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## Proposal for an International Criminal Court Arrest Procedures Protocol

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# Proposal for an International Criminal Court Arrest Procedures Protocol

By David Scheffer

¶1 The International Criminal Court continues to face the challenge of apprehending or facilitating the surrender of indicted fugitives. At the end of April 2014, ten indicted individuals remained at large and two indicted individuals were in domestic custody in Libya.<sup>1</sup> While Part 9 of the Rome Statute of the International Criminal Court requires all States Parties to cooperate in the investigation of suspects and the capture and arrest of indicted fugitives on their respective territories,<sup>2</sup> there have arisen circumstances where indicted individuals have remained at large for relatively long periods of time even when their presence on a State Party's territory is generally known or suspected.<sup>3</sup> Some of the indicted fugitives are men of great power, such as President Omar Hassan Ahmad Al Bashir of Sudan,<sup>4</sup> who have the means to shield themselves behind their country's non-party status under the Rome Statute and by the absence of effective Security Council enforcement action to compel the surrender of such high-level officials.<sup>5</sup> Other indicted fugitives have the advantage of stealth and escape into the forested environs of central Africa, as well as associates who facilitate their avoidance of arrest.<sup>6</sup> Joseph Kony and his

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<sup>1</sup> For an update on the number of indicted fugitives of the International Criminal Court, see *Situations and Cases*, ICC, [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx) (last visited May 24, 2014).

<sup>2</sup> United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF.183/9 art. 86, 89, corrected Nov. 10, 1998, and July 12, 1999, available at <http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf> [hereinafter Rome Statute].

<sup>3</sup> *Situation in Darfur, Sudan*, ICC, [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/Pages/situation%20icc-0205.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/Pages/situation%20icc-0205.aspx) (last visited May 22, 2014); see Beth van Schaack, *ICC Fugitives: The Need for Bespoke Solutions*, Comment to *Invited Experts on Arrest Question*, ICC FORUM (Feb. 13, 2014), <http://iccforum.com/arrest>.

<sup>4</sup> See *Situations and Cases*, *supra* note 1.

<sup>5</sup> See van Schaack, *supra* note 3.

<sup>6</sup> See *id.*

indicted colleagues in the Lord's Resistance Army<sup>7</sup> have evaded arrest despite the active pursuit of the Ugandan military accompanied by U.S. military advisers.<sup>8</sup>

Northwestern University School of Law, with the generous support of the Open Society Justice Initiative, convened a set of closed-door meetings in the Office of the Prosecutor of the International Criminal Court in November 2011 to discuss a wide range of issues pertaining to government cooperation on surrenders and arrest capabilities and tactics. One of the prospects for further consideration raised at the meetings was the creation of some kind of special operations unit that could be deployed relatively quickly into the territory of consenting Parties to the Protocol ("Protocol Parties") for the purpose of professionally tracking and apprehending, or facilitating the surrender of, any indicted fugitive on the territory of that Protocol Party.

Having previously written general thoughts on this issue,<sup>9</sup> I have drafted the "International Criminal Court Arrest Procedures Protocol" set forth below, with commentary following each article of the Protocol, in an effort to present at least one detailed approach to the challenge for relevant parties and scholars to consider in the near future.<sup>10</sup>

## INTERNATIONAL CRIMINAL COURT ARREST PROCEDURES PROTOCOL

### *Preamble*

*The Parties to this Protocol,*

*Affirming the obligation of States Parties to the Rome Statute of the International Criminal Court to comply with requests for arrest and surrender of indicted fugitives in accordance with Part 9 of the Rome Statute and with the procedures under their respective national laws,*

*Emphasizing the importance of achieving the arrest or surrender of indicted fugitives of the International Criminal Court as quickly as possible so as to advance the cause of international justice and to defeat impunity for the commission of atrocity crimes within the jurisdiction of the International Criminal Court,*

*Recognizing that a State may not possess or find opportunity to exercise the requisite capabilities in particular circumstances to successfully undertake the arrest or surrender*

<sup>7</sup> See Uganda, ICC, [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/related%20cases/icc%200204%200105/Pages/uganda.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/related%20cases/icc%200204%200105/Pages/uganda.aspx) (last visited Apr. 4, 2014).

<sup>8</sup> See van Schaack, *supra* note 3.

<sup>9</sup> See David Scheffer, *The Enforcement of International Criminal Court Arrest Warrants*, in THE RISE OF INTERNATIONAL JUSTICE 175 (Kelly Askin ed., 2013); David Scheffer, *Maximizing Opportunities to Deter Further Atrocity Crimes*, Comment to *Invited Experts on Prevention Question*, ICC FORUM (Oct. 6, 2011), <http://iccforum.com/prevention#Scheffer>; David Scheffer, *David Scheffer's Arrest Lecture*, ICC FORUM (Feb. 5, 2013), <http://iccforum.com/forum/arrest-lecture>.

<sup>10</sup> For a detailed examination of the state of International Criminal Court arrest policies and procedures, see *Invited Experts on Arrest Question*, ICC FORUM, (Feb. 13, 2014), <http://iccforum.com/arrest>.

*of indicted fugitives of the International Criminal Court believed to be on the territory of such State,*

¶11

¶12 *Determined to ensure that custody of indicted fugitives is accomplished forthrightly so that their right to be tried without undue delay before the International Criminal Court can be enforced or, in the alternative, the procedures for national prosecution and trial can be followed in a timely manner pursuant to principles of admissibility under the Rome Statute,*

¶13

¶14 *Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any manner inconsistent with the Purposes of the United Nations,*

¶15

¶16 *Emphasizing in this connection that nothing in this Protocol shall be taken as authorizing any Party to this Protocol to intervene in an armed conflict or in the internal affairs of any State,*

¶17

¶18 *Determined to provide the means, with the consent of the State in question, to track and arrest or arrange the surrender of indicted fugitives and their transport to the International Criminal Court to stand trial or, in the event it is determined under the Rome Statute that national prosecution shall proceed, to the appropriate national authorities,*

¶19

¶20 *Resolved to respect fully the sovereign authority of any State upon which territory the personnel provided pursuant to this Protocol are invited by such State to operate in order to track and achieve the custody of indicted fugitives of the International Criminal Court,*

¶21

¶22 *Have agreed as follows:*

### **Commentary:**

¶23 The Preamble sets forth the parameters of the dilemma, the aspirations of the States Parties of the International Criminal Court, and the determination to provide the means to track and arrest or arrange the surrender of the indicted fugitives.

