

**Fourteenth session**

The Hague, 18-26 November 2015

**Report of the Bureau on cooperation****Annex IV****Report on the draft Action Plan on arrest strategies, submitted by the Rapporteur****A. Introduction**

1. At its twelfth session (2013) the Assembly of States Parties (“Assembly”) endorsed the Concept Paper on arrest strategies (“Concept Paper”)<sup>1</sup> and adopted the roadmap that had been submitted by one delegation (Italy). Both documents had been discussed in The Hague Working Group of the Bureau, within the facilitation on cooperation, and annexed to the report of the Bureau on cooperation.<sup>2</sup> The decision of the Assembly aimed at achieving by its thirteenth session (2014) an Action plan to operationalize the prospect that requests of the Court for arrest and surrender are expeditiously executed,<sup>3</sup> based on the consideration that the effective exercise of the Court’s jurisdiction depends on the ability to enforce its judicial decisions, so that the presence of the accused at trial is ensured. At its thirteenth session (2014) the Assembly decided to continue working towards a consolidated Action Plan.<sup>4</sup>

2. The Bureau appointed Mr. Roberto Bellelli (Italy) as *Rapporteur* on the arrest strategies.<sup>5</sup> The *Rapporteur* delivered a report (“2014 report”)<sup>6</sup> which provided background and justification for an attached draft Action plan on arrest strategies. The mandate to the *Rapporteur* was thereafter renewed by the Bureau,<sup>7</sup> to complete consideration on the draft Action Plan. The present report implements such mandate, and reflects the proceedings and contents of the negotiations of the attached finalized [draft] Action Plan.

**B. A result oriented approach: the Concept Paper (2013)**

3. The issue of the high number of outstanding arrest warrants had been raised by the Court as a matter which has a significant negative impact on the ability to execute its mandate. In 2013, the Office of the Prosecutor provided an important input for States

<sup>1</sup> ICC-ASP/12/Res.3, *Cooperation*, para. 5.

<sup>2</sup> ICC-ASP/12/36, *Report of the Bureau on cooperation*, Annex IV, pages 14-21.

<sup>3</sup> ICC-ASP/12/Res.3, para. 5: “to enhance the prospect that requests of the Court for arrest and surrender are expeditiously executed”.

<sup>4</sup> ICC-ASP/13/Res.3, *Resolution on cooperation*, paragraph 4.

<sup>5</sup> ICC-ASP Bureau, *Agenda and Decision*, 18 February 2014.

<sup>6</sup> ICC-ASP/13/29/Add.1, Report of the Bureau on cooperation, Annex VII, *Report on arrest strategies*, dated 18 November 2014.

<sup>7</sup> ICC-ASP Bureau, *Agenda and Decisions*, 17 February 2015.

Parties to consider “tangible and concrete measures to achieve arrests and thus trials”.<sup>8</sup> The Assembly of States Parties acknowledged the importance of an effective cooperation in this area of the execution of Court requests,<sup>9</sup> and decided to focus its work on the value of lessons learned,<sup>10</sup> by adopting a structured and experience-based approach.<sup>11</sup>

4. On 23 September 2013, a Concept Paper was introduced before the Facilitation on cooperation by one delegation (Italy), and was retained as Annex for the resolution on cooperation.<sup>12</sup>

5. At its twelfth session, in 2013, the Assembly of States Parties (ASP):<sup>13</sup>

- (a) *Adopted* the Roadmap for achieving an Action Plan on arrest strategies, and
- (b) *Endorsed* the Concept Paper.

### C. Lessons learned: the draft Action Plan (2014)

6. Based on the scope of work endorsed by the Assembly in the Concept Paper, in 2014 the *Rapporteur* conducted a review of the relevant practices implemented in international and national jurisdictions. The lessons learned distilled from such practices were captured in the *Report on arrest strategies* (“the 2014 report”), and the draft Action Plan based on the lessons learned was annexed to the Report.<sup>14</sup>

7. The lessons learned study had required the cooperation of a number of external sources as well as the completion of surveys conducted within the national and international jurisdictions, which resulted in the research being only completed in October 2014. As a consequence, both the report and draft Action Plan had become available briefly before their submission to the Assembly,<sup>15</sup> which did not allow a thorough discussion to be conducted on the draft Action Plan. While some preliminary comments were provided at that time, most States Parties requested more time to consider the complex documentation.

8. At its thirteenth session the ASP:<sup>16</sup>

- (a) *Took note* of the Report on arrest strategies, including a draft Action Plan, and
- (b) *Mandated* the Bureau to submit a consolidated draft Action Plan to the Assembly.

<sup>8</sup> ICC-OTP, *Contribution paper*, 2013, paragraph 8. See also ICC-ASP/12/35, *Report of the Court on cooperation*, paras 10-26, and the Annex concerning the *OTP Mapping of Instances of Outstanding Arrest Warrants* (reporting 12 un-executed arrest warrants).

<sup>9</sup> ICC-ASP/10/Res. 2, para. 2 (rolled-over in the following resolutions): “*Emphasizes* the importance of timely and effective cooperation and assistance from 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, as the failure to provide such cooperation in the context of judicial proceedings affects the efficiency of the Court, and notes the 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>10</sup> ICC-ASP/11/Res. 5, para. 3: “*Stresses* the value of the lessons learned from international ad hoc and mixed tribunals on the enforcement of arrest warrants.”

<sup>11</sup> ICC-ASP/12/Res.3, para. 4: “*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.”

<sup>12</sup> ICC-ASP/12/36, *Report of the Bureau on cooperation*, para. 21.

<sup>13</sup> ICC-ASP/12/Res.3, Cooperation[The Assembly of States Parties]; paragraph 4: “*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;” paragraph 5: *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.”

<sup>14</sup> ICC-ASP/13/29/Add.1, *Report on arrest strategies by the Rapporteur*, Annex VII to the Report of the Bureau on cooperation.

<sup>15</sup> While the Report of the rapporteur was distributed on 7 November 2014, the appended draft Action Plan was circulated on 10 November. Presentation and discussion of the documents took place over the meetings held by the facilitation on cooperation on 15 and 20 November 2014. The official document containing the Report and the appended draft Action Plan, issued as an addition to the report of the Bureau on cooperation, was submitted on 21 November to the thirteenth session of the Assembly (New York, 8-17 December).

<sup>16</sup> ICC-ASP/13/Res.3, *Resolution on cooperation*, operative para. 4: “*Takes note* of the report on arrest strategies by the Rapporteur, and *invites* the Bureau to continue discussions on the topic, with a view to submitting a consolidated draft Action Plan on Arrest Strategies for consideration of the Assembly of States Parties”.

## D. A consolidated Action Plan (2015)

### 1. Proceedings

9. The *Rapporteur* conducted six open-ended consultation meeting with the view to consolidating a draft Action Plan<sup>17</sup> and, as the definition of the mandate-holder suggests, to report back thereon.<sup>18</sup> The draft Action Plan was submitted to the Facilitation on cooperation on 25 September 2015.

### 2. Structure and function

10. Based on the lessons learned exercise, the main findings in the 2014 report were that a combination of the two dimensions - political (focus on legal obligations) and operational (focus on ownership of information) – is necessary to achieve at the ICC and enhanced execution rate of the arrest warrants, comparable to the better results of the other international jurisdictions. From this conclusion, the report suggested that: several measures identified to implement the political approach, including conditionality, would necessarily require integration in specific strategies: the establishment of an in-house operational capability, instead, should become a priority for the Office of the Prosecutor (“OTP”). Drawing on these findings, the draft Action Plan made a clear distinction between the two areas – political and operational – and on the implementation of the measures proposed.

