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Report of the Bureau on cooperation**Addendum****Annex VII****Report on arrest strategies by the *Rapporteur*****Executive Summary*

The present report of the Rapporteur provides the analysis of the experiences developed in national and internationalized jurisdictions on arrest strategies and, on these bases, provides the recommendations listed below, to establish a comprehensive arrest strategy for the ICC, as encompassed in the draft Action plan attached to the report (Appendix III).

The report finds that the success of arrest strategies in other international jurisdictions has been driven by a combination of political support and operational assets, that should also be followed at the ICC, including with a particular focus on improving its own capacity.

From this perspective, a comprehensive approach is proposed to the measures conducive to a successful arrest strategy, including by setting up framework strategies specific to regions, situations and cases, that would be based on a partnership model for the relevant actors to contribute to arrest efforts. While these specific strategies would not preclude discrete initiatives of the partners, the collaborative framework provided would enhance the effectiveness of any agreed measures, including policies of conditionality, marginalization, or others of political and diplomatic character. A Tracking Unit should be established as a matter of priority within the Office of the Prosecutor, in order to provide a professional independent capacity to conduct operations.

A network of focal points would ensure coordination of relevant actors and implementation in a collaborative manner of the measures established. The Assembly would continue to follow closely the process.

Recommendation 1: It is recommended that conditionality policies be considered in the context of the ICC whenever possible, but only within the framework strategies applicable to the different regions, situations and cases. Given the nature and objective of such policies, the relevant section of the framework strategies should include clearly defined and communicated conditions to be met to trigger the rewards, and should be consistently implemented, while ensuring that the necessary degree of discretion is retained in order to adapt to the circumstances.

* Received by the Secretariat on 17 November 2014.

Recommendation 2: It is recommended that a comprehensive package of positive and negative incentives be established in advance and appropriately communicated, so that the accused can reliably assess the benefits of such measures against the precarious lifestyle of fugitives.

Recommendation 3: It is recommended that policies of marginalization of fugitives be only implemented within individualized strategies that take primarily into account the prospects of enforcing arrest warrants in the short term through technical operations, and without disclosing the existence of the restrictive order. In cases where this does not appear possible, sanctions and avoidance of non-essential contacts should be applied, and the relevant actors might consider enabling a monitoring of the implementation of such policies.

Recommendation 4: It is recommended that a twofold approach be followed, with structured and integrated measures of political and diplomatic nature that address the compliance with the obligations under the Rome Statute first at the preventive stage (monitoring of implementing measures), and then at the level of specific instances where requests of the Court appear to have been turned down.

Recommendation 5: It is recommended that all stakeholders focus on operations as the priority area for achieving arrests. A professional Tracking Unit should be established in the short term and directly report to the Prosecutor through the Head of the Investigative Division. Operations should also be strengthened by enhanced mechanisms for coordination and cooperation at the technical level (police and prosecuting authorities) and, when necessary and possible, with the assistance of arrest mandated peacekeeping missions or multi-national forces.

Recommendation 6: It is recommended that the Action plan be implemented with a structured process, including:

6.1. The priority establishment of an ICC-OTP Tracking Unit, to be pursued in the short term by means of a Task Force of Experts mandated to ensure that at the startup stage of the Tracking Unit its legal frameworks, structures, professionalism and practices closely follow successful and consolidated practices from the international and national jurisdictions;

6.2. Consolidated specific strategies applicable to the different regions, situations and cases, that would provide a framework to implement the measures relevant to the arrest strategy, as appropriate. Such framework strategies should be established through a partnership modeled process, inclusive of all relevant actors and implemented in a collaborative manner, in particular taking into account the role of States and of International Organizations in the different contexts, and without prejudice to the protection of sensitive information. Non-States Parties that exercise an influence in the context, including when Members of the Security Council, should be constructively and proactively engaged in these strategies. All relevant actors should identify focal points for the purpose of setting up and implement the strategies, with the lead on region and situation specific strategies in the Assembly and for the case specific strategies in the ICC-OTP. A consultation mechanism with current and former Prosecutors of the international jurisdictions should also be envisaged;

6.3. The oversight functions of the Assembly to include closely following the process through a Focal Point and a Special Rapporteur, 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.

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I. Introduction

1. At its twelfth session (2013) the Assembly of States Parties endorsed the Concept Paper on arrest strategies (“Concept Paper”)¹ 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.² The decision of the Assembly aims 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,³ 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.

2. The Bureau appointed Mr. Roberto Bellelli (Italy) as *Rapporteur* on the arrest strategies.⁴ The present report (“report”) implements the mandate received by the Rapporteur, and provides background and justification for the draft Action plan on arrest strategies (Appendix III). As the position of Rapporteur has been established by the Assembly for the first time on this occasion in the context of the ongoing review of its working methods, some lessons learned from the position are also attached (Appendix IV).

A. Background

3. The implementation of the cooperation obligations emanating from the Rome Statute, with particular regard to arrest and surrender, has been initially addressed by the Assembly of States Parties (ASP) in the context of its institution building framework, the “Omnibus resolution”.⁵ Between 2003 and 2008, the Assembly moved through progressive stages, as the first challenges arising out of the issuance of arrest warrants became apparent. At the time when the Court had just started its first investigations (2003-2004), the Assembly only addressed the matter through a limited call for the adoption of national implementing legislation to ensure cooperation.⁶ As the first warrants remained outstanding,⁷ a more compelling language aimed at securing arrest and surrender (2005-2010).⁸ However, until 2007 the Assembly only considered the cooperation from the perspective of the general compliance with the legal obligations established under the Rome Statute, and practices on arrest strategies received little attention.

4. The adoption of the 66 *Recommendations on cooperation* (2007)⁹ set the basis for a more focused approach of the Assembly on cooperation.

5. The current approach of the Assembly has become apparent with the introduction of a stand-alone resolution on cooperation, and stronger result oriented language and practices (2011-2013), including:

- (a) Consideration of the negative effects that the non-execution of arrests has on the efficiency of the Court and its ability to deliver on its mandate,¹⁰

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

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

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

⁴ ICC-ASP Bureau, *Agenda and Decision*, 18 February 2014.

⁵ *Strengthening the International Criminal Court and the Assembly of States Parties*.

⁶ ICC/ASP/2/Res.7, *Omnibus resolution*, operative para. (OP) 3: “Recalls that the ratification of the Rome Statute must be matched by national implementation of the obligations emanating therefrom, notably through implementing legislation, in particular in the areas of penal law and judicial cooperation with the Court, and in this regard encourages States Parties to the Rome Statute that have not yet done so to adopt such implementing legislation as a priority”. The same language was adopted by ICC-ASP/3/Res.3, OP3.

⁷ Issued in May-July 2005 in the situation in Uganda.

⁸ ICC-ASP/4/Res.4, OP 16: “Urges States to comply with their obligations to cooperate with the Court in such areas as preserving and providing evidence, sharing information, securing the arrest and surrender of persons to the Court and protecting victims and witnesses and encourages international and regional organisations as well as civil society to support the Court and States in their respective efforts to that end as appropriate”. The same language in ICC-ASP/5/Res.3, OP 34 and substantially also in ICC-ASP/6/Res.2 , OP 37, and ICC-ASP/7/Res.3, OP 41.

⁹ ICC-ASP/6/Res.2, Annex II.

¹⁰ ICC-ASP/10/Res.2, OP 2: “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

- (b) The need for focused, specific, complete and timely requests for cooperation by the Court,¹¹
- (c) The need to avoid contacts that undermine the objectives of the Rome Statute,¹²
- (d) The value of lessons learned,¹³
- (e) An enhanced public dialogue,¹⁴
- (f) The need to adopt a structured and experienced-based approach,¹⁵
- (g) The aim of adopting an Action plan at its fourteenth session, in 2014.¹⁶

6. On its side, the Office of the Prosecutor (OTP) has over the years repeatedly stressed the need for States to translate their support into more concrete measures to facilitate arrests, and that cooperation of States in the execution of outstanding arrest warrants was a “missing component for the effective implementation of the Court’s mandate.”¹⁷ The elements of this position provided an important input to advancing discussions on the matter within the Assembly.¹⁸

B. Mandate¹⁹

7. The Roadmap and the Concept Paper, which detail the scope of the mandate for the Rapporteur, are annexed to the 2013 Report of the Bureau on cooperation.²⁰ Consistently with the deadlines indicated in the Roadmap, the duration of the mandate was limited in time and expected to deliver concrete results in the period 2013-2014, in the form of:

- (a) An experience-based analysis to be conducted with the assistance of external parties, including the *ad hoc* and hybrid Tribunals (“Tribunals”), their situation countries, and UN cooperating Member States, as well as of the Court; and
- (b) A draft Action plan to be adopted by the Assembly, containing concrete measures for States Parties, the Court and other cooperating actors to consider.

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”.

¹¹ *Ibidem*, OP3: “Notes that focused requests for cooperation and assistance from the Court to States Parties and other States will enhance the capacity of States to respond expeditiously to requests from the Court.” ICC-ASP/11/Res.5, OP4: “4. Emphasizes also the ongoing 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 also continue improving its practice in transmitting specific, complete and timely requests for cooperation and assistance.”

¹² ICC-ASP/11/Res.5, preambular para. (PP) 4: “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.”

¹³ *Ibidem*, OP3: “Stresses the value of the lessons learned from international ad hoc and mixed tribunals on the enforcement of arrest warrants.”

¹⁴ ICC-ASP/11/Res.5, OP 22: “Welcomes the enhanced dialogue between States Parties, the Court and civil society offered by the plenary discussion on cooperation held for the first time during the eleventh session of the Assembly, with a special focus on arrests and the identification, tracing, freezing and seizure of assets, and, mindful of the importance of full and effective cooperation with the Court in accordance with the Rome Statute, notes with appreciation the fruitful exchange of views on, inter alia, practical measures to enhance implementation of requests for cooperation, and the need to include cooperation as a standing agenda item for future sessions of the Assembly.”

¹⁵ ICC-ASP/12/Res.3, OP 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.”

¹⁶ *Ibidem*, OP5: “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;

¹⁷ ICC-ASP/10/40, *Report of the Court on cooperation*, para. 2.

¹⁸ ICC-OTP, *Contribution paper*, 2013 and ICC-ASP/12/35, *Report of the Court on cooperation*, paras 10-26.

¹⁹ ICC-ASP/12/Res.3, OP 4 and 5, *supra*, footnotes 15-16.

²⁰ ICC-ASP/12/36, *Report of the Bureau on cooperation*, Annex IV.

C. Concept

8. There is little need to elaborate on the urgency to enforce the arrest warrants of the ICC. Without arrests trial cannot be held, and the purpose of a Court established to timely deliver justice in order to deter the commission of further crimes, redress victims and contribute to international peace and security would be defeated. Also, the report does not specifically elaborate on the legal bases for the enforcement of the arrest warrants, while the legal obligations for international cooperation and assistance are incidentally addressed.²¹

9. To put in context the problems surrounding the apprehension of the fugitives from the Court, their impact, and the possible solutions, it is important to note that most of the crimes under the Rome Statute would be normally perpetrated by an organized or structured group:²² war crimes, genocide and crimes against humanity are – at the highest political and military level – planned, financed and instigated by groups of people acting with strategies that are very similar to those of criminal and terrorist organizations.

10. That a person charged with serious crimes remains at large is a situation rather common in national jurisdictions as well as in international ones, when common features of domestic and international crimes and of the context thereof play a facilitating role in ensuring that power, protection and consensus continue to support fugitives. In this regard, organized crimes – either at the national or at the transnational level – may offer a contextual basis similar to that of serious crimes of international concern falling within international jurisdictions. In such situations, persons at large would normally receive substantial financial and other material assistance from large and organized groups exerting control over wide territories, in some cases in a state capacity. The experience of national jurisdictions – where fugitives have been able to abscond for life-long periods of time²³ – is coupled with some most notorious cases in international jurisdictions where, e.g., Ratko Mladić's continued absence from the ICTY courtroom for sixteen years (1995-2011).

11. The fact that an accused with a leadership position in organized crime or serious crimes of international concern (which have similar characterization of organization) remains at large allows him/her to continue exerting their role, perpetuating the pattern of criminal conduct, and jeopardize the preservation and acquisition of evidence. Considering serious international crimes within an organized crime framework would provide tested strategies to establish measures at the level of incentives and sanctions for fugitives, as well of tracking the individuals and their assets.

12. Two alternative strategies might theoretically be considered to execute arrest warrants against accused holding the higher positions, reflecting the preminence accorded to the reasons of politics and of justice:

- (a) Postpone execution until the accused are no longer in power. This has in fact been the practice in the past, with international and mixed courts;²⁴
- (b) Take action for the timely enforcement of the arrest warrants, irrespective of the status and condition of the accused.

13. While the ICC is a permanent institution and the availability of justice at all times is *per se* an assurance that impunity for the core crimes under the Rome Statute will not be tolerated by the international community, the expectations of timely delivery of justice appear to be an essential part of the support for the mandate of the Court. Also, current records show that is not uncommon that national leaders remain in power for periods

²¹ Respectively, for the ICC the Rome Statute, Part 9, and Chapter VII UNSC resolutions; for inter-State cooperation, relevant multilateral and bilateral treaties, as well as customary rules (*aut dedere aut judicare*).

²² UNGA Res. 55/25, 15 November 2000, *United Nations Convention against Transnational Organized Crime*, Article 2: “‘Organized criminal group’ shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit [...]”; “Structured group” shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure”.

²³ The Italian Mafia boss Bernardo Provenzano remained at large for 43 years, while many other members of mafia-type organizations have remained at large for decades.

²⁴ *Infra*, para. 47, for the cases of Slobodan Milosević, Radovan Karadzic and Charles Taylor.

between 20 to 40 years.²⁵ As a result, simply waiting for leaders to be toppled or abandon their positions because of ageing does not appear to be an option consistent with the responsibility to protect of the international community and with the mandate of the ICC.

14. However, this report concludes that the interests of politics and justice can be both served if political and operational measures are put in place, as it has been in the case of the most successful international jurisdictions. The lessons learned in the latter appear to be of significant relevance at the ICC as well, whose specific features would have to be taken into account within a strategic framework.

15. Drawing on the 2013 Concept Paper this Report aims at identifying measures to improve cooperation based on a comprehensive approach, or a combination of approaches:²⁶ *ex ante* (preventive, i.e. prior to any specific request of arrest being issued), and *ex post* (redressing, i.e. when substantially negative results of a request for cooperation have already materialized). Measures to prevent or redress unfavourable conditions for enforcement have been identified following experience, as acquired from relevant sources and analyzed by the Rapporteur. However, the Report indicates measures from the limited perspective of the objective assigned, that is to identify arrest strategies. Once these are defined and adopted, the implementation thereof will have to address more in detail the applicable measures and their exact connotations, including by dealing with practical elements that will have to be considered also in light of available consolidated practices in other international jurisdictions.²⁷

D. Objective

16. The definition of any effective strategy requires that its objectives are clearly defined and unambiguous. In that regard, both the ASP and the OTP have clarified that an arrest strategy is intended to increase prospects for the arrest warrants issued by the ICC to be executed.²⁸ Consequently, the focus of the arrest strategy should be on its practical results, i.e. modify the status of fugitives, by depriving them of their freedom (arrest) and making them appear before the ICC (surrender).

17. In general terms, as the objective of an arrest strategy, i.e. carrying out arrests and bringing apprehended individuals to justice, is a practical result, the identification of the appropriate means to achieve such result has primarily an operational dimension. However, the enforcement of arrest warrants in international and mixed jurisdictions is confronted not only with the ordinary challenges of any arrest operation, but also with those arising from the lack of enforcement powers within the jurisdiction.

18. Consequently, while the individual character of the criminal responsibility would normally require that arrests are carried out at a professional level, only, ICC arrest warrants targeting leadership criminal responsibility include a significant political dimension, depending on the status of the suspect, or other interests connected to the State of nationality or of presence, or where the crimes were committed. In that context, the responsibility of States comes into play, in general because of the responsibility to protect and, in particular, with regard to the cooperation obligations established under the Rome Statute and the authority of UNSC resolutions.

19. At the same time, the reality of international and domestic politics must be fully taken into account, in order to avoid that a confrontation between legal obligations and the balance of power results in the final defeat of the interests of justice. From this perspective, while the final objective of an arrest strategy remains the execution of arrests, also measures aimed at creating an environment conducive to that result would become relevant, as an intermediate step.

20. This report highlights that the achievement of the ultimate objective of an arrest strategy should be pursued through efforts that, although premised on the existence of generic and specific obligations of cooperation, are based on the synergies that the relevant

²⁵Out of 17 leaders reportedly having held the power for more than 20 years, 11 are from African countries. http://en.wikipedia.org/wiki/List_of_current_longest_ruling_non-royal_national_leaders.

²⁶ ICC-ASP/12/36, *Report of the Bureau on cooperation*, Annex IV, *Concept Paper*, paras 6 to 12.

²⁷ *Infra*, footnote 35.

²⁸ ICC-ASP/12/Res.3, para. 5, *supra*, footnote 16.

actors can put into place to execute arrest warrants. As a result, the available tools would need to be based on the underlying legal obligation for cooperation of the relevant States, but be crafted with emphasis on collaborative efforts by relevant actors, including other States, International Organizations, NGOs, and the Office of the Prosecutor.

E. Methodology

1. Terminology

21. The terminology adopted in the report reflects the mandate received by the Rapporteur and, in particular, the need to ensure that an arrest strategy is developed based on lessons learned distilled from the experiences of national and international jurisdictions. As the actual arrest is the practical result aimed at by an arrest strategy,²⁹ definitions used in the report might disregard - for the limited purpose of research and analysis - the language established in the legal or political practice at the ICC.

22. The following definitions do not reflect the existing language in the ICC documentation:

- (a) “Fugitives”, is used to indicate individuals remaining at large and escaping justice and, in that regard, it equates to the expressions established in the legal and political practice at the ICC, i.e. “persons for whom arrest warrants have been issued” or “individuals subject to arrest warrants”;
- (b) “Arrest” and “arrest strategy”, include matters referred to provisional arrest and surrender, unless otherwise specified.

2. Fact-finding

23. Consistently with the mandate received, the Rapporteur has approached the subject from a technical perspective, based on relevant experience. Lessons learned have been taken into account for both national and international jurisdictions, as available from focused consultations and open sources. Due to the sensitive nature of part of the information involved as well as to the need to avoid misperceptions, in some instances it is possible to only refer to experiences in general terms. While full confidentiality is ensured on the information providers,³⁰ references are sometimes included to States or other actors to provide a meaningful context, when appropriate and based on publicly available documentation. The collection of information included the following means:

- (a) A questionnaire for all States,³¹ based on the elements of the Concept Paper endorsed by the ASP;³²
- (b) A blueprint for International Tribunals to compare results achieved in individual cases;
- (c) Interviews with current or former relevant States’ and International Organizations’ officials;
- (d) Participation into law enforcement seminars;³³
- (e) Consultations with NGOs and members of the Academia;
- (f) Documentation of confidential nature;
- (g) Existing practices of the international jurisdictions;³⁴

²⁹ *Supra*, para. 14.

³⁰ See, e.g., letter of the Rapporteur to States for transmittal of the Questionnaire, dated 30 June 2014: “Any replies to the Questionnaire will remain internal work of the study conducted by the Rapporteur, and are only to be reflected in statistical format. Both the information provided, and the names of States that have or have not responded, will not be disclosed”.

³¹ Issued on 30 June 2014 in English, and on 11 July 2014 in French.

³² ICC-ASP/12/Res.3 , para. 5: “endorses the appended concept document”.

³³ *Plenary ENFAST Seminar* (European Network of Fugitive Active Search Teams), Brussels, 17-18 September 2014.

(h) Publicly available information, including documentation from International Tribunals and Organizations, books and articles, and other.

24. The Concept Paper provided a detailed breakdown on how the survey of national and international practices would have been conducted, including the criteria for classification of the different situations that might arise in executing a Court's request for arrest (obligations and capacity of the State of presence, and status of the fugitive), and the initiatives that would facilitate the execution of arrests (incentives for States and individuals, as well as actions aimed at tracking and isolating the fugitive, and to exert pressure on States and support the ICC).

25. At the collection of information stage, the Rapporteur has investigated all the avenues he had indicated in the Concept Paper. Upon analysis, the elements acquired have been summarized and presented in this report following a partially different structure, aimed at only highlighting practices that appear to be relevant in the ICC context. As a result, distilled practices identify the elements conducive to executing arrests, *lacunae* that might affect certain areas, responsibilities to be enhanced, practical tools, resources and other relevant measures that it is recommended form part of the Action plan of the Assembly. Due to its restrictions, this reports assumes and does not reproduce all elements relevant to the preparation of the Action plan but already discussed in reports on cooperation of both the Court and the Bureau.

