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NOTE

from:	Working Party on Public International Law
to:	Political and Security Committee
Subject:	Draft Action Plan to follow-up on the Decision on the International Criminal Court

1. On 21 March 2011, the Council of the European Union adopted a Decision on the International Criminal Court repealing its 2003 Common Position (Council Decision 2011/168 CFSP, OJ EC L 76/56 of 22 March 2011). This Decision calls for the Action Plan, agreed upon on 4 February 2004, to be adapted as appropriate.
2. On 23 February and 8 June 2011, the ICC Sub-Area of the Working Party on Public International Law (COJUR-ICC) discussed the draft Action Plan to follow-up on the Decision on the International Criminal Court.
3. On 24 June 2011, COJUR-ICC agreed under silence procedure the draft Action Plan as set out in the Annex.

4. The Political and Security Committee is invited to confirm the agreement reached by COJUR-ICC on the text of the draft Action Plan to follow-up on the Decision on the International Criminal Court, as set out in the Annex, with a view to submitting the text to Coreper for information.

DRAFT ACTION PLAN TO FOLLOW-UP ON THE DECISION ON THE INTERNATIONAL CRIMINAL COURT

On 21 March 2011, the Council of the European Union adopted a Decision on the International Criminal Court (ICC)¹ repealing its 2003 Common Position² (hereinafter "the Decision"). This Decision calls for the Action Plan agreed upon on 4 February 2004³ to be adapted.

The Council has also adopted several Decisions⁴ in the area of Justice and Home Affairs, with a view to strengthening co-operation among Member States on the fight against impunity of those who have committed genocide, crimes against humanity and war crimes.

This revised Action Plan is focused on the 5 objectives of the Decision, as described in Article 1.2 of the 2011 Decision⁵.

The Action Plan is divided into 5 sections:

- A. Co-ordination of EU activities to implement the objectives of the Decision.
- B. Universality and integrity of the Rome Statute.
- C. Independence of the ICC and its effective and efficient functioning.
- D. Co-operation with the ICC.
- E. Implementation of the principle of complementarity.

¹ Decision 2011/168/CFSP.

² Council Common Position of 16 June 2003, Official Journal L 150 of 18.06.2003, page 67.

³ Document 5742/04.

⁴ Decision 2002/494/JHA, of 13 June 2002 (OJ L 167, p. 1), setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes; Framework Decision 2002/584/JHA, of 13 June 2002 (OJ L 190, p. 1), on the European arrest warrant and the surrender procedures between Member States; and Decision 2003/335/JHA, of 8 May 2003 (OJ L 118, p. 12), concerning the investigation and prosecution of genocide, crimes against humanity and war crimes.

⁵ Which provides that: 'The objective of this Decision is to advance universal support for the Rome Statute of the International Criminal Court (hereinafter the "Rome Statute") by promoting the widest possible participation in it, to preserve the integrity of the Rome Statute, to support the independence of the ICC and its effective and efficient functioning, to support cooperation with the ICC, and to support the implementation of the principle of complementarity.'

A. CO-ORDINATION OF EU ACTIVITIES

1. LEGAL BASIS

- a) Article 6 of the Decision entrusts the Council and the High Representative of the Union for Foreign Affairs and Security Policy (HR) with the task of co-ordinating measures, where appropriate, by the EU and its Member States for the implementation of Articles 2 to 5 of the Decision.
- b) Articles 2 to 5 touch upon a number of issues, such as: (i) the universality and integrity of the Rome Statute; (ii) the independence of the ICC and its effective and efficient functioning ; (iii) cooperation with the ICC and (iv) the principle of complementarity.
- c) Article 8 of the Decision calls on the EU to ensure consistency and coherence between its instruments and policies in all areas of its external and internal action in relation to the most serious international crimes as referred to in the Rome Statute.

2. CONCRETE MEASURES

2.1 International Criminal Court sub-area of the Public International Law Working Party (COJUR ICC)

- a) The Chair will convene meetings of COJUR ICC, usually twice every semester. However, if need be and in duly justified cases, the Chair could convene an extra meeting in Brussels during the respective semester.
- b) Informal meetings of COJUR ICC with other relevant actors, such as the ICC, international organisations, third countries and non-governmental organisations may also take place as appropriate.