11. Since the objective of the Assembly is to adopt a comprehensive operational instrument that draws on practice to enhance the perspective of achieving the execution of the arrest warrants, successful practices from international and national jurisdictions have been considered and included in the Action Plan. Differently than in other jurisdictions, at the ICC this holistic approach was in fact without concrete alternatives, as the Court has a potentially universal jurisdiction. Consequently, the variety of situations that may arise at the ICC requires a wide array of potential tools to be considered, on a case-by-case basis, as part of the relevant specific strategy. Following such holistic approach, the draft has covered areas that had been otherwise dealt under cooperation, non-cooperation, and complementarity discussions in the ICC context.

12. However, the recognition of the potential relevance of measures adopted in a variety of international and national situations required, at the same time, that a structure of the Action Plan was devised so as to allow sufficient flexibility in adopting the complex decisions - often covering highly sensitive political matters - that would make it operational. This has resulted in an instrument that does not include prescriptive measures and is not immediately operational to its full extent. In addition, the non-prescriptive language also addressing the coordination measures and other implementation steps that would be necessary to translate into concrete actions the Action Plan, would directly affect its implementation. However, if the necessary political agreement is achievable within the Assembly, the Action Plan still provides a solid framework to build future consensus on putting into place targeted strategies that would enable relevant actors to take - within a process based on multilateralism, collaboration and confidence-building - agreed and concrete actions aimed at enforcing ICC arrest warrants.

13. Consistently, the approach of the Action Plan is – instead of focusing on the responsibility for incompliance with the legal obligation to cooperate with the Court (non-cooperation) – to build a positive multilateral consensus by involving all relevant actors to

<sup>17</sup> ICC-ASP/13/Res.3, para. 4, *supra*, footnote 16.

<sup>18</sup> ICC-ASP/12/59, *Report of the Bureau: Evaluation and rationalization of the working methods of the subsidiary bodies of the Bureau*, para. 23 (b): [...] to lower the overall intersessional workload, the Bureau decided to: [...] evaluate if one of the following forms - single person mandates in the form of facilitations, focal points or – as a novelty – rapporteurs – can be given to each mandate. The three different types of mandate-holders would serve distinct purposes. **Facilitators** are mandated to shepherd a particular issue through inclusive consultations with delegations to a specific outcome, for example a resolution. **Focal points** are mandated to serve as primary responders and coordinators for a particular issue, without expectations that there need to be a specific result. **Rapporteurs** would be mandated to examine a particular question and report back to the Bureau (and by extension to the Assembly) reflecting a personal, expert-based assessment. It is the work of rapporteurs that would inform the work of facilitators or decision-making by the Bureau.

setting up in a collaborative manner<sup>19</sup> the specific strategies and agreeing on the measures that, on a case-by-case basis, would be appropriate to include in such strategies.<sup>20</sup> Therefore, an essential part of the flexibility of the Action Plan is represented by the multiple safeguards - that have been introduced at different levels in the Action Plan – in order to protect the sovereignty and independence of mandates of all potential actors:<sup>21</sup>

- (a) Overall (non-mandatory nature),<sup>22</sup>
- (b) Specific strategies (establishment and implementation with a collaborative and coordinated approach to measures;<sup>23</sup> respect for independent mandates and sovereign prerogatives;<sup>24</sup> non-interference with other actors' strategies to support the enforcement of the ICC's orders),<sup>25</sup>
- (c) Measures (sovereign determination),<sup>26</sup>
- (d) Reservations in the form of "as appropriate", "case-by-case basis" and "without prejudice" clauses, as well as in the form of discretionary language ("may" or "might"), both at the general level and for specific measures (non-prescriptiveness).

14. To achieve the required compromise between experience, inclusiveness, and discretion, the Action Plan requires active collaboration and consent of States at three different levels,<sup>27</sup> which correspond to the tripartite approach to achieving the ultimate goals agreed by the Assembly:

- (a) Adoption of the Action Plan:

The Action Plan is the primary strategic level for improving the perspective of success in the enforcement of the Court's restrictive orders. It follows a holistic approach, which is mandated by the Assembly ("structured approach") and necessary to create a flexible strategy that can be adapted to the many political and operational variables. This requires that any measures which in practice have proven conducive to the enforcement of arrest warrants be included in the Action Plan, so that they remain theoretically available for application in the variety of situations that characterize the jurisdiction of the ICC;

- (b) Adoption of specific strategies (region, situation, and case related):

Such specific strategies are the secondary strategic level, on which occasion the inclusion of any of the measures listed in the Action Plan would have to be agreed upon. The specific strategies would operate as flexible framework<sup>28</sup> that enable relevant actors to include in a structured manner measures that can concretely - on a case-by-case basis - be applied in the region, situation and case at stake. Therefore, while the Action Plan would offer the opportunity that specific strategies be discussed, the contents of any such strategies would be entirely mandated to a decision to be taken at the time when each of the specific strategies is discussed for adoption. As a consequence, any of the measures indicated in the Action Plan may form or not part of each specific strategy that would be concretely set up.<sup>29</sup> The ICC-

<sup>19</sup> 2014 *Report*, para. 114: "Such framework strategies should be developed through a partnership modeled inclusive process, and should also be implemented in a collaborative manner, without prejudice to the confidentiality required by the different mandates of the relevant actors, and would enable a case-by-case assessment of the feasibility of the measures potentially available. Additionally, while based on the underlying legal obligations for cooperation, the strategies will need to approach arrest efforts from a collaborative perspective of the actors involved."

<sup>20</sup> Action Plan, para. 12: "The objective of the specific strategies is to provide agreed frameworks to implement, as appropriate, concrete measures aimed at ensuring that fugitives are arrested and surrendered to the Court".

<sup>21</sup> As a consequence of this multi-layer set of safeguards, at the implementation stage of the Action Plan, disagreement might lead to not establishing any specific strategy, or not including therein any of the listed measures.

<sup>22</sup> *Ibidem*, para. 3.

<sup>23</sup> *Ibid.* paras 10 and 19.

<sup>24</sup> *Ibid.*, para. 19.

<sup>25</sup> *Ibid.*, para. 11.

<sup>26</sup> *Ibid.*, para. 24, second sub-para.

<sup>27</sup> *Rapporteur*, "Working Plan 2015", 3 April 2015, para. 19.

<sup>28</sup> *Ibid.* para. 12: "[...] Frameworks to implement, as appropriate, concrete measures [...]."

<sup>29</sup> *Ibid.*, para. 24 (conditionality), "on a case-by-case basis and within the context of the specific strategies adopted"; para. 30 (incentives to individuals), "should consider [...] and factor such measures in the specific

OTP would lead the establishment of any case-specific strategy,<sup>30</sup> and would also have full control on the required confidentiality;<sup>31</sup>

(c) Implementation of the measures indicated in the specific strategies:

The tertiary level of the Action Plan is represented by the individual measures indicated in the Action Plan. The political and operational challenges identified in the 2014 report through the analysis of existing practices both require to be addressed at the ICC by introducing practices amply tested in international-ized and national jurisdictions. However, while the most significant political measures necessarily require to be put in place only within a specific strategy,<sup>32</sup> other such measures would largely represent a consolidation of existing practices, or the streamlining thereof.<sup>33</sup>

15. The establishment of in-house resources (a Unit reporting directly to the Prosecutor), recommended as a priority in the 2014 Report,<sup>34</sup> has been discussed in its merits and in the light of its added value and of the resources that would be required. Some delegations also expressed the views that reference in the Action Plan to such a Unit would have impinged on the authority of the Prosecutor to organize her own office and, thereby, affected her independence. Further consideration as to its operationalization has been deferred to the Court. Other operational measures<sup>35</sup> that were intended to be a complement to the in-house capacity at the Court are included in the Action Plan.