II. Analysis

A. Facts and figures

26. As a starting point, the Table below presents a comparison of the execution rate of arrest warrants in the international-ized jurisdictions, taking into account the period between the enter into functioning of the jurisdiction and the arrest of the last fugitives or the current status. The Table only reflects information related to core crimes, excluding offenses against the administration of justice or contempt cases, and any possible sealed arrest warrant. The main policy differences behind these diverging results are discussed as a result of the analysis of the different practices in the following Sections of the report. Such policies are identified in the availability of external conditionality policies ("conditionality"), and/or internal dedicated resources to foster operations ("operations"), in the form of a specialized Tracking Unit, or other favourable conditions on the ground. These differences are highlighted in the conclusions, and a more complete comparative Table is also attached (Appendix I).

27. The experiences of internationalized or mixed jurisdictions are also indicated, as the differences in structure and relationship with territorial States provide useful indications. In both the cases of the Special Court for Sierra Leone (SCSL)³⁵ and of the Extraordinary Chambers in the Courts of Cambodia (ECCC)³⁶ the sitting of the courts in the countries were the crimes took place is per se an indication of the local political support for the trials, based on instances of national reconciliation and prevention of security threats in the country and in the region,³⁷ which resulted in a high execution rate of the arrest warrants.

³⁴ ICTY-ICTR-SCSL-ECCC-STL, *Prosecuting Mass Atrocities: Lessons Learned from the International Tribunals*, ("Lessons Learned from the International Tribunals") launched on 1 November 2012, addresses arrests at Practices 68-72, paras 336-356. ICTR-OTP manual on *The Tracking and Arrest of Fugitives from International Criminal Justice: Lessons from the International Criminal Tribunal for Rwanda*, June 2013 (restricted), addressing: the legal framework required for tracking; the structure and management of specialized units for tracking; strategies for tracking; the handling of confidential sources; rewards programs; and security issues related to tracking operations; engagement with national authorities.

³⁵ SCSL - established by the Agreement United Nations/Sierra Leone of 16 January 2002, to prosecute serious violations of IHL and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.

³⁶ ECCC trial is ruled by Cambodian domestic law, as approved under the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, adopted on 10 August 2001 and as amended on 27 October 2004. Jurisdiction *ratione temporis* refers to crimes committed between 17 April 1975 and 6 January 1979, *ratione personae* to "senior leaders of Democratic Kampuchea and those who were most responsible" (emphasis added), and *ratione materiae* for "crimes and serious violations of Cambodian laws related to crimes, international humanitarian law and custom, and international conventions recognized by Cambodia".

³⁷ In particular, this is the case of the Charles Taylor trial, which was moved to the ICC premises, in The Hague, upon a Memorandum of Understanding signed between the ICC and the SCSL on 13 April 2006.

On the contrary, for the Special Tribunal for Lebanon (STL) the negative arrest performance appears to depend on apparent political and security factors, which also required the STL to be established and run trials from outside the situation country. However, in this case the shortcomings resulting from the lack of arrests are partially offset by the unique possibility to conduct trials *in absentia* of the accused fugitives. The dramatic difference in the performance indicator for arrest warrants in the cases of the STL (0%) and the ECCC (100%) seems ultimately to reflect the relevance of the condition of the accused, in situations where effective political power exists in relevant political networks³⁸ or not.³⁹

28. Based on the figures in the Table, the analysis of the information gathered will provide answers to the following questions: what are the reasons for the comparatively higher performance of other international-ized jurisdictions in the execution of arrest warrants, when compared with the ICC? Are there good practices that can be used at the ICC to improve this performance? What initiatives need to be taken, by whom, and what is a reasonable timeframe to achieve this?

<i>Jurisdiction</i>	<i>Situations</i>	<i>Period</i> ⁴⁰	<i>Years</i>	<i>Accused</i>	<i>Fugitives</i>	<i>Execution rate</i>
ICC	CAR, DRC, Ivory Coast, Kenya, Libya, Mali, Sudan/Darfur, Uganda	2002-2014	12	21 ⁴¹	12 ⁴²	57.14%
ICTY	Conflicts in the Balkans	1993-2011	18	161	0	100%
ICTR	Rwanda and neighbouring states	1995-2013	18	98	9	90.82%
SCSL	Sierra Leone	2002-2013	11	13	1	92.40%
ECCC	Cambodia [Democratic Kampuchea]	2006-2014	8	5	0	100%
STL	Lebanon [Rafiq Hariri and others]	2009-2014	5	5	5	0%

B. Inputs from jurisdictions

29. A number of States Parties from different Regions have provided significant replies to the Questionnaire received. The UN *ad hoc* Tribunals, ICTR and ICTY, have also provided detailed insight into their practices, while information on the experiences of SCSL, STL and ECCC have been drawn from interviews with former or current officials, and from relevant documentation.

30. International-ized jurisdictions have all experienced the challenges posed by the lack of autonomous enforcement powers. However, differences exist based on the following factors:

- (a) The legal basis established under the authority of the UNSC or Treaty Law,
- (b) The conduct of operations,
- (c) The use of appropriate incentives, and
- (d) The presence on the ground of arrest-mandated international military forces.

³⁸ The five accused at STL are members of Hezbollah, a governmental force.

³⁹ The five accused at ECCC are the most senior survivors of the Khmer Rouge regime, ended in 1979.

⁴⁰ Between the actual enter into functioning and the arrest of the last fugitives or completion of the jurisdiction.

⁴¹ For the following eight accused only summonses to appear were issued: Bahr Idriss Abu Garda, and Saleh Jerbo - Darfur/Sudan; William Ruto, Joshua Sang, Henry Kosgey, Uhuru Kenyatta, Francis Muthaura, Mohamed Hussein Ali - Kenya.

⁴² The following arrest warrants are outstanding: DRC - Sylvestre Mudacumura; Uganda - Joseph Kony, Okot Odhiambo, Dominic Ongwen, and Vincent Otti; Sudan - Omar al Bashir (two warrants), Ahmed Harun, Ali Kushayb, Abdel Raheem Muhammad Hussein, and Abdallah Banda Abakaer Nourain; Ivory Coast - Simone Gbagbo (arrested but not surrendered); Libya - Saif Al-Islam Ghaddafi (arrested but not surrendered). Abdullah Al-Senussi is no longer considered as a fugitive, as its case before the Court is terminated upon decision by the Appeals Chamber on its inadmissibility, issued on 24 July 2014.

C. Initiatives

31. The following sections III and IV of the report address the elements that appear to be directly relevant to devising an arrest strategy for the ICC, based on the results of the surveys and on the other information collected. Measures that would appear most appropriate to enhance the expectation that arrest warrants are executed are categorized as:

- (a) *Incentives*, i.e. measures aimed at promoting a voluntary positive approach by both States and individuals, and
- (b) *Actions*, including operational, political, legal and other measures.

III. Incentives

32. These measures have been to a different degree enacted and successfully tested at the international and national level to 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 relevant justice system. Based on their addressees, incentives are of different nature - public or private, political or technical (police, procedural and substantive criminal law, penitentiary law) – while their actual availability depends on many variables, including political factors, resources, and the circumstances of the situation and of the case. Incentives might be directed to States or individuals.

A. Incentives to States⁴³

1. Conditionality policies and practices

33. In situations where incentives were put in place, the relevant international authority assessed that States had the capacity requisite to execute arrest warrants, while domestic political circumstances were countering compliance with the international obligations. In that regard, incentives from the international community addressed a primary public interest of the concerned States so as to outweigh internal impediments, including with a clearly recognizable and credible political, economic, security, and/or social benefit. Conditionality policies required actors to use a leverage point, with the credible promise of a reward in return of the expected cooperation (condition) by the requested State. Additionally, the success of these policies required that possible interests by other relevant players in the region did not translate into the provision of adverse incentives or other assistance to the requested State, in order for it to be able to withstand the pressure exerted with the conditionality policies. Such policies were part of wider strategies aimed at stabilizing the relevant region, including by bringing fugitives before international justice. As a result, conditionality was part of the process resulting in political changes which, in turn, assisted in achieving the arrest and surrender of fugitives.

34. Conditionality policies were key to the success of the ICTY, the only International Tribunal which was able to achieve all the arrests it had sought. While conditionality was complemented by a robust conduct of the operations, which was also the case at ICTR,⁴⁴ the determinant role of conditionality at ICTY is shown by contrast with the lower results achieved at ICTR, where no conditionality policy was available.⁴⁵ In fact, the ICTY was the only one among all the international-ized jurisdictions where conditionality proper was applied.⁴⁶ While the 100% execution rate⁴⁷ at the ICTY is matched by that of the ECCC, at the latter the full control of the territory and the political will of the Cambodian authorities make the situation not comparable with that in the Former Yugoslavia.

⁴³ *Concept Paper*, para. 21 (i).

⁴⁴ *Infra*, para. 77.

⁴⁵ While donors in Rwanda did not attach conditions to aid measures, the leverage of Rule 11 *bis* RPE (referral of cases to national jurisdictions) was successfully used by ICTR itself to obtain reforms in the justice field, upon which eight cases were transferred to Rwanda.

⁴⁶ At SCSL, the direct threat posed by Charles Taylor to the region was, in fact, an internal incentive for cooperation.

⁴⁷ See Annex I, Table – *Execution rate and policies*.

35. Conditionality in the Former Yugoslavia was first applied in its negative meaning, as sanctions⁴⁸ were adopted by European Union,⁴⁹ with the freezing of funds and ban of investments against the Federal Republic of Yugoslavia (FRY) in 1999.⁵⁰ As the political result of democratic presidential elections was successfully achieved,⁵¹ it was matched with the swift lifting of the sanctions against the State⁵² and their restriction to only cover former President Milošević (and its associates),⁵³ who was sought by ICTY and no longer acted as representative of the State.

36. In its positive meaning (reward), since 2000 conditionality was used in a structured and systematic manner by both the EU and the US in support of the mandate of the ICTY.

37. The European Union used the opportunities offered in its enlargement process by the interest of the States in the Region to candidate for accession in the Union. The leverage was based on a process which set out the conditions to be fulfilled to gain membership (1993),⁵⁴ including through the Stabilization and Association Process (SAP) and the implementing Stabilization and Association Agreement (SAA) to be entered with partner countries in the Western Balkans. Entering and successfully completing negotiations of an SAA represented for the States in the region a concrete perspective of gaining membership of the Union, as well as the financial assistance needed to complete the process. In this context, full cooperation with the ICTY was required as a clear and unambiguous condition (2003) for the candidate countries to fulfill.⁵⁵ Around the same time that the EU was establishing this condition, Serbia arrested and surrendered to ICTY five indictees.

38. Conditionality achieved its expected results in the cases of both Serbia and Croatia, where effective measures of cooperation were progressively put in place, as the consistency of the EU position with the established condition was maintained. In the process, steps forward were made in visible coincidence with the tightening of the conditionality policy with regard to the negotiations of the SAA, explicitly linked to full cooperation with ICTY (2005-2008).⁵⁶

39. Similarly, the conditionality policy of the United States linked financial aid to arrest and surrender of ICTY indictees. Two instances show the relevance of this policy:

- (a) US legislation was enacted,⁵⁷ which requested cooperation from Yugoslavia (FRY) to be certified by 31 March 2001 in order for the US to release substantial assistance funds⁵⁸ and support loans and assistance from international financial institutions,⁵⁹

⁴⁸ Sanctions are an instrument of a diplomatic or economic nature which seeks to bring about a change in activities or policies such as violations of international law or human rights, or policies that do not respect the rule of law or democratic principles. Restrictive measures imposed may target governments of third countries, or non-state entities and individuals (such as terrorist groups and terrorists). They may comprise arms embargoes, other specific or general trade restrictions (import and export bans), financial restrictions, restrictions on admission (visa or travel bans), or other measures, as appropriate.

⁴⁹ UNSC resolution 757 (1992) had introduced sanctions against FRY, which were lifted in 1996, as a reward for the Dayton Peace Accords (1995).

⁵⁰ EU Council Regulation No. 1294/1999, 15 June 1999.

⁵¹ Election of President Kostunica, 24 September 2000.

⁵² Declaration of the EU Council, 9 October 2000.

⁵³ Council Regulation No. 2488/2000, of 10 November 2000, paras 1 to 4, and Article 1.

⁵⁴ EU Council, *Presidency Conclusions*, Copenhagen, 21-22 June 1993. The *Copenhagen criteria* included the following conditions for accession to the EU to be achieved by a candidate country: “stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection for minorities”, as well as “ability to take on the obligations of membership including the adherence to the aims of political, economic and monetary union”.

⁵⁵ EU-Western Balkans Summit, *Declaration*, Thessaloniki, 21 June 2003, para. 4: “progress of each country towards the EU will depend on its own merits in meeting the Copenhagen criteria and the conditions set for the SAP”; para. 5: “The Western Balkan countries pledge full and unequivocal cooperation with the [ICTY] on all open issues, including the transfer to The Hague of all remaining indictees”. The Thessaloniki Agenda made the condition even clearer: “The EU urges all concerned countries and parties to co-operate fully with the [ICTY] recalling that respect for international law is an essential element of the SAP, the EU reiterates that full cooperation with ICTY, in particular with regard to the transfer to The Hague of all indictees and full access to documents and witnesses is vital for further movement towards the EU”.

⁵⁶ Negotiations were started, called off, resumed, and SAA signature and ratification took place depending on the fulfillment of obligations towards the ICTY, as reported by its Prosecutor. See, e.g., EU Commission, *Serbia 2006 Progress Report*, SEC(2006) 1389 of 8.11.2006, at 1.2, and *Serbia 2008 Progress Report*, SEC(2008) 2698 of 5.11.2008, at 1.3.

⁵⁷ Law No. 429 of 6 November 2000, *Making appropriations for foreign operations, export financing, and related programs for the fiscal year ending September 30, 2001*, Sec. 594 “Funding for Serbia”.

⁵⁸ \$100 million.

with the sole exception of humanitarian assistance or assistance to promote democracy in municipalities. In the first week of March 2001 a list of US demands was submitted to the Yugoslav Government to be complied with by 31 March, including: the arrest of former President Milosević and ultimate cooperation in his case, including on his financial assets; the adoption of legislation enabling surrender without a prior national conviction; the surrender of at least another indictee; and the access of ICTY to “documents of real importance”. The results were visible: Milomir Stakić was arrested on 23 March and surrendered the same day to the ICTY; Slobodan Milosević was arrested on 1 April 2001. Still, not all conditions had been fulfilled including, notably, the surrender of Milosević;

- (b) A donors conference had been convened on 29 June 2001, where FRY was seeking \$1.2 billion. The US indicated that they would have deferred support until Milosević was surrendered.⁶⁰ On 28 June, the day before the conference, Milosević was surrendered to the ICTY.⁶¹

40. The timing of the concrete signs of cooperation in proximity to the deadlines established as a condition for the rewards appears unambiguous. In the following years as well, cooperation increased when the US certification deadline for aid drew near, clearly indicating a direct relationship between the strategic priorities of the State and its cooperation.⁶²

41. At the ICC, at least in one instance the United States utilized the financial leverage to prompt the enforcement of arrest warrants.⁶³ The Assembly has also approved a limited conditionality policy, where the reward is identified with the support for the election of candidates to United Nations organs, as States Parties should take into account the ability and willingness of candidates to ratify the Rome Statute and to fully cooperate with the Court.⁶⁴ As the implementation of this policy is an internal matter in the decision making of each State Party, there is currently no information available on its success.

2. Lessons learned

42. Conditionality policies have proven to be a successful solution in addressing the reconciliation of the reasons of peace and justice, so that political efforts can assist judicial ones, and international jurisdictions continue to be recognized as an instrument to achieve stability.

43. In the Former Yugoslavia conditionality has undoubtedly contributed to a substantial extent in ensuring substantial cooperation to and bringing all fugitives before the ICTY. However, implementation of such policies highlighted the risks that inflexible conditions could have triggered political crises, fuel nationalist sentiments and ultimately derailing the agenda for the reforms required in the transitional period, resulting in instability in the region and ultimately also achieving the opposite than intended result in terms of cooperation with the ICTY. The overall positive experience at the ICTY can instead be attributed to the synergies of policies implemented by the different actors present in the region, to the absence of adverse incentives by other relevant players in the region, to the interests of new elected governments to get rid of prominent figures who had become a liability, and to a strategic flexibility which has enabled to adapt conditionality policies to the most critical moments in the peace and transition processes. Practice has also shown

⁵⁹ Including the International Monetary Fund and World Bank.

⁶⁰ AFP, May 09, 2001, *Bush tells Kostunica that US aid hinges on Milosevic hand over*.

⁶¹ International Crisis Group, *Milosevic in The Hague: What it Means for Yugoslavia and the Region*, 6 June 2001, <http://www.crisisgroup.org/~media/Files/europe/Serbia%2016.pdf>

⁶² Congressional Research Service, *Conditions on U.S. Aid to Serbia*, 7 January 2008.

⁶³ Congressional Research Service, *Malawi: Recent Developments and U.S. Relations*, 21 March 2013, reports that a U.S. Millennium Challenge Corporation (MCC) five-year compact approved in 2011 a \$350 million program that was suspended in March 2012 out of concerns about good governance matters, including Malawi’s decision to host Bashir at trade summit in Lilongwe, and to the Common Market for Eastern and Southern Africa (COMESA) summit held in October 2011. In May 2012 the new Malawian leadership announced that it would not host Bashir at an AU Summit to be held in July 2012.

⁶⁴ ICC-ASP/6/Res.2, *Omnibus resolution*, Annex II, Recommendation 49: “States Parties should, when considering candidacies for membership in United Nations organs, where relevant take into account the preparedness and willingness of candidates to fully cooperate with the Court, and if they had not yet done so, to become a State Party to the Rome Statute”.

that effective conditionality should: present in a clear manner what results would trigger rewards; be implemented consistently by all partners involved, so as to avoid counter-tactics by the requested States; dispel misperceptions of an uneven application of the benefits; be accompanied by a robust outreach policy, aimed at avoiding manipulations; and, be supported at the operational level with reliable information gathered by professional in-house capacity of the Tribunal, which provides the Prosecutor with strong evidence on the actual level of compliance in the field [see *infra*, 77-79]. While ICTR and SCSL had operational structures similar to those of the ICTY, the absence there of conditionality policies provides an explanation for the lower execution rate of the arrest warrants.

3. Leverage points

44. The toolkit potentially available to develop conditionality policies includes elements that reflect political, security and financial interests of relevant States. Whether it is possible to make use of any of the following levers as a reward to achieve the arrest and surrender of ICC fugitives would depend on a case-by-case assessment conducted in the context of strategies specific to the region, situation and the cases which, to be effective, require to be established with an inclusive process and implemented in a collaborative manner:

- (a) *Participation into 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, including for drug crop eradication and/or trafficking;
- (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.

Recommendation 1

45. It is recommended that conditionality policies be considered in the context of the ICC whenever possible, but only within the framework strategies applicable to the different regions, situations and cases. Given the nature and objective of such policies, the relevant section of the framework strategies should include clearly defined and communicated conditions to be met to trigger the rewards, and should be consistently implemented, while ensuring that the necessary degree of discretion is retained in order to adapt to the circumstances.

B. Incentives to individuals⁶⁵

46. Individualized incentives 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, or simply it is possible to limit the ability of the fugitive to remain at large. Such measures would mostly

⁶⁵ *Concept Paper*, para. 21 (ii).

depend on the State of residence or nationality. Financial measures could also facilitate the gathering of information leading to arrests.

1. Practices

(a) Sanctions

47. At the ICTY individuals have been targeted by sanctions regimes, with the aim of limiting their ability to hide, and ensure the support of their protection networks, including with the freeze of all funds and economic resources which were applied by the EU to Milosevic and its associates,⁶⁶ as well later to all individuals indicted by the ICTY.⁶⁷ Fugitives, in particular the military, also had their assets frozen by the States of nationality, including the payment of salaries and pensions.⁶⁸ UNSC sanctions regimes currently include ICC fugitives in the situations of the Democratic Republic of the Congo, Côte d'Ivoire and the Central African Republic, but not in others and, notably, not for Darfur/Sudan.

(b) Admissions restrictions

48. Bans on travel and visas were also enacted by the European Union to prevent the entry into or transit through the territories of the Member States “of persons who [were] engaged in activities which help[ed] persons at large indicted by the” ICTY.⁶⁹ However, the effectiveness of such measures might depend on whether suspects can avail themselves of assumed identities or not.

