where strategies would need to be coordinated in order to achieve the expected results.

3. The development of arrest strategies is part of the implementation of the policy of the Assembly for enhancing the effectiveness of the Court through cooperation.<sup>7</sup> This paper focuses on arrest strategies, only, and it is aimed at providing the Assembly of States Parties (the Assembly) at its 2013 twelfth session with an input to furthering a thorough discussion on steps and measures to be taken by relevant actors, and that could concretely advance the status of execution of the outstanding arrest warrants issued by the Court. For that purpose, a step-by-step approach might be taken by the Assembly, based on a realistic roadmap. In the process, the concept presented in this paper may be adapted as required, in accordance with the findings.

<sup>1</sup> Six arrest warrants were enforced in the following situations: DRC - Thomas Lubanga Dylo, Germain Katanga, Mathieu Ngunjolo Chui (acquitted-released), and Callixte Mbarushimana (charges dismissed-released); Central African Republic - Jean-Pierre Bemba Gombo; Côte d’Ivoire - Laurent Gbagbo. One suspect surrendered himself voluntarily to the Court: DRC – Bosco Ntaganda (two warrants). Two arrest warrants were withdrawn following the death of the accused in: Uganda – Raska Lukwiya; Libya – Muammar Gaddafi.

<sup>2</sup> The following arrest warrants are still outstanding: DRC - Sylvestre Mudacumura; Uganda - Joseph Kony, Okot Odhiambo, Dominic Ongwen, and Vincent Otti; Sudan - Omar al Bashir (two warrants), Ahmed Harun, Ali Kushayb, and Abdel Raheem Muhammad Hussein; Côte d’Ivoire - Simone Gbagbo (arrested but not surrendered); Libya - Saif Al-Islam Ghaddafi, and Abdullah Al-Senussi (both arrested but not surrendered).

<sup>3</sup> Article 61(2) ICCSt. [see also Rules 125(1) and 126(2) RPE] only allow to hold the pre-trial phase *in absentia* of the accused. In order to further proceed to the trial stage after the confirmation of charges the rule, with no exception, is that ‘the accused shall be present during the trial’ [Art. 63(1) ICCSt], while his presence may be ensured through voluntary appearance [Art. 58(7) ICCSt] or arrest and surrender [Art. 58(1) ICCSt].

<sup>4</sup> ICC-ASP/11/Res.5, Cooperation, paragraph 2: “*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”.

<sup>5</sup> Based on established practice in inter-State and international cooperation, the notion of cooperation proper is referred to extradition, which has evolved in direct surrender in those contexts where a strictly judicial procedure was intended to overcome the political phase of evaluation and the application of the dual criminality requirement, achieving a leaner and more expeditious procedure (e.g., European Arrest Warrant, introduced by Council Framework Decision of 13 June 2002). The “other forms of cooperation” under article 93 of the Rome Statute refer to judicial assistance, i.e. the provision of any other support necessary to enable another jurisdiction to carry out its mandate.

<sup>6</sup> ICC-OTP, *Contribution paper*, 2013, para. 8: “It is not enough for States to simply recognize the importance of arrests for the work of the Court without considering tangible and concrete measures to achieve arrests and thus trials [...]”; para. 9: “[...] to date there has not been a systematic results-orientated discussion among States Parties on concrete steps or measures that can be taken to facilitate arrests, the time is ripe for discussions specifically focused on cooperation to achieve arrests, with a view to producing recommendations on how best to contribute towards securing arrests”.

<sup>7</sup> ICC-ASP/6/Res.2, *Strengthening the International Criminal Court and the Assembly of States Parties*, paragraphs 37, 38 and 40, and annex II, 66 *Recommendations on Cooperation*, Recommendation 21: “States Parties and the Assembly of States Parties should consider ways in which experiences can be shared on issues relating to arrest and transfer, possibly through a general focal point for cooperation appointed by the Assembly of States Parties”.

## II. Roadmap

4. It is suggested that the Assembly might be seized of arrest strategies as a discrete sub-agenda item of cooperation at its twelfth session in 2013 and, on that basis, it could further mandate the Bureau, through the Hague Working Group, to conduct in 2014 a detailed analysis, with the aim to approving at its thirteenth session an operational tool. The process would include the following steps, as detailed in the annex:

1. Concept stage ..... September to November 2013
2. Experience-based analysis ..... December 2013 to June 2014
3. Action Plan ..... July to November 2014

5. The working method should be lean and flexible, focussed on the technical nature of the research and of the practices to be taken into account, as well as on the operational nature of the result to be achieved. Based on this structure, the development of arrest strategies qualifies for being addressed through a *Rapporteur*, who will further the following process in order to deliver concrete results by 2014.