¶24 First, there is an affirmation of the Part 9 procedures of the Rome Statute,<sup>11</sup> as they are the paramount means of securing the arrest of indicted fugitives. The Protocol serves only as a default option in the event Part 9 procedures prove futile and the “receiving”

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<sup>11</sup> See Rome Statute, *supra* note **Error! Bookmark not defined.**2, at art. 86-102. Part 9 of the Rome Statute is entitled, “International Cooperation and Judicial Assistance” and consists of Articles 86-102 of the Rome Statute. *Id.* Surrender and arrest procedures are covered within Part 9, as well as Rules 181-197 of the Rules of Procedure and Evidence of the International Criminal Court. *Id.*; The Rules of Procedure and Evidence, rules 181-97, ICC-ASP/1/3 and Corr.1 (Sept. 3-10, 2002). For example, Article 89 of the Rome Statute concerns “Surrender of persons to the Court.” Rome Statute, *supra* note **Error! Bookmark not defined.**2, at art. 89. Article 91 covers “Contents of request for arrest and surrender.” *Id.* at art. 91. Article 92 sets forth requirements for “Provisional arrest.” *Id.* at art. 92.

Party to the Protocol consents to deployment of highly skilled experts to track and arrest indicted fugitives.

¶25 Second, the Preamble reaffirms the Parties' allegiance to the United Nations Charter and the Charter's prohibition on the use or threat of force against any State in a manner inconsistent with the Purposes of the United Nations.<sup>12</sup> This is important to clarify up front in the document so that the consensual, voluntary, and non-aggressive character of the deployment of the ICC Protocol Team onto the sovereign territory of a Protocol Party for a very limited objective is clearly understood. The sovereignty of the consenting and thus receiving Party of the ICC Protocol Team is a primary, if not the primary, right to be protected and preserved in this exercise. This is essential for the participation of any government in any such plan.

## ARTICLE I

### PURPOSE OF THE PROTOCOL

¶26 *The purpose of this Protocol is to establish the means by which highly skilled and trained personnel and equipment can be made available for deployment into a consenting State to track and arrest or facilitate the surrender of indicted fugitives of the International Criminal Court and transport them either to the International Criminal Court or to appropriate national authorities where national prosecution has been approved by the International Criminal Court.*

#### ***Commentary:***

¶27 The purpose provision states the limited character of the Protocol, namely to establish the means to track and apprehend indicted fugitives as effectively as possible and to transport them to The Hague, or to any other agreed location.

## ARTICLE II

### PARTIES TO THE PROTOCOL

¶28 *As its participation is required to carry out the procedures and responsibilities of this Protocol, the International Criminal Court shall be a Party to this Protocol provided the Assembly of States Parties approves ratification thereof. Any Member State of the United Nations and any international or regional organization or defense alliance approved for this purpose by the Assembly of States Parties to the International Criminal Court may sign and ratify or accede to this Protocol and become a Party to the Protocol. Any such approval by the Assembly of States Parties shall be pursuant to Article 112 of the Rome Statute and the Rules of Procedure of the Assembly of States Parties.*

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<sup>12</sup> See U.N. Charter art. 2, para. 4.

*Commentary:*

¶29 The range of eligible parties to the Protocol spans across Member States of the United Nations, the International Criminal Court, and other designated organizations. While this makes for a potentially diverse pool of parties including governments and international or regional organizations of varied character, the objective is to ensure that the ICC Protocol Team can function effectively with the right cast of participating supporters. The participation of the International Criminal Court, particularly the ICC Prosecutor and ICC Registrar, is essential, and various Protocol provisions make that clear. The International Criminal Court is a vital player in the entire structure of the Protocol and in the performance of the ICC Protocol Team, and thus the Court must be a treaty party to the Protocol so that it can enter into force and then be implemented. This would require the Assembly of States Parties of the ICC to approve the ICC Arrest Procedures Protocol, and to do so initially so as to stimulate governmental ratifications that achieve the minimum number required for entry into force.

¶30 The governments that join the Protocol most likely would be States Parties to the Rome Statute, but they need not be. Any Member State of the United Nations is eligible to join the Protocol. This would facilitate a non-party to the Rome Statute to join the Protocol if, for example, that government has a special interest in assisting with the arrest of indicted fugitives on its territory and yet cannot achieve ratification of the Rome Statute in a timely fashion, or a government that, while a non-party to the Rome Statute, nonetheless wishes to provide assistance for tracking and arrest operations either generally or in a particular situation and finds participation in the Protocol useful for its own national purposes.

¶31 There could be real value attached to the participation of certain organizations in the Protocol. These could include the European Union, the African Union, NATO, INTERPOL, EUROPOL, the Organization of American States, and the United Nations. These types of organizations can provide critical assistance to the ICC Protocol Team under varied circumstances and benefit from the apprehension of indicted fugitives who can threaten international peace and security while remaining at large. In theory any one of them could join with the International Criminal Court as an institutional party to the Protocol and thus participate in the work of the ICC Protocol Team through the provision of important forms of assistance. But any such organization would have to be approved in advance for party status in the Protocol by the Assembly of States Parties to the International Criminal Court. This is important to ensure that any organizational participant is acceptable to the International Criminal Court for engagement (however structured or detached in character) in tracking and arrest operations, which typically are very sensitive matters to orchestrate. The International Criminal Court also should consider the desirability of any particular organization being entitled to a vote in the Protocol Supervisory Group (PSG) as provided in the Protocol. Thus, the Court's discretion is a necessary component in determining which organizations would be eligible for and acceptable for membership in the Protocol.

## ARTICLE III

## CREATION AND FUNCTIONS OF THE ICC PROTOCOL SUPERVISORY GROUP

1. *Within 30 days of receipt by the Registrar of the International Criminal Court, who would serve as the Depository of the Protocol, of the required number of ratifications or accessions to this Protocol, the Parties to the Protocol shall convene a meeting to examine and discuss the implementation of the Protocol and initiate administrative and logistical measures for creation of the ICC Protocol Supervisory Group (hereinafter "PSG") within 60 days of such meeting.*
2. *The PSG shall be comprised of one delegate from each Party to the Protocol. The PSG delegates shall elect a Chairperson from among such delegates by majority vote for a single four-year non-renewable term. A Party whose delegate has served as Chairperson cannot hold the position for two consecutive terms.*
3. *The headquarters of the PSG shall be located in The Hague, Netherlands. Meetings of the PSG shall take place in The Hague or elsewhere as determined by the Chairperson of the PSG.*
4. *The functions of the PSG are:*
  - a. *to agree upon and supervise the coordination among the Parties of the selection and training of personnel, including leaders, of the ICC Protocol Team as well as acquisition of supplies and equipment for the ICC Protocol Team;*
  - b. *to determine when to deliver a request for deployment of the ICC Protocol Team to the Party on which territory the ICC Prosecutor has reason to believe one or more indicted fugitives are located or are transiting frequently enough to merit a track and arrest operation on such territory, to obtain the advance written consent of the Party receiving the ICC Protocol Team on its territory (the "Receiving Party"), and to confirm that the ICC Prosecutor recommends deployment of the ICC Protocol Team to the Receiving Party's territory for such purpose;*
  - c. *to respond to any issues or questions raised by the Receiving Party and facilitate the cooperation of the Receiving Party;*
  - d. *to determine, based upon the advice received from the leadership of the ICC Protocol Team, the precise timing and character of the deployment of the ICC Protocol Team to the territory of the Receiving Party;*
  - e. *to determine, based on the advice received from the Joint Command Group (as defined in Article V(2)) or the request of the Receiving Party, the schedule and character of withdrawal of all or part of the ICC Protocol Team from the territory of the Receiving Party;*
  - f. *to prepare, examine, and approve the annual budgets of the Joint Command Group, the ICC Protocol Team, and of the PSG.*
5. *The written consent of a Receiving Party relating to the planned deployment of the ICC Protocol Team on its territory shall be delivered prior to any such deployment to the Registrar of the International Criminal Court, with simultaneous copy to the PSG.*