(c) Benefits

49. More visibly, voluntary surrenders were facilitated in a significant number of cases by a package of benefits provided by the State of nationality of the fugitives, including paid family visits, issuance of visas, a minimal monthly remuneration for detainees, and the payment of legal fees.⁷⁰ The facilitation of communication with families residing far from the venue of detention did also provide some relief to humane concerns of fugitives.⁷¹

50. Along the same lines, the right of the accused to maintain family ties is considered in any jurisdiction at the time of deciding where to enforce a sentence. International jurisdictions also develop a network of Agreements for the purpose of sentence enforcement and, when appropriate, the proximity to the State of residence is one of the elements considered in the selection of the State of enforcement. The anticipated acceptance by States of their designation as States of enforcement has also played a positive role in the decision of some accused to voluntarily surrender. Some national jurisdictions also provide assurances covering the family members of detainees, facilitating their relocation and, where appropriate, their protection.

51. The cooperation of the accused with the Tribunal, which can include voluntary surrender, is also a factor which may be considered within the policies of Prosecutors when

⁶⁶ Council Regulation No. 2488/2000, of 10 November 2000, para.s 1 to 4, and Article 1.

⁶⁷ EU Common Positions 2003/280/CFSP of 16 April 2003, and 2004/694/CFSP of 11 October 2004, and subsequent extensions.

⁶⁸ However, while Gen. Ratko Mladić had been indicted by ICTY since 25 July 1995, and dismissed from his position of Commander in the Bosnian Serb Army on 8 November 1996, he continued to receive a pension until November 2005.

⁶⁹ EU Council Decision 2011/421/CFSP of 18 July 2011.

⁷⁰ Such package was provided by Serbia, and included the four yearly visits of family members to the UN Detention Unit in The Hague, facilitation in obtaining visas, and a monthly payment of €200, subsequently extended also to detainees who had not voluntarily surrendered. On occasion and based on the lack of means of the family, the ICRC had also provided financial assistance, though unrelated with the surrender.

⁷¹ ICTY *Non paper re Family Visits to Detainees* (2008), introduced in the discussions on the matter at the ICC. The Tribunal noted that consideration could be given to introducing less costly than family visits means, to maintain contacts with family members. These might include the use of a “toll-free” number to have meaningful conversations with family members at specified times, or “installing closed-circuit televisions within the UNDU whereby the detainees would be able to communicate with their families through a direct feed monitor. A possibility might be to install such a unit in both the UNDU and the ICTY field offices, which would significantly reduce the traveling expense for families”.

formulating the charges, and by Judges at the time of sentencing. National systems also widely attach rewards to the positive behavior before and after the commission of the crimes, and at various stages of the criminal proceedings, including through mitigating circumstances, reduction or commutation of sentence, and substantial penitentiary benefits. The indication of upper and lower limits of such rewards is also common. Some legislations also recognize as a ground for excluding criminal responsibility the conduct of a person who prevents the commission of crimes and contributes crucial elements leading to the collection of evidence and the responsibility of accomplices. Analogies between core international crimes and other forms of structured crime, both of national and transnational character (organized crime and terrorism) also suggest that benefits applied to the latter could be applied to the former.

(d) Special programmes

52. Financial incentives might be also provided to individuals who contribute to the arrest by providing significant information. The United States have such a programme, which was expanded (2013) to also cover targeted ICC fugitives in the situations in Uganda and Democratic Republic of the Congo.⁷² Tracking activities, well established in other international-ized jurisdictions, also have greatly benefitted of sufficient resources to facilitate the gathering of crucial information leading to arrests.⁷³ Other domestic systems might include similar rewards. Communication issues have arisen with regard to the conditions to be fulfilled to achieve the reward, and the actual amount of it.

2. Lessons learned

53. Without prejudice to the obligation of the relevant authorities to proactively seek the enforcement of arrest warrants, a combination of positive and negative incentives might deter individuals from continuing to evade justice, facilitate or even compel a positive determination to voluntary surrender and cooperate with the Prosecution, or otherwise contribute to the operations conducted by the international jurisdiction and the enforcement authorities for the apprehension of fugitives. These measures should be defined in advance and their availability communicated in a clear manner and as a comprehensive package, so that they can be factored in the accused own assessment on the cost to be borne if they remain fugitives, against the risk that benefits would not be applicable in case an arrest is carried out without cooperation of the accused. Expectations of informants about possible rewards for leading information should be managed.

54. Targeted individual rewards and sanctions might mitigate the political and operational challenges at the enforcement stage. The adoption of sufficiently diversified measures, so as to address different interests and stages of the proceedings, might require changes in the legal framework and operational methods. While the political implications of these changes are limited, their achievement requires a strong governance framework to ensure strategic consistency with the objectives.

3. Leverage points

55. The practices analyzed reveal the existence of a panoply of measures that can act as incentives to individuals, deter fugitives from continuing to evade justice, facilitate a positive determination to voluntary surrender, or otherwise contribute to the operations

⁷² 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.

⁷³ *Infra*, para. 78, fund for special operations.

conducted by the international jurisdiction and the arresting authority. Such measures should be presented as a package, and include.⁷⁴

- (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);
- (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).
- (c) Sentencing:
 - (i) Mitigating circumstances (fixing a minimum and maximum limit in sentence determination),⁷⁵
 - (ii) Special reduction or commutation of sentences, as well as penitentiary benefits for collaborators of justice or those who have definitely abandoned their associates,⁷⁶
 - (iii) Grounds for excluding criminal responsibility⁷⁷ based on the prevention of crimes and leading evidence to identify the criminal plan or policy and the responsibilities of the accomplices,
 - (iv) Facilitation in the relocation, including for family members.
- (d) Release:
 - (i) Early release to or enforcement of any ICC sentence in an agreed Country (unless adverse prevailing interests of justice),
 - (ii) Granting of some residence status, upon completion of proceedings (asylum or other).
- (e) Other measures:
 - (i) Special programmes publicly advertising rewards for information leading to arrests,
 - (ii) Resources available for sensitive sources at the tracking stage.

Recommendation 2

56. It is recommended that a comprehensive package of positive and negative incentives be established in advance and appropriately communicated, so that the accused can reliably assess the benefits of such measures against the precarious lifestyle of fugitives.

⁷⁴ Procedural tools based on prosecutorial discretion might as well contribute to bringing the accused before justice, such as for the issuance of a summons to appear or proceedings to be run in absentia.

⁷⁵ Based on Article 78(1), Rule 145(2)(a)(ii) RPE allows the Court to take into account, in imposing the sentence, of the mitigating circumstance of (emphasis added): “The *convicted person’s conduct after the act, including any efforts by the person to compensate the victims and any cooperation with the Court*”.

⁷⁶ E.g., including by admitting their responsibilities, acting in a manner univocally inconsistent with a criminal intent, and renouncing to violence.

⁷⁷ Article 31(3) of the Rome Statute: “At trial, the Court may consider [other than provided in the Statute] grounds for excluding criminal responsibility [...] where such a ground is derived from applicable law as set forth in article 21 [...]”. Rule 80 RPE establishes the procedure for the defense to raise such grounds.

IV. Actions

57. While incentives are instrumental to improving the willingness of States and individuals, they will always need to be complemented by appropriate actions aimed at the isolation of fugitives, exerting additional pressure on States, and support the operations of the ICC.

A. Isolation of fugitives

1. Practices

58. Policies of marginalization and political isolation of fugitives have been widely implemented in international jurisdictions, bringing about positive results in peace processes and, eventually, also contributing to the enforcement of arrests. Select cases illustrate the effectiveness of such policies, where indicted Heads of States were marginalized, consequently toppled, arrested and surrendered, although in some instances this might still have requested a long time. At the ICTY, Slobodan Milosević was the incumbent President of the Federal Republic of Yugoslavia (FRY) at the time the first indictment was confirmed against him (24 May 1999): he was surrendered (28 June 2001) after he had been overthrown (7 October 2000). Similarly, Radovan Karadžić was President of the Republika Srpska at the time he was first indicted (25 July 1995): he was arrested (21 July 2008) after he had to leave office (19 July 1996). At the SCSL, Charles Taylor was President in charge of Liberia at the time of his indictment (3 March 2003): he was arrested (29 March 2006) after having relinquished his position (11 August 2003). Also, ICTY indictees were not considered interlocutors in peace negotiations.⁷⁸ Marginalization policies have been enacted by means of:

(a) Publicity around the arrest warrants

59. Unsealed arrest warrants have increased stigmatization of the fugitive, and stimulated the pressure of the domestic and international public opinion, resulting in political support and diplomatic pressure for States to enforce the arrest warrant. Issuance of INTERPOL Red Notices is also premised on unsealed arrest warrants.⁷⁹ However, beside possible negative effects on the operations,⁸⁰ the result of this practice might have contributed in some situations to radicalize nationalist feelings and unite positions which, otherwise, would have remained divided in domestic politics. This might have ultimately resulted in delays for the enforcement of arrest warrants. Within the INTERPOL framework, available means to ensure cooperation while arrest warrants are still sealed include the use of restrictions to the diffusion of requests of police cooperation (or alerts), as well as on access to relevant database, only to the intended recipient countries.⁸¹

(b) Listing for sanction purposes

60. There is no general and detailed assessment available on the impact of individualized sanctions, with the inclusion of individuals, their supporting networks and entities in sanctions lists and for the purpose of the application of such sanctions.⁸² However, restrictions imposed have effectively reduced the subsistence means of fugitives and their ability to move from the territories where they were hiding.⁸³ The ICC Prosecutor

⁷⁸ The exclusion of both Karadžić and Mladić from the negotiations leading to the Dayton Accords (November 1995) was considered key to the achievement of the result. Based on this experience, the ICC-OTP has called on States to “eliminate non-essential contacts with individuals subject to an arrest warrant issued by the Court, [...] contribute to the marginalization of fugitives and take steps to prevent that aid and funds meant for humanitarian purposes or peace talks are diverted for the benefit of persons subject to a warrant” (Prosecutorial Strategy 2009 – 2012, para. 48).

⁷⁹ *Infra*, para. 81(b).

⁸⁰ *Infra*, para. [86].

⁸¹ INTERPOL, *Rules on the Processing of Data*, Articles 1(14) [Definition of Diffusion], 58 [Access Restrictions], and 97 [Diffusion System].

⁸² *Supra*, paras 39-40 and 44.

⁸³ ICTY: Ratko Mladić, who had reportedly disappeared from Belgrade after the arrest of Milosević (1 April 2001) and his removal from State run institutions, was apprehended (26 May 2011) in the house of a relative, in Serbia.

has also occasionally highlighted the risk that humanitarian aid might be diverted and result in assistance to the fugitives.⁸⁴ UN sanctions regimes have also been applied in some situations before the ICC.⁸⁵

(c) Avoidance of non-essential contacts

61. Such policies are aimed at preventing that individuals be acknowledged as interlocutors on matters where contacts can be conducted through other representatives, and have been implemented in several situations by the UN and a number of States, taking into account the discretion required to balance the interests of peace and security with those of justice. Non-essential contacts were often avoided at the ICTY.⁸⁶ Guidelines have been adopted by the UN Secretary-General,⁸⁷ including for mediation processes,⁸⁸ and by the European Union.⁸⁹ The ICC Prosecutor has constantly called on States to contribute to the marginalization of fugitives by eliminating non-essential contacts.⁹⁰ The United Nations has developed a practice of informing the ICC Prosecutor and the President of the ASP “beforehand of any meetings with persons who are the subject of arrest warrants issued by the Court that are considered necessary for the performance of United Nations-mandated tasks which has been implemented on two occasions when principals were having such meetings in relation to the situation in Darfur”.⁹¹ A number of States Parties have informed that they are avoiding what on a case-by-case basis is considered not to be an essential contact.⁹² Some non-States Parties as well implement the same policy. As these practices retain sufficient flexibility for the implementing Party to pursue the priority objectives of its

⁸⁴ Food aid had been provided to LRA (Uganda) to facilitate their sitting in the peace talks, in Juba, and avoid continued looting. However, allegations were made that such aid was being sold by LRA to rearm. The Prosecutor recalled that “any assistance that can help the sought individuals abscond from the Court would be illegal” (ICC, *Eleventh Diplomatic Briefing*, The Hague, 10 October 2007). The Prosecutor also called on States to “take steps to prevent that aid and funds meant for humanitarian purposes or peace talks are diverted for the benefit of persons subject to an arrest warrant” (*Prosecutorial Strategy 2009-2012*, dated 1 February 2010, para. 48).

⁸⁵ In particular, in the situation in the Democratic Republic of the Congo, Côte d’Ivoire and the Central African Republic.

⁸⁶ *Supra*, footnote 79.

⁸⁷ UNSG, A/67/828-S/2013/210, Annex, *Guidance on contacts with persons who are the subject of arrest warrants or summonses issued by the International Criminal Court*, requiring UN official to restrain contacts with ICC fugitives to “those which are strictly required for carrying out essential United Nations mandated activities”, avoiding ceremonial (receptions, photo opportunities, national days’ celebrations) or courtesy contacts, and, when contacts are essential, attempt to interact with other relevant individuals. The “Commentary” to the *Guidance* also clarifies the level of discretion afforded by the policy as, when in exceptional circumstances it is still needed to interact directly with a fugitive from the ICC, and “this is an imperative for the performance of essential United Nations mandated activities, direct interaction with such a person may take place to the extent necessary only [...] the decision as to whether contact is strictly required in order to carry out United Nations mandated activities is an operational one, which is to be made in the light of a careful consideration of all the circumstances”.

⁸⁸ UNSG, *Guidance for Effective Mediation*, September 2012, page 13: “Limit contacts with actors that have been indicted by the International Criminal Court to what is necessary for the mediation process”; page 11: “Arrest warrants issued by the International Criminal Court, sanctions regimes, and national and international counter-terrorism policies also affect the manner in which some conflict parties may be engaged in a mediation process. Mediators need to protect the space for mediation and their ability to engage with all actors while making sure that the process respects the relevant legal limitations”.

⁸⁹ EU *Action plan to follow-up on the Decision on the International Criminal Court*, 12 July 2011: “The EU and its Member States should avoid non-essential contacts with individuals subject to an arrest warrant issued by the ICC.” EU Council – COJUR, 16993/13, *The EU’s response to non-cooperation with the International Criminal Court by third states*, 27 November 2013: [...] “EU and its Member States should avoid non-essential contacts with individuals subject to an arrest warrant issued by the ICC”; para. 9 “Essential contacts could be further defined as those which are strictly required for carrying out core diplomatic, consular and other activities and/or those activities which are UN-mandated or which arise from a legal obligation (e.g., under headquarters agreements), and has noted that the specific circumstances of a particular case would be relevant when determining what is an essential contact for these purposes”.

⁹⁰ ICC-OTP, *Prosecutorial Strategy 2009-2012*, para. 48(a): “eliminate non-essential contacts with individuals subject to an arrest warrant issued by the Court. When contacts are necessary, attempt first to interact with individuals not subject to an arrest warrant”. Also, RC/ST/PJ/INF.3, *The Importance of Justice in Securing Peace*, 30 May 2010, para. 21.

⁹¹ A/68/364, Report of the Secretary-General, *Information relevant to the implementation of article 3 of the Relationship Agreement between the United Nations and the International Criminal Court*, 4 September 2013, para. 5.

⁹² ICC-ASP/13/29, *Report of the Bureau on cooperation*, Annex IV, “Summary of the discussions on non-essential contacts during the September 23 meeting”. Essential contacts would include the presentation of credential of a new Ambassador, attendance to main National civilian or religious celebrations, consular work needed for the well-being of nationals, participation to events that might help to achieving essential objectives, such as negotiating a peace agreement.

external relations, they do not *per se* affect the principled legitimacy of fugitives to negotiate peace and justice matters as these, in fact, might be normally considered as essential contacts. The essentiality of the contacts is based on the external relations policy of States and, consequently, a policy thereon is understood to inherently require sufficient discretion. However, consideration could be given for States to objectively assessing the results achieved by their practices, by establishing a monitoring mechanism which would allow to categorize contacts and results over a period of time.

(d) Proceedings

62. Where the legal framework allows for proceedings in absentia to take place, pending the arrest of the accused the judicial review of the charges brought by the Office of the Prosecutor (ICC)⁹³ and the subsequent trial (STL) may also increase the international stigma. However, when the accused and its supporting networks are able to influence the domestic public opinion, nationalist sentiments and support for the fugitive might be fuelled by any judicial proceeding. At the ICC, no confirmation of charges proceedings in absentia have yet been experienced,⁹⁴ while the lack of execution of arrest warrants has brought the OTP to put in a dormant stage some investigations.

63. Most of the situation before the ICC are the result of self-referrals⁹⁵ or of the acceptance of jurisdiction,⁹⁶ in some situations fugitives are believed to move in the territories of other States in the region. A policy of joint referrals by the territorial and neighbouring States, ideally assisted by specific commitments of regional actors to engage in cooperation, might facilitate efforts to isolate individuals sought by the Court.

64. National jurisdictions regard any contacts that might help assist fugitives to evade justice as an obstruction of justice, which is normally criminalized both in civil and common law systems either as an offence against the administration of justice⁹⁷ or as aiding and abetting⁹⁸ in the commission of the crime.⁹⁹

2. Lessons learned

65. The assumption that positive effects in the search for individuals at large would be achieved¹⁰⁰ by isolating them is essentially based on the fact that unexecuted arrest warrants would still produce the effect of substantially modifying the legal status of the person sought, by restricting freedom of movement within the borders of the state of residence or other non-cooperating states. As a result, an “international pariah” would also have a reduced ability to be considered as a credible interlocutor in relevant talks, including peace negotiations. The creation of an hostile environment around a fugitive would increase the prospects that the conditions negatively affecting the enforcement of an arrest warrant would over time weaken enough to make the arrest possible.

66. However, as it is shown from the select cases above,¹⁰¹ this approach can produce positive effects only from a long term perspective, while individuals at large would

⁹³ Article 61(2) of the Rome Statute.

⁹⁴ *Ibidem.*: ‘The Pre-Trial Chamber may, upon request of the Prosecutor or on its own motion, hold a hearing in the absence of the person charged to confirm the charges on which the Prosecutor intends to seek trial when the person has: (a) Waived his or her right to be present; or (b) Fled or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court and to inform the person of the charges and that a hearing to confirm those charges will be held. In that case, the person shall be represented by counsel where the Pre-Trial Chamber determines that it is in the interests of justice.’ Under Rule 125(1) ICC RPE ‘the Pre-Trial Chamber shall decide whether there is cause to hold a hearing on confirmation of charges in the absence of the person concerned, and in that case, whether the person may be represented by counsel’, while in the latter case, under Rule 126(2) ICC RPE ‘the counsel shall have the opportunity to exercise the rights of the person concerned’.

⁹⁵ Uganda, DRC, CAR, and Mali.

⁹⁶ Côte d’Ivoire.

⁹⁷ E.g., Italian Criminal Code, Article 378 (assistance to evade investigations or escape from arrest).

⁹⁸ E.g., Canadian Criminal Code, Section 23 (1) ‘An accessory after the fact to an offence is one who, knowing that a person has been a party to the offence, receives, comforts or assists that person for the purpose of enabling that person to escape’.

⁹⁹ E.g., United Kingdom The offence can be either charged as a common law offence or under statutory law (*Assisting an Offender* - section 4(1) Criminal Law Act 1967).

¹⁰⁰ Lately, ICC-ASP/12/35, *Report of the Court on cooperation*, para. 21, dated 9 October 2014.

¹⁰¹ *Supra*, para. 47.

continue to represent a threat and an obstacle for the achievement of peace and stability in the areas affected, as well as to avoid retribution and redress for victims.

67. Consideration for the adoption of isolation policies should involve an assessment on the quality and condition of the fugitive, the short and long term expected results, as well as of the political and operational effects of such policies.

68. The advantages of isolation are most visible in instances where the challenges for executing an arrest are dependent on

- (a) The high level position of the individuals. In these cases (e.g., Heads of States, Ministers, high ranking military) isolation is expected to provoke over time a diminished authority of the fugitives. In turn, this would progressively erode the base of support of the individuals, as their inner circles or political supporters realize that fugitives would become a liability, more than an asset. In the medium to the long run, this might result in the loosening of the grip on power, and finally in the fugitives to be toppled from power. As a consequence, major obstacles from carrying out the arrest would be removed, provided that adequate pressure is maintained on the State where the fugitive is located,
- (b) The existence of military networks of support, as it is for armed groups. The removal from the ground of the armed force granting security to fugitives can be facilitated by military operations, technical means (e.g., enabling affected populations to timely communicate), and reward for justice programmes.