16. From this structure, it flows that the adoption of the Action Plan by the Assembly - with its current comprehensive contents and holistic approach - would deliver on expectations that a clear and positive message of the resolve of States Parties in support for the mandate of the Court is disseminated. It will further be through the follow-up mechanisms<sup>36</sup> included in the Action Plan, and the implementation thereof, that the Assembly will trigger in the future effective and lasting operational results.

### 3. Specific issues

17. The achievement of a negotiated text for the Action Plan has led to the exclusion from the final draft of some of the lessons learned distilled in the 2014 report. In that regard, the *Rapporteur* wishes to recall the references previously contained in current paragraph 31(c) (*Sentencing. Enforcement*) to: fixing the lower and upper limits for mitigating circumstances; special reduction or commutation of sentences, as well penitentiary benefits for some individuals; grounds for excluding criminal responsibility; facilitation of relocation. Similarly, the approach agreed on the establishment of an in-house resource that would enable the Court to conduct the tracking and arrest of fugitives from a more operational perspective does not provide concrete enactment to a key success factor recorded in other international jurisdictions.

18. In addition, previous language was removed from the final text, because of concerns expressed by some delegations, concerning conditionality policies (sanctions), political support (UN PKO mandates), and marginalization policies, as detailed in the following paragraphs. On all these matters, the views were expressed that a thorough discussion would have requested another that ASP preparation forum, to properly address the many political issues involved.

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strategies”; para. 38 (political support), “should include [...] the incorporation [...] in the framework of the specific strategies”.

<sup>30</sup> *Ibid.*, para. 17(b).

<sup>31</sup> *Ibid.*, para. 20.

<sup>32</sup> *Ibid.*, para. 24 (conditionality), 28 and 30 (incentives to individuals), and 33 (marginalization).

<sup>33</sup> *Ibid.*, para. 40 (a) (i) to (viii) (statements and other diplomatic support).

<sup>34</sup> *Ibid.*, para. 110.

<sup>35</sup> *Ibid.*, para. 44 (including police training and equipment, Interpol, technical assistance, coordination, information sharing, communication activities, policies, military).

<sup>36</sup> *Ibid.*, paras. 45-61 and 14-19.

19. “Restrictive measures (sanctions).”<sup>37</sup> It had been objected that including sanctions as a potential measure to be considered when setting-up any specific strategies would have resulted in an acknowledgement that other than the Security Council authority would be lawfully entitled to impose such measures and, in particular, that it might provide legitimacy to unilaterally adopted sanctions.

20. In that regard, the Rapporteur had noted that the Action Plan rather aims at prioritizing a multilateral and collaborative setting for consideration of any political measures that would be conducive to achieving the enforcement of ICC arrest warrants. In particular:

- (a) Sanctions had been key for the jurisdiction of the ICTY to achieve a 100% success rate in the execution of the arrest warrants in the Balkan situations.<sup>38</sup> Such sanctions were imposed by individual States and Regional Organizations, only;<sup>39</sup>
- (b) No sanctions have been imposed in ongoing situations before the ICC to prompt cooperation;<sup>40</sup>
- (c) Since the jurisdiction of the ICC is theoretically universal and the Action Plan is an overall framework for future specific strategies to be developed, the latter needs to reflect lessons learned and that might become applicable, as appropriate, to diversified situations;
- (d) The Assembly has already consolidated an even stronger language, urging States Parties to support the adoption of pro-ICC cooperation language in Security Council “resolutions on sanctions”;<sup>41</sup>
- (e) The proposed language for the Action Plan referred to the “relevant international authority” to adopting sanctions. It does not call for unilateral sanctions, but rather takes into account experience and sovereign authority in the implementation of sanction regimes, and recommends that – should there be any consideration to applying sanctions – this should take place within an agreed strategy, and based on the relevant international authority. As a result, the Action Plan would privilege a multilateral approach to sanctions, while respecting decisions of States to contribute to an agreed strategy or not. Based on the lessons learned, the reference to “relevant international authority” is wider than to the Chapter VII authority of the Security Council, so as to enable sufficient flexibility for other actors to take action within their competence, while this should always remain within the UN Charter legality framework.

21. Mandates of UN peacekeeping forces.<sup>42</sup> It had been objected for the support of relevant actors to the arrest strategy to include, as appropriate,<sup>43</sup> promoting with the Security Council<sup>44</sup> that language be included in the UN peacekeeping mandates to assist in the enforcement of ICC arrest warrants. It was argued that UN peacekeeping should remain impartial, and should not be seen as taking side with one of the parties in conflict, as it would be the case if there was a mandate to take an active and direct participation in the

<sup>37</sup> *Ibid.*, para. 27 *chapeau* and (d): “*Restrictive measures (sanctions)* adopted under the relevant international authority with respect to States under an obligation to cooperate with the ICC and targeted to its compliance, including embargoes and freezing of assets”.

<sup>38</sup> 2014 *Report*, paras 34-40.

<sup>39</sup> *Ibidem*.

<sup>40</sup> However, in the situation of Sudan, on one occasion an individual State threatened sanctions to a State Party in order to prompt cooperation with the ICC. See 2014 *Report*, para. 41.

<sup>41</sup> ICC-ASP/13/Res.3, Cooperation (2014), paragraph 11: “*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”. The same language was also in previous years’ ASP resolutions, e.g., ICC-ASP/12/Res.3, para. 12 (2013) and ICC-ASP/11/Res.5, para. 12.

<sup>42</sup> *Ibid.*, para. 40 (ix)(b): “Mandates of the UN peace operations to support, where appropriate, cooperation with the ICC, including with assistance for the enforcement of arrest warrants”.

<sup>43</sup> Action Plan, para. 40 *chapeau*.

<sup>44</sup> *Ibidem*, (ix).

arrest and surrender operations. Rather, it was noted that a more general reference to cooperation with the ICC in the mandates' language would have been acceptable.

22. In that regard, the *Rapporteur* had noted that practice of the Security Council already recognized the complementarity role of ICC jurisdiction, so that peacekeeping mandates are in several cases drafted as to ensure that both the primacy of States and the complementarity role of the Court are at the same time upheld:

- (a) Mandates for peacekeeping forces deployed in several ICC situations already include facilitation to the execution of arrest warrants (DRC, CAR, Mali).<sup>45</sup> In all these cases, the Security Council has adapted the language to the situation so as to, *inter alia*, reflect the primary responsibility of the territorial State to exercise jurisdiction over those responsible of international crimes and at the same time to comply with the cooperation obligation with the Court, while the UN peacekeeping operations are authorized to assist the local authorities to execute ICC arrest warrants;<sup>46</sup>
- (b) The peacekeeping operations are by definition relevant insofar the legitimate use of force is necessary (or it is the provision of other assistance conducive to the enforcement of arrests).<sup>47</sup> Since the objective of the Action Plan is to enhance the prospects of enforcing the arrests warrants, the use of force would be conducive in this regard, but not insofar other cooperation obligations are concerned (e.g., taking of evidence);
- (c) A generic reference to cooperation has already been consolidated in the Assembly's resolutions on cooperation,<sup>48</sup> which is the proper context to address cooperation at large. Instead, the Assembly has decided that the obligation to arrest and surrender be addressed specifically through a target oriented Action Plan, as an operational instrument conducive to achieving arrests. Consequently, a general reference to cooperation at large in the Action Plan would have been inconsistent with its focused objective. Other cooperation activities that fall outside the scope of the obligation to arrest and surrender could, rather, be considered in the context of the current review of the 66 Recommendations.