- c) One additional meeting of COJUR ICC will take place in The Hague, prior to the Assembly of State Parties or any review conference, involving representatives of local missions as appropriate.
- d) Meetings of other Council Working Parties and attendance by COJUR ICC experts at such meetings, where appropriate, may also provide an opportunity for the effective co-ordination of initiatives falling within their respective competence and concerning the ICC. Each semester, COJUR ICC will decide to meet with thematic and/or geographic Council Working Parties in order to ensure the ICC is mainstreamed across relevant EU policies.
- e) The Chair of COJUR ICC and/or the EU focal point should hold exchanges with the relevant Working Parties as required by current events related to the work of the ICC. Furthermore, the Chair should meet periodically with the European External Action Service (EEAS) and the European Commission, as appropriate, in order to co-ordinate informally and generate ideas to reinforce the EU's support for the ICC.

2.2 EU Focal Point

- a) The EU Focal Point, established by the European External Action Service (EEAS), shall operate according to the terms of reference set out in the Annex to this Action Plan.
- b) The EU Focal Point assists in ensuring effective co-ordination and consistency of information, and in adequately preparing the programmes and activities of the Union in the implementation of the Decision.

2.3 National Focal Points

- a) National Focal Points, established by each Member State, shall be the external contact points for the exchange of information concerning the implementation of the Decision. Each national Focal Point will liaise with the EU Focal Point. The EU Focal Point will make available information flowing in from all relevant sources and in particular information concerning relevant meetings and other events, seeking to identify synergies or risks of overlap.

- b) At their own initiative or upon request and in accordance with applicable law, National Focal Points should provide to the EU, to other Member States and to any relevant state or non-state actor, as appropriate, any available information that may be relevant in the implementation of the Decision.

2.4 Member States co-ordination

- a) Member States should also co-ordinate on ICC matters in all relevant multilateral fora, as appropriate and in accordance with established procedures.
- b) Member States are encouraged to have an expert in their embassies in The Hague and in their missions in New York dealing also with specific ICC matters. A list of these experts should be made available to all partners through the EU Focal Point.
- c) To promote efficiency and cost-effectiveness, Member States should endeavour to share labour between them. Such burden-sharing could relate to relations with specific countries or organisations or to specific issues, and could concern contacts, analyses and other tasks. The EU Focal Point should assist in establishing such co-ordination and should be kept informed of its operation.
- d) Member States are encouraged to coordinate and mainstream the ICC at a national level (e.g. national focal points could organize inter-ministerial/ inter-departmental coordination meetings on the ICC, where relevant ICC officials could be invited at times).
- e) They should further strengthen cooperation and information exchange between the responsible national units in line with Council Decision 2003/335/JHA concerning the investigation and prosecution of genocide, crimes against humanity and war crimes.
- f) Member States should contribute to ensuring consistency and coherence between EU instruments and policies in all areas of its external and internal action in relation to the most serious international crimes as referred to in the Rome Statute.

2.5 European External Action Service

- a) The Service will mainstream the ICC across its different departments, including thematic and geographical directorates as well as crisis management structures and relevant CSDP missions and operations.
- b) The Service will include the theme of the fight against impunity and capacity building measures to address the crimes under the jurisdiction of the ICC, as appropriate, in Local Human Rights Strategies, Country Strategy Papers, and their Mid-term Reviews.
- c) The Service will also ensure close coordination with the European Commission.
- d) The Service will organise training on the ICC (and international justice issues) for EEAS and Commission staff as well as EU Member States' officials.
- e) The Service will ensure that EU delegations have ready access to existing ICC and justice experts whose expertise is in particular but not limited to situation countries or countries under investigation or under preliminary examination by the ICC.
- f) EU delegations should monitor developments on the ground in relation to countries under investigation by the ICC or under preliminary examination, as well as in relation to countries under a specific obligation to cooperate with the ICC. This information should be shared with Member States through Focal Points.

2.6 European Commission

The European Commission will contribute to ensuring consistency and coherence between EU policies and instruments in all areas of its external and internal action in relation to the most serious international crimes as referred to in the Rome Statute.

The Commission should focus the financing of relevant programmes under the EU budget along the lines of the Decision and this Action Plan.