6. *The PSG shall act on the basis of consensus when possible and by recorded majority vote when consensus is not achieved.*
7. *The PSG shall act secretly when necessary to preserve the secrecy of a sealed indictment, the secrecy of a deployment or particular operation, the secrecy of a withdrawal of all or part of the ICC Protocol Team from a Receiving Party, or at the explicit request of a Receiving Party for as long as the PSG considers appropriate.*

**Commentary:**

¶32 Article III describes how the decision-making body, namely the ICC Protocol Supervisory Group (“PSG”), would be created and stipulates its functions. The first step would be a management meeting of the Parties to the Protocol once the minimum number for entry into force have ratified the Protocol. The number of days following entry into force for the first meeting—30 days—is arbitrary and could be modified during the drafting stage. The number of days for the actual establishment of the PSG is also arbitrarily set at 90 days, and could be altered during drafting.

¶33 Each Party to the Protocol would have a seat at the table of the PSG. This includes governmental and institutional parties. For example, the ICC would have a voting seat, as would INTERPOL if it chose to join the Protocol, and each State ratifying or otherwise joining the Protocol would have a voting seat. The Chairperson of the PSG would be the delegate of one of the Parties, elected to the post by a majority of the total membership of the PSG, and that individual would serve for a four-year non-renewable term. The delegate of any Party to the Protocol cannot serve two consecutive terms as Chairperson, a choice reflected in the drafting so that no Party becomes a dominant actor in the process and so that leadership can be appropriately shared over the years as is done in other organizations.

¶34 The logical location for the headquarters of the PSG would be The Hague so that it is proximate to the headquarters of the ICC Protocol Team itself, as well as being proximate to the Office of the Prosecutor of the ICC, with which the PSG would meet frequently for briefings and guidance. While meetings of the PSG normally would take place in the headquarters located in The Hague, there should be flexibility for the PSG to meet elsewhere at the discretion of the Chairperson. This could be particularly useful if a Party volunteered to host a meeting in its capital or headquarters (for an organization such as NATO if it were to join the Protocol) and even offered to cover the travel expenses of the delegates for this purpose.

¶35 The functions of the PSG are set forth in Article III(4) and are largely self-explanatory. The most ambiguous function as stated in the Protocol is the Article III(4)(a) mandate for the PSG to “agree upon and supervise” the selection and training of ICC Protocol Team personnel. That responsibility would require the PSG to develop plans and procedures for selection and training purposes in coordination with Parties providing personnel (the “Sending Parties”), a task that is better left to the PSG itself when it meets and examines options and available resources.

¶36 The PSG would have to make the formal request to a Protocol Party for the latter’s consent to deployment of the ICC Protocol Team onto its territory. Prior to doing so, however, the PSG would need to receive confirmation from the ICC Prosecutor that she

or he has reason to believe the indicted fugitive is located on such territory or is transiting it frequently enough to merit a track and arrest operation in that country and that the ICC Prosecutor recommends deployment of the ICC Protocol Team for this purpose.

¶37 The PSG should stand prepared to respond to all inquiries from the Receiving Party prior to and during the deployment of the ICC Protocol Team so that misunderstandings are avoided and the operation can proceed efficiently and with the full cooperation of the Receiving Party. The PSG would make the decision, based upon advice from the leadership of the ICC Protocol Team, when and how to deploy the ICC Protocol Team to the territory of the Receiving Party. Likewise, the PSG would make the decision on withdrawal of all or part of the ICC Protocol Team based upon the advice of the ICC Protocol Team and/or at the request of the Receiving Party or of a Sending Party.

¶38 The PSG would bear the responsibility to prepare, review, and approve the budgets of the ICC Protocol Team and of the PSG itself.

¶39 Given the requirement that the ICC Protocol Team would not deploy to the territory of a Party unless and until the ICC Prosecutor seeks such deployment *and* the Receiving Party has consented to such deployment, one would expect that the PSG would act on a largely consensus basis to reach decisions pertaining to the deployment and the ICC Protocol Team's operations on the Receiving Party's territory. But where consensus cannot be achieved, then the majority-vote rule would be used to arrive at decisions.

¶40 There may be situations where the PSG must act in secrecy, at least until such time as a particular deployment or matter of interest can be revealed publicly. Article III(7) permits such secrecy in particular circumstances, namely, deployment of a particular operation by the ICC Protocol Team, operational details relating to partial or full withdrawal, or a Receiving Party's interest in maintaining secrecy, at least for some period of time, given the political or logistical risks that could arise with a publicly-announced deployment or withdrawal of the ICC Protocol Team.

#### ARTICLE IV

##### CREATION AND COMPOSITION OF THE ICC PROTOCOL TEAM

1. *The PSG shall convene no later than 90 days following its establishment to undertake the procedures set forth below for the creation of the ICC Protocol Team.*
2. *The ICC Protocol Team shall be comprised of personnel from Parties to the Protocol (each hereafter referred to as the "Sending Party"), command leadership drawn from such Protocol Parties, and the necessary infrastructure support such as communications, weapons, supplies, and logistical assistance.*
3. *The PSG may seek or obtain training and logistical assistance for the ICC Protocol Team from any non-party State or any public or private group or entity organized under or incorporated in such non-party State, provided the PSG approves of such non-Party State or any such entity participating pursuant to an agreement or contract entered into between either the non-party State or the relevant public or private group and the PSG and further provided that the non-party State or public or private group agrees in writing to comply fully with the obligations of Article VI of the Protocol.*

4. *The headquarters of the ICC Protocol Team shall be located in The Hague, Netherlands. The main training and base camp of the ICC Protocol Team shall be established on the territory of any Protocol Party that offers and establishes such a site following PSG approval. The field headquarters for any particular operation may be established in or proximate to the territory of any Party in which the ICC Protocol Team is deployed on mission.*
5. *Parties to the Protocol are encouraged to commit requisite personnel, supplies, or logistical support to the creation and operation of the ICC Protocol Team, which would be sustainable only to the extent that such support is provided by the Protocol Parties.*
6. *The PSG shall activate the ICC Protocol Team on a standby basis for possible deployment on any approved mission provided the PSG has determined that sufficient personnel, supplies, and logistical support for an operational tracking and arrest team have been committed for an effective organizational and operational capability and funding is sufficient to sustain a standby capacity.*

***Commentary:***

¶41 Once the PSG is established and a Chairperson is elected, one of the group's first responsibilities would be the establishment of the ICC Protocol Team, which would be the operative means by which to track and arrest the indicted fugitives. The Protocol requires a timeline of 90 days within which the PSG would plan for a meeting that launches the creation of the ICC Protocol Team. There is no set timeline for actual creation of the ICC Protocol Team, as that would be part of the planning process resulting from the first PSG meeting on the subject.