## III. Approaches

6. Dealing with the enforcement of the Court's requests for arrest and surrender on a case-by-case basis appears to have its limitations, as it might not allow to timely highlight common challenges and their possible solutions, which could lead to missing enforcement opportunities. On the other hand, addressing the matter at the enforcement stage, only, puts both States and the Court before a given legal and factual framework, whose flexibility might be limited. From this perspective, the cooperation relationship between the States and the Court is affected by the decision of the Court which renders specific and concrete the cooperation obligation, i.e. the issuance of a request for arrest and surrender.

7. Based on these two phases of the cooperation relationship (establishment of the obligation and its actualization with a request), two possible approaches to improving cooperation can be identified: one of a preventive nature, whereby an arrest strategy is dealt with *ex ante*, i.e. prior to any specific request of arrest being issued; the other of a redressing nature, where measures tuned on the specificity of the case are required *ex post*, on the basis of the substantially negative results of a request for cooperation. The two approaches are obviously not alternative but complementary, and they might achieve the best results if effectively combined in a unified strategy.

### A. Prevention

8. Prior to a request of cooperation, the relationship of a State Party with the Court is only regulated by the general obligation to fully cooperate.<sup>8</sup> How States respond to this general obligation, i.e. whether their legal systems would be prepared to enabling a full cooperation with the Court, falls within their implementation of the principle of complementarity. It is at this stage that an analysis of the complementarity measures might focus on the preparedness for responding to possible requests of cooperation from the Court. Until the moment when a State Party is called by decision of the Court to a specific conduct for the implementation of the general obligation - in the case at hand, to execute a request for the arrest and surrender - an early agreement on the modalities and contents of cooperation could prepare for a better execution of the restrictive orders of the Court.

9. In fact, it would seem that it is at an even earlier stage that the Court would be better placed for negotiating with States and other relevant actors the modalities, means and other conditions for providing cooperation, i.e. prior to a referral, or not later than during the interval between a referral and a decision to open an investigation. In case of a referral by a State or the Security Council, the referring entity might be called to considering a proactive engagement upon the trigger of an investigation, thereby needing to factor-in a referral proceeding the possible subsequent need to provide a concrete follow-up to it, including with executing requests for arrest and surrender.

<sup>8</sup> Art. 86 of the Rome Statute: "States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court".

## B. Enforcement

10. Upon a request for cooperation, the attitude of a State to fully comply with the obligation to arrest and surrender may be influenced by a number of factors. If not considered at an earlier stage, operational or political challenges may substantially affect the outcome of the request for cooperation. In this case, the willingness and capacity to arrest and surrender might need to be addressed in the unfavourable scenarios that are currently faced by the Court.

11. At the current stage of consideration of the arrest strategies, this paper will only elaborate following the *ex post* approach, that is by tentatively identifying the elements that would be considered at the analysis stage of the process. These would include:

(a) Classification, i.e. common features and challenges for the execution of the Court arrest warrants, and

(b) Initiatives, i.e. sets of measures that are conducive to facilitating enforcement.

12. However, a comprehensive approach to arrest strategies will also need to include an analysis of the preventive or *ex ante* approach, which might be conducted in sequence, based on the elements emerged *ex post*, at the enforcement level. Similarly, from a perspective of mutual cooperation, the exercise would also need to explore what complementary policies of the Court could best serve the purpose of achieving the enforcement of arrest warrant, e.g. including in the preparation of a request or in keeping it under seal.

## IV. Elements for the analysis

### A. Classification

13. The survey of the different situations that might arise in executing a Court's request of cooperation for arrest and surrender would be based on the legal and factual qualifications attached to both the relevant States and the persons sought by the Court. In that regard, a typology could be identified on the basis of:

1. *Location*, i.e. presence of the person, and obligation of States,
2. *Capacity*, of States where the person is located,
3. *Status*, or quality of the person sought by the Court.

#### 1. Location

14. The primary element for the enforcement of an arrest warrant is the location, actual or potential, present or future, of a person sought by the Court. The physical presence, however, might provide different enforcement opportunities depending on whether a State is bound or not to cooperate with the Court, and whether compliance with any such an obligation depends on the mechanisms available under the Rome Statute or under the UN Charter. From this perspective, relevant elements to be considered are:

- Existence of an obligation for States,
- Source of the obligation, i.e. Rome Statute or Security Council resolution,
- Presence of the person.