23. More in general, since the Security Council has already adopted in a number of cases mandates for peacekeeping forces that support the enforcement of ICC arrest warrants – and the Assembly, in its annual resolutions on cooperation, has also been calling States Parties to strengthening such practice, including on sanctions<sup>49</sup> – not referencing to such practices in the Action Plan would have produced a substantially negative effect. States Parties would have appeared to be less supportive to the execution of the mandate of the ICC than the Security Council is. This would have weakened the public image of the

<sup>45</sup> Appendix 2 to this report contains excerpts of the relevant UNSC resolutions.

<sup>46</sup> (1) DRC, SCR 2211(2015), par. 9(d): "Support and work with [the authorities] [the Government] of the DRC to arrest and bring to justice [those responsible for international crimes] including through cooperation with States of the region and the ICC;"

(2) CAR, SCR 2217(2015), par. 33(a)(iii): "arresting and handing over to the CAR authorities those responsible for [international crimes] so that they can be brought to justice, and through cooperation with States of the region as well as the ICC in cases of crimes falling within its jurisdiction";

(3) Mali, SCR 2227(2015), par. 14(e)(i): "to support, as feasible and appropriate, the efforts of the Malian authorities, without prejudice to their responsibilities, to bring to justice those responsible for [international crimes] taking into account the referral by the transitional authorities of Mali of the situation in their country [...] to the International Criminal Court".

<sup>47</sup> Appendix 2 (page 2), also refers to the UN-ICC MoU that allows the assistance of MONUC for security (Article 17), military (Art. 9), but also for logistic and transportation (Articles 5 and 8), as well as intelligence (Article 10).

<sup>48</sup> ICC-ASP/13/Res.3, Cooperation (2014), paragraph 11: "Urges States Parties to explore possibilities for facilitating further cooperation and communication between the Court and international and regional organizations, including by [...] the United Nations Security Council [...] cooperation by all UN Member States and taking into account the Court's mandate in the context of [...] areas of work of the Security Council [...]". The same language was also in previous years' ASP resolutions, e.g., ICC-ASP/12/Res.3, para. 12 (2013) and ICC-ASP/11/Res.5, para. 12.

<sup>49</sup> ICC-ASP/13/Res.3, Resolution on cooperation, para. 11: "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 United Nations 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."

Assembly and the position of the ICC in the Security Council debates, while not mirroring the reality of the ongoing debate. In fact, States Parties are actively supporting that the emerging practice of the Security Council to take advantage of the ICC as a complementary tool in the international peace and security framework is by now consolidated, and consistently implemented.

24. **Isolation of fugitives.**<sup>50</sup> Concerns were expressed as to the legality of the notification to a specific State being withheld, based on the presumption of good faith under the Vienna Convention on the Law of Treaties. Further, it had been objected that, if notification of an arrest warrant was not made in the some States, cooperation would not be favoured, and controversy would be triggered among States Parties, instead.

25. In that regard, the *Rapporteur* had stressed that practice showed that, until the accused hold power in a State, the notification of arrest warrants to such a State (or, as appropriate, in others) might not achieve practical results but rather attract political controversy.<sup>51</sup> The analysis of the advantages and disadvantages of marginalization policies was conducted in the 2014 Report.<sup>52</sup> Drawing on the lessons learned, the draft Action Plan concluded for prioritizing the enforcement of the arrest warrants in the short term, “at the operational level and in a strictly confidential manner”, while the longer-term approach (marginalization) should be followed when the first approach is not possible.<sup>53</sup>

26. Since practice shows that opportunities for executing arrests might arise at an operational level only if arrest warrants are kept secret, such opportunities might instead be wasted when there is an early disclosure of the warrant to the person sought by the Court. The Action Plan builds on such experience and on the discretionary authority of the Court, under the Rome Statute, to notify its requests to any State it might so decide, based on the likelihood that the person sought is present on its territory.<sup>54</sup> Also, because there is no obligation for the Court to notify any specific State, the issue should be looked at from the operational perspective, only. In particular, when the person sought is capable to determine or substantially influence the law enforcement authorities in a State, a notification of the arrest warrant to such State would be equivalent to requesting the person sought to agree with the arrest and surrender.

27. Under the Rome Statute, the cooperation obligation is legally binding on individually requested States. However, in a situation where a State has been consistently evading its general cooperation obligation with the Court – also by, in some instances, denying the legal authority of the Court’s orders – if a request for arrest and surrender is notified to such State in order to obtain the arrest and surrender of a person who is able to determining the policy of non-compliance with the cooperation obligation, the anticipated consequence could only be that of a further non-compliance. At that stage, under the Rome Statute, the implementation of the cooperation obligation (i.e. non-cooperation) becomes a matter legally relevant to all States Parties and, in case the situation had been referred by it, to the Security Council as well.<sup>55</sup> Account taken of the mechanisms for the Court’s findings of non-cooperation, those for the activation of the ASP procedures on non-cooperation, and of the relevant practices in the Bureau, in the Assembly and in the Security Council, it seems difficult to conclude that the current practice is either not divisive between States or successful in bringing about compliance, or even to discussing effectively non-compliance within the Assembly.<sup>56</sup> In the views of the *Rapporteur*, looking into potential alternatives to

<sup>50</sup> Draft Action Plan, para. 36(d)(iv): “Not notifying arrest warrants to the relevant State, as long as the accused remains firmly high in the echelons of power”.

<sup>51</sup> See *Report*, para. 70(b): “Where the accused is high in the echelons of powers, avoid notifying the arrest warrant to that State, although it might normally be the one upon which it is incumbent the obligation to arrest and surrender. Until the political situation on the ground is ready for a change and assessed within the appropriate consultation process, notification of restrictive orders might prioritize other States, and opportunities for carrying out the arrest could be taken advantage of”.

<sup>52</sup> 2014 *Report*. For the isolation, in particular paras 58-59 and 65-70.

<sup>53</sup> Action Plan, paras 32-33.

<sup>54</sup> Article 89(1) ICCSt.: “The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person.”

<sup>55</sup> Art. 87(7) ICCSt. and Article 17(3) of the UN-ICC Relationship Agreement.

<sup>56</sup> Following the Court’s findings of non-compliance (Article 87.7 ICCSt.) no discussions and decisions have taken place on specific instances of non-cooperation both at the ASP (Art. 112.2(f) ICCSt.) or at the Security Council (ref. *supra*, footnote 53).



such status would be essential to avoid a substantial risk of erosion for the authority of States Parties and of the Court alike.

28. During the negotiations, one delegation expressed the views that the reference [paragraph 31(d) *Release*] to interests of justice raised a more general concern, as to the “generic and undefined concept of interests of justice”.