¶42 The composition of the ICC Protocol Team would consist of military, law enforcement personnel (including investigators), and civilian personnel from Protocol Parties that have been voluntarily committed to the ICC Protocol Team by such Parties. This means that some Parties to the Protocol might decide not to contribute personnel, but instead to support the ICC Protocol Team and the PSG through payment of the required assessments under the Protocol and perhaps to provide supplies and logistical support to the ICC Protocol Team. The Protocol does not envisage private contractors being part of the ICC Protocol Team, but that is a subject that could be further explored in negotiations over the text of the draft Protocol. As provided in Article X(3), the salaries and benefits of the personnel provided to the ICC Protocol Team would be covered by the Sending Party.

¶43 The command leadership of the ICC Protocol Team would be drawn from the ranks of the personnel committed by the individual Protocol Parties; details about the command structure are provided in Article V. The rationale for drawing the leadership strictly from contributing Protocol Parties rests on simple command principles and political realities, namely that such Parties would be more willing to contribute personnel knowing that their commanders would be part of the command structure.

¶44 The ICC Protocol Team also includes the non-personnel components of the Team, namely the communications, supplies, weapons, and logistical support necessary for the

efficient and professional operation of the Team in both its training facility and when deployed in the field.

¶45 The Protocol, in Article IV(3), offers the opportunity for the PSG to reach agreement directly with a non-party State that may have capabilities in training or logistical support that would be useful for the ICC Protocol Team. Any public entity of such non-party State and any private contractor providing such services would have to be contracted under arrangements fully approved by the PSG, which must include the agreement of such non-party State or such public or private entity to comply with all of the Article VI conditions of the Protocol. This is intended to avoid the recent Iraq/Afghanistan experiences with private contractors and their possible non-compliance with international humanitarian law. There would need to be strict safeguards built into any PSG relationship with either public or private contractors of non-party States to avoid illegal behavior by such contractors.

¶46 The geographical locations of various activities are spelled out in Article IV(4). The ICC Protocol Team headquarters would be located in The Hague, which would be expected to maintain close cooperation and coordination with the ICC Prosecutor and her or his staff. The training and base camp of the ICC Protocol Team could be established wherever it makes most sense for efficiency and operational effectiveness and as determined by the PSG in the future. The actual field headquarters of the ICC Protocol Team for any particular operation presumably would be established on the territory of the Receiving Party or perhaps an adjacent Party's territory depending on the operational requirements of the particular mission.

¶47 Protocol Parties are encouraged to commit personnel, supplies, or logistical support to the ICC Protocol Team and to incur the cost of any such commitments. Article X sets forth the financial requirements, namely that the costs of the personnel are to be covered by the Sending Party (unless voluntary funders step forward to cover part or all of such expenses), while the costs of supplies and logistical support should be covered to the extent possible by the Sending Party. Where coverage of non-personnel costs by the Sending Party is not possible, the PSG should factor into the budget such costs and determine the extent to which they can be paid for out of the budget on a case-by-case basis and/or by voluntary funders. This flexibility is built into the Protocol to afford the PSG and the ICC Protocol Team options in actually setting up their operations. Article X of the Protocol encourages voluntary contributions by Protocol Parties and by any State, organization, or private benefactor.

¶48 The PSG would have the authority to activate the ICC Protocol Team on a "standby basis," meaning that its operational readiness would be confirmed and it could thereafter be available for deployment in accordance with the procedures set forth in the Protocol. This action by the PSG would trigger the operational character of the ICC Protocol Team so that requests and approvals of its deployment onto the territory of a Receiving Party would be possible.

## ARTICLE V

## COMMAND STRUCTURE OF THE ICC PROTOCOL TEAM

1. *Military commanders and civilian advisers of the ICC Protocol Team shall be nominated by the Protocol Parties committing personnel to the ICC Protocol Team; their qualifications shall be reviewed by the PSG; they shall be selected for duty by and with the approval of the PSG.*
2. *The PSG shall establish the Joint Command Group, to be headquartered in The Hague, and consisting of at least one senior commanding officer from each Party dedicating military personnel to the ICC Protocol Team. The PSG shall designate among such senior commanding officers one force commander of the Joint Command Group (the "Force Commander") who will chair its meetings and oversee its daily operations, who will be responsible for direct communications with and reporting to the PSG and the ICC Prosecutor, and who will coordinate communications and control measures among the senior commanding officers. The Force Commander shall determine the further delegation of authority in the ICC Protocol Team in consultation with the PSG and the Joint Command Group.*
3. *Senior commanding officers of the Protocol Party contingents that make up the ICC Protocol Team shall report to the Force Commander on all operational matters and must not be given or accept instructions from their own national authorities that are contrary to the mandate of the operation. The Force Commander shall ensure that senior commanding officers are involved in operational planning and decision-making, especially where their respective national contingents are concerned. Such involvement shall take the form of regular consultations in a unified force.*
4. *Operational authority of the Joint Command Group shall include the authority to issue operational directives within the limits of a specific operation and its specific geographic area (the mission area) and for an agreed period of time, with the stipulation that an earlier withdrawal of a contingent will require the Sending Party to provide reasonable prior notification.*
5. *Senior commanding officers of national military units participating in ICC Protocol Team operations shall refer orders that are illegal under relevant national or international law or are outside the mandate of the particular operation to higher national authorities, if they are unable to resolve the matter with the Joint Command Group or with the Force Commander. No senior commanding officer shall carry out any order that violates relevant national law or international humanitarian law or the law of war or falls outside the mandate of the operation.*
6. *Military, police, and other civilian personnel provided by any Party to the ICC Protocol Team shall be transferred to the operational control of the Joint Command Group for the purpose of unified command within the ICC Protocol Team.*

7. *Each Protocol Party contributing to the ICC Protocol Team shall retain and not relinquish command authority over its national forces and personnel. With respect to any particular operation undertaken by the ICC Protocol Team, national authorities shall place their forces and personnel under the temporary operational control of the Force Commander and Joint Command Group to perform such operation. The chain of command from the highest national authority to the senior commanding officer in the field with the ICC Protocol Team shall remain inviolate. Senior commanding officers shall maintain the capability to report separately to higher national military authorities, as well as to the Joint Command Group, provided that operational matters that must remain secret are handled in accordance with procedures to be approved by the PSG.*
8. *National authorities of Sending Parties may at any time terminate the participation of their national contingent provided reasonable prior notice is delivered to the Joint Command Group and the PSG, which will advise the ICC Prosecutor.*
9. *National authorities shall continue to exercise administrative control of their relevant national personnel in the ICC Protocol Team for purposes such as discipline and evaluation.*

***Commentary:***

¶49 The command leadership would be comprised only of nationals of the Protocol Parties contributing personnel to the ICC Protocol Team. The PSG would review the qualifications of individuals nominated by such Protocol Parties and select officers for the ICC Protocol Team. There would be established a Joint Command Group, headquartered in The Hague, and comprised of one commander per Party selected by the PSG for the ICC Protocol Team (the “Joint Command Group”). The PSG would select a “Force Commander” from among the ranks of the commanders on the Joint Command Group. The Force Commander would chair the meetings of the Joint Command Group and oversee its day-to-day operations. He or she would be responsible for direct communications with the PSG and would coordinate communications and control measures among the commanders. Importantly, the Force Commander would determine the further delegation of authority within the ICC Protocol Team following consultation with the PSG and the Joint Command Group.