69. However, the isolation of fugitives might also bring disadvantages and, in particular, the risk that important opportunities for carrying out arrests would be lost. As the final objective of an arrest warrant and supporting techniques and policies is that the individual sought is apprehended and brought to justice,¹⁰² it should be in first place attempted to achieve results by keeping operations strictly secret. In that regard, measures such as limiting the ability of accused to travel and making the pressure of arrest operations apparent might effectively delay the execution of arrests. Fugitives would be forced to further go into the hiding or shield themselves within the safety of the environment where they firmly hold the reins of their power, be it because of political, military, economic or other supporting networks. Additionally, admission restrictions might not be effective, if assumed identities are available.

70. By weighing these opposite elements, the implementation of a policy of isolation of fugitives seems to be subject to the following:

- (a) Arrests should be pursued first and foremost as technical operations. Chances of enforcement might be increased if arrest warrants are kept under seal,
- (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.

3. Measures

71. When all the conditions indicated above exist, the isolation of the accused should be included in the relevant strategies at the regional, situation and case levels, and implemented by actions 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,

¹⁰² *Supra*, para. 14.

- (d) *Proceedings*, i.e. within the relevant strategies, consider:
- (i) Conducting the confirmation of charges in absentia - when arrest warrants have been outstanding for a prolonged period;
 - (ii) Joint referrals by the situation Country and neighbouring States; and
 - (iii) Not notifying arrest warrants to the relevant State, until the accused is firmly high in the echelons of power.

Recommendation 3

72. It is recommended that policies of marginalization of fugitives be only implemented within individualized strategies that take primarily into account the prospects of enforcing arrest warrants in the short term through technical operations, and without disclosing the existence of the restrictive order. In cases where this does not appear possible, sanctions and avoidance of non-essential contacts should be applied, and the relevant actors might consider enabling a monitoring of the implementation of such policies.

B. Political support

1. Practices

73. Support for international jurisdiction has been provided throughout their existence, in variable degrees. The UN established or mandated jurisdictions have benefitted and continue to take advantage either of Chapter VII authority or of the variety of structures and initiatives through which the UN performs its mandates. Differently, as a treaty based organization, the ICC relies on States Parties to ensure that political support and other forms of assistance are provided both on an institutional basis, including through the Assembly, and on a need basis, depending on the challenges the Court faces in the conduct of its operations. The reaction of the Assembly and States Parties to the challenges of cooperation has been growing in recent years, and efforts are being made to structure the efforts of all actors to achieve the enforcement of arrest warrants. Apparent synergies with actors in the international community - in relation to partially overlapping mandates or common interests - and the civil society have been occasionally exploited.

(a) Public support and policies

74. Initiatives of political support for the ICC and the enforcement of its arrest warrants have been publicly undertaken by States Parties, both multilaterally and bilaterally. The Assembly has reflected and structured this approach, and public statements are delivered at the ASP sessions and on other significant occasions, calling for cooperation with the Court, in particular in the area of arrests. Non-States Parties as well have been publicly pledging cooperation with the ICC. National and regional pro-ICC policies have been developed and implemented including by stipulating agreements with other States and carrying out démarches. The execution of arrest warrants is also raised at the bilateral level with relevant States.

(b) United Nations

75. The UN Security Council supported the enforcement of ICTY arrest warrants with determination, and effectively demanding States under an obligation to do so, to comply with the Tribunal's orders.¹⁰³ Ad hoc Tribunals' Prosecutor and Presidents have regularly reported to the Council the progress achieved. Instead, while the ICC Prosecutor has constantly reported the challenges faced for the implementation of the referral resolutions of the situations in Darfur/Sudan and Libya including, more recently, funding matters, concrete follow-up support of the Council has been missing.

¹⁰³ UNSC resolution 1207 (1998): "Condemns the failure to date of the Federal Republic of Yugoslavia to execute the arrest warrants issued by the Tribunal against the three individuals ["three of Vukovar"] and demands the immediate and unconditional execution of those arrest warrants, including the transfer to the custody of the Tribunal of those individuals".

76. The relationship between the UN and the ICC has greatly assisted the Court, including in areas of cooperation potentially relevant to arrest strategies. Peacekeeping operations provide important opportunities of a political, logistical and operational nature. The UN operations have secured assistance to the ICC¹⁰⁴ in several of its situations, either with agreed in advance modalities,¹⁰⁵ or through assistance provided on different bases.¹⁰⁶ However, the scope of UN peacekeeping cooperation in the area of arrest and surrender remains dependent upon a clear mandate. Overall, the ICTY largely benefitted of the assistance of NATO-led multinational forces,¹⁰⁷ which enabled the arrest and surrender of a significant number of accused¹⁰⁸ although, when it came to senior accused, most commanders in the field had interpreted restrictively their mandate.¹⁰⁹ The current mandate of MONUSCO includes an authorization to assist the DRC to carry out arrests and cooperate with the ICC¹¹⁰

(c) Implementing measures

77. The absence of an adequate national legal framework has been at times a challenge in the cooperation of Member States with the *ad hoc* Tribunals, including for the enforcement of arrests. At least on one occasion, this situation was only remedied by the voluntary surrender of the accused to ICTR. At the ICC as well, compliance with cooperation is only addressed at the level of execution of the Court's requests. However, as States Parties are under a positive obligation to ensure that they have in place appropriate measures to enable them to address requests for cooperation¹¹¹ the absence of such measures might also trigger relevant findings by the Court¹¹² and ASP procedures of non-cooperation.¹¹³ As such judicial and political processes only address the unwillingness of States to cooperate on a case-by-case basis, their effectiveness remains to be proven. No overall verification mechanism¹¹⁴ for the fulfillment of obligations exists under the

¹⁰⁴ ICC-ASP/12/42, *Report of the Court on the status of ongoing cooperation between the International Criminal Court and the United Nations, including in the field*, 14 October 2013.

¹⁰⁵ Memorandum of Understanding (MoU) exist with: MONUC - United Nations Mission in the Democratic Republic of Congo, and thereafter with MONUSCO - United Nations Organization Stabilization Mission in the DRC; UNOCI - United Nations Operation in Côte d'Ivoire; MINUSMA -United Nations Multidimensional Integrated Stabilization Mission in Mali.

¹⁰⁶ E.g., through UNON (United Nations Office at Nairobi), and BINUCA (United Nations Integrated Peacebuilding Office in the Central African Republic).

¹⁰⁷ NATO-led Stabilization Force (SFOR) was authorized to execute arrest warrants in the territory of Bosnia and Herzegovina based on Article VI(4) of Annex 1-A to the Dayton Peace Accord, as implemented by the NATO North Atlantic Council resolution of 16 December 1995: [...] having regard to the [UNSC resolutions 827 and 1031 and Annex 1-A] IFOR should detain any persons indicted by the [ICTY] who come into contact with IFOR in its execution of assigned tasks, in order to assure the transfer of these persons to the [ICTY]". At the UNGA, on 4 November 1997, Russia "objected to an interpretation of the mandate of IFOR that would endow the multinational forces with police functions".

¹⁰⁸ The first of 21 arrests was executed in July 1997, while the predecessor NATO-led Implementation Force (IFOR) did not execute arrests. However, the policy of IFOR had been of cooperation with and support to ICTY, including on occasion by providing logistic assistance in the transport of detainees (NATO Press release, 14 February 1996).

¹⁰⁹ Serge Brammertz, *Arresting fugitives from International Justice and Other Aspects of State Cooperation: Insights from ICTY Experience*, keynote address to the ASP/11, on 16 November 2012, page 11 (referred Karadžić and Mladić).

¹¹⁰ UNSC resolution 2098(2013), 28 March 2013, establishes an Intervention Brigade under the military command of MONUSCO (OP9) and authorizes the mission "to take all necessary measures to [...] support and work with the Government of the DRC to arrest and bring to justice those responsible for war crimes and crimes against humanity in the country, including through cooperation with States of the region and the ICC" (OP12). The resolution also requests DRC "to arrest and hold accountable those responsible for war crimes and crimes against humanity in the country, including Sylvestre Mudacumura, and stresses the importance to this end of regional cooperation, including through cooperation with the ICC".

¹¹¹ Article 88 of the Rome Statute: "States Parties shall ensure that there are procedures available under their national law for all the forms of cooperation which are specifically required under this Part [9]".

¹¹² Article 87 of the Rome Statute.

¹¹³ Article 112(2)(f) of the Rome Statute.: "The Assembly shall [...] consider pursuant to article 87, paras 5 and 7, any question

relating to non-cooperation". Ibidem, (f)"[and] perform any other function consistent with this Statute or the Rules of Procedure and Evidence"; ICC-ASP/10/37, *Report of the Bureau on potential Assembly procedures relating to non-cooperation*, 30 November 2011.

¹¹⁴ Under Art. 112(2)(c) of the Rome Statute., the ASP is called to "consider the reports and activities of the Bureau ... and take appropriate action in regard thereto" and (g) to "perform any other function consistent with this Statute". Which, although vague, could be used as a basis for any mechanism the ASP decides to establish.

Statute¹¹⁵ that would allow to appraise the performance of the Statute also in its implementation by States Parties¹¹⁶ with a preventive approach,¹¹⁷ i.e. before specific instances of cooperation arise. The existing monitoring mechanism is exclusively based on reporting from willing States Parties,¹¹⁸ while the Legal Tools Database has set the bases for a comprehensive and objective review. Issues on the preparedness of States for responding to requests of cooperation might also emerge after a self-referral or acceptance of jurisdiction has been filed. A proactive engagement of interested States could be requested at an earlier stage, with regards to the modalities, means and conditions to be fulfilled in order for the cooperation obligation to be complied with.

78. The need for adequate implementing measures also relate to the area of complementarity, i.e. to the adoption of substantive criminal law implementing legislation, which is normally required irrespective of the legal system.¹¹⁹ In that regard, depending on national practice, the absence in statutory law of an explicit criminalization of the core crimes under the Rome Statute might also represent an obstacle to the enforcement of arrest warrants as it might raise a dual criminality issue¹²⁰ under extradition procedures, if the problem is matched with the absence of appropriate implementing legislation as far as cooperation procedures are concerned.

(d) Non-cooperation procedures.

79. At the ad hoc Tribunals non-cooperation of Member States in general and obligated States, in particular, was routinely brought to the attention of the Security Council, as well as to other Organizations and States that had enacted conditionality policies.¹²¹ Specific calls to cooperation were addressed by the Council to relevant States¹²² while, to become effective, required to be supported with ongoing diplomatic engagement and strong political pressure by Member States. At the ICC, the Assembly has established formal and informal procedures¹²³ to implement its oversight functions.¹²⁴ Steps have been undertaken on these bases, including with public and diplomatic actions by the ASP President.¹²⁵

¹¹⁵ The establishment of such a mechanism for the implementation of an international instrument would apparently foster a wider participation of states and their ratification process through confidence building, information sharing, awareness raising and technical assistance. However, its inclusion in a treaty is rather rare, account taken of the interest of states to maintain their sovereign right to keep under control the means, procedure and timing of implementing international law provisions, in accordance with national interests. Examples of effective verification mechanisms for the implementation of treaty obligations are available in the field of disarmament, e.g.: the “safeguard system” under the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT), as revamped by the 1997 Model Additional Protocol; the comprehensive and robust “verification” system established by the 1993 Convention of the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction.

¹¹⁶ Art. 112(4) of the Rome Statute only addresses evaluation as an oversight function of the Assembly over the Court.

¹¹⁷ *Concept paper*, paras 6 to 12.

¹¹⁸ ICC-ASP/5/Res.3 of 1 December 2006, Annex I, *Plan of action for achieving universality and full implementation of the Rome Statute*.

¹¹⁹ Both in monist and dualist States. For the practical effects of the distinction, ICRC, *The Domestic Implementation of International Humanitarian Law: a Manual*, 2013, p. 24

¹²⁰ The double criminality requirement (extradition or mutual legal assistance may only be sought if a conduct is criminalized in both the legal systems of the requesting and of the requested state) is applied in all bilateral agreements and is also repeated in the most recent multilateral Conventions concerning serious crimes. E.g., Art. 18(9) Convention against Transnational Organized Crime, New York, 15 November 2000; Art. 18(1)(f) Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Strasbourg, 8 November 1990. The latter, however, allows for the refusal of assistance in the absence of the required double criminality only in the limited case of a request of assistance entailing coercive acts

¹²¹ *Supra*, paras 27-37.

¹²² S/RES/1503 (2003), 28 August 2003: “calls on all States, especially Serbia and Montenegro, Croatia, and Bosnia and Herzegovina, and on the Republika Srpska within Bosnia and Herzegovina, to intensify cooperation with and render all necessary assistance to the ICTY, particularly to bring Radovan Karadzic and Ratko Mladic, as well as Ante Gotovina and all other indictees to the ICTY and calls on these and all other at-large indictees of the ICTY to surrender to the ICTY; Calls on all States, especially Rwanda, Kenya, the Democratic Republic of the Congo, and the Republic of the Congo, to intensify cooperation with and render all necessary assistance to the ICTR, including on investigations of the Rwandan Patriotic Army and efforts to bring Felicien Kabuga and all other such indictees to the ICTR and calls on this and all other at-large indictees of the ICTR to surrender to the ICTR”. See also S/RES/1534 (2004), 26 March 2004; S/RES/1932 (2010), 29 June 2010

¹²³ ICC-ASP/10/37, *Report of the Bureau on potential Assembly procedures relating to non-cooperation*, 30 November 2011.

¹²⁴ *Supra*, para. 65.

¹²⁵ E.g., on occasion of Al-Bashir visits to Nigeria (July 2014) and Chad (February 2013).

(e) Role of the civil society

80. The role of civil society, in particular including NGOs and Academia, in support of international jurisdictions has been invaluable, as they have contributed to a conducive cultural environment or even promoted the establishment of international courts. At the ICC a remarkable number of NGOs, both in their individual capacity and under the umbrella of the Coalition for the ICC (CICC), conduct passionate and effective campaigns in support of cooperation, including by supporting arrest strategies.¹²⁶ Research institutions around the world also contribute to advancing the cause of the ICC and even promoting changes in areas which have proven to represent a challenge for the institution.¹²⁷

81. The contribution of NGOs in promoting arrests is significant, as they are an integral part of early warning practices,¹²⁸ which have seen cooperative efforts with the States, the Assembly and the Court. On a number of occasions, announced visits of Al-Bashir in other States have been revealed beforehand, leading in some cases to the cancellation of the visits or to their abrupt termination. NGOs have also made use of the available legal framework to file actions before domestic jurisdictions, in order to promote the arrest of Al-Bashir when travelling to Kenya (2010),¹²⁹ Nigeria (2011 and 2013),¹³⁰ and RDC (2014).¹³¹ The African Court on Human and People's Rights has also been seized of the matter, with a request for an advisory opinion¹³² on the relationship between the obligations under the Rome Statute and the African Charter, and the consequent effect on the execution of the arrest warrants issued by the Court.¹³³

2. Lessons learned

82. The current practice of dealing with instances of lack of cooperation mainly at the execution stage of Court's requests is a process which requires intensive efforts by a number of actors, presents an uncertain outcome, and creates the potential for divisive cases between States and the Court, as well as within the Assembly.

83. The multi-faceted support for the ICC mandate by the different actors at the international and national level presents important synergies that have the potential to multiply the effectiveness of the efforts. Political support and diplomatic engagement should be as structured as possible, and inputs from the civil society should be timely fed in the process aimed at ultimately resulting in the enforcement of the arrest warrants. From the same perspective, legislative or other obstacles to cooperation by States Parties should be identified and addressed at the appropriate technical, diplomatic and political level, including with an appropriate verification mechanism. In cases of referrals or acceptance of jurisdiction, States should also provide a sufficient proactive engagement to fulfill the demands of cooperation.

84. As to the UNSC referrals or other decisions relevant to the ICC (including peacekeeping and sanctions), it appears that the absence of any mechanism or procedure for

¹²⁶ See Human Rights Watch, *Memorandum for the twelfth session of the ASP*, November 2013, pages 23-28.

¹²⁷ *Inter alia*, University of Amsterdam, *Expert initiative on promoting effectiveness at the International Criminal Court* (2014).

¹²⁸ Such efforts include the *Bashir Watch Coalition*, an international advocacy campaign aimed at achieving the execution of the arrest warrants issued by the ICC in the situation of Darfur/Sudan.

¹²⁹ On 28 November 2011, the High Court of Kenya granted the application by *ICJ Kenya* (Public Interest Litigation filed on 18 November 2010) concerning the enforcement of the ICC arrest warrants against Al-Bashir. The decision on the appeal filed by the Government of Kenya is still pending (*Kenya Section of the International Commission of Jurists v Attorney General & Another* [2011]).

¹³⁰ On the occasion of a visit of Al-Bashir to Nigeria in July 2013, the Nigerian CICC and others filed a case asking the Federal High Court to issue an arrest warrant against Al-Bashir, based on the obligation of Nigeria under the Rome Statute and the Vienna Convention to arrest an ICC fugitive present on the territory (*NICC vs. Federal Republic of Nigeria*). After Bashir left Nigeria, the same plaintiff sought court's orders compelling the President of Nigeria to arrest Bashir upon re-entry on the national territory, and a provisional arrest warrant against the latter.

¹³¹ On the occasion of a visit in Kinshasa, to attend the 17th Summit of COMESA, on 25-27 February 2014.

¹³² African Charter on Human and People's Rights (ACHPR), Article 4 of the Protocol for the Establishment of the African Court on Human and People's Rights; Rule 68 of the Rules of the ACTHPR.

¹³³ The request by the Nigerian CICC & Others is on whether there is prevalence of Rome Statute's obligations over the AU resolution calling for non-cooperation with the Court and, in the affirmative, whether all States Parties who are Members of the African Union have an overriding obligation to arrest and surrender Al Bashir, when present in their territories.

their preparation and follow-up in consultation with the ICC does not support the effectiveness of the decisions of both the Council and of the Court. Instead, the establishment of such a procedure would allow to define the responsibilities of the Court and of the Council, and identify the modalities, means and other conditions to fulfill in order for referrals to become effective, including through the adoption of clearer resolution language, as appropriate. Additionally, as referrals are made to the Prosecutor,¹³⁴ it is only the Prosecutor who has been reporting to the Council on developments in the relevant situations. These arrangements correspond to the Prosecutor's independent mandate as regards investigation and prosecution. However, it should be considered whether, based on the UN-ICC Relationship Agreement, different matters in the implementation of UNSC referrals should instead be addressed by those who bear the relevant responsibilities within the Rome Statute system, upon invitation.¹³⁵ Consequently, while referrals are made to the Prosecutor, once the situation is before the Chambers it appears that the responsibilities to be discharged by the ICC include those of its President, who might be called to keep the Council informed on institutional and judicial developments, as it has been the case for the Presidents of the ad hoc Tribunals. Similarly, matters falling outside the exclusive independent mandate of the Court, including when related to resources and political conditions in support of the Court, would also appear to fall squarely within the mandate of the Assembly and its President. Based on the Council's practice, the President of the Assembly might as well be called to address the Council, including at the request of a Member State and on behalf of the ASP.¹³⁶ Finally, it should be considered the efficient alignment of the UN sanctions regimes in situations falling under the ICC jurisdiction with the requirements of the arrests and surrender strategies.

3. Measures

85. Based on the above practices, the following means appear relevant to ensuring wider support to the enforcement of arrest warrants:

- (a) Political¹³⁷ and diplomatic,¹³⁸ including¹³⁹
 - (i) Public statements¹⁴⁰ and commitments, in the UN and other multilateral bodies,

¹³⁴ Article 13(b) of the Rome Statute: "The Court may exercise its jurisdiction [...] if a situation [...] is referred to the Prosecutor by the Security Council acting under Chapter VII" of the UN Charter.

¹³⁵ Relationship Agreement between the International Criminal Court and the United Nations, Article 4(3): "Whenever the Security Council considers matters related to the activities of the Court, the President of the Court [...] or the Prosecutor [...] may address the Council, at its invitation, in order to give assistance with regard to matters within the jurisdiction of the Court."