29. In conclusion, the *Rapporteur* notes that the Assembly of States Parties expressed the intention to enhance the prospects of execution of the ICC arrest warrants with a tool that be operational in nature, and built upon a comprehensive review of national and international experience.<sup>57</sup> While such review was presented in the 2014 report, some of the lessons learned indicated therein have not made it through the final stages of the negotiations.

30. The *Rapporteur* also notes that, should the Assembly in future revise its working methods, would be important to consider ensuring that the position of the *Rapporteur* closely follows the understandings contained in ICC-ASP/12/59 (*supra*, footnote 18).

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<sup>57</sup> ICC-ASP/12/Res.3, Cooperation [The Assembly of States Parties]: paragraph 4: “*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;” paragraph 5: *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 [...]”

## Appendix

### [Draft] Action Plan on arrest strategies submitted by the Rapporteur

#### I. Framework

##### A. Background

1. At its twelfth session (2013) the Assembly of States Parties (“Assembly”) acknowledged that the ability of the International Criminal Court (“Court”) to achieve its mandate is negatively affected by the protracted non-execution of its requests of cooperation, in particular when it concerns the arrest and surrender of individuals subject to arrest warrants (“fugitives”). In that regard, the Assembly decided to consider concrete steps and measures to securing arrests in a structured and systematic manner, based on the experience developed in national and international jurisdictions. To that end, the Assembly endorsed a concept document<sup>1</sup> and decided to achieve by its thirteenth session (2014) an operational tool to enhance the prospect that requests of the Court for arrest and surrender are expeditiously executed.<sup>2</sup>

2. The analysis of the practices in the relevant jurisdictions and the lessons learned are reflected in the *Report on arrest strategies* (“report”),<sup>3</sup> which identifies concrete measures that would have a positive impact on achieving arrests, by both preventing and redressing instances where restrictive orders by the Court are not executed. These measures and their justification in the report form the basis of the Action plan, which includes strategies, processes, objectives and timelines to establish and implement such measures, also identifying the role of the different actors.<sup>4</sup>

##### B. Legal bases

3. The legal bases for the Action plan are the governance and oversight functions of the Assembly,<sup>5</sup> exercised with a view to facilitating cooperation of States Parties and other States under an obligation to cooperate with the Court, and preventing instances of non-cooperation.<sup>6</sup> The Action Plan does not create any legal obligation for States Parties or other States, as it only provides general recommendations for the implementation of the obligations established by the applicable law under the Rome Statute. The Action plan is open to participation by other relevant actors (Section II.E), on a voluntary and collaborative basis.

##### C. Objective

4. The Action plan is the arrest strategy of the Assembly of States Parties, and is result-oriented towards ensuring full compliance with the requests of the Court for the execution of its restrictive orders.

5. The objective of the Action plan is to ensure that appropriate initiatives are undertaken and actions are performed, so that the individuals subject to the arrest warrants of the Court are arrested and surrendered.

6. To that end, the measures contained in the Action plan address both the legal dimension of the obligations of cooperation with the Court and the operational activities required to apprehend the fugitives.

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<sup>1</sup> ICC-ASP/12/36, *Report of the Bureau on cooperation*, Annex IV, *Arrest strategies: roadmap and concept paper*.

<sup>2</sup> ICC-ASP/12/Res.3, *Cooperation*, paras 2-5.

<sup>3</sup> ICC-ASP/13/29, Add. 1, *Report on arrest strategies*.

<sup>4</sup> ICC-ASP/13/Res. 3, paragraph 4: [the Assembly] “Takes note of the report on arrest strategies by the Rapporteur, and invites the Bureau to continue discussions on the topic, with a view to submitting a consolidated draft Action Plan on Arrest Strategies for consideration of the Assembly of States Parties”.

<sup>5</sup> Article 112(2)(b), (c) and (g).

<sup>6</sup> *Ibidem*, litera (f).

## **D. Structure**

7. The structure and contents of the Action plan provide a comprehensive framework for the relevant actors to coordinate their actions aimed at establishing the measures required to further the objective of the arrest strategy of the Assembly.

8. The contents of the Action plan are included in the following Sections:

- II. Specific strategies
- III. Measures
- IV. Coordination
- V. Roadmap

## **II. Specific strategies**

### **A. Concept**

9. The request of cooperation for the enforcement of the arrest warrants issued by the Court calls on States under an obligation to do so, to implement their general obligation of cooperation and to carry out the required action (arrest and surrender). As a result, the compliance with the obligation and the achievement of the objectives depend both on the ability of the legal system of a State to respond to the request of cooperation, and on operational and political challenges that might arise at the enforcement stage. If not considered at an earlier stage, such challenges may substantially affect the outcome of the request for cooperation, and require that the willingness and capacity to arrest and surrender be addressed in the unfavourable scenarios of non-cooperation processes, with the potential of creating divisive effects within the membership of the Rome Statute and with external actors.

10. The arrest strategy of the Assembly follows a comprehensive approach, by identifying measures that address the obligation to cooperate both prior to any specific request being issued, as well as when negative results of a request for cooperation have already materialized. The measures to prevent or redress unfavourable conditions for enforcement, as identified in the Action plan, have implications at the legal, political, diplomatic and operational level, with diversified impact, based on a number of variables. While some of these measures may be implemented with discrete policies by different actors, others require coordination and collaboration of the parties involved in their implementation. For this reason, the Assembly needs to establish appropriate frameworks, defined according to the different contexts relevant to the enforcement of the Court's orders. In this wider context, practical measures will be considered also in light of the implications on cooperation that any elements impacting on the willingness and ability of States might have, such as the political interests surrounding the situation, the profile of the accused, as well as inter-state relationships.

### **B. Object**

11. The Assembly and the ICC may establish, in cooperation with the relevant actors and on a partnership basis, consolidated specific strategies ("strategies") applicable to the different regions, situations and cases. Such strategies may be developed with reference to all existing or newly open investigations, as appropriate. Any strategies adopted on the basis of this Action plan should not limit the ability of any relevant actors to establish and implement further strategies and measures it may deem appropriate to support the enforcement of the restrictive orders of the Court.

### **C. Objective**

12. The objective of the specific strategies is to provide agreed frameworks to implement, as appropriate, concrete measures aimed at ensuring that fugitives are arrested and surrendered to the Court.

## **D. Contents**

13. The strategies will address the elements that are relevant to the enforcement of the orders of the ICC for the arrest and surrender of individuals, including the political conditions that affect the willingness of relevant actors to cooperate with the Court, and the technical elements that define their ability to do so.

## **E. Process**

14. The Assembly, working in close consultation with the Court, may develop the specific strategies referred to under paragraph 11, as appropriate.

15. In developing such strategies the Assembly would consider the potential roles that, as appropriate, might be played by:

- (a) The Court,
- (b) The Assembly,
- (c) States Parties,
- (d) Non-States Parties,
- (e) The United Nations, including the Secretary-General, the Security Council and its subsidiary Organs, and the General Assembly,
- (f) International and regional Organizations with a mandate on matters relevant to the functions of the Court, including on justice, law enforcement, and peace and security,
- (g) Other actors, including NGOs.

16. The participation of different actors in the development of region, situation and case specific strategies should take into account their role in the relevant context. Non-States Parties that exercise an influence in the context may be consulted and engaged in the establishment of the strategies, as appropriate.

17. A list of Organizations and other actors relevant to the development of the specific strategies could be established and maintained in consultation with the Court.