¶50 Clear lines of operational command between the Joint Command Group and subordinate officers within the ICC Protocol Team would be established. The subordinate commanders of Party contingents would not receive or accept instructions from their national governments that would be contrary to the mandate of operations. The Force Commander must ensure that national contingent commanders are involved in operational planning and decision-making, especially where their respective contingents are concerned. Such involvement should take the form of regular consultations in a unified force.

¶51 Article V(4) of the Protocol speaks to operational directives that can be issued by the Joint Command Group to implement actions within the limited mandate and geographical and temporal limitations of the operation. If a Sending State seeks to withdraw its contingent from an operation, it must give reasonable notification of such withdrawal. What constitutes “reasonable” could be left vague for the case-by-case

management of different situations, or further drafting considerations could establish a period of prior notification required for withdrawal of a national contingent.

¶52 All commanders in the ICC Protocol Team would have the obligation not to carry out any orders that violate national law or international law and to report any such illegal orders to higher national authorities of their Sending State. In order to achieve a unified and coordinated command structure within the entire ICC Protocol Team, all military, police, and civilian personnel would fall under the operational command of the Joint Command Group.

¶53 An important caveat in the command of national contingents that serve in the ICC Protocol Team is that their respective senior commanding officers retain *command* authority over national forces and personnel while placing them under the temporary operational control of the Joint Command Group. The senior commanding officers continue to report to their national superiors, but not with respect to secret operational matters for which the PSG would need to establish the procedures. Commanders of national contingents can withdraw their personnel from an operation provided reasonable notice is delivered to the Joint Command Group and the PSG. While deployed with the ICC Protocol Team, national personnel would continue to fall under the control of senior commanding officers with respect to the exercise of administrative control for purposes of discipline and evaluation.

## ARTICLE VI

### RESPECT FOR THE LAW

1. *The Joint Command Group shall command the ICC Protocol Team, and its personnel shall perform, in strict compliance with international law, including the law of war and international humanitarian law, and in a manner respectful of the sovereignty and national laws of the Receiving Party.*
2. *The ICC Protocol Team shall use means and methods of combat or law enforcement that comply strictly with international law and norms. The ICC Protocol Team shall comply with relevant instruments of international humanitarian law and customary international law prohibiting or restricting the use of certain weapons and methods of combat. Military and police forces and other personnel of the ICC Protocol Team must make a clear distinction between civilians and combatants and conduct military operations only against combatants and military objectives in pursuit of indicted fugitives. In the treatment of civilians during any particular operation, the ICC Protocol Team shall provide special protection to women and children from rape, enforced prostitution and any other form of sexual violence or humiliation or indecent and criminal assault.*
3. *All military, police, and civilian personnel of the ICC Protocol Team shall be subject to investigation and prosecution under their own national systems of military justice or civilian justice for their conduct with the ICC Protocol Team pursuant to procedures set forth in the Contingency Agreement required by Article VIII below, unless the Sending Party has waived this right for any particular individual(s) or the Sending Party is a*

*Member State of the Rome Statute of the International Criminal Court and the alleged crime falls within the jurisdiction of the Rome Statute, in which case the Sending Party shall comply fully with its obligations under the Rome Statute and the Contingency Agreement.*

4. *The ICC Protocol Team shall obey local laws and respect social, cultural and religious norms and customs that do not violate international norms of human rights protection. Personnel of the ICC Protocol Team shall maintain the highest standards of integrity for international civil servants and military and police forces in their personal conduct.*

**Commentary:**

¶54 Article VI of the Protocol requires all commanders and personnel of the ICC Protocol Team to perform their duties and responsibilities in strict compliance with international humanitarian law and the law of war as well as relevant national law of the Receiving Party. This includes making a clear distinction between combatants and civilians, and providing special protection for women and children.

¶55 Article VI opts for enforcement of legal standards under the law and courts of the Sending State, as is typical in Status of Forces and Status of Mission Agreements worldwide. It is highly doubtful any other formula would be acceptable to Sending States for deployment in the ICC Protocol Team. However, States Parties of the Rome Statute of the International Criminal Court are required to comply with the rules and procedures of the ICC in connection with the performance of their national personnel in the ICC Protocol Team if they are allegedly responsible for a crime falling within the jurisdiction of the Rome Statute.

¶56 While local laws and customs are to be respected by the ICC Protocol Team, personnel must not act in a way that violates international norms of human rights protection.

ARTICLE VII

DEPLOYMENT OF THE ICC PROTOCOL TEAM

1. *The ICC Protocol Team may be deployed into the territory, including the airspace or territorial sea, of any Party to this Protocol in accordance with the procedures set forth in this article and the special arrangements negotiated in the Contingency Agreement between the PSG and such Receiving Party pursuant to Article VIII of this Protocol (“Contingency Agreement”).*
2. *The ICC Protocol Team will deploy only onto the territory of a Party for the purpose of arresting or facilitating the surrender of an indicted fugitive of the International Criminal Court believed to be present on such Party’s territory or in a neighboring country that also has provided written consent for the ICC Protocol Team to operate on its territory if necessary, particularly in hot pursuit.*

3. *Any deployment of the ICC Protocol Team into the territory of a Receiving Party requires a request by the ICC Prosecutor, a written consent by the Receiving Party, and the approval of the PSG.*
4. *A Protocol Party may request the deployment of the ICC Protocol Team onto its territory for the sole purpose of arresting or facilitating the surrender of an indicted fugitive of the International Criminal Court. Any such request shall be in writing and delivered to the Prosecutor of the International Criminal Court. The ICC Prosecutor then may act upon the request by submitting his or her own request to the PSG. Any subsequent deployment of the ICC Protocol Team into the territory of the Receiving Party shall require the prior approval of the PSG.*
5. *The Prosecutor of the International Criminal Court may initiate with a Protocol Party a request for deployment of the ICC Protocol Team into the territory of such Party for the sole purpose of arresting or facilitating the surrender of an indicted fugitive of the International Criminal Court. If such Protocol Party delivers a written consent thereof to the Prosecutor, the Prosecutor shall notify the PSG of such request and written consent. Any subsequent deployment of the ICC Protocol Team into the territory of the Receiving Party following its express consent shall require the prior approval of the PSG.*

**Commentary:**

¶57 There is a central requirement for any deployment of the ICC Protocol Team: the consent of the Receiving Party. The Protocol fully respects the sovereign rights of the Receiving Party in the requirements that the Receiving Party be a State Party to the Protocol, that there be a Contingency Agreement ratified between the Receiving Party and the PSG, and that the Receiving Party grant its prior written consent to the deployment of the ICC Protocol Team onto its territory for each operation pertaining to an indicted fugitive. Until those requirements are met, there can be no such deployment. Once the deployment is made, operations must conform to the Protocol's provisions and the Contingency Agreement.