¹³⁶ *Provisional Rules of Procedure of the Security Council (S/96/rev.7)*, Rule 37: "Any Member of the United Nations which is not a member of the Security Council may be invited, as the result of a decision of the Security Council, to participate, without vote, in the discussion of any question brought before the Security Council when the Security Council considers that the interests of that Member are specially affected [...];" Rule 39: "The Security Council may invite [members of the Secretariat or] other persons, whom it considers competent for the purpose, to supply it with information or to give other assistance in examining matters within its competence". It should be noted that the practice of the Council has been to extend invitations as appropriate, irrespective of a reference to the relevant Charter articles. See *Repertoire of the Practice of the Security Council*, 17th Supplement, 2010-2011, page 49: "following its previous practice, the Council invited non-members to participate in its meetings. These invitations were extended either under the "relevant provisions" of the Charter without an explicit reference to a Rule, or under rule 37 or rule 39 [...] Member States continued to be invited under rule 37, while representatives of [...] regional and other intergovernmental organizations, or other invitees [...] were invited under rule 39"; page 50: "Member States invited under rule 37 spoke occasionally in other capacities, such as on behalf of regional or international organizations, or groups of States" and "there was no instance [...] where a request from a Member State to participate in a Council meeting was put to a vote or denied at a public meeting"; "invitations under rule 39 were extended to representatives of Member States on an exceptional basis, only if their participation was in a role other than as representative of their State, for example [...] as representatives of certain organizations".

¹³⁷ 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". *Concept Paper*, para. 23(i).

¹³⁸ *Concept Paper*, para. 23(ii).

¹³⁹ *Concept Paper*, para. 23(i).

¹⁴⁰ ICC-ASP/6/Res.2, Annex II, *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".

- (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,¹⁴¹
 - (vii) Démarches¹⁴² and summoning Ambassador of a concerned State,
 - (viii) Pro-ICC clauses in relevant agreements,¹⁴³
 - (ix) Security Council matters, 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 peacekeeping forces to include assistance for the enforcement of arrest warrants, when appropriate;¹⁴⁴
 - 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.
- (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.

¹⁴¹ 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.

¹⁴² 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.

¹⁴³ 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.

¹⁴⁴ Including mandates for UN peacekeeping forces to include assistance in enforcing ICC arrest warrants *Supra*, para. 64. See also ICC-OTP, *Contribution paper*, 2013, paras 14-15.

Recommendation 4

86. It is recommended that a twofold approach be followed, with structured and integrated measures of political and diplomatic nature that address the compliance with the obligations under the Rome Statute first at the preventive stage (monitoring of implementing measures), and then at the level of specific instances where requests of the Court appear to have been turned down.

C. Operations

87. This section refers to areas where actions deployed by the relevant actors, including governance, structures, and policies, impact on the conduct of the operations leading to arrests.

1. Practices

88. The legal, political and diplomatic framework¹⁴⁵ creates the environment conducive to the successful conduct of arrest operations. However, the practical structures and means for achieving that is a matter addressed at a different level, where a combination of tools have proven to be key for translating the positive overall environment into concrete enforcement actions. Such measures have extensively built upon the enforcement practices developed at national level, where substantial experience has been gained in the arrest of individuals protected by powerful economic, political, and armed networks, often entrenched in wide areas of the society (e.g. organized crime and terrorism) and supported by corrupt practices. In that regard, the most important element in the success of the Tribunals' arrest strategies appears to have been their practical approach, with the development of their own operations' capacity, in parallel with efforts aimed at achieving compliance with the cooperation obligations. Such in-house capacities, by putting in place flexible and effective practices, have largely offset the shortcomings deriving from the available level of the rule of law structures on the ground.

(a) Tracking

89. The Tribunals have all recognized that investigations on fugitives are core activities within the mandates of the OTP and, although important synergies with evidence related activities were found, locating a wanted person is a specific activity, which requires specifically trained resources. As a consequence, the Tribunals have prioritized tracking activities, which have been conducted through special Units.¹⁴⁶ These have been directly responsible for a substantive part of the arrest warrants enforced. At the ICTR, a *Tracking Unit* was established in 1997 and it achieved the arrest of 83 fugitives in 27 States, out of the 84 individuals brought before the justice of the Tribunal, and a total of 93 fugitives. The ICTR-MICT continues to retain the *Tracking Unit* for the apprehension of the remaining 9 fugitives. At the SCSL a *Criminal Intelligence Unit* was also established. At the ICTY a *Fugitive Tracking Unit* established in 1999 intensively worked on the ground and supplied information to authorities and the Prosecutor, leading to successful outcome in a number of cases.. Experience had also shown that such capacity should have been put in place before arrest warrants were made public and suspects went into hiding.¹⁴⁷ At the Tribunals, such capacity was initially established as a small Unit, whose minimal structure consisted in a Head of Unit, two investigators deployed in the field, one interpreter, and one analyst posted at Headquarters.

90. Such Tracking Units enabled the jurisdictions to conduct their own activities focused on the location and apprehension of fugitives by identifying and investigating leads to possible location:

- (a) Intelligence, gathered from different sources, including cooperative Government services, as well as through its own capacity, which also enabled screening of denial

¹⁴⁵ *Supra*, paras 27-74.

¹⁴⁶ ICTY-ICTR-SCSL-ECCC-STL, *Prosecuting Mass Atrocities: Lessons Learned from the International Tribunals*, Practice 72, paras 351-356.

¹⁴⁷ Serge Brammertz, *supra*, footnote 110, pages 5-10.

of information by local Agencies, as well as developing high level insider witnesses. The Unit also conducted financial tracking with the purpose of locating assets and restraining the ability the fugitives to stay at large, as well as to ensure the other relevant purposes (availability of resources against legal representation and reparations);

- (b) Sources and informants, recruited and cultivated directly by the Unit;
- (c) Monitoring and coordination of the activities of local and other relevant agencies.

91. Although differences existed, based on the regional context and the availability to the Tribunals of other means conducive to the enforcement of arrest warrants, the effectiveness of the Units has been assessed as being the result of the following main factors characterizing a lean and flexible organization:

- (a) Direct chain of responsibility, from the Head of the Unit to the Prosecutor and through the Chief of Investigations, depending on the sensitivity of the matter and of the need to attract trust of the counterparts;
- (b) Staff with a strong professional background in domestic jurisdictions (law enforcement and intelligence), as to easily establish a colleague-type relationship with relevant agencies, but also trained and experienced with the context they have to operate into;
- (c) Creative, result oriented working methods developed by the Unit itself;
- (d) Analysis capacity of the information gathered, based at Headquarters;
- (e) Operations conducted on the field, which would ensure that contacts are adequately developed and maintained both with the relevant circles and the authorities, and that surveillance and other sensitive activities are efficiently and directly conducted;
- (f) Availability of a fund for special operations, including the management of confidential sources, within the appropriate regulatory and control framework;
- (g) Relyance on in-house investigation for the location and movement of fugitives, and involvement of local authorities whenever possible. Where local authorities are willing to cooperate, dedicated resources might not be available or prioritized on domestic matters. In such instances, the Unit needed to be prepared to provide the local authorities with information at an arrest-ready operation level;
- (h) Relationship with local authorities supported by high level diplomatic engagement conducted by the Prosecutor, including with the support of relevant Embassies in Countries where fugitives were located;
- (i) Preparedness for assisting the local authority with appropriate equipment.

92. In national jurisdictions, tracking units or teams might only be established permanently when the most challenging situations are usual (e.g., organized crime and terrorism).¹⁴⁸ More frequently, special tracking staff is deployed a case-by-case basis, including when established to arrest individuals sought for serious international crimes.¹⁴⁹ States also acknowledge that successful tracking requires: dedicated and well trained resources; special investigative techniques (e.g., surveillance and wire-tapping); strong coordination of all the relevant Agencies; liaison with international counterparts through a colleague-type relationship, based on common background. Domestic jurisdictions seek arrest from other States by providing detailed information leading to the location of the fugitive and the arrest, also participating with their own arrest staff to the operations. The dossier handed over to the requested authority also contains sufficient and updated information, including on the whereabouts, supporting networks, connections, and personal details.¹⁵⁰ In any case, the requested Authorities have normally difficulties in prioritizing the use of their resources in order to meet the requested activities. As a result, a thorough

¹⁴⁸ *Fugitive Action Search Teams* (FAST) are established in EU Member States, and connected in a European Network (ENFAST).

¹⁴⁹ *Fugitive Tracking Unit* established in Rwanda (2007). *Infra*, paras 82 and 89.

¹⁵⁰ See also, *Lessons Learned from the International Tribunals*, *supra*, footnote 35, Practice 69: "The arrest team must have adequate identification information [...]".

and proactive investigation of leads by the requesting Authority is reported as being of great assistance to the requested States in providing the expected cooperation. Some domestic legislations have limitations as to conducting invasive investigation (e.g., wiretapping and electronic surveillance) on the fugitives' network structures. Similar limitations on financial investigations can achieve the same negative results. While at the ICC some consideration has been given to dedicate resources to tracking efforts, it appears that the priorities on investigations and prosecutions contained in the current prosecutorial strategy did not allow to also address the budgetary implications of tracking activities.

(b) Police

93. All international jurisdictions have experienced different level of cooperation depending on the resources available at the national level. Domestic jurisdictions as well consider proper training, equipment and techniques of tracking and arrest staff to be of essence, especially in complex arrest operations. Appropriate training and expertise of law enforcement personnel have greatly facilitated arrest efforts, as international coordination at police level has. In that regard, active participation of police forces in international police networks facilitates exchange of information on specific cases as well as on best practices. Training programmes at national and regional level also promote police professionalism.¹⁵¹ The appointment of police liaisons also expedites and improves the efficiency of arrest procedures. The availability of rewards has also been successfully exploited in international cases.¹⁵²

(c) INTERPOL

94. As the largest police organization,¹⁵³ INTERPOL is ideally placed to provide important opportunities, which have been largely utilized by international jurisdictions, as they routinely are by its Members, in the areas of tracking,¹⁵⁴ communication, and capacity building. At ICTR, 9 fugitives have been located or arrested with the assistance of INTERPOL in the period 2007-2011. INTERPOL's experience identify the following good practices:

- (a) Identify, investigate and develop leads, providing the requested State with sufficient information to assist in providing the cooperation required. To this end, new leads should be actively sought, including with investigations extended to the fugitive's network structure by means of special techniques (surveillance, wire-tapping) and financial investigations (conducted as early as possible, to detect and identify all the assets of the suspects);
- (b) Red Notices should be requested for all fugitives, as they are circulated in all 190 Members of the Organization and are considered a valid request for a provisional arrest for extradition purposes. Differently from requests emanating from its Member States, INTERPOL's legal framework does not prohibit the Organization to assist international jurisdictions in cases that have a political, military, religious or racial character.¹⁵⁵ Hence, Red Notices can be requested and issued also against individuals who enjoy immunities before national jurisdictions¹⁵⁶ while, within the

¹⁵¹ E.g., Organization of American States (OAS), Department of Public Security, Strategic Plan 2013-2018, *Inter-American Network for Police Development and Professionalization*. The "West Africa Coast Initiative" launched (2009) by the United Nations Office for West Africa (UNOWA) provides advise, equipment, technical assistance and specialized training.

¹⁵² *Supra*, Special programmes, para. 42.

¹⁵³ 190 States are Members of INTERPOL.

¹⁵⁴ Location and arrest assistance.

¹⁵⁵ International Criminal Police Organization-INTERPOL, *Constitution (I/CONS/GA/1956, adopted in Vienna, June 1956)*, Article 3: "It is strictly forbidden for the Organization to undertake any intervention or activities of a political, military, religious or racial character". In 1994, INTERPOL General Assembly considered, with regard to ICTY, the issue whether the Organization should get involved in the fight against serious international crimes, and concluded that Article 3 was not a priori an obstacle to collaborate in this field. AGN/63/RES/9. In 2004, when approving the Cooperation Agreement with the ICC, the INTERPOL General Assembly explicitly stated that the Rome Statute core crimes fall outside the purpose of Article 3 of INTERPOL Constitution. AG/2004/RES/16.

¹⁵⁶ To date, the ICC has not requested Red Notices for 4 out of its 12 fugitives, including Al-Bashir, Mudacumura, Hussein, Banda, and Simone Gbagbo.

INTERPOL's legal framework, such requests would still be considered on a case-by-case basis;

- (c) Training activities for law enforcement officials of countries where fugitives might be located;
- (d) Communications efforts should include:
 - (i) Make Red Notices visible also through the ICC website,
 - (ii) Ensure that Red Notices exist for any fugitives advertised in the War Crimes Reward Programme,
 - (iii) Launch public campaign strategies,¹⁵⁷ and have a joint poster advertising wanted persons,¹⁵⁸ which all could result in the possible submission of leads and tips,
 - (iv) Establish a link on the requesting authority's website with the INTERPOL wanted persons page.
- (d) **Technical Assistance**¹⁵⁹

95. Although technical assistance to international jurisdictions has not been reported, some domestic jurisdictions might take advantage of trained staff¹⁶⁰ provided on a case-by-case basis or within a capacity building programme.¹⁶¹ At ICTR, joint operations have been conducted by the international investigators together with national police staff.¹⁶²

(e) **Coordination**

96. At the ICTY, situation Countries have established internal coordination mechanisms for tracking fugitives at the technical and operational level,¹⁶³ as well as Entities intended to facilitate the relationships between the national and international jurisdictions.¹⁶⁴ At the ICC, only one State Party has reported the establishment of a national coordination mechanism for authorities involved in cooperation procedures, also depending on the high volume of requests received by the Court. The ASP is also considering the establishment of a coordinating mechanism of national authorities dealing with cooperation.¹⁶⁵ At the regional level, States have also experienced the advantages for all interested jurisdictions of legal frameworks¹⁶⁶ that ensure enhanced cooperation and assistance, at the investigative and judicial,¹⁶⁷ as well as at the police level.¹⁶⁸ The establishment of leaner regimes¹⁶⁹ for

¹⁵⁷ E.g., the "Rwandan Genocide Fugitives Project" established by INTERPOL Fugitive Investigative Support Sub-Directorate in 2004. In July 2014, joint efforts of ICTR-MICT/Tracking Unit, Rwanda National Public Prosecution Authority/Genocide Fugitive Tracking Unit, INTERPOL Fugitive Investigative Support Sub-Directorate, U.S. War Crimes Rewards Programme (Department of State-Office of Global Criminal Justice), FBI and Rwandan National Police, led to the launch of the International Fugitive Initiative, targeting the nine MICT-ICTR remaining fugitives.

¹⁵⁸ An ICTR-INTERPOL joint poster was disseminated in 2008 and 2010, and regularly updated.

¹⁵⁹ ICC-ASP/6/Res.2, Annex II, *Recommendations*, Recommendation 20: "All States Parties should consider whether it would be possible, 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".

¹⁶⁰ *Concept Paper*, para. 23(iv).

¹⁶¹ Including judiciary, prosecution, police, security, administration, and penitentiary facilities.

¹⁶² *Joint Task Force*, with the Kenya Police; *Fugitive Tracking Unit*, in Rwanda.

¹⁶³ E.g., *Action team*, in Serbia.

¹⁶⁴ Croatia – *Council of Cooperation*; Serbia – *National Council for Cooperation*.

¹⁶⁵ ICC-ASP/13/29, [Draft] *Report of the Bureau on cooperation*, Annex II, "Report of the Feasibility study on the establishment of a coordinating mechanism of national authorities dealing with cooperation", and its Appendix.

¹⁶⁶ *Good practice in mutual legal assistance in criminal matters*, EU Joint Action 98/427/JHA of 29 June 1998; *European crime prevention network*, EU Council Decision 2001/427/JHA of 28 May 2001.

¹⁶⁷ *Eurojust, with a view to reinforcing the fight against serious crime*, established by EU Council Decision 2002/187/JHA of 28 May 2001 and lately reviewed by Council Decision 2009/426/JHA of 16 December 2008; *Investigation and prosecution of genocide, crimes against humanity and war crimes*, Council Decision 2003/335/JHA of 8 May 2003; *European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes*, Council Decision 2002/494/JHA of 13 June 2002; *Joint investigative teams* (replaced by the EU Convention on Mutual Assistance in Criminal Matters of 29 May 2005), Council Framework Decision 2002/465/JHA of 13 June 2002; *Creation of a European Judicial Network*, Joint Action 98/428/JHA of 29 June 1998; *Framework for the exchange of liaison magistrates to improve judicial cooperation between the Member States of the European Union*, Joint Action 96/277/JHA of 22 April 1996. Ibero-American Network of International Judicial Cooperation (IberRed) to promote judicial and police cooperation at the national,

the enforcement of arrest warrants related to Rome Statute offenses through a strictly judicial procedure for surrender¹⁷⁰ - without the hurdles of the political phase¹⁷¹ typical of an extradition process - has also proven to be particularly effective.

(f) Information sharing¹⁷²

97. Exchanges of information¹⁷³ take place at the technical level, where enhanced police cooperation is benefitted by appropriate databases.¹⁷⁴

(g) Communication

98. Communication to relevant actors¹⁷⁵ has also proven relevant to increase awareness on the importance of carrying out arrests and, hence, facilitate the adoption of relevant policy decisions.¹⁷⁶

(h) Policies

99. In international jurisdictions, the practice of (“unsealed”) arrest warrants, although often used as a last resort measure, has escalated the matter at the higher end of the cooperation issue.¹⁷⁷ Practice of States consistently shows that unveiling the existence of a restrictive order might represent a serious impediment to enforcement, and that strict confidentiality around the matter is always of essence to achieving arrests. A notable exception is represented by the need to obtain judicial cooperation to enforce an arrest warrant in other jurisdictions, through the use of INTERPOL Red Notices. The structure of the OTPs in the Tribunals has prioritized the role of their Investigative branches, while at the ICC the Jurisdiction Complementarity and Cooperation Division (JCCD) and the Investigative Division have complementary functions that require internal coordination.

regional and international levels. See also the initiative of the African Union Commission to establish a network of prosecutors, specializing in core international crimes (presentation at the 16th meeting of the European Genocide Network, 19-20 May 2014).

¹⁶⁸ E.g., European Police Office (Europol), EU Council Decision 2009/371/JHA of 6 April 2009. Eastern Africa Police Chiefs Cooperation Organisation (EAPCCO), Comité des chefs de police d’Afrique centrale (CCPAC), Comité des Chefs de Police de l’Afrique de l’Ouest (CCPAO), and Southern African Regional Police Chiefs Cooperation Organisation (SARPCCO). INTERPOL has established a number of international cooperation agreements with Regional Organizations, including the African Union, (AU), Southern Development Community (SADC), Council of Europe, CARICC, EUROPOL, ECOWAS, ASEANPOL, CARICOM, Andean Community, OAS, Caribbean Anti-terrorism Center of the Commonwealth of Independent States (ATC-CIS), European Police College (CEPOL). Full list available at, <http://www.interpol.int/About-INTERPOL/Legal-materials/International-Cooperation-Agreements/Regional-Organizations>.

¹⁶⁹ The European arrest warrant is being progressively and steadily achieving the result of replacing the extradition procedures between EU Members States (EU Council Framework Decision of 13 June 2002).

¹⁷⁰ The term ‘extradition’ is understood to be used only to address state-to-state relations. Art. 102 of the Rome Statute. gives a clear indication of the use of terms: “surrender”, as the delivering up of a person by a state to the Court, pursuant to the Statute; “extradition”, as the delivering up of a person from one state to another, as provided by a treaty, convention or national legislation. This definition reflects the different nature of the acts and was already well used in precedents having as their common denominator the transfer of accused persons by states to entities established with jurisdictional functions under international law, as is the case of the UN ad hoc Tribunals. See Article 29(2)(e) ICTYSt. and Article 28(2)(e) ICTRSt.. Surrender is also a term used when referring to cooperation between states when, in the context of a reciprocal waiver of sovereign prerogatives, enhanced cooperation comes under consideration.

¹⁷¹ I.e., the ministerial procedure.

¹⁷² ICC-ASP/6/Res.2, Annex II, *Recommendations*, 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”.

¹⁷³ *Concept Paper*, para. 23(v).

¹⁷⁴ Including the INTERPOL “I-24/7 network” and the Schengen Information System, with the S.I.R.E.N.E. (Supplementary Information Request at the National Entries).

¹⁷⁵ *Concept Paper*, para. 23(vi).

¹⁷⁶ ICC-ASP/6/Res.2, Annex II, *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”.

¹⁷⁷ *Supra*, para. 48.

(i) **Military**

100. Only ICTY has so far benefitted¹⁷⁸ of the presence of a military NATO-led force on the ground, with a mandate to enforce arrest warrants.¹⁷⁹ However, it had also been considered that, when possible, police practices and teams, instead of military operations, should be preferred.¹⁸⁰ The mandate of the Court, where activation of the jurisdiction during ongoing conflicts might be a regular occurrence, has not so far been supported by similar measures, but the current framework for MONUSCO goes in that direction.