18. The Assembly would take the lead for the establishment of the region-specific and situation-specific strategies.

## **F. Implementation**

19. The strategies should be implemented in a collaborative manner by the relevant actors, taking into account both their role and capacity in the context. To that end, a mechanism is established to ensure enhanced consultation and coordination at the political and operational levels, in full respect of the independent mandates of all participants and without prejudice to their sovereign prerogatives and confidentiality obligations, where applicable (Section IV).

## **G. Protection of confidentiality**

20. The involvement of different actors in the inclusive process for the establishment of the strategies and in their collaborative implementation is without prejudice to the protection of sensitive information. In particular, parts of the strategies might remain subject to the exclusive responsibility of different actors, depending on their confidentiality requirements.

## **III. Measures**

21. Lessons learned from the international jurisdictions suggests that successful arrest policies are the result of a diversification of the tools available to enforce arrest warrants,

based on the legal and practical dimension of the challenges. Keys to successful arrest strategies have included both elements of political (role of the States, the United Nations, and conditionality policies), as well as operational character (coordination and cooperation, tracking units, and military assistance on the ground).

22. The arrest strategy of the Assembly is based on a combination of elements drawing on the legal obligation to cooperate with the Court and on the operational tools required for tracking and arrest activities to be conducted through professional and flexible structures.

23. The measures established under the Action plan are categorized based on their objective, as they aim, on the one hand, to establish the conditions for the willingness of relevant States and individuals to cooperate and, on the other hand, to promote and execute efficient operations.

#### **A. Incentives to States: conditionality policies**

24. The Assembly and the States Parties should consider the implementation of conditionality policies on a case-by-case basis, where appropriate and within the context of the specific strategies adopted, in order to use as a leverage the political, security and the financial interests of States under an obligation to cooperate in the enforcement of the arrest warrants issued by the Court. Other relevant actors consulted for the establishment of the strategies may be called on to participate in their implementation, as appropriate. Consideration of conditionality policies should include a thorough impact assessment, where expected benefits would be weighed against any negative consequences of such measures.

Nothing in this Section shall be interpreted as limiting or prejudicing in any way the sovereign determination of States to enter into any obligation aimed at implementing conditionality policies.

25. The implementation of the conditionality policies should ensure:

- (a) Clear communication, including on what results would trigger rewards;
- (b) Consistency by all partners involved, so as to avoid counter-tactics by the requested States;
- (c) Even application in similar situations, so as to dispel misperceptions;
- (d) A robust outreach policy, aimed at avoiding manipulations.

26. The specific strategies should retain a sufficient degree of discretion in order to adapt the conditionality policies to the circumstances.

27. The following rewards and measures may be included in the specific strategies, as appropriate, and in conformity with the principles of the Charter of the United Nations,<sup>7</sup> without prejudice to the competence of individual States to implement such rewards and measures, including:

- (a) *Participation in regional or intergovernmental organizations*, with regard to the status of Member, Observer or Candidate;
- (b) *Capacity building assistance*, including for the development of the rule of law;
- (c) *Cooperation aid*, with the exception of humanitarian assistance, including
  - (i) *Development aid*. Programmes in support of the economic, environmental, social, and political development;
  - (ii) *Financial assistance*. Financial aid and loans, including bilateral and from World Bank, International Monetary Fund, and European Investment Bank;
  - (iii) *Economic assistance*. Bilateral cooperation agreements aimed at providing economic assistance, trade concessions, or to an international debt relief plan;

- (iv) *Military assistance.* Military assistance programmes, including on bilateral and multilateral basis;
- (v) *Other assistance.* Any other assistance programme.

## **B. Incentives to individuals**

28. The Assembly, the States Parties and third States may consider establishing and implementing a combination of positive and negative elements aimed at deterring individuals from continuing to evade justice, and at facilitating a positive determination to voluntary surrender and to cooperate with the Prosecution, or otherwise to contribute to the operations conducted by the international jurisdiction and the enforcement authorities for the apprehension of fugitives.

29. Such incentives, including targeted rewards and sanctions, should be established based on the following criteria, with the aim of becoming a reliable element in the assessment of possible benefits against the disadvantages of remaining a fugitive:

- (a) Definition in advance;
- (b) Provide a comprehensive package, so that targeted individuals can assess the benefits;
- (c) Clear communication, including the process and results that would trigger rewards;
- (d) Inapplicability in case an arrest is carried out without cooperation of the targeted individuals;
- (d) Management of expectations also at the operational stage.

30. The Assembly, States Parties and other relevant States, in consultation with the Court, should consider the establishment and implementation of incentives to individuals, including by introducing relevant changes in their legal frameworks and operational methods, and factor such measures in the specific strategies.

31. The following measures may be considered, where appropriate, in accordance with the relevant legal systems. Any such measures<sup>8</sup> are to be considered within the distinct competencies of the different actors, with full preservation of the sovereign legislative authority, and of the judicial independence in implementing relevant provisions:

- (a) *Sanctions*
  - (i) Freezing of monetary entitlements and allowances (e.g. salaries and pensions);
  - (ii) Freezing of assets, including bank accounts (both in the context of an international sanctions regime or in the State of nationality or residence);
  - (iii) Admission restrictions (travel bans and visas), where appropriate, and taking into account the flexibility required both by the operations, and the need for lifting, as appropriate, such restrictions;
- (b) *Detention*
  - (i) Assistance during ICC proceedings (including ensuring legal aid in national proceedings before surrender);
  - (ii) Family contacts and visits facilitation (paid visits, issuance of visas, communication facilities such as telephone and AV connections), both at the ICC Detention Centre and upon release;
  - (iii) Minimal remuneration while in detention (by relevant States, directly or through a fund).

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<sup>8</sup> It is understood that the measures listed under (b) *Detention*, (c) *Sentencing* and (d) *Release*, if established by the competent sovereign legislative authorities, would require implementation by means of independent exercise of judicial discretion.

- (c) *Sentencing, Enforcement*
- Any measures that, based on the experience developed at the national and international level, would represent an incentive to collaborators of justice and those who have definitely abandoned their associates to prevent crimes and further the objectives of the Action Plan.
- (d) *Release*
- (i) Early release to or enforcement of any ICC sentence in an agreed Country (unless adverse prevailing interests of justice);<sup>9</sup>
- (ii) Granting of some residence status, upon completion of proceedings.
- (e) *Other measures*
- (i) Special programmes publicly advertising rewards for information leading to arrests;
- (ii) National programmes for the management of informants;
- (iii) Resources available for sensitive sources at the tracking stage.

### C. Isolation of fugitives

32. The Assembly, States Parties and other relevant States, relevant Organizations, as well as the Court, should prioritize in their own strategies, as well as in the specific strategies established following this Action plan, the short term enforcement of arrest warrants, at the operational level and in a strictly confidential manner.

33. When circumstances require a longer term approach, on a case-by-case basis the Assembly, States Parties and other relevant States, as well as the Court, may consider adopting and implementing marginalization policies, aimed at reducing the conditions that affect the ability of fugitives to remain at large.

34. Such policies might be included by the relevant actors in their own policies, as well as in the specific strategies established following this Action plan. A monitoring mechanism might keep under review the effectiveness of the policies adopted (Section IV).