¶58 The procedures for a deployment of the ICC Protocol Team require a request by the ICC Prosecutor either acting at his or her own initiative or following a request from the Receiving Party, then the approval of the PSG, and finally the written consent of the Receiving Party. The sole purpose of any deployment would be to track and arrest one or more indicted fugitives of the ICC believed to be located on the territory of the Receiving Party. It is important to confirm that there is no other objective (other than tracking and apprehending indicted fugitives) that can be approved or undertaken by the ICC Protocol Team.

¶59 The Receiving Party must provide all necessary access to and mobility within its territory for the ICC Protocol Team, including logistical support as agreed between the PSG and the Receiving Party in its Contingency Agreement.

## ARTICLE VIII

## CONTINGENCY AGREEMENTS

1. *Each Protocol Party shall enter into a Contingency Agreement with the PSG as soon as possible following entry into force of this Protocol for such Party. The ICC Protocol Team may not be deployed into the territory of any Protocol Party until a Contingency Agreement meeting the requirements of this Protocol has entered into force between such Party and the PSG.*
2. *The Contingency Agreement shall provide for:*
  - a. *efficient entry of the ICC Protocol Team into the territory of the Receiving Party granting consent pursuant to Article VII, including rapid compliance with immigration procedures and the provision of necessary national personnel (including interpreters and translators) to facilitate the entry and movement of the ICC Protocol Team on the territory of the Receiving Party;*
  - b. *access to base facilities for stationing of the ICC Protocol Team as deemed appropriate by the Joint Command Group;*
  - c. *requisite privileges and immunities for personnel of the ICC Protocol Team;*
  - d. *specification of conditions required by the Receiving Party for the stationing and operation of the ICC Protocol Team on its territory;*
  - e. *collaborative relationships and operations with national military or police forces;*
  - f. *timely medical treatment of personnel of the ICC Protocol Team when that is deemed necessary by commanders of the ICC Protocol Team;*
  - g. *waivers of any national or local laws prohibiting or restricting the importation or use of any weapons or tracking technology or the payment of any tariffs or taxes or fees relating to such items that are required, at the sole discretion of the Joint Command Group, for the efficient operation of the ICC Protocol Team in the Receiving Party;*
  - h. *procedures for the disposition of matters of criminal law or military justice with respect to personnel of the ICC Protocol Team in a manner consistent with this Protocol;*
  - i. *a field headquarters facility in a secure location of the territory of the Receiving Party for use by the leadership of the ICC Protocol Team;*
  - j. *communications between the Joint Command Group and national government, military, and police authorities; and*
  - k. *respect for identified local customs and law that do not conflict with international human rights law or international humanitarian law.*
3. *The Contingency Agreement shall conform to the greatest extent possible with the form agreement set forth in Annex A of this Protocol.*

**Commentary:**

¶60

One of the key advantages of the existence of the ICC Protocol Team would be its relatively rapid availability to track and apprehend indicted fugitives on the territory of a

Protocol Party once that government has consented to such deployment. The logistical details and political understandings that must be achieved in order for the deployment to take place can delay and ultimately even cripple efforts to send the ICC Protocol Team into the Protocol Party's territory. The Protocol thus requires, in Article VIII, that each Protocol Party enter into a Contingency Agreement with the PSG to iron out a range of issues that would logically arise in the deployment of foreign forces, police, and civilian personnel onto the Protocol Party's territory for the purpose of tracking and apprehending indicted fugitives of the ICC. Until such a Contingency Agreement is concluded between the PSG and the Protocol Party, there can be no deployment of the ICC Protocol Team on the territory of such Protocol Party (as the Receiving Party).

- ¶61 Logistical matters addressed in the Contingency Agreement would include:
- ¶62 —visa status for the rapid entry of personnel of the ICC Protocol Team;
  - ¶63 —collaborative relationships and operations with national military or police forces;
  - ¶64 —access to base facilities;
  - ¶65 —domestic transport arrangements;
  - ¶66 —provision of interpreters and translators;
  - ¶67 —requisite privileges and immunities for personnel of the ICC Protocol Team;
  - ¶68 —special conditions required by the Receiving Party for the stationing and operation of the ICC Protocol Team on its territory;
  - ¶69 —timely medical treatment of personnel of the ICC Protocol Team when that is deemed necessary by commanders of the ICC Protocol Team;
  - ¶70 —waivers of any national or local laws prohibiting or restricting the importation or use of any weapons or tracking technology or the payment of any tariffs or taxes or fees relating to such items that are required, at the sole discretion of the Joint Command Group, for the efficient operation of the ICC Protocol Team in the Receiving Party;
  - ¶71 —procedures for the disposition of matters of criminal law or military justice with respect to personnel of the ICC Protocol Team in a manner consistent with this Protocol;
  - ¶72 —a field headquarters facility in a secure location for use by the leadership of the ICC Protocol Team;
  - ¶73 —communications between the Joint Command Group and national government, military, and police authorities; and
  - ¶74 —respect for identified local customs and law that do not conflict with international human rights law or international humanitarian law.

¶75 These requirements would be negotiated in advance, basically on general terms, through completion of the Contingency Agreement in order to be prepared for any future possible deployment of the ICC Protocol Team to the Protocol Party's territory. With these matters well settled between the PSG and the Receiving Party in the Contingency Agreement, the introduction of the ICC Protocol Team on the Receiving Party's territory would be greatly facilitated and rapidly achievable once an operation is requested by the ICC Prosecutor and the Receiving Party has granted its required consent for the new operation.