2. Lessons learned

101. The successful practice of the Tribunals highlights that leading the search for fugitives requires professionalism and in-house capacity, a strong chain of command, and an agile structure, able to interact swiftly and generate trust with interlocutors in the field. The Tracking Units provided the OTPs with the independent intelligence gathering capability and capacity for operating in the field that are of essence to achieving both the arrest of fugitives and the seizure of their assets, including with the submission of sufficiently developed requests to the local Authorities. As a result, operations depend to a much lesser degree by local Authorities, interaction with the latter is facilitated, and the Prosecutor is provided with strong information to support high level contacts. Deployment of tracking capacity is crucial to coordinate with local agencies and handle sensitive investigation operations, and such Units should be set up at as an early stage as possible to avoid that suspects go into hiding. Tracking Units are equally of use in situations where international staff can be deployed on the ground, and others where challenges depending either on the willingness of the State or other security conditions would require to operate in a more discrete manner. The inherent flexibility which is required of trackers would allow them to conduct operations with appropriate techniques that are not expected to raise the same challenges that would be encountered by more formal procedures. The result of the intelligence gathering, however, would put in the hands of the Prosecutor strong factual arguments to dispel misinformation and misunderstandings with her interlocutors at the political level, be them within the States subject to an obligation to cooperate, in the Security Council, or in any Organization supporting or opposing the enforcement of arrest warrants. Budgetary constraints within the ICC-OTP could require that the establishment of a Tracking Unit achieved by shifting resources between the relevant Divisions.

102. Other operational elements of an arrest strategy include making use of the opportunities offered by police coordination (including INTERPOL assets), coordination mechanisms at the national and international level, joint task forces with national police, keeping arrest warrants under seal, and taking advantage of the possible expansion of the peacekeeping forces mandates.

3. Measures

- (a) *Tracking activities*, by establishing a lean Unit in the Investigative Division, with direct reporting lines to the Prosecutor, flexible working methods, and a financial tracking capacity facilitated by the appropriate legal frameworks;¹⁸¹

¹⁷⁸ *Supra*, para. 64.

¹⁷⁹ NATO, Press Release: IFOR Assistance to the International Tribunal (February 14, 1996), available at <http://www.nato.int/docu/pr/1996/p96-026e.htm>.

¹⁸⁰ *Supra*, footnote 109, page 12.

¹⁸¹ Including extending tracking activities on the assets of family members, taking into account that abusive practices of fictitious allocation of assets are the rule rather than the exception. In that regard, it would become relevant how Regulation 84(2) of the Regulations of the Court is implemented, as far as the scope of the means relevant to the determination of the indigence of an accused for purposes of legal assistance paid by the Court are concerned. The rights of bona fide third parties are protected under Articles 77(2)(b) [imposition of fines and forfeitures], Article 93(1)(k) [judicial assistance for asset tracing, freezing and seizure], Article 109 (enforcement of fines and forfeitures), Rule 147(2) and (3) RPE [orders of forfeiture]. Practice at the other international tribunals include the assets of members of the household in the available means for indigence, which would support tracking also their assets. See *Report on different legal aid mechanisms before the international criminal jurisdictions*, ICC-ASP/7/23; *Report on the principles and criteria for the determination of indigence for purposes of legal aid*, ICC-ASP/6/INF.1; *Report on the operation of the Court's legal aid system and proposals for its amendment*, ICC-ASP/6/4/Annex I. Though, the Court maintained that "it would be an unfair burden on the

- (b) *Police*¹⁸² *training*¹⁸³ *and equipment*,¹⁸⁴ including through programmes of international assistance¹⁸⁵ and special reward for justice programmes,¹⁸⁶
- (c) *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 “diffusions”; enhanced joint communication, including with public campaigns and posters;
- (d) *Technical assistance*, on a case-by-case basis to domestic systems requiring it, including the establishment of mixed tracking Teams¹⁸⁷ or the conduct of joint operations;¹⁸⁸
- (e) *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;
- (f) *Information*¹⁸⁹ *sharing*¹⁹⁰ at technical level;¹⁹¹
- (g) *Communication*¹⁹² activities for decision-makers, at the diplomatic and political level;¹⁹³
- (h) *Policies*, including keeping the arrest warrants under seal whenever possible, and preparation of complete and execution-ready requests to local Authorities;
- (i) *Military*, with the expansion of peacekeeping forces’ mandates, when possible.

Recommendation 5

103. It is recommended that all stakeholders focus on operations as the priority area for achieving arrests. A professional Tracking Unit should be established in the short term and directly report to the Prosecutor through the Head of the Investigative Division. Operations should also be strengthened by enhanced mechanisms for coordination and cooperation at the technical level (police and prosecuting authorities) and, when necessary and possible, with the assistance of arrest mandated peacekeeping missions or multi-national forces.

finances of [...] dependants [should their assets be included] as funds which might serve to ensure representation of the applicant”. *Report of the Court on legal aid: Alternative models for assessment of indigence*, ICC-ASP/8/24, 18 September 2009, paras 21 to 26 and Annex II, Recommendation 2. See its Annex III, page 14, for the practice of other international jurisdictions in taking into account the assets of family members. See also the *Report of the Bureau on family visits for detainees*, ICC-ASP/8/42, 9 October 2009, with the annexed expert’s advise on some possible precedential effects.

¹⁸² OTP, *Prosecutorial Strategy 2009-2013*, para. 48(d): “make collaborative efforts to plan and execute arrests of individuals subject to an arrest warrant issued by the Court, including by providing operational or financial support to countries willing to conduct such operations but lacking the capacity to do so”.

¹⁸³ ICC-ASP/6/Res.2, Annex II, *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 specialized training of law enforcement personnel”.

¹⁸⁴ *Concept Paper*, para. 23(iii).

¹⁸⁵ Including availability of appropriate know how, technologies, personnel.

¹⁸⁶ 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.

¹⁸⁷ This might include, e.g., hybrid national/international teams, embedded staff, gratis personnel, or other forms of assistance, including the deployment of resources under the Justice Rapid Response mechanism.

¹⁸⁸ *Concept Paper*, para. 23(iv).

¹⁸⁹ *Ibidem*, and also *Recommendations*, 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”.

¹⁹⁰ *Concept Paper*, para. 23(v).

¹⁹¹ *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”.

¹⁹² *Concept Paper*, para. 23(vi).

¹⁹³ *Recommendations*, Recommendation 59.

V. Process forward

104. The recommendations presented in this report formed the basis for the draft Action plan prepared by the Rapporteur (Appendix III), together with the lessons learned and the measures they suggest (Appendix II). Based on the contents of the Action plan that the Assembly, the measures proposed have a different degree of readiness to be implemented. A roadmap for the different measures is also included in the Action plan.

105. The inclusive approach followed in the report requires that some of the proposed measures only be considered upon the establishment of framework strategies specific to regions, situations and cases. In particular, measures such as incentives for States and individuals will require to be addressed within such strategies. To be effective, these framework strategies will need to be established through an inclusive process, following a partnership model. Such process should take into account the role of States and of International Organizations in the different contexts, and require coordination of the different actors and implementation on a collaborative basis, without prejudice to the protection of confidentiality pursuant to the respective mandates of the same actors. Non-States Parties that exercise an influence in the context, including when Members of the Security Council, should be constructively and proactively engaged in the framework strategies. The preparation of the framework strategies should be coordinated through a network of focal points identified by all relevant actors, with diversified leads for the regions and situation specific strategies (ASP) and case specific ones (OTP). A consultation mechanism with current and/or former Prosecutors of the international Tribunals (ICTY, ICTR, SCSL) should also be established.

106. Following the priority identified in the area of operations, an ICC-Tracking Unit (“Unit”) should be set up in the short term, with a minimal structure consisting of a Head of Unit, two investigators deployed in the field, one interpreter, one analyst and financial tracker both posted at Headquarters.

107. For the purpose of establishing the Unit, a Task Force of Experts (“Task Force”) should be mandated with the preparation of all organizational elements required, including:

- (a) The appropriate legal and assurances framework, including Regulations, Practice directions, Guidelines, basic working methods, and Agreements with relevant territorial and partner States,
- (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.

108. While the Task Force will have to be established within the OTP, it is also crucial that at the startup stage it is ensured that successful and consolidated experiences from the international Tribunals are retained. As a consequence, the Task Force should include 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. The Task Force should also include relevant staff from INTERPOL Fugitive Investigative Support Sub-Directorate and other Specialized Units (War Crimes and Genocide Sub-Directorate, Anti-Corruption and Financial Crimes Sub-Directorate), as well as dedicated Teams within National authorities. The Experts in the Task Force should be employed on a pro-bono basis from the sending Institutions, when necessary with reimbursement of expenses or *per diem* regime. At the strategic level, a consultation mechanism with current and/or former Prosecutors of the international Tribunals (ICTY, ICTR, SCSL) should also be established.

109. Because of the finite objective and timelines assigned to the Rapporteur,¹⁹⁴ further steps will need to be taken to follow-up to any adopted Action plan. Its implementation, in particular, will require that all relevant actors put in place their own internal processes, while maintaining strict coordination to achieve the objectives retained in the plan. This applies both at the strategic level (specific strategies) and for the implementing measures. In that regard, the ASP should consider following closely the process with an appropriate mechanism, in order to ensure that the process is so-ordinated and remains consistent with the objectives assigned by the plan, as well as that the strategies are set up and implemented in a result oriented manner. This mechanism should include both a Focal Point and an expert a mandate for a *Special Rapporteur*.

Recommendation 6

110. It is recommended that the Action plan be implemented with a structured process, including:

- 6.1. The priority establishment of an ICC-OTP Tracking Unit, to be pursued in the short term by means of a Task Force of Experts mandated to ensure that at the startup stage of the Tracking Unit its legal frameworks, structures, professionalism and practices closely follow successful and consolidated practices from the international and national jurisdictions;
- 6.2. Consolidated specific strategies applicable to the different regions, situations and cases, that would provide a framework to implement the measures relevant to the arrest strategy, as appropriate. Such framework strategies should be established through a partnership modeled process, inclusive of all relevant actors and implemented in a collaborative manner, in particular taking into account the role of States and of International Organizations in the different contexts, and without prejudice to the protection of sensitive information. Non-States Parties that exercise an influence in the context, including when Members of the Security Council, should be constructively and proactively engaged in these strategies. All relevant actors should identify focal points for the purpose of setting up and implement the strategies, with the lead on region and situation specific strategies in the Assembly and for the case specific strategies in the ICC-OTP. A consultation mechanism with current and former Prosecutors of the international jurisdictions should also be envisaged;
- 6.3. The oversight functions of the Assembly to include closely following the process through a Focal Point and a Special Rapporteur, 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.

VI. Conclusions

A. Keys to success

111. The analysis conducted has shown that the significant discrepancies in the execution rate for arrest warrants issued by the ICC, with respect to other international-ized jurisdictions depend on different practices existing both at the level of political support and at the operational one. The attached Table (Appendix I) presents the performances of the international-ized jurisdictions in light of the implementation of conditionality policies and of the setting up of specialized operations. The successful arrest strategies of international-ized jurisdictions appears to have been the result of the following main factors:

- (a) *Political*, impacting primarily on the willingness of States to provide full cooperation. This support and/or assistance was received by:
 - (i) *The United Nations*, either under the Chapter VII authority of Security Council

¹⁹⁴ *Supra*, paras 1 and 7-9.

- (ii) resolutions (ICTY, ICTR and STL), or ad hoc Agreements (ECCC),
 - (iii) *Conditionality policies* implemented by States and Regional Organizations (ICTY),
 - (iv) *States*, including territorial¹⁹⁵ and others in the region, as well as others (ICTR, ICTY, SCSL, ECCC);
- (b) *Operational*, impacting on the ability of both the Tribunals and States to carry out arrest operations through:
- (i) *Tracking Units* specialized and established both within the Tribunals-OTPs (ICTY, ICTR, SCSL) and territorial States (e.g., Rwanda and Serbia);
 - (ii) *Coordination and cooperation* among relevant authorities, including through police networks and INTERPOL (ICTY, ICTR, SCSL),
 - (iii) *Military presence*, including multi-national forces and peacekeeping operations (ICTY).

112. International practice also shows that when these two factors coexist,¹⁹⁶ the success rate is higher (ICTY) compared with situations where a determinant part of the political support (conditionality) is not put at use (ICTR, SCSL), unless the territorial State's willingness is otherwise ensured (ECCC).

113. As a result, successful arrest policies in international jurisdictions appear to have been driven by the diversification of the tools available to enforce arrest warrants, based on the legal and practical dimension of the challenges. In particular, the Tribunals have relied on the existence of obligations of full cooperation, but focused their operations through professional and flexible structures established under their control and working in coordination with the appropriate Agencies of relevant States.

B. Integrated approach

114. Based on the lessons learned, the report identifies measures that at the ICC would have an impact on the objective of achieving the arrest and surrender of fugitives, by both preventing and redressing instances where restrictive orders by the Court are not executed. The findings suggest that arrests strategies be addressed by a structured framework, where political and operational aspects are integrated within strategies specific to regions, situations and cases. 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. On these bases, coordination for setting up and implementing the strategies should be ensured through a network of Focal Points identified by the different actors, with the lead on the region and situation specific strategies within the ASP and for the case specific strategies in the ICC-OTP. Former and current Prosecutors of the international jurisdictions should also be consulted at the strategic level. Building on the lessons learned, the draft Action plan includes the actors, the objectives, processes and expected timelines for putting in place the proposed measures. The Action plan also identifies a process for the establishment of the specific strategies required at its implementation stage.

C. Political support

115. The report finds that the political challenges in the enforcement of arrest warrants of the ICC require an inclusive support of the international community, that should be sought within the United Nations, other International Organizations, and bilaterally, with third States being called to collaborative efforts. ICC supportive policies should also aim at

¹⁹⁵ Where the crimes were committed.

¹⁹⁶ See Annex I, Table-Execution rate and policies.

addressing in a collaborative manner possible interests of relevant players in the concerned region and situation, so as to avoid adverse influences.

116. While a plethora of political and diplomatic actions have been undertaken by the international community in support of the Court, it is suggested that these would have a stronger impact if their consistency was streamlined within the inclusive framework strategies specific to regions, situations and cases (Section IV.2). The mandate of the United Nations and its tight relationship with that of the ICC creates unique opportunities. It is especially for States to further such opportunities, in particular in Security Council matters, including with incentives for States and individuals (Section III), process and contents of referral and follow-up resolutions, as well as peacekeeping mandates and representation of ICC matters (Section IV.2). Marginalization tactics are also considered as potentially conducive, when short term strategies are not an option (Section IV.1).

D. Operations

117. The analysis also highlights that a significant divergence exists in the cultural approaches which inform the arrest strategies in other international and national jurisdictions, with respect to the ICC. Practice shows (Section III.3) that both national jurisdictions and the Tribunals, while relying on distinct legal basis for international cooperation and judicial assistance, take a practical approach to arrests, by primarily conducting technical operations under their own responsibility, including with an active role in tracking fugitives and requesting the local Authorities to carry out arrests on the basis of strong information. The Court appears rather to focus on stressing the responsibility of the requested States to fulfill their legal obligations. The point of emergence of this approach is the lack in the ICC-OTP of a Tracking Unit and, consequently, the current ICC arrest strategy appears dependent on the variable conditions of cooperation. The structure of the OTP - where cooperation variables are addressed by a Division (JCCD) distinct from the one with investigative capacities (Investigative Division) - reflects the predominance of the legal dimension on the operational one. Absent a Tracking Unit, the OTP cannot benefit of the opportunities that the deployment on the ground of trained staff would offer, including intelligence gathering, coordination with relevant Agencies, and enforcement actions. The Prosecutor is thus missing an important instrument for being provided with information relevant to identifying possible responsibilities of unsuccessful operations, and address on stronger grounds non-cooperation matters during her high level contacts. The use of unsealed arrest warrants also seems to reflect the predominant reliance on the legal dimension, i.e. the obligation of States, and inevitably triggers non-cooperation mechanisms whose attitude to result in arrests at the ICC has so far remained unchecked. As opposed to this approach, focusing on professional operations also enables to seek collaboration at the ground level and build trust that can reverberate to the upper levels, while offering the advantage of investing in efforts of a technical nature, aimed at the apprehension of fugitives in a more silent manner.

E. Flexibility

118. Any arrest warrants issued by the Court are judicial orders and, as such, their authority is legally unchallenged outside the courtroom. However, different situations, cases and accused pose different obstacles to the enforcement of restrictive orders, based on factors such as the effective authority over conflict areas, the position of the fugitive within a State's apparatus or an organized armed group, and other circumstances related to the individual or its supporting networks. As a result, no quick-fix can be found to achieve arrests by focusing a priori on the obligation of cooperation and on any specific tool and process. Efforts and solutions to carry out arrests should instead remain tailored on the elements acquired on a case-by-case basis. Along the same line, each of the available measures to support an arrest should not be overestimated a priori and, whenever possible, a combination of such measures should instead be put at use.

119. From this perspective, the recommendations in this report and the measures they refer to should be read in conjunction, as proposing a comprehensive although flexible overall arrest strategy, where a combination of the two approaches identified in the analysis – obligations and operations – is considered as a necessary feature of any international

jurisdiction. While keeping the objective of the strategy focused on the intended execution of the arrest, structured and specific arrest strategies will have to be prepared and implemented, following a partnership model, in an inclusive and collaborative manner, although preserving the confidentiality required by the different mandates of the actors involved, and take into account the political interests surrounding the situation, the profile of the accused, as well as inter-state relationships. Under any circumstances, situations, cases, and individuals relevant information remains important for arrests to be achieved either directly or in combination with appropriate political and diplomatic steps. For this purpose, the establishment of a Tracking Unit within the OTP-Investigative Division should be the priority objective of the ICC in the implementation of the Action plan.

Appendix I

Table - Execution rate and policies

Jurisdiction Situations		Period ¹	Years	Accused	Fugitives	Execution rate	Conditionality ²	Operations ³
ICTY ⁴	Conflicts in Balkans	1993-2011	18	161	0	100%	YES	YES
ECCC ⁵	Cambodia [Democratic Kampuchea]	2006-2014	8	5	0	100% ⁶	NO	YES
SCSL ⁷	Sierra Leone	2002-2013	11	13 ⁸	1	92.40%	NO	YES
ICTR ⁹	Rwanda and neighbouring states	1995-2013	18	98 ¹⁰	9 ¹¹	90.82%	NO	YES
ICC ¹²	CAR, DRC, Ivory Coast, Kenya, Libya, Mali, Sudan/Darfur, Uganda	2002-2014	12	21 ¹³	12 ¹⁴	57.14%	NO	NO
STL ¹⁵	Lebanon [Rafiq Hariri and others]	2009-2014	5	5 ¹⁶	5	0%	N/A	N/A

¹ Between the actual enter into functioning and the arrest of the last fugitives or completion of the jurisdiction.

² Availability of structured conditions imposed by States and International Organizations.

³ Establishment of specialized Tracking Units and related policies within the international-ized jurisdictions, or favourable operational conditions on the ground.

⁴ Temporal Jurisdiction: Since 1 January 1991. The Mechanism for International Criminal Tribunals (MICT) – ICTY continues the jurisdiction of the Tribunal as of 1 July 2013.

⁵ Temporal Jurisdiction: 17 April 1975 to 6 January 1979.

⁶ All suspects in cases 001 and 002 were arrested within three months of the opening of judicial investigations.

⁷ Temporal Jurisdiction: Since 30 November 1996. The Residual Special Court for Sierra Leone (RSCSL) continues the jurisdiction of the SCSL as of 2 December 2013.

⁸ All accused were tried in multi-accused cases (CDF, RUF and AFRC cases), plus the *Charles Taylor* trial, completed in 2013. Two formerly accused deceased before trial (Foday Sankoh and Sam Bockarie) and one remains at large (Johnny Paul Koroma).

⁹ Temporal Jurisdiction: 1 January 1994 to 31 December 1994. The MICT – ICTR continues the jurisdiction of the Tribunal as of 1 July 2012.

¹⁰ Completed cases, 75 (of which 52 final, 11 under appeal, and 12 acquitted); deceased before judgement, 2; transferred to national jurisdictions, 10; released, 2.

¹¹ Six accused were transferred to the jurisdiction of Rwanda, pursuant to Rule 11bis RPE (Fulgence Kayisema, Charles Sikubwabo, Ladislav Ntaganzwa, Aloys Ndimbati, Charles Ryandikayo, and Pheneas Munyarugarama), while the Mechanism for the International Criminal Tribunals (MICT-ICTR) retain jurisdiction on three fugitives (Augustin Bizimana, Felicien Kabuga, and Protais Mpiranya).

¹² Temporal Jurisdiction: Since 1 July 2002.

¹³ Against 25 accused. For the following eight accused only summonses to appear were issued: Bahr Idriss Abu Garda, and Saleh Jerbo - Darfur/Sudan; William Ruto, Joshua Sang, Henry Kosgey, Uhuru Kenyatta, Francis Muthaura, Mohamed Hussein Ali – Kenya.