2.7 European Parliament

The European Parliament will be kept regularly informed by the Chair and the EEAS of significant developments concerning the ICC and its views on the ICC should be taken into account, as appropriate. To the extent possible, Member States will provide information about parliamentary contacts and visits in bilateral and multilateral format and seek through the Chair and the EEAS information from the European Parliament to this effect.

B. UNIVERSALITY AND INTEGRITY OF THE ROME STATUTE

1. LEGAL BASIS

- a) Article 1.2 of the Decision states that one of its objectives is to advance universal support for the Rome Statute by promoting the widest possible participation in it and to preserve the integrity of the Rome Statute.
- b) Article 2 of the Decision addresses the issue of the universal participation in the Rome Statute, by committing the EU and its Member States to furthering the process of its ratification, accession and implementation.
- c) Article 4.4 of the Decision recalls the EU position with regard to proposals for agreements or arrangements concerning conditions for the surrender of persons to the ICC.

2. OBJECTIVES

The above objectives will continue to be relevant until universal participation in the Rome Statute is attained. In some cases, the primary objective with regard to third countries is to maximise their political will for the ratification, accession and implementation of the Statute in order to achieve the desired universality. The realisation of this objective requires the use of a variety of means such as political dialogue, demarches, clauses in agreements, letters from the High Representative or other bilateral means, statements, including at the UN and other multilateral bodies, and support for the

dissemination of the ICC principles and rules. It may also be important to assist countries which are willing but which may encounter difficulties with ratification, accession or implementation of the Statute. This could involve, inter alia, concrete expert assistance, financial support or access to data compiled by others.

Various initiatives have been taken and continue to be taken, ranging from political dialogue and bilateral demarches to the dissemination of the principles and rules of the ICC Statute through awareness-raising campaigns led by non-governmental organisations and to expert assistance in drafting relevant legislation. The EU and others have been involved, directly or indirectly, as providers of funds or technical assistance for these activities. This practice should continue in a co-ordinated manner.

The preservation of the integrity of the Rome Statute encompasses the protection of the core principles established under the Rome Statute throughout any review process that might lead to amendments to the Statute itself and its subsidiary instruments.

3. CONCRETE MEASURES

- a) The EU Focal Point, whenever appropriate, will suggest measures for consideration, based upon the analysis of the information provided by the EU delegations, EU Member States, the Focal Point of the Assembly of States Parties, the ICC, civil society, third States and other international and regional organisations.
- b) Every semester COJUR ICC should decide target countries or regions where EU action can contribute to advancing the universality and/or preserving the integrity of the Rome Statute. This does not preclude initiatives from Member States or the EU, where appropriate. Member States should provide as promptly as possible any relevant information about such initiatives to other partners and the EU.

- c) The EU Focal Point, in close co-operation with all relevant actors, will facilitate advice and/or support to the ratification or accession process of a third state by providing updated lists of experts, relevant texts and commentaries. Technical consultations at an expert level with relevant target countries should be promoted.
- d) The ICC should be further mainstreamed in EU external relations. In this respect, the fight against impunity and the ratification, accession and implementation of the Rome Statute should be addressed in the negotiation of EU agreements with third countries. The EU should follow up the implementation of ICC clauses included in agreements with third countries by, inter alia, reporting from Delegations, raising the matter in political and human rights dialogues, and through letters from the High Representative, as appropriate.

Consideration should be given to these issues being brought up at summits and other high-level meetings with third countries as appropriate.

The EU's support for the universality and implementation of the Rome Statute should be highlighted in relevant EU statements at the UN and other multilateral fora.

- e) Whenever appropriate, the EU should continue to use other diplomatic means, including bilateral demarches, to encourage ratification of or accession to the Rome Statute and related instruments such as, in particular, the Agreement on Privileges and Immunities of the ICC.
- f) The effect of demarches and other measures should be monitored.
- g) Member States should raise the ICC in bilateral contacts with third countries, whenever appropriate, and should inform partners through the EU Focal Point of the outcome of such contacts.
- h) Whenever appropriate, the EU should co-operate with interested third countries (including those which have developed a partnership in the framework of their bilateral cooperation with the EU such as Japan, Canada, Australia, Brazil and South Africa) and with international and

regional organisations as well as non-governmental organisations in order to further the goal of the universality and integrity of the Rome Statute. In particular, the EU should co-operate with the ICC organs and the Assembly of States Parties to this end.