35. Isolation policies should be based on the assessment of the anticipated advantage of their implementation, taking into account any relevant elements, including:

- (a) The quality and condition of the fugitive, e.g. the position in the civilian or military ranking of a State, or the de facto authority over certain territories;
- (b) The short and long term expected results, as well as of the political and operational effects of such policies;
- (c) The availability of mandated military operations;
- (d) The availability of any operational opportunities to enforce arrest warrants, including technical means (e.g. enabling affected populations to timely communicate the presence of fugitives), and reward for justice programmes.

36. Isolation policies may be considered, as appropriate, including:

- (a) *Unsealed arrest warrants* only as a last resort, when operations cannot be carried out secretly;
- (b) *Sanctions*, i.e. inclusion of fugitives in the relevant lists;
- (c) *Avoidance of non-essential contacts*, with a self-monitoring mechanism conducted by States;

<sup>9</sup> It is understood that, for the purposes of such measure, the interests of justice would be assessed by the Court within its authority under Part 10 of the Statute and relevant provisions of the Rules of Procedure and Evidence.

- (d) *Proceedings*, i.e. within the relevant strategies, consider:
- (i) Appropriate measures, when arrest warrants have been outstanding for a prolonged period of time;<sup>10</sup>
  - (ii) Taking any of the measures referred to in article 56;
  - (iii) Joint referrals by the situation countries and their neighbouring States; and

## D. Political support

37. The Assembly, States Parties, other relevant States and Organizations, including within the civil society, should continue to provide and strengthen their political and diplomatic support to the Court, for the purpose of ensuring compliance with the obligations under the Rome Statute and the United Nations Charter.

38. Such support might include the adoption of relevant internal policies and instruments, as well as the incorporation of elements thereof in the framework of the specific strategies, with the aim of providing a structured and integrated process to further the execution of the restrictive orders of the Court.

39. Measures of political and diplomatic support should promote the compliance of cooperation obligations to arrest and surrender both at the preventive stage, with monitoring of implementing measures, and at the level of specific instances where requests of the Court may have been turned down.

40. Support of relevant actors to the arrest strategy of the Assembly might include the following, as appropriate:

- (a) *Political and diplomatic*,<sup>11</sup> including:
- (i) Public statements<sup>12</sup> and commitments, in the UN and other multilateral bodies,
  - (ii) Direct (bilateral) or indirect, formal or informal contacts with relevant States, aimed at facilitating the enforcement of arrest warrants, and at supporting States willing to do so,
  - (iii) Informal multilateral consultations,
  - (iv) Inclusion in the agendas of bilateral and multilateral dialogue,
  - (v) Language in statements at the ASP sessions' General Debate;
  - (vi) Development of national or multilateral pro-ICC policies,<sup>13</sup>
  - (vii) Démarches and summoning Ambassador of a concerned State,
  - (viii) Pro-ICC clauses in relevant agreements,<sup>14</sup>
  - (ix) Measures to be promoted by relevant actors in their engagement with the Security Council, including
    - (a) A consultative process in preparation and implementation of referrals and other decisions, identifying conditions to fulfill in order for referrals to become effective, including through the adoption of clearer resolution language, as appropriate;
    - (b) Mandates of UN peace operations to include cooperation with the ICC;

<sup>10</sup> E.g. under article 61(2), the confirmation of charges could take place in absentia.

<sup>11</sup> ICC-ASP/6/Res.2, annex II, 66 *Recommendations on Cooperation (Recommendations)*, Recommendation 17; *Concept Paper*, para. 23(i) and (ii).

<sup>12</sup> *Ibid*, Recommendation 48.

<sup>13</sup> E.g. EU Commission, *Joint Staff Working Document - Toolkit for Bridging the gap between international & national Justice*, SWD (2013) 26 final, dated 31 January 2013.

<sup>14</sup> Article 11(7) of the EU *Cotonou Agreement*.



- (c) Reports of the President of the ICC on institutional and judicial matters, as well as of the President of the Assembly on political and funding matters;
  - (d) Sanctions aligned to the developments in the arrest and surrender process in addition to the regular reports of the Prosecutor.
- (b) *Implementation measures:*
- (i) Implementation of national procedures enabling requests for cooperation (arrest and surrender) and assistance from the ICC to be dealt with;
  - (ii) Implementation of complementarity legislation;
  - (iii) Agreed framework, or verification mechanism, to monitor the ability of national measures to respond to requests of cooperation;
  - (iv) Concrete engagement of States to fully cooperate, in preparation of referrals or acceptance of jurisdiction.
- (c) *Role of civil society:*
- (i) Within an early warning mechanism, monitor events at regional and sub-regional level, and exchange information with actors present in the region;
  - (ii) Use domestic jurisdictions to prompt enforcement of restrictive orders.

## E. Operations

41. The Assembly, States Parties, the Court, other relevant States, and International Organizations should focus their respective activities in support of the enforcement of the arrest warrants of the Court by prioritizing professional operations, including through valuing and strengthening existing capacities and coordination mechanisms at the technical level of police and prosecuting authorities and, as appropriate, establishing new ones [and, in this respect, encourages the Court to consider taking further operational measures, which could include the establishment of a professional in-house capacity to conduct the search for fugitives and their assets.]

42. Support of relevant actors to the operations of the Court might include:

- (a) *Police training and equipment*,<sup>15</sup> including programmes of international assistance on techniques and methods, technologies and personnel, as well as special reward for justice programmes;
- (b) *INTERPOL*: training activities for national police forces in countries of possible location and for OTP staff; use of Red Notice for all unsealed arrest warrants and of “diffusion”; enhanced joint communication, including with public campaigns and posters;
- (c) *Technical assistance*, on a case-by-case basis, to domestic systems requiring it, including the establishment of mixed Tracking Teams or the conduct of joint operations;<sup>16</sup>
- (d) *Coordination*. Establishment of mechanisms at the national and international level to facilitate dealing with requests from the Court, exchange practices and liaising between national law enforcement, including by networks of existing tracking teams;
- (e) *Information sharing* at the technical level;<sup>17</sup>
- (f) *Communication* activities for decision-makers, at the diplomatic and political level;<sup>18</sup>

<sup>15</sup> *Recommendations*, Recommendation 20; *Concept Paper*, para. 23(iii).

<sup>16</sup> *Concept Paper*, para. 23(iv).

<sup>17</sup> *Ibidem*, and para. 23(v); *Recommendations*, Recommendations 21 and 59.

<sup>18</sup> *Ibidem*, Recommendation 59 ; *Concept Paper*, para. 23(vi).

- (g) *Policies*, including keeping the arrest warrants under seal whenever possible, and preparation of complete and execution-ready requests to local Authorities;
- (h) *Military*, with the expansion of peacekeeping forces' mandates, as appropriate.

## **IV. Coordination**

43. The Assembly should promote an enhanced coordination and consultation, as appropriate and on a case-by-case basis, of all the actors relevant to the measures under this Action plan, including with the mechanisms established in this Section.

44. The Assembly might keep under review the implementation of the Action Plan.

45. The objective of the coordination and consultation processes is to ensure that the arrest strategy of the Assembly is supported by the broadest number of relevant actors, with the aim of increasing its effective implementation. Such processes should be conducted in a collaborative manner, in full respect of the independent mandates of all participants and without prejudice to their sovereign prerogatives and confidentiality obligations, where applicable.

### **A. Focal Point and Special Rapporteur of the Assembly**

46. The Assembly should ensure that the implementation of this Action Plan remains consistent with its objective, and that such implementation remains result oriented. To this end, the Assembly should follow closely the process under this Action plan in order to contribute, as appropriate, to the follow-up initiatives by the different actors, monitor progress and prepare any further action required of the Assembly to ensure that arrest strategies are efficiently and effectively implemented.