¹⁴ The following arrest warrants are outstanding: DRC - Sylvestre Mudacumura; Uganda - Joseph Kony, Okot Odhiambo, Dominic Ongwen, and Vincent Otti; Sudan - Omar al Bashir (two warrants), Ahmed Harun, Ali Kushayb, Abdel Raheem Muhammad Hussein, and Abdallah Banda Abakaer Nourain; Ivory Coast - Simone Gbagbo (arrested but not surrendered); Libya - Saif Al-Islam Ghaddafi (arrested but not surrendered). Abdullah Al-Senussi is no longer considered as a fugitive, as its case before the Court is terminated upon decision by the Appeals Chamber on its inadmissibility, issued on 24 July 2014.

¹⁵ Temporal Jurisdiction: attack on 14 February 2005, but it can be extended by the Tribunal itself, should it find that ‘attacks occurred in Lebanon between 1 October 2004 and 12 December 2005, or [at] any later date ... are connected [including for criminal intent, purpose of attacks, nature of victims, modus operandi and perpetrators] and are of a nature and gravity similar to the attack of 14 February 2005’ resulting in the death of former Lebanese Prime Minister Rafiq Hariri and in the death or injury other persons. On 19 August 2011 the Tribunal established jurisdiction over three connected cases, for the attacks relating to Marwan Hamadeh, George Hawi and Elias El-Murr.

¹⁶ Salin Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi, and Assad Hassan Sabra – Trial; Hassan Merhi – Pre-Trial.

Appendix II

Lessons, Recommendations and Measures

<i>Area</i>	<i>Lessons learned</i>	<i>Recommendations</i>	<i>Measures</i>
Incentives to States	<p>Conditionality</p> <p>34. Conditionality policies have proven to be a successful solution in addressing the reconciliation of the reasons of peace and justice, so that political efforts can assist judicial ones, and international jurisdictions continue to be recognized as an instrument to achieve stability.</p> <p>35. In the Former Yugoslavia conditionality has undoubtedly contributed to a substantial extent in ensuring substantial cooperation to and bringing all fugitives before the ICTY. However, implementation of such policies highlighted the risks that inflexible conditions could have triggered political crises, fuel nationalist sentiments and ultimately derailing the agenda for the reforms required in the transitional period, resulting in instability in the region and ultimately also achieving the opposite than intended result in terms of cooperation with the ICTY. The overall positive experience at the ICTY can instead be attributed to the synergies of policies implemented by the different actors present in the region, to the absence of adverse incentives by other relevant players in the region, to the interests of new elected governments to get rid of prominent figures who had become a liability, and to a strategic flexibility which has enabled to adapt conditionality policies to the most critical moments in the peace and transition processes. Practice has also shown that effective conditionality should: present in a clear manner what results would trigger rewards; be implemented consistently by all partners involved, so as to avoid counter-tactics by the requested States; dispel misperceptions of an uneven application of the benefits; be accompanied by a robust outreach policy, aimed at avoiding manipulations; and, be supported at the operational level with reliable information gathered by professional in-house capacity of the Tribunal, which provides the Prosecutor with strong evidence on the actual level of compliance in the field [see <i>infra</i>, 77-79]. While ICTR and SCSL had operational structures similar to those of the ICTY, the absence there of conditionality policies provides an explanation for the lower execution rate of the arrest warrants.</p>	<p>Recommendation 1</p> <p>37. It is recommended that conditionality policies be considered in the context of the ICC whenever possible, but only within the framework strategies applicable to the different regions, situations and cases. Given the nature and objective of such policies, the relevant section of the framework strategies should include clearly defined and communicated conditions to be met to trigger the rewards, and should be consistently implemented, while ensuring that the necessary degree of discretion is retained in order to adapt to the circumstances.</p>	<p>Conditionality</p> <p>36. [Depending on a case-by-case assessment conducted in the context of strategies specific to the region, situation and the cases, the following leverage points can be considered]:</p> <p>(e) <i>Participation into regional or intergovernmental organizations</i>, with regard to the status of Member, Observer or Candidate;</p> <p>(f) <i>Capacity building assistance</i>, including for the development of the rule of law;</p> <p>(g) <i>Cooperation aid</i>, with the exception of humanitarian assistance, including</p> <p>(i) <i>Development aid</i>. Programmes in support of the economic, environmental, social, and political development;</p> <p>(ii) <i>Financial assistance</i>. Financial aid and loans, including bilateral and from World Bank, International Monetary Fund, and European Investment Bank;</p> <p>(iii) <i>Economic assistance</i>. Bilateral cooperation agreements aimed at providing economic assistance, trade concessions, or to an international debt relief plan;</p> <p>(iv) <i>Military assistance</i>. Military assistance programmes, including on bilateral and multilateral basis;</p> <p>(v) <i>Other assistance</i>. Any other assistance programme, including for drug crop eradication and/or trafficking;</p> <p>(h) <i>Restrictive measures (sanctions)</i> 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.</p>
Incentives to Individuals	<p>43. Without prejudice to the obligation of the relevant authorities to proactively seek the enforcement of arrest warrants, a combination of positive and negative incentives might deter individuals from continuing to evade justice, facilitate or even compel a positive determination to voluntary</p>	<p>Recommendation 2</p> <p>45. It is recommended that a comprehensive package of positive and negative incentives be established in advance and appropriately communicated, so</p>	<p>(f) <i>Sanctions</i>:</p> <p>(i) Freezing of monetary entitlements and allowances (e.g. salaries and pensions),</p> <p>(ii) Freezing of assets, including bank accounts (both in the context of an international sanctions regime or in the State of nationality or residence),</p>

Area	Lessons learned	Recommendations	Measures
	<p>surrender and cooperate with the Prosecution, or otherwise contribute to the operations conducted by the international jurisdiction and the enforcement authorities for the apprehension of fugitives. These measures should be defined in advance and their availability communicated in a clear manner and as a comprehensive package, so that they can be factored in the accused own assessment on the cost to be borne if they remain fugitives, against the risk that benefits would not be applicable in case an arrest is carried out without cooperation of the accused. Expectations of informants about possible rewards for leading information should be managed.</p> <p>Targeted individual rewards and sanctions might mitigate the political and operational challenges at the enforcement stage. The adoption of sufficiently diversified measures, so as to address different interests and stages of the proceedings, might require changes in the legal framework and operational methods. While the political implications of these changes are limited, their achievement requires a strong governance framework to ensure strategic consistency with the objectives.</p>	<p>that the accused can reliably assess the benefits of such measures against the precarious lifestyle of fugitives.</p>	<p>(iii) Admission restrictions (travel bans and visas);</p> <p>(g) <i>Detention:</i></p> <p>(i) Assistance during ICC proceedings (including ensuring legal aid in national proceedings before surrender),</p> <p>(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,</p> <p>(iii) Minimal remuneration while in detention (by relevant States directly or through a fund).</p> <p>(h) <i>Sentencing:</i></p> <p>(i) Mitigating circumstances (fixing a minimum and maximum limit in sentence determination),</p> <p>(ii) Special reduction or commutation of sentences, as well as penitentiary benefits for collaborators of justice or those who have definitely abandoned their associates,</p> <p>(iii) Grounds for excluding criminal responsibility based on the prevention of crimes and leading evidence to identify the criminal plan or policy and the responsibilities of the accomplices,</p> <p>(iv) Facilitation in the relocation, including for family members.</p> <p>(i) <i>Release:</i></p> <p>(i) Early release to or enforcement of any ICC sentence in an agreed Country (unless adverse prevailing interests of justice),</p> <p>(ii) Granting of some residence status, upon completion of proceedings (asylum or other).</p> <p>(j) <i>Other measures:</i></p> <p>(i) Special programmes publicly advertising rewards for information leading to arrests,</p> <p>(ii) Resources available for sensitive sources at the tracking stage.</p>
Isolation of fugitives	<p>53. The assumption that positive effects in the search for individuals at large would be achieved by isolating them is essentially based on the fact that unexecuted arrest warrants would still produce the effect of substantially modifying the legal status of the person sought, by restricting freedom of movement within the borders of the state of residence or other non-cooperating states. As a result, an “international pariah” would also have a reduced ability to be considered as a credible interlocutor in relevant talks, including peace negotiations. The creation of an hostile environment around a fugitive would increase the prospects that the conditions negatively affecting the enforcement of an arrest warrant would over time weaken enough to make the arrest possible.</p> <p>54. However, as it is shown from the select cases above, this approach can produce positive effects only from a long</p>	<p>Recommendation 3</p> <p>It is recommended that policies of marginalization of fugitives be only implemented within individualized strategies that take primarily into account the prospects of enforcing arrest warrants in the short term through technical operations, and without disclosing the existence of the restrictive order. In cases where this does not appear possible, sanctions and avoidance of non-essential contacts should be applied, and the relevant actors might consider enabling a monitoring of the implementation of such policies.</p>	<p>(e) <i>Unsealed arrest warrants</i> only as a last resort, when operations cannot be carried out secretly,</p> <p>(f) <i>Sanctions</i>, i.e. inclusion of fugitives in the relevant lists,</p> <p>(g) <i>Avoidance of non-essential contacts</i>, with a self-monitoring mechanism conducted by States,</p> <p>(h) <i>Proceedings</i>, i.e. within the relevant strategies, consider:</p> <p>(i) Conducting the confirmation of charges in absentia - when arrest warrants have been outstanding for a prolonged period;</p> <p>(ii) Joint referrals by the situation Country and neighbouring States; and</p> <p>(iii) Not notifying arrest warrants to the relevant State, until the accused is firmly high in the</p>

Area	Lessons learned	Recommendations	Measures
	<p>term perspective, while individuals at large would continue to represent a threat and an obstacle for the achievement of peace and stability in the areas affected, as well as to avoid retribution and redress for victims.</p>		echelons of power.
	<p>55. Consideration for the adoption of isolation policies should involve an assessment on the quality and condition of the fugitive, the short and long term expected results, as well as of the political and operational effects of such policies.</p>		
	<p>56. The advantages of isolation are most visible in instances where the challenges for executing an arrest are dependent on</p>		
	<p>(c) The high level position of the individuals. In these cases (e.g., Heads of States, Ministers, high ranking military) isolation is expected to provoke over time a diminished authority of the fugitives. In turn, this would progressively erode the base of support of the individuals, as their inner circles or political supporters realize that fugitives would become a liability, more than an asset. In the medium to the long run, this might result in the loosening of the grip on power, and finally in the fugitives to be toppled from power. As a consequence, major obstacles from carrying out the arrest would be removed, provided that adequate pressure is maintained on the State where the fugitive is located,</p>		
	<p>(d) The existence of military networks of support, as it is for armed groups. The removal from the ground of the armed force granting security to fugitives can be facilitated by military operations, technical means (e.g., enabling affected populations to timely communicate), and reward for justice programmes.</p>		
	<p>57. However, the isolation of fugitives might also bring disadvantages and, in particular, the risk that important opportunities for carrying out arrests would be lost. As the final objective of an arrest warrant and supporting techniques and policies is that the individual sought is apprehended and brought to justice,¹ it should be in first place attempted to achieve results by keeping operations strictly secret. In that regard, measures such as limiting the ability of accused to travel and making the pressure of arrest operations apparent might effectively delay the execution of arrests. Fugitives would be forced to further go into the hiding or shield themselves within the safety of the environment where they firmly hold the reins of their power, be it because of</p>		

¹ *Supra*, para. 14.

Area	Lessons learned	Recommendations	Measures
	<p>political, military, economic or other supporting networks. Additionally, admission restrictions might not be effective, if assumed identities are available.</p> <p>58. By weighing these opposite elements, the implementation of a policy of isolation of fugitives seems to be subject to the following:</p> <p>(c) Arrests should be pursued first and foremost as technical operations. Chances of enforcement might be increased if arrest warrants are kept under seal,</p> <p>(d) 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.</p>		
Political support	<p>70. The current practice of dealing with instances of lack of cooperation mainly at the execution stage of Court's requests is a process which requires intensive efforts by a number of actors, presents an uncertain outcome, and creates the potential for divisive cases between States and the Court, as well as within the Assembly.</p> <p>71. The multi-faceted support for the ICC mandate by the different actors at the international and national level presents important synergies that have the potential to multiply the effectiveness of the efforts. Political support and diplomatic engagement should be as structured as possible, and inputs from the civil society should be timely fed in the process aimed at ultimately resulting in the enforcement of the arrest warrants. From the same perspective, legislative or other obstacles to cooperation by States Parties should be identified and addressed at the appropriate technical, diplomatic and political level, including with an appropriate verification mechanism. In cases of referrals or acceptance of jurisdiction, States should also provide a sufficient proactive engagement to fulfill the demands of cooperation.</p> <p>72. As to the UNSC referrals or other decisions relevant to the ICC (including peacekeeping and sanctions), it appears that the absence of any mechanism or procedure for their preparation and follow-up in consultation with the ICC does not support the effectiveness of the decisions of both the Council and of the Court. Instead, the</p>	<p>Recommendation 4</p> <p>74. It is recommended that a twofold approach be followed, with structured and integrated measures of political and diplomatic nature that address the compliance with the obligations under the Rome Statute first at the preventive stage (monitoring of implementing measures), and then at the level of specific instances where requests of the Court appear to have been turned down.</p>	<p>(d) Political and diplomatic, including</p> <p>(i) Public statements and commitments, in the UN and other multilateral bodies,</p> <p>(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,</p> <p>(iii) Informal multilateral consultations,</p> <p>(iv) Inclusion in the agendas of bilateral and multilateral dialogue,</p> <p>(v) Language in statements at the ASP sessions' General Debate;</p> <p>(vi) Development of national or multilateral pro-ICC policies,</p> <p>(vii) D�marches and summoning Ambassador of a concerned State,</p> <p>(viii) Pro-ICC clauses in relevant agreements,</p> <p>(ix) Security Council matters, including</p> <p>e. A consultative process in preparation and implementation of referrals and other decisions, identifying conditions to fulfill in order for referrals to become effective,</p>

Area	Lessons learned	Recommendations	Measures
	<p>establishment of such a procedure would allow to define the responsibilities of the Court and of the Council, and identify the modalities, means and other conditions to fulfill in order for referrals to become effective, including through the adoption of clearer resolution language, as appropriate. Additionally, as referrals are made to the Prosecutor, it is only the Prosecutor who has been reporting to the Council on developments in the relevant situations. These arrangements correspond to the Prosecutor's independent mandate as regards investigation and prosecution. However, it should be considered whether, based on the UN-ICC Relationship Agreement, different matters in the implementation of UNSC referrals should instead be addressed by those who bear the relevant responsibilities within the Rome Statute system, upon invitation. Consequently, while referrals are made to the Prosecutor, once the situation is before the Chambers it appears that the responsibilities to be discharged by the ICC include those of its President, who might be called to keep the Council informed on institutional and judicial developments, as it has been the case for the Presidents of the ad hoc Tribunals. Similarly, matters falling outside the exclusive independent mandate of the Court, including when related to resources and political conditions in support of the Court, would also appear to fall squarely within the mandate of the Assembly and its President. Based on the Council's practice, the President of the Assembly might as well be called to address the Council, including at the request of a Member State and on behalf of the ASP. Finally, it should be considered the efficient alignment of the UN sanctions regimes in situations falling under the ICC jurisdiction with the requirements of the arrests and surrender strategies.</p>		<p>including through the adoption of clearer resolution language, as appropriate;</p> <p>f. Mandates of UN peacekeeping forces to include assistance for the enforcement of arrest warrants, when appropriate;</p> <p>g. 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;</p> <p>h. Sanctions aligned to the developments in the arrest and surrender process.</p> <p>(e) Implementation measures</p> <p>(v) Implementation of national procedures enabling requests for cooperation (arrest and surrender) and assistance from the ICC to be dealt with,</p> <p>(vi) Implementation of complementarity legislation,</p> <p>(vii) Agreed framework, or verification mechanism, to monitor the ability of national measures to respond to requests of cooperation,</p> <p>(viii) Concrete engagement of States to fully cooperate, in preparation of referrals or acceptance of jurisdiction.</p> <p>(f) Role of civil society</p> <p>(iii) Within an early warning mechanism, monitor events at regional and sub-regional level, and exchange information with actors present in the region,</p> <p>(iv) Use domestic jurisdictions to prompt enforcement of restrictive orders.</p>
Operations	<p>88. The successful practice of the Tribunals highlights that leading the search for fugitives requires professionalism and in-house capacity, a strong chain of command, and an agile structure, able to interact swiftly and generate trust with interlocutors in the field. The Tracking Units provided the OTPs with the independent intelligence gathering capability and capacity for operating in the field that are of essence to achieving both the arrest of fugitives and the seizure of their assets, including with the submission of sufficiently developed requests to the local Authorities. As a result, operations depend to a much lesser degree by local Authorities,</p>	<p>Recommendation 5</p> <p>90. It is recommended that all stakeholders focus on operations as the priority area for achieving arrests. A professional Tracking Unit should be established in the short term and directly report to the Prosecutor through the Head of the Investigative Division. Operations should also be strengthened by enhanced mechanisms for coordination and cooperation at the technical level (police and prosecuting</p>	<p>1. <i>Tracking activities</i>, by establishing a lean Unit in the Investigative Division, with direct reporting lines to the Prosecutor, flexible working methods, and a financial tracking capacity facilitated by the appropriate legal frameworks;</p> <p>2. <i>Police training and equipment</i>, including through programmes of international assistance and special reward for justice programmes,</p> <p>3. <i>INTERPOL</i>: 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 "diffusions"; enhanced joint communication, including with</p>

Area	Lessons learned	Recommendations	Measures
	<p>interaction with the latter is facilitated, and the Prosecutor is provided with strong information to support high level contacts. Deployment of tracking capacity is crucial to coordinate with local agencies and handle sensitive investigation operations, and such Units should be set up at as an early stage as possible to avoid that suspects go into hiding. Tracking Units are equally of use in situations where international staff can be deployed on the ground, and others where challenges depending either on the willingness of the State or other security conditions would require to operate in a more discrete manner. The inherent flexibility which is required of trackers would allow them to conduct operations with appropriate techniques that are not expected to raise the same challenges that would be encountered by more formal procedures. The result of the intelligence gathering, however, would put in the hands of the Prosecutor strong factual arguments to dispel misinformation and misunderstandings with her interlocutors at the political level, be them within the States subject to an obligation to cooperate, in the Security Council, or in any Organization supporting or opposing the enforcement of arrest warrants. Budgetary constraints within the ICC-OTP could require that the establishment of a Tracking Unit achieved by shifting resources between the relevant Divisions.</p> <p>89. Other operational elements of an arrest strategy include making use of the opportunities offered by police coordination (including INTERPOL assets), coordination mechanisms at the national and international level, joint task forces with national police, keeping arrest warrants under seal, and taking advantage of the possible expansion of the peacekeeping forces mandates.</p>	<p>authorities) and, when necessary and possible, with the assistance of arrest mandated peacekeeping missions or multi-national forces.</p>	<p>public campaigns and posters;</p> <p>4. <i>Technical assistance</i>, on a case-by-case basis to domestic systems requiring it, including the establishment of mixed tracking Teams or the conduct of joint operations;</p> <p>5. <i>Coordination</i>. 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;</p> <p>6. <i>Information sharing</i> at technical level;</p> <p>7. <i>Communication</i> activities for decision-makers, at the diplomatic and political level;</p> <p>8. <i>Policies</i>, including keeping the arrest warrants under seal whenever possible, and preparation of complete and execution-ready requests to local Authorities;</p> <p>9. <i>Military</i>, with the expansion of peacekeeping forces' mandates, when possible.</p>
Process forward	<p>91. The recommendations presented in this report formed the basis for the draft Action plan prepared by the Rapporteur (Appendix III), together with the lessons learned and the measures they suggest (Appendix II). Based on the contents of the Action plan that the Assembly, the measures proposed have a different degree of readiness to be implemented. A roadmap for the different measures is also included in the Action plan.</p> <p>92. The inclusive approach followed in the report requires that some of the proposed measures only be considered upon the establishment of framework strategies specific to regions, situations and cases. In particular, measures such as incentives for States and individuals will require to be addressed within such strategies. To be effective, these framework strategies will need to be established through an inclusive</p>	<p>Recommendation 6</p> <p>95. It is recommended that the Action plan be implemented with a structured process, including:</p> <p>6.1 The priority establishment of an ICC-OTP Tracking Unit, to be pursued in the short term by means of a Task Force of Experts mandated to ensure that at the startup stage of the Tracking Unit its legal frameworks, structures, professionalism and practices closely follow successful and consolidated practices from the international and national jurisdictions;</p> <p>6.2 Consolidated specific strategies applicable to the different regions, situations and cases, that would provide a framework to implement the</p>	<p>Establishment of :</p> <p>1. A Tracking Unit within the OTP-Investigative Division, prepared by</p> <p>(i) A Task Force of Experts,</p> <p>(ii) A consultation mechanism of current and/or former Prosecutors of the international Tribunals (ICTY, ICTR, SCSL);</p> <p>2. Consolidated strategies specific to regions, situations and cases, in an inclusive and process and implemented in a collaborative manner with all relevant actors, taking into account the role of States and of International Organizations in the different contexts. This process should include:</p> <p>(i) A network of Focal Points identified by all the actors;</p> <p>(ii) The lead for the region and situation specific strategies in the ASP, and for the case specific strategies in the OTP;</p> <p>(iii) A consultation mechanism of current and/or</p>