- i) Member States shall contribute when requested with technical and, where appropriate, financial assistance to the legislative work which may be needed for the ratification of or accession to the Statute by third countries. The EU may, when requested, also contribute with such assistance. The EU Focal Point in liaison with national Focal Points will seek to mobilise expertise to that end, including the expertise that may be provided by non-governmental organisations.
- j) In the framework of its Decision and of this Action Plan, the EU and its Member States should facilitate technical assistance to interested states by supporting their participation in the ICC and their access to its instruments, as well as by facilitating their co-operation with the ICC.

Technical assistance to third states could be provided through different channels:

- the secondment or any other form of deployment of EU Member States' experts to the relevant administrations of the requesting state. Third states could also apply for exchange programmes of experts or the detachment of their own experts to Member States' relevant administrations, according to the relevant legislation,
- organization of technical consultations at expert level between the EU and target countries,
- EU development and cooperation programmes, and
- civil society projects, especially those funded by the EU and its Member States.

The EU and its Member States will coordinate this assistance with other actors active in this area, including the International Committee of the Red Cross, the Commonwealth Secretariat and third States.

- k) Each Member State may designate one or more experts to be included in the list of experts maintained by the EU Focal Point.

EU experts could be deployed for the accomplishment of specific missions.

EU experts may be mandated to provide technical assistance on behalf of the EU, including the following tasks:

- Co-operating with requesting third states in any technical issue related to the participation in and implementation of the Rome Statute and its instruments, including cooperation mechanisms;
 - Participating in seminars, symposiums, conferences, technical consultations or any other national or international event, either of academic or of official character, as may be necessary for the widest dissemination of the values, principles and provisions of the Statute and related instruments, as well as for the implementation of the Decision, and for the co-operation of the EU with the ICC;
 - Any other task as may be needed for the fullest implementation of the Decision.
- l) The EU and its Member States, acting preferably in a coordinated manner, will preserve the integrity of the Rome Statute.
- m) They will monitor the situation as regards proposals for agreements or arrangements concerning conditions for the surrender of persons to the ICC, the invocation of Article 16 of the Rome Statute and other developments when they might impede the effective functioning of the ICC, and may take appropriate action.

C. THE INDEPENDENCE OF THE ICC AND ITS EFFECTIVE AND EFFICIENT FUNCTIONING

1. LEGAL BASIS

- a) Article 1.2 of the Decision indicates that one of its objectives is to support the independence of the ICC and its effective and efficient functioning.

- b) Article 3 of the Decision establishes possible means of EU co-operation with the ICC to achieve this objective.

2. CONCRETE MEASURES

- a) Member States should continue to encourage the establishment of transparent selection, nomination and election procedures for ICC judges and prosecutors. They should also make every possible effort to ensure that highly qualified candidates are nominated for positions to be filled through elections and that the overall composition of the ICC with regard to competences, geographic origin, legal systems and gender remains in conformity with the criteria stipulated in the Rome Statute. To that end, they will take into account relevant provisions of the Rome Statute and the resolutions of the Assembly of States Parties. To ensure the highest standards of credibility and efficiency of the ICC, the selection, nomination and election procedures should be kept under regular review.
- b) The EU and its Member States will monitor how the ICC applies the above standards and principles to the recruitment of the ICC's staff.
- c) Member States will transfer promptly and in full their assessed contributions to the ICC. They should also encourage other State Parties to do likewise.
- d) The EU and its Member States should work, together with the ICC, other interested States, international organisations and non-governmental organisations to ensure that the media and the general public understand the ICC and the framework in which it operates and that the independence and judicial nature of the ICC is acknowledged and respected.
- e) Member States are encouraged to accede to or ratify the Agreement on Privileges and Immunities of the ICC without delay. They will also encourage third states to do likewise.