¶77 Annex A of the Protocol would set forth a model Contingency Agreement as a guide to Parties of what to negotiate and agree upon prior to any deployment of the ICC

Protocol Team, and to negotiate the standards terms far in advance of any actual deployment.<sup>13</sup>

## ARTICLE IX

### TRACKING, APPREHENSION, AND TRANSPORT OF INDICTEES

1. *The ICC Protocol Team shall undertake measures to skillfully track indicted fugitives, coordinating closely with and using, with the consent of the ICC Prosecutor, any tracking unit established by the ICC Prosecutor and, when possible and feasible, with national authorities and international agencies and any government willing to share information or other skills.*
2. *The ICC Protocol Team shall develop and implement an arrest strategy in close coordination with the ICC Prosecutor with regard to indicted fugitives who are the target of any particular operation. Any such strategy shall follow explicit guidelines set forth in this Protocol and in the Contingency Agreement of the Receiving Party.*
3. *The arrest of an apprehended indictee shall be made by a representative of the Office of the Prosecutor of the International Criminal Court as soon as possible following the physical apprehension or surrender of the indictee. The Contingency Agreement shall establish the procedures for ready access by such OTP representative to the apprehended indictee.*
4. *Within ten days of the apprehension of an indicted fugitive by the ICC Protocol Team, that individual shall be transported by air, if possible, or by another means of transport if necessary to The Hague to appear before the International Criminal Court or, if approved by the International Criminal Court, to appropriate national authorities. The Receiving Party shall facilitate, in coordination with the ICC Prosecutor and the Registrar of the International Criminal Court, all arrangements for the transport of such arrested indictee from its territory to The Hague or to an alternative destination approved by the International Criminal Court and requested by the ICC Registrar, and shall do so rapidly in accordance with the procedures set forth in the Contingency Agreement with the Receiving Party. Other Parties, non-party States, and organizations may voluntarily assist with transport of the arrested indictee at the request of the Receiving Party or the ICC Registrar.*

#### **Commentary:**

¶178

The Protocol stipulates the modalities for tracking indicted fugitives and requires that the ICC Protocol Team coordinate with the ICC Prosecutor and national authorities on tracking matters. The tracking function obviously would be a major responsibility of the ICC Protocol Team, which would have to draw up the strategy for the tracking and arrest operation in close cooperation with the ICC Prosecutor. Another major

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<sup>13</sup> I have omitted any model draft of a Contingency Agreement here but recognize that it would be a useful document to make available to governments and thus would be desirable as a next step in the process.

responsibility would be the individual who makes the arrest, and who would need to be an OTP official. That official would require rapid access to the territory of the Receiving Party for this purpose.

¶79 The transport of the arrested indictee also requires coordination among the Receiving Party, the relevant organs of the International Criminal Court (namely, the ICC Prosecutor and the ICC Registrar), and any other Party, non-party State, or organization that may be requested by the Receiving Party or the ICC Prosecutor or ICC Registrar to assist, voluntarily, with transport requirements. The Protocol should envisage the possibility of transport to an alternative jurisdiction (rather than The Hague) in the event the International Criminal Court needs to hold the arrested indictee outside of the Netherlands at an approved location for some period of time prior to transport to The Hague or in connection with an exercise of complementarity already approved by the Court.

## ARTICLE X

### FINANCIAL PROCEDURES

1. *Expenses of the PSG, the Joint Command Group, and the ICC Protocol Team (the "Protocol Group") shall be paid from the funds contributed by Protocol Parties and, as stipulated below, from in-kind support through the deployment of seconded personnel and in-kind provision of equipment, supplies, or other logistical support.*
2. *The cost of any commitment of personnel shall be borne by the Sending Party itself and by any other Party to this Protocol contributing funds voluntarily for such purpose or by any State or organization or private benefactor or any combination thereof contributing funds voluntarily for such purpose, provided the PSG approves of the voluntary contribution in advance. The costs of non-personnel support for the ICC Protocol Team shall be borne to the extent possible by the Sending Party and, where necessary and agreed to by the PSG in advance, by other voluntary funders and from the PSG annual budget.*
3. *The expenses of the Protocol Group, tabulated in the annual budget prepared by the PSG, shall be provided from the following sources:*
  - a. *assessed contributions by and any supplemental voluntary funds from the Protocol Parties;*
  - b. *funds provided voluntarily by non-party States, organizations, or private individuals;*
  - c. *in-kind provision of equipment, supplies, and logistical support (including required weapons, tracking gear, transport on air, sea, or land); and*
  - d. *with respect to personnel deployed by a Sending Party, the national-scale salaries and benefits of such personnel paid directly to such personnel through the standard procedures of such Sending Party that have been established for their domestic stationing or foreign deployment in non-Protocol situations.*

4. *The contributions of Protocol Parties shall be assessed in accordance with an agreed scale of assessment that is based on the scale adopted by the United Nations for its regular budget and adjusted in accordance with the principles on which that scale is based.*
5. *The records, books, and accounts of the Protocol Group, including its annual financial statements, shall be audited annually by an independent auditor.*

***Commentary:***

¶80 The primary source of funding for any operation of the ICC Protocol Team would be the Sending Party committing personnel, supplies, and logistical support for the operation. The essential principle of funding is that participating Parties in the ICC Protocol Team would cover their own costs of participation to the greatest extent possible. It is doubtful that the project could be launched and maintained if it were entirely dependent on an assessed budget drawn from all of the Parties to the Protocol. And to do so would discourage States that wish to participate but know they cannot bear even a proportionate share of the financial burden of military and law enforcement operations of the ICC Protocol Team, but would be willing to pay assessments fairly allocated among Protocol Parties.

¶81 Article X thus provides for a financial structure that has as its foundation assessments from the Protocol Parties to cover the largely administrative expenses of the PSG, the Joint Command Group, and the ICC Protocol Team (the “Protocol Group”), but that the expenses associated with personnel required for the ICC Protocol Team must be paid by the Sending Party and any other Party, non-party State, or organization that voluntarily wishes to help cover such expenses and is approved for this purpose by the PSG in advance. As for supplies and logistical support expenses, those too should be covered to the extent possible by the Sending Party, but the cost can be shared with others willing to make voluntary contributions, provided the PSG approves of such support in advance. The reason is to ensure oversight of the sources and character of such financial and in-kind support and further to ensure coordination of the provision of support to the Sending Party and to the ICC Protocol Team.

¶82 The scale of assessments for the Protocol Parties would be the same as that used at the United Nations, adjusted to reflect the smaller number of States that would be Protocol Parties. Like the Rome Statute, the Protocol would require an annual independent audit of the records, books, and accounts, including annual financial statements.

ARTICLE XI

SETTLEMENT OF DISPUTES

¶83 *Any dispute between two or more Protocol Parties relating to the interpretation or application of this Protocol which is not settled through negotiations between or among such disputing Protocol Parties within three months of their commencement shall be referred to the PSG. The PSG may itself seek to settle the dispute or may make*

*recommendations on further means of settlement of the dispute, including referral to the Registrar of the International Criminal Court to serve as a mediator of the dispute or for adjudication before the International Court of Justice in conformity with the Statute of that Court. The Protocol Parties agree to submit to the jurisdiction of the International Court of Justice for such purpose if requested by the PSG.*

***Commentary:***

¶84 The resolution of disputes between or among the Protocol Parties would be undertaken first through diplomatic channels between or among the disputing Protocol Parties and, if unresolved after three months, sent to the PSG for resolution. If the PSG fails to resolve the dispute, it may then submit it either to the Registrar of the International Criminal Court for mediation, or, either failing that effort, or as an alternative to the ICC Registrar, to the International Court of Justice. Article XI thus constitutes a compromissory clause of agreed submission by the Protocol Parties of their disputes to the International Court of Justice in the event preliminary means of settlement fail.