15. In that regard, the following situations might arise, depending on the presence of a person sought by the Court on the territory of the following States:

(i) *State under obligation to cooperate, pursuant to the Rome Statute:*

(a) State Party, as a situation country [Uganda, DRC, CAR, Kenya, Côte d'Ivoire, Mali]; or

- (b) Other States having accepted jurisdiction;<sup>9</sup> or
  - (c) Other States voluntarily accepting to cooperate;<sup>10</sup> or
  - (d) State Party or State having accepted jurisdiction, when transit or destination countries.<sup>11</sup>
- (ii) *State under obligation to cooperate, pursuant to a Security Council resolution:*<sup>12</sup>
- Non-States Parties [Sudan, Libya].
- (iii) *State with no obligation to cooperate, but urged to cooperate pursuant to a Security Council resolution.*<sup>13</sup>
- (iv) *State with no obligation to cooperate:*
- Non-States Parties, in situations other than those referred by a Security Council resolution.

## 2. Capacity

16. Once a fugitive is located and his or her presence on a territory establishes a concrete relationship with the concerned State for the enforcement of an arrest warrant, the question arises whether the ability of a State to execute the warrant depends on its willingness or on its capacity. From this perspective, while unwillingness might result in instances of non-cooperation and be dealt with under the relevant procedures,<sup>14</sup> the ability of a willing State to execute an arrest could be the result of the interplay of different factual elements:

- (a) Actual control, of the territory where the person is located; and
- (b) Technical capacity, to ensure arrest and surrender.

17. In that regard, the following situations might arise, depending on the authority of a State on a territory, and on its preparedness to enforce an arrest warrant:

<sup>9</sup> Article 12(3): "[...] The accepting State shall cooperate with the Court without any delay or exception, in accordance with Part 9". Côte d'Ivoire had previously accepted the jurisdiction of the Court for crimes committed since 19 September 2002 (declaration dated 18 April 2003). Upon accession, for the same State the Rome Statute entered into force on 1 May 2013.

<sup>10</sup> A State, although not party to the Statute, may decide to provide cooperation with the Court by entering into special agreements or arrangements "or on any other appropriate basis" [art. 87(5)(a)]. While States Parties have an obligation of full cooperation with the Court [art. 86] and, consequently, "shall ... comply with a request for arrest and surrender" [art. 89(1)], non-States Parties voluntarily entering into a cooperation relationship with the Court are only bound to "cooperate" [art. 87(5)(b)], including for the execution of arrest and surrender [Art. 89(1)].

<sup>11</sup> In *Al-Bashir*, e.g.: Kenya on 7 August 2010, promulgation new Constitution; Chad, on 21-23 August 2010, AU Summit, and on 7-8 August 2010; Djibouti on 8 May 2011, inauguration of the President; Malawi, on 14 October 2011, Summit of the Common Market for Eastern and Southern Africa (Comesa).

<sup>12</sup> Article 13(b) ICCSt. See, for Sudan Security Council resolution 1593 (2005), 31 March 2005, OP 2, which sets up an obligation ("decides") for "the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully", while *urging* "all States and concerned regional and other international organizations to cooperate fully" (emphasis added). Similarly, for Libya, Security Council resolution 1970 (2011), 26 February 2011, OP 5 establishes the obligation of full cooperation only for the Libyan authorities, while all States and relevant international organizations are also urged in that regard ("Decides that the Libyan authorities shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully with the Court and the Prosecutor").

<sup>13</sup> In *Al-Bashir*, e.g., travelling countries: Iran, 27 June 2011, and China, 28-30 June 2011.

<sup>14</sup> Pursuant to Art. 112(2)(f) the Assembly would consider [...] any question relating to non-cooperation" and it has, in that regard, established the *Assembly procedures relating to non-cooperation* (ICC-ASP/10/Res.5, annex). In case a situation was referred by the Security Council, it might as well decide on matters of non-compliance of obligations by States Parties [Art. 87 (7)] or non-States Parties, also when they have contracted voluntary obligations with the Court [Art. 87(5)(b)]. See also Art. 17(3) of the UN-ICC Relationship Agreement: "the Court shall ... refer the matter to [the Security Council]. The Council may avail itself of sanctions and other measures [e.g., Security Council resolution 1207, 17 November 1998, OP 3: "Condemns the failure to date of the Federal Republic of Yugoslavia to execute the arrest warrants issued by the Tribunal [ICTY] against the three individuals [...] and demands the immediate and unconditional execution of those arrest warrants, including the transfer to the custody of the Tribunal of those individuals".