47. The Bureau of the Assembly may establish within its Working Group in The Hague:

- (a) A Focal Point on arrest strategies, who might assist in ensuring effective coordination and consistency of the implementing policies and strategies;
- (b) A Special Rapporteur on arrest strategies, who might adequately prepare the projects and activities of the Assembly for the implementation of this Action plan.

48. While the Focal Point and Special Rapporteur of the Assembly perform two distinct functions, the Bureau may decide that such functions are carried out by the same adequate profile.

49. The Focal Point and Special Rapporteur may maintain an open list of actors relevant to this Action plan, establish the appropriate working methods, and operate according to any terms of reference that the Bureau may decide.

### **B. Network of Focal Points**

50. The Assembly may establish a network of Focal Points ("network") on the arrest strategies. The network should participate in the establishment, implementation and review of the framework strategies, as well as in the monitoring of the results of the policies adopted.

### **C. National and other actors' Focal Points**

51. All States Parties and situation Countries might designate a national Focal Point for the arrest strategies. Other relevant actors may be invited to designate a Focal Point for the same purpose.

52. Each Focal Point will liaise with the Focal Point of the Assembly, who will make available information flowing in from all relevant sources with the aim of seeking synergies and improve coordination. All Focal Points should provide to the Focal Point of the Assembly, as appropriate, any available information that may be relevant in the

implementation of this Action plan, without prejudice to the protection of confidentiality as set out in paragraph 20 and, in particular, of national security information.<sup>19</sup>

#### **D. Consultation mechanism**

53. A consultation mechanism may be established with the current and/or former Prosecutors of the international Tribunals, including the ICTY, ICTR, and SCSL. The consultation mechanism should assist in exploring the implications of the lessons learned by the Tribunals at the strategic level, for both the establishment and the implementation of the specific strategies.

54. The Special Rapporteur shall identify the working methods of the consultation mechanism, focusing on cost neutral consultations. The Special Rapporteur shall also consider any such additional contributions that might be required to ensure that the specific strategies are supported by the relevant experience.

#### **E. Task Force of experts**

55. The Court may consider setting up a Task Force of Experts (“Task Force”) for the purpose of establishing the Unit within the Office of the Prosecutor. The Task Force might be mandated with the preparation of all organizational elements required to that end, based on the successful and consolidated experiences of international and national jurisdictions. The mandate of the Task Force could include:

- (a) The appropriate legal and assurances framework, including Regulations, Practice directions, Guidelines, basic working methods,
- (b) The organigramme and structure,
- (c) Any review of the OTP structure that may be necessary to ensure the staffing of the Unit, the coordination with JCCD, and direct reporting lines to the Prosecutor, through the Head of Investigations,
- (d) Budgetary implications and any complementary funding measure,
- (e) Job descriptions, and conduction of the recruitment for the positions in the Unit,
- (f) Collection of relevant practices of international and domestic jurisdictions.

56. The Task Force might include members with specific experience in intelligence and tracking operations, including staff formerly or currently employed within the international Tribunals (ICTY, ICTR, SCSL) with responsibilities as Chief of Investigations or Operations, Team Leaders, and Confidential Human Resources Coordinators, as well as from dedicated Teams within National Authorities and relevant staff from INTERPOL.<sup>20</sup>

57. The Experts in the Task Force might be employed on a pro-bono basis from the sending Institutions, when necessary with reimbursement of expenses or *per diem* regime.

#### **F. Working methods**

58. The Focal Point and Special Rapporteur (“FP/SR”) of the Assembly should ensure that the working methods in the implementation of this Action plan remain lean and with minimal financial impact. Contacts with the network of Focal Points, the consultation mechanism or other relevant actors should take place by means of information technology and audiovisual systems.

59. As appropriate, meetings of the network of the consultation mechanism or other relevant actors may be convened, with the view of fostering the implementation of the Action plan and keeping under review the strategies and policies adopted. Such meetings should be held on the margins of relevant events taking place in The Hague, at the ICC or in other relevant Institutions.

<sup>19</sup> Article 72 of the Rome Statute.

<sup>20</sup> Fugitive Investigative Support Sub-Directorate and other Specialized Units (War Crimes and Genocide Sub-Directorate, Anti-Corruption and Financial Crimes Sub-Directorate).

60. Irrespective of the timelines indicated in the roadmap of this Action plan, the Focal Point and the Special Rapporteur should strive to promoting and achieving an early implementation of the strategies and of the measures conducive to concrete results in the arrest strategy of the Assembly.

## **G. Review**

61. The Assembly might keep this Action plan under review on a yearly basis, based on the concrete results achieved in its implementation.

## **V. Roadmap**

62. The Action plan on arrest strategies may be implemented according to the following timelines and competencies:

### **2016**

#### **February**

- Appointment of the Focal Point and Special Rapporteur (Bureau),

#### **March**

- Establishment of the working methods and of the consultation mechanism (FP/SR),
- Establishment of the list of relevant actors (FP/SR-ICC),

#### **April**

- Establishment of the Network of Focal Points (FP/SR),
- Designation of National Focal Points (States Parties and situation Countries);

#### **April – July**

- Designation of others' Focal Points (All relevant actors);
- Preparation of the framework strategies region, situation and case specific (All);
- Consideration of possible operational measures (ICC-OTP);

#### **September – November**

- Consideration of the implementing measures taken within the framework strategies (All);

#### **December**

- Report on the implementation of the Action plan to ASP/15 (Bureau, FP/SR)

### **2017**

- Agreed framework, or verification mechanism, to monitor the ability of national measures to respond to requests of cooperation (Bureau/HWG),
  - Definition of a package of benefits to promote the voluntary surrender (All).
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**Fourteenth session**

The Hague, 18-26 November 2015

**Report of the Bureau on cooperation**

**Annex IV**

**Report on the draft Action Plan on arrest strategies, submitted  
by the Rapporteur**

**Corrigendum**

Page 8, paragraph 26:

*Insert the following paragraph after paragraph 26:*

26.*bis* Operations. The removal from the draft Action Plan of an even permissive language whereby the Court was encouraged to consider the establishment of a dedicated in-house professional directly reporting to the Prosecutor so as to enhance<sup>1</sup> prospects of arrests, does not retain the successful experiences of the other international and internationalized jurisdictions.

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<sup>1</sup> Purposes of such capacity would have been: (a) Providing an agile and flexible tracking capacity, including on financial matters, mostly deployed on the field and capable of performing with appropriate informal techniques, (b) Interacting swiftly and generating trust with interlocutors in the field, (c) Collecting independent intelligence, and coordinating local and other Agencies' activities, (d) Developing execution-ready requests for the local Authorities, (e) Supporting the high level contacts of the Prosecutor on non-cooperation matters, and (f) Performing any other tasks as they might be conferred to it by the Prosecutor.



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**Corrigendum II**

Paragraph 10:

*Replace* in line 7 the colon after the word “strategies” with a semi-colon.

Paragraph 14(b):

*Delete* in the final sentence the phrase “lead the establishment of any case-specific strategy, and would”.

Paragraph 15, :

*Insert* in the penultimate sentence the word “Any” before the first word “Further”; and *substitute* the phrase “of this matter has thus” for the phrase “as to its operationalization has”.

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