Area	Lessons learned	Recommendations	Measures
	<p>process, following a partnership model. Such process should take into account the role of States and of International Organizations in the different contexts, and require coordination of the different actors and implementation on a collaborative basis, without prejudice to the protection of confidentiality pursuant to the respective mandates of the same actors. Non-States Parties that exercise an influence in the context, including when Members of the Security Council, should be constructively and proactively engaged in the framework strategies. The preparation of the framework strategies should be coordinated through a network of focal points identified by all relevant actors, with diversified leads for the regions and situation specific strategies (ASP) and case specific ones (OTP). A consultation mechanism with current and/or former Prosecutors of the international Tribunals (ICTY, ICTR, SCSL) should also be established.</p> <p>93. Following the priority identified in the area of operations, an ICC-Tracking Unit (“Unit”) should be set up in the short term, with a minimal structure consisting of a Head of Unit, two investigators deployed in the field, one interpreter, one analyst and financial tracker both posted at Headquarters.</p> <p>For the purpose of establishing the Unit, a Task Force of Experts (“Task Force”) should be mandated with the preparation of all organizational elements required, including:</p> <ul style="list-style-type: none"> (g) The appropriate legal and assurances framework, including Regulations, Practice directions, Guidelines, basic working methods, and Agreements with relevant territorial and partner States, (h) The organigramme and structure, (i) 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, (j) Budgetary implications and any complementary funding measure, (k) Job descriptions, and conduction of the recruitment for the positions in the Unit, (l) Collection of relevant practices of international and domestic jurisdictions. <p>While the Task Force will have to be established within the OTP, it is also crucial that at the startup stage it is ensured that successful and consolidated experiences from the international Tribunals are retained. As a consequence, the Task Force should include staff formerly or currently employed</p>	<p>measures relevant to the arrest strategy, as appropriate. Such framework strategies should be established through a partnership modeled process, inclusive of all relevant actors and implemented in a collaborative manner, in particular taking into account the role of States and of International Organizations in the different contexts, and without prejudice to the protection of sensitive information. Non-States Parties that exercise an influence in the context, including when Members of the Security Council, should be constructively and proactively engaged in these strategies. All relevant actors should identify focal points for the purpose of setting up and implement the strategies, with the lead on region and situation specific strategies in the Assembly and for the case specific strategies in the ICC-OTP. A consultation mechanism with current and former Prosecutors of the international jurisdictions should also be envisaged;</p> <p>6.3 The oversight functions of the Assembly to include closely following the process through a Focal Point and a Special Rapporteur, 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.</p>	<p>former Prosecutors of the international Tribunals (ICTY, ICTR, SCSL).</p> <p>3. A follow-up mechanism of the Assembly, including a Focal Point and an expert <i>Special Rapporteur</i>.</p>

Area	Lessons learned	Recommendations	Measures
	<p>within the international Tribunals (ICTY, ICTR, SCSL), with responsibilities as Chief of Investigations or Operations, Team Leaders, and Confidential Human Resources Coordinators. The Task Force should also include relevant staff from INTERPOL Fugitive Investigative Support Sub-Directorate and other Specialized Units (War Crimes and Genocide Sub-Directorate, Anti-Corruption and Financial Crimes Sub-Directorate), as well as dedicated Teams within National authorities. The Experts in the Task Force should be employed on a pro-bono basis from the sending Institutions, when necessary with reimbursement of expenses or <i>per diem</i> regime. At the strategic level, a consultation mechanism with current and/or former Prosecutors of the international Tribunals (ICTY, ICTR, SCSL) should also be established.</p>		
	<p>94. Because of the finite objective and timelines assigned to the Rapporteur,² further steps will need to be taken to follow-up to any adopted Action plan. Its implementation, in particular, will require that all relevant actors put in place their own internal processes, while maintaining strict coordination to achieve the objectives retained in the plan. This applies both at the strategic level (specific strategies) and for the implementing measures. In that regard, the ASP should consider following closely the process with an appropriate mechanism, in order to ensure that the process is so-ordinated and remains consistent with the objectives assigned by the plan, as well as that the strategies are set up and implemented in a result oriented manner. This mechanism should include both a Focal Point and an expert a mandate for a <i>Special Rapporteur</i>.</p>		

² *Supra*, paras. 1 and 7-9.

Appendix III

Draft Action plan on arrest strategies

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 document¹ 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.²

2. The analysis of the practices in the relevant jurisdictions and the lessons learned are reflected in the *Report on arrest strategies* (“report”),³ 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.

B. Legal bases

3. The legal bases for the Action plan are the governance and oversight functions of the Assembly,⁴ exercised with a view to facilitating cooperation of States Parties and others States under an obligation to cooperate with the Court, and preventing instances of non-cooperation.⁵ 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.

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.

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

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

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

⁴ Article 112(2)(b), (c) and (g).

⁵ *Ibidem*, litera (f).

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 conduct (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 shall 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 should be developed with reference to all existing or newly open investigations. 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 development of the framework specific strategies should remain open to all relevant actors, including States other than States Parties, that are willing to participate in the process established pursuant to the Action plan (“relevant States”) on a partnership basis. All relevant actors should contribute on a collaborative basis to the establishment of the strategies.

15. Such process should be open to the following relevant actors:

- (a) The Court,
- (b) The Assembly,
- (c) States Parties and other relevant States,
- (d) The United Nations, including the Secretary-General, the Security Council and its subsidiary Organs, and the General Assembly,
- (e) 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,
- (f) 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 should 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 shall be established and maintained in consultation with the Court.

18. The lead for the establishment of the strategies should be as follows:

- (a) The Assembly, for the region-specific and situation-specific strategies;
- (b) The ICC-OTP, for the case-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 strict consultation and coordination at the political and operational levels (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, the States Parties and other relevant States should consider the implementation of conditionality policies, on a case-by-case basis and within the context of the specific strategies adopted, in order to use as a leverage the political, security of 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.

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 may be included in the specific strategies, as appropriate:

- (a) *Participation into 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
 - (vi) *Development aid*. Programmes in support of the economic, environmental, social, and political development;
 - (vii) *Financial assistance*. Financial aid and loans, including bilateral and from World Bank, International Monetary Fund, and European Investment Bank;
 - (viii) *Economic assistance*. Bilateral cooperation agreements aimed at providing economic assistance, trade concessions, or to an international debt relief plan;
 - (ix) *Military assistance*. Military assistance programmes, including on bilateral and multilateral basis;
 - (x) *Other assistance*. Any other assistance programme, including for drug crop eradication and/or trafficking;
- (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.

B. Incentives to individuals

28. The Assembly, the States Parties and third States should 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;
- (e) Management of expectations also at the operational stage.

30. The 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 should be considered:

- (a) *Sanctions*
 - (iv) Freezing of monetary entitlements and allowances (e.g. salaries and pensions),
 - (v) Freezing of assets, including bank accounts (both in the context of an international sanctions regime or in the State of nationality or residence),
 - (vi) 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).
- (c) *Sentencing*
 - (i) Mitigating circumstances (fixing a minimum and maximum limit in sentence determination),⁶
 - (ii) Special reduction or commutation of sentences, as well as penitentiary benefits for collaborators of justice or those who have definitely abandoned their associates (e.g., including by admitting their responsibilities, acting in a manner univocally inconsistent with a criminal intent, and renouncing to violence),
 - (iii) Grounds for excluding criminal responsibility,⁷ based on the prevention of crimes and leading evidence to identify the criminal plan or policy and the responsibilities of the accomplices,
 - (iv) Facilitation in the relocation, including for family members.
- (d) *Release*
 - (i) Early release to or enforcement of any ICC sentence in an agreed Country (unless adverse prevailing interests of justice),

⁶ Article 78(1), Rule 145(2)(a)(ii) RPE.

⁷ Article 31(3) of the Rome Statute, Rule 80 RPE.

- (ii) Granting of some residence status, upon completion of proceedings (asylum or other).
- (e) *Other measures*
 - (i) Special programmes publicly advertising rewards for information leading to arrests,
 - (ii) 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, should consider adopting and implementing marginalization policies, aimed at reducing the conditions that affect the ability of fugitives to remain at large.

34. Such policies should 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 shall 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. The following isolation policies should be considered:

- (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;
- (d) *Proceedings*, i.e. within the relevant strategies, consider:
 - (i) Conducting the confirmation of charges in absentia, when arrest warrants have been outstanding for a prolonged period of time;
 - (ii) Joint referrals by the situation Countries and their neighbouring States; and
 - (iii) Not notifying arrest warrants to the relevant State, until the accused is firmly high in the echelons of power.

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 should 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 should include the following:

- (a) *Political and diplomatic*,⁸ including:
- (i) Public statements⁹ 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,¹⁰
 - (vii) Démarches and summoning Ambassador of a concerned State,
 - (viii) Pro-ICC clauses in relevant agreements,¹¹
 - (ix) Security Council matters, 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 peacekeeping forces to include assistance for the enforcement of arrest warrants, when appropriate;
 - 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.

⁸ ICC-ASP/6/Res.2, Annex II, 66 *Recommendations on Cooperation (Recommendations)*, Recommendation 17; *Concept Paper*, para. 23(i) and (ii).

⁹ *Ibidem*, Recommendation 48.

¹⁰ 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.

¹¹ Article 11(7) of the EU *Cotonou Agreement*.

- (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.

42. The Court should establish, as a matter of priority and in the short term, a professional in-house capacity to conduct the search for fugitives and their assets, in the format of a Tracking Unit (“Unit”) directly reporting to the Prosecutor through the Head of the Investigative Division, for the purpose of:

- (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) Handling sensitive investigative operations,
- (e) Developing execution-ready requests for the local Authorities,
- (f) Supporting the high level contacts of the Prosecutor on non-cooperation matters.

43. The Unit should be established with a process that ensures its consistency with the operational and experience based mandate (Section IV) and initially consist in a lean structure. Its establishment and functioning should be supported by the re-allocation of existing resources, and the appropriate legal frameworks.

44. Support of relevant actors to the operations of the Court should include:

- (a) *Police training and equipment*,¹² 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;¹³
- (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;¹⁴
- (f) *Communication* activities for decision-makers, at the diplomatic and political level;¹⁵

¹² *Recommendations*, Recommendation 20; *Concept Paper*, para. 23(iii).

¹³ *Concept Paper*, para. 23(iv).

¹⁴ *Ibidem*, and para. 23(v); *Recommendations*, Recommendations 21 and 59.

- (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

45. The Assembly should promote a strict coordination and consultation of all the actors relevant to the measures under this Action plan, including with the mechanisms established in this Section.

46. 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

47. The Assembly should ensure that the implementation of this Action remains consistent with its objective, and that such implementation remains result oriented. To this end, the Assembly shall 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.

48. The Bureau of the Assembly shall establish within its Working Group in The Hague:

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

49. 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.

50. The Focal Point and Special Rapporteur shall 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

51. The Assembly shall 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

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

53. 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.

¹⁵ *Ibidem*, Recommendation 59 ; *Concept Paper*, para. 23(vi).

D. Consultation Mechanism

54. A consultation mechanism should 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.

55. The Special Rapporteur shall identify the working methods of the consultation mechanism and additional contributions that might be required to ensure that the specific strategies are supported by the relevant experience.

E. Task Force of Experts

56. The Court should establish a Task Force of Experts (“Task Force”) for the purpose of establishing the Tracking Unit within the Office of the Prosecutor. The Task Force should 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 should 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.

57. The Task Force should 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.¹⁶

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

F. Working Methods

59. 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.

60. 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.

61. 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.

¹⁶ Fugitive Investigative Support Sub-Directorate and other Specialized Units (War Crimes and Genocide Sub-Directorate, Anti-Corruption and Financial Crimes Sub-Directorate).

G. Review

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

V. Roadmap

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

2015

January - February

- (a) Appointment of the Focal Point and Special Rapporteur (Bureau),
- (b) Establishment of the Task Force of Experts (ICC-OTP);

March

- (a) Establishment of the working methods and of the consultation mechanism (FP/SR),
- (b) Establishment of the list of relevant actors (FP/SR-ICC),
- (c) Recruitment process for the Tracking Unit;

April

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

April – July

- (a) Designation of others' Focal Points (all relevant actors);
- (b) Preparation of the framework strategies region, situation and case specific (All);

September

- (a) Tracking Unit recruited (Task Force/OTP);

September – November

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

December

- (a) Report on the implementation of the Action plan to ASP/14 (Bureau, FP/SR)

2016

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

Appendix IV

Working Methods: Lessons learned from the Rapporteur

I. Background

1. Within the ongoing review of its working methods, the Assembly has considered the benefits of a documentation of the lessons learned on specific topics mandated to the subsidiary bodies of the Bureau.¹ As the position of Rapporteur has been introduced for the first time in the practice of the Assembly with the mandate on arrest strategies, lessons learned appear appropriate to provide a basis to further consider making use of similar positions.

II. Experience base

2. The position of Rapporteur on arrest strategies has been established based on a Concept Paper and a Roadmap prepared by the same person later appointed as Rapporteur, that were respectively endorsed² and approved by the Assembly.

3. The Concept Paper has represented the working plan for the Rapporteur, as it contained a clear outline of the elements to be included in the expected outcome, i.e. both in the report and the draft Action plan.

4. Since the mandate of the Rapporteur was to prepare a draft Action plan based on existing practices in international and national jurisdictions, it has been carried out through informal activities, including bilateral and multilateral contacts. The Hague Working Group, in its facilitation on cooperation, has been kept informed on the ongoing process and on the steps undertaken. No meetings have been held on the substance of the arrest strategies within the Hague Working Group, until the report and the attached Action plan were submitted to delegations. A presentation of a questionnaire to collect information from all States has, although, taken place to clarify possible questions.

5. As the specific mandate inherently required a research-type activity on lessons learned by various actors, the methodology applied by the Rapporteur³ has included three distinct stages:

- (a) Collection of information;
- (b) Analysis;
- (c) Drafting and reporting.

6. At the collection of information stage, surveys, consultations and other means have been carried out:

- (a) A questionnaire for all States,⁴ based on the elements of the Concept Paper endorsed by the ASP;⁵
- (b) A blueprint for International Tribunals to compare results achieved in individual cases;
- (c) Interviews with current or former relevant States' and International Organizations' officials;
- (d) Participation into law enforcement seminars;⁶

¹ICC-ASP/12/59, *Report of the Bureau: Evaluation and rationalization of the working methods of the subsidiary bodies of the Bureau*, para. 27(b): "The Bureau [...] welcomes [that] outgoing facilitators [...] draft a personal lessons learned/hand-over document with recommendations regarding both substance and process. These lessons learned could also feed into the general guidelines/facilitator's guiding note. This note could contain practical recommendations regarding procedure and recommendations for report writing and drafting of resolutions" [...].

² ICC-ASP/12/Res.3, para. 5: "endorses the appended concept document".

³ ICC-ASP/13/29/Add 1, *Report on arrest strategies*, paras 21-25.

⁴ Issued on 30 June 2014 in English, and on 11 July 2014 in French.

⁵ ICC-ASP/12/Res.3, para. 5: "endorses the appended concept document".

- (e) Consultations with NGOs and members of the Academia;
- (f) Documentation of confidential nature;
- (g) Existing practices of the international jurisdictions;⁷
- (h) Publicly available information, including documentation from international Tribunals and Organizations, books and articles, and other.

III. Lessons learned

7. Based on the experience of the Rapporteur, the following lessons can be drawn:

A. Purpose

8. The position of Rapporteur should aim at simplifying and streamlining the work of the relevant Working Group of the Bureau, with a view to enhancing the efficiency and effectiveness of the working methods of the Assembly. When required by the subject matter, the Rapporteur should also provide an expert basis for the draft decisions of the Assembly. To this end, the Rapporteur should be appointed based on personal qualification, and the report delivered should reflect his/her personal expert assessment;

B. Objective

9. The establishment of the position of Rapporteur should be result-oriented, i.e. the mandate conferred by the Bureau should assign a clear objective to be achieved within a given timeline. The objective would necessarily include a report, but it may also comprise a specific outcome, such as a draft stand alone instrument or other decision to be approved by the Assembly;

C. Working plan

10. The Rapporteur is expected to carry the mandate received without requiring, until a late stage of the process, the Working Group of the Bureau to be convened on the substance. As a result, the work of the Rapporteur should start on a solid basis, agreed by States Parties beforehand. The working plan for the Rapporteur should include an outline of the elements that would be addressed in the expected specific outcome (report and any draft stand alone instrument or other decision), with a clear definition of the contents, process and timelines. Such outline should also be the basis for the Assembly to decide on the need to establish the position of Rapporteur and, as a result, it should ideally be approved together with the mandate for the Rapporteur;

D. Working methods

11. At the outset of the mandate, the Rapporteur should define a methodology for the result to be delivered. The working methods of the Rapporteur should include a clear outline of the stages envisaged in the process, with steps to be undertaken and tools to be used, as well as of the interlocutors relevant to the mandate. Consultations should take place also upon completion of the review of the elements that would form the basis for the report, as appropriate;

⁶ *Plenary ENFAST Seminar* (European Network of Fugitive Active Search Teams), Brussels, 17-18 September 2014.

⁷ ICTY-ICTR-SCSL-ECCC-STL, *Prosecuting Mass Atrocities: Lessons Learned from the International Tribunals*, ("Lessons Learned from the International Tribunals") launched on 1 November 2012, addresses arrests at Practices 68-72, paras 336-356. ICTR-OTP manual on *The Tracking and Arrest of Fugitives from International Criminal Justice: Lessons from the International Criminal Tribunal for Rwanda*, June 2013 (restricted), addressing: the legal framework required for tracking; the structure and management of specialized units for tracking; strategies for tracking; the handling of confidential sources; rewards programs; and security issues related to tracking operations; engagement with national authorities.

E. Results

12. The Rapporteur should keep the Working Group informed on the process and on the progress in the mandate received, on a monthly or on any other appropriate basis.

13. The final report should remain under the exclusive responsibility of the Rapporteur. However, a draft report should be submitted to the Working Group and other relevant actors for final comments, before it is finalized.

14. Other relevant outcome that might be proposed in the report, such as any decision to be taken by the Assembly in the form of a stand-alone resolution or other instrument, should be approved by the Working Group and submitted separately to the Bureau.

F. Rapporteur and Special Rapporteur

15. Based on the purpose and objective for the position of Rapporteur, i.e. to foster the efficiency and effectiveness of the working methods of the Assembly, such position appears to be indicated when there is no need to conduct open meetings with States Parties and other participants to inform the preparation of a report, and/or when there is an expert analysis to be conducted.

16. A distinction can be made in the position of Rapporteur, based on the subject matter to be addressed and depending on the need to coordinate information or also to provide an expert based assessment or evaluation, for the purpose of a specific action to be taken in the form of an instrument to be adopted or other decision.

17. As a consequence, the Assembly might consider, on a case-by-case basis, establishing a differentiated position of:

1. Rapporteur

18. A Rapporteur proper would be mandated to examine a particular question by conducting consultations, monitoring processes and receiving suggestions or other inputs from the stakeholders.

19. The selection of a Rapporteur, based on personal qualification, could take place following the usual criteria within the relevant subsidiary body;

2. Special Rapporteur

20. A Special Rapporteur would be mandated to examine a particular question on an expert basis and reflecting a personal, expert-based assessment, carried out by means of research, study and evaluation, upon consultations with any relevant external actors.

21. The appointment of a Special Rapporteur would need to be informed by the specific expertise required by the particular question to be examined. When the appropriate profile is not available within the delegations, consideration should be given to identify the incumbent from external parties, e.g. on a pro bono or other consultancy basis.

G. Reporting lines

22. Based on the purpose and objective for the positions of Rapporteur and Special Rapporteur, as well as on the personal assessment contained in their report, both positions should report directly to the Bureau and the Assembly.