- (i) *Control of the territory, where the fugitive is located*
  - (a) State is in control:
    - territorial State [e.g., Sudan; Côte d’Ivoire-Simone Gbagbo; Libya-Senussi]
  - (b) State has no control:
    - territorial State [e.g., Uganda; Libya-Ghaddafi]
- (ii) *Technical capacity to enforce arrests*
  - (a) Unavailability of technologies or know how, to track and arrest fugitives;
  - (b) Inability to track or arrest fugitives, due to the characteristics of the territory or to the assistance provided to fugitives by organized groups or other networks; and
  - (c) Unavailability of such minimal structures as they are needed for the functioning of the rule of law, as they might also have been considered at the admissibility stage of the case.<sup>15</sup>

### 3. Status

18. Upon the location of a fugitive, practice reveals that the personal quality or status of the fugitive might assume practical relevance for the enforcement of the Court’s order, depending on the suspect’s:

- (a) Official position or *de facto* authority;
- (b) No ”privilege”; and
- (c) Detention for other reason.

19. In that regard the following circumstances may come into play:

- (i) *Official Position*
  - (a) ”Immune” person; and
  - (b) Immunity waived, or consent to surrender.<sup>16</sup>
- (ii) *Non-privileged position*, including
  - (a) Prisoners in internal or international armed conflicts; and
  - (b) Persons detained for other than statutory offenses.

### B. Initiatives

20. The classification of the elements characterizing the enforcement of any arrest warrant would allow to individualize the measures that would appear, based on the relevant practice, more appropriate to enhance expectations of execution. Such measures would include:

- (a) Incentives; and
- (b) Actions.

#### 1. Incentives

21. These measures would promote the building of a voluntary positive approach by both States and individuals, in order to bring about the arrest and/or surrender of persons sought by the Court. Based on the their addressees, incentives would be of different nature,

<sup>15</sup> Article 17(1) and (3) of the Rome Statute: [the Court shall determine that a case is admissible where a State is unwilling or unable genuinely to carry proceedings and,] “in order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused [...]” (emphasis added).

<sup>16</sup> Article 98(1) and (2) of the Rome Statute.

public or private, while their actual availability might depend on the circumstances of the situation and of the case. Incentives might be directed to:

(i) *States*

In situations where incentives can be considered, normally States would have the capacity requisite to execute arrest warrants, while domestic political circumstances might counter compliance with the obligations towards the Court. In that regard, incentives from the international community would have to address a primary public interest of the concerned State, and be able to outweigh internal impediments, including with a clearly recognizable political, economic, security, or social benefit. Such conditionality policies might include:

- (a) Participation into regional or intergovernmental organizations;
- (b) Capacity building assistance; and
- (c) Cooperation aid, account taken of humanitarian needs.

(ii) *Persons*

Individualized incentives for individuals sought by the Court might represent a viable option where the willingness of a State to cooperate with the Court exists, but domestic social or political circumstances require that the person concerned be convinced to voluntarily surrender. Such measures would mostly depend on the State of residence or nationality, and might include assurances or arrangements for:

- (a) Assistance during Court proceedings, including legal, material, issuance of visas, or arrangements in case of provisional release and sentence enforcement;
- (b) Facilitation for family members, including for visits at the Court's Detention Centre;
- (c) Enforcement of any Court's sentence in an agreed country;
- (d) Granting of a domestic status, upon completion of proceedings; and
- (e) Granting of some residence status abroad, upon completion of proceedings.

## 2. Actions

22. In situations where incentives would not be an option, either because they are not available (e.g., a State has no interest into admission to an organization) or because their disadvantages would not advise their use (e.g., humanitarian crisis in the area), specific cooperation building measures would have to be considered for States, and operational means put in place to execute arrests. These actions would aim at:

- Isolation, tracking, and arrest of a person, and/or
- Exert pressure on States, and
- Support the Court.

23. In that regard, means for fostering cooperation could be of different nature:

- (i) *Political*,<sup>17</sup> including
- Public statements<sup>18</sup> and commitments, in the UN and other multilateral bodies,
  - Private consultations;
  - Development of national or multilateral pro-ICC policies;<sup>19</sup>

<sup>17</sup> ICC-ASP/6/Res.2, annex II, 66 *Recommendations on Cooperation* (hereinafter, *Recommendations*), Recommendation 17: "All States Parties should contribute where appropriate to generating political support and momentum for the timely arrest and surrender of wanted persons both in their bilateral contacts and activities in regional and international organizations".