ARTICLE XII

RESERVATIONS

¶85 *No reservations may be made to this Protocol.*

***Commentary:***

¶86 In keeping with the Rome Statute, the Protocol would not permit reservations. This may prove contentious during negotiations of the drafting of the Protocol, and some States may bring forth considerations that point to the need for some kind of right to reservations from the Protocol because the Protocol does not have precisely the same character as the Rome Statute, which addresses issues of international criminal law and, indirectly, international human rights principles.

ARTICLE XIII

AMENDMENTS

1. *Any Protocol Party may propose an amendment to this Protocol and within three months of such proposal the PSG shall convene all Protocol Parties for consideration of such proposed amendment.*
2. *The adoption of an amendment shall require a two-thirds majority vote of approval by all Protocol Parties at a meeting convened by the PSG.*

3. *An amendment shall enter into force for all Protocol Parties one year after instruments of ratification or acceptance have been deposited with the Registrar of the International Criminal Court by seven-eighths of them.*
4. *Any Protocol Party that has not accepted the amendment may withdraw from this Protocol in accordance with Article XVI of this Protocol.*

**Commentary:**

¶87 Procedures for amendments to the Protocol are set forth in Article XIII and mirror some of the relevant procedures of Article 121 of the Rome Statute, although the latter deals with a far more complex set of circumstances. There is a right of withdrawal from the Protocol by any Party that does not accept the amendment, but the right must be exercised within one year of the amendment's entry into force.

ARTICLE XIV

SIGNATURE, RATIFICATION, ACCEPTANCE, APPROVAL OR ACCESSION

1. *This Protocol shall be open for signature by the International Criminal Court, all States, and organizations approved by the Assembly of States Parties of the International Criminal Court in The Hague at the Registrar's Office in the headquarters of the International Criminal Court in The Hague, Netherlands.*
2. *This Protocol is subject to ratification, acceptance or approval by signatories. Instruments of ratification, acceptance or approval shall be deposited with the Registrar of the International Criminal Court.*
3. *This Protocol shall be open to accession by all States and approved organizations. Instruments of accession shall be deposited with the Registrar of the International Criminal Court.*

**Commentary:**

¶88 Article XIV has standard provisions on signature, ratification, etc., drawn from the Rome Statute. But the Registrar of the International Criminal Court would be the designated depository for such documents.

ARTICLE XV

ENTRY INTO FORCE

1. *This Protocol shall enter into force on the first day of the month after the 60<sup>th</sup> day following the date of the deposit of the tenth instrument of ratification, acceptance, approval or accession with the Registrar of the International Criminal Court provided*

*there already has been deposited with the Registrar the ratification of the International Criminal Court, by appropriate action of the Assembly of States Parties.*

2. *For each State or organization ratifying, accepting, approving, or acceding to this Protocol after the entry into force of the Protocol pursuant to this Article, the Protocol shall enter into force on the first day of the month after the 60<sup>th</sup> day following the deposit by such State or organization of its instrument of ratification, acceptance, approval or accession.*

**Commentary:**

¶89 Entry into force of the Protocol requires two significant events: 1) the International Criminal Court must become a Party to the Protocol; and 2) at least ten States must become Parties to the Protocol. The International Criminal Court's participation is so critical to the operations of the Protocol Group that there would be no point in implementing the Protocol without the Court's direct and obligatory engagement. The relatively low number of ratifying Parties reflects the simple reality that there remain a limited number of situations under litigation at the International Criminal Court and thus it may prove very useful for key States, such as where indicted fugitives are known or believed to be located and others that could be of significant assistance in tracking and apprehension operations, to join together so that the deployment of the newly-created ICC Protocol Team could be achieved as quickly as possible.

ARTICLE XVI

RIGHT OF WITHDRAWAL

1. *A Protocol Party may, by written notification to the Registrar of the International Criminal Court that is simultaneously copied to the PSG, withdraw from this Protocol. The withdrawal shall take effect one month after the date of receipt of the notification, unless the notification specifies a later date.*
2. *A withdrawal by the International Criminal Court from this Protocol would terminate the Protocol for all Parties as of the effective date of withdrawal by the International Criminal Court.*
3. *A State or organization shall not be discharged, by reason of its withdrawal, from the obligations arising from this Protocol while it was a Party to the Protocol, including any financial obligations that it may have accrued. If the State is a Member State of the International Criminal Court, its financial obligations and duty to cooperate with the International Criminal Court under the Rome Statute shall continue.*

**Commentary:**

¶90 The Protocol would have a somewhat novel withdrawal clause. Given the operational character and personnel risks associated with the ICC Protocol Team, a Party

should have the right to withdraw with one month’s notice (rather than one year). This would give the participating government confidence that it can disengage quickly not only from a theater of operation but from the Protocol itself, which is a voluntary undertaking to begin with, if circumstances, political or otherwise, require such withdrawal.

¶91 The other unorthodox feature of the Protocol is the automatic termination of the Protocol in the event its anchor Party, the International Criminal Court, were to withdraw from the treaty. The ICC Protocol Team simply cannot and should not function without the full participation of the ICC Prosecutor, ICC Registrar, and Assembly of States Parties in its various operations and structural requirements. Thus, a withdrawal by the International Criminal Court, presumably upon determination of the Assembly of States Parties, would fatally undermine the entire rationale of the Protocol.

¶92 However, outstanding financial obligations under the Protocol accrued by a withdrawing Party would need to be paid by such withdrawing Party.

ARTICLE XVII

AUTHENTIC TEXTS

¶93 *The original of this Protocol, of which the Arabic, Chinese, English, French, Russian, and Spanish texts are equally authentic, shall be deposited with the Registrar of the International Criminal Court, who shall send certified copies thereof to all Protocol Parties.*

¶94

¶95 *In Witness Whereof, the undersigned, being duly authorized thereto by their respective*  
 ¶96 *Governments or Institutions, have signed this Protocol.*

¶97

¶98 *Done at \_\_\_\_\_, this \_\_\_\_ day of \_\_\_\_\_ 20\_\_.*

**Commentary:**

¶99 This is a standard provision, drawn from the Rome Statute, on authentic language texts of the Protocol and signature requirements.

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¶102 It is my hope that this draft Protocol will inspire some forward movement in improving the arrest capabilities of the International Criminal Court with the support not only of States Parties to the Rome Statute, but also of key non-party States, including the United States of America, which can enhance their own security and allegiance to the rule of law by facilitating the apprehension of such indicted fugitives and help meet a worthy common objective for all of humankind.