<sup>18</sup> *Recommendations*, Recommendation 48: "States Parties should remind States of their duty to cooperate and request in their statements that States fulfill their obligations to cooperate, in particular when it concerns arrest and surrender".

- démarches<sup>20</sup> and summoning Ambassador of a concerned State;
- pro-ICC clauses in relevant agreements;<sup>21</sup> and
- initiatives in the Security Council,<sup>22</sup> including the mandates for peacekeeping missions, sanctions and other measures,<sup>23</sup> as well as follow-ups to referral resolutions.

(ii) *Diplomatic*, e.g.

- non-essential contacts;
- inclusion in the agendas of bilateral and multilateral dialogue; and
- language in statements at the Assembly sessions' General Debate.

(iii) *Police*, including

- training of law enforcement personnel;<sup>24</sup>
- special programmes.<sup>25</sup>

(iv) *Technical assistance*,<sup>26</sup> including through the establishment of tracking and arrest teams, which could follow different models or a combination thereof, e.g.

- mixed teams;
- staff embedded in national forces;
- gratis personnel provided to the Court; and
- contribution of qualified staff directly by a State or through a catalyst entity (as Justice Rapid Response or regional Organizations).

(v) *Exchange of information*,<sup>27</sup> including intelligence

(vi) *Communication to relevant actors*, including national decision-makers and diplomats.<sup>28</sup>

<sup>19</sup> A comprehensive and updated overview of the legal framework established by the European Union to support the ICC, and of the practices to improve cooperation and complementarity, is reflected in the document presented at the 5 September 2013 meeting of the HWG: *Joint Staff Working Document - Toolkit for Bridging the gap between international & national Justice*, SWD (2013) 26 final, dated 31 January 2013, issued by the European Commission and High Representative of the European Union for Foreign Affairs and Security Policy.

<sup>20</sup> In some instances, démarches can be carried out in a multilateral format. Since 2002 the European Union has targeted more than 130 countries, carrying out 430 démarches, including to promoting ratification and implementation of the Rome Statute, ratification of the Agreement on the Privileges and Immunities, and highlighting its guidelines on bilateral non-surrender agreements.

<sup>21</sup> See article 11(7) of the EU *Cotonou Agreement*, the most comprehensive partnership agreement between developing countries and the EU. Since 2000, it has been the framework for the EU's relations with 79 countries from Africa, the Caribbean and the Pacific (ACP), and it follows a comprehensive approach to "State fragility and aid effectiveness" (interdependence between security and development, including peace building and conflict prevention), where a combination of diplomacy, security and development cooperation is considered for situations of State fragility.

<sup>22</sup> E.g. mandates for UN peacekeeping forces to include assistance in enforcing ICC arrest warrants, and follow-ups to referral resolutions.

<sup>23</sup> *Supra*, footnote 14. See also ICC-OTP, *Contribution paper*, 2013, paragraphs 14-15.

<sup>24</sup> *Recommendations*, Recommendation 20: "[consider] on request, to provide a State on whose territory suspects are located with technical assistance and support such as information-sharing and specialised training of law enforcement personnel".

<sup>25</sup> E.g., under the *War Crimes Rewards Program* (part of the wider Rewards for Justice Programme) the U.S. Department of State offers rewards of up to \$5 million to individuals who provide information regarding designated defendants who have been charged with the commission of international crimes. Legislation signed on January 15, 2013, expands the authority of the Department of State to provide rewards for information leading to the arrest or conviction in any country, or the transfer to or conviction by any international criminal tribunal, of any foreign national accused of war crimes, crimes against humanity, or genocide. ICC fugitives for which the *Program* is currently applicable include : Uganda - Joseph Kony, Dominic Ongwen, Okot Odhiambo; DRC - Sylvestre Mudacumura.

<sup>26</sup> *Recommendations*, Recommendation 20, *supra*, footnote 20.

<sup>27</sup> *Ibidem*, and also Recommendation 21: States Parties and the Assembly of States Parties should consider ways in which experiences can be shared on issues relating to arrest and transfer, possibly through a general focal point for cooperation appointed by the Assembly of States Parties.

<sup>28</sup> *Recommendations*, Recommendation 59: "Workshops on practical issues related to cooperation such as arrest and surrender, freezing of assets and financial investigations could be organized, with the participation of relevant United Nations actors".