- f) The EU and its Member States are encouraged to contribute to the Trust Fund for Victims and to support its work through concrete initiatives, such as awareness-raising, and to implementing the Review Conference resolution on the Impact of the Rome Statute system on victims and affected communities and other relevant instruments adopted by the Assembly of States Parties with regard to victims and witnesses.
- g) The EU and its Member States should exchange information on the fulfilment of the pledges made in particular at the Review Conference, the Assembly of States Parties or in any other international fora such as the ICRC conference.
- h) Member States will ensure that future amendments to the Rome Statute and its subsidiary instruments are considered on their merits, including in enhancing the ICC's efficiency and effectiveness, with full respect for its integrity and judicial independence.

D. COOPERATION WITH THE ICC

1. LEGAL BASIS

- a) Article 4 of the Decision addresses the issue of co-operation with the ICC, in accordance with the Rome Statute, by committing the EU and its Member States to follow closely related developments. It also addresses the 2006 Agreement between the EU and the ICC on cooperation and assistance. It finally refers to the conclusion, as appropriate, of ad hoc arrangements and agreements to enable the effective functioning of the ICC.
- b) Article 7 of the Decision provides that Member States shall co-operate to ensure the smooth functioning of the Assembly of States Parties in all respects.

2. CONCRETE MEASURES

- a) The EU and its Member States will lend the ICC the assistance and cooperation provided for in the Rome Statute and other relevant agreements. Member States must co-operate with the

ICC in accordance with their obligations under Articles 86 and 87 and other related provisions of the Statute. They will also implement the ICC's Decisions and the Assembly's resolutions on cooperation.

- b) Member States are also encouraged to act in a coordinated manner within the Assembly of States Parties in order to ensure that the provisions in Article 87 of the Statute, dealing with failure to cooperate with the Court, are effectively implemented.
- c) The EU and its Member States will undertake consistent action to encourage full cooperation of States with the ICC, including the prompt execution of arrest warrants. The EU and its Member States should avoid non-essential contacts with individuals subject to an arrest warrant issued by the ICC. They will monitor and address developments that may hamper the ICC's work.
- d) The EU will provide political and diplomatic support to the ICC in the framework of political dialogues with third countries, regional organisations and other regional groups as well as in the conduct of the EU's action on the international scene, such as at the UN and other relevant fora.
- e) The EU shall establish regular contacts with the ICC to assess the implementation of the 2006 Agreement on cooperation and assistance and keep informed EU Member States.
- f) The EU and its Member States should work towards effective co-operation between the ICC and the UN, in particular by supporting the implementation of the ICC-UN Relationship Agreement.
- g) The EU and its Member States shall consider, as appropriate, the conclusion of ad hoc arrangements and agreements to enable the effective functioning of the ICC. They shall share their experience in concluding such agreements.

- h) The EU and its Member States shall encourage third States and other regional organisations to consider entering such ad hoc arrangements and agreements with the ICC as appropriate.

E. COMPLEMENTARITY

1. LEGAL BASIS

Article 1.2 of the Decision indicates that one of its objectives is to support the implementation of the principle of complementarity.

Article 5 of the Decision provides that the EU and its Member States shall, as appropriate, take initiatives or measures to ensure the implementation of the principle of complementarity at national level.

2. CONCRETE MEASURES

- a) Member States, where appropriate, will endeavour to put in place as soon as possible legislation necessary to implement the Rome Statute. They will exchange information on their experience and progress.
- b) The EU and its Member States will give high priority, where appropriate, to the fight against impunity in development cooperation and technical assistance to third countries within the broader framework of strengthening the rule of law and advancing legal and institutional reforms (for instance, in post-conflict peace building processes).
- c) The EU and its Member States shall, as appropriate, promote the implementation of the Rome Statute in third countries. Their actions should include concrete measures envisaged for the promotion of the universality and integrity of the ICC, adapted as appropriate.

- d) The EU will carry out work to establish a complementarity toolkit which will describe how the application of the principle of complementarity can be strengthened through existing and future justice and rule of law assistance. The EU and its Member States will endeavour to work together in the development of the toolkit and use it as appropriate;
- e) For the purpose of lending assistance to countries unable to properly proceed with the investigation of the crimes within the jurisdiction of the ICC, the EU and its Member States shall endeavour to support, as appropriate, the development of training and assistance for judges, prosecutors, officials, legal assistance experts and counsels.
- f) To this end, the EU and its Member States should consider establishing ad hoc teams of relevant expertise, such as judges, prosecutors, legal experts, legal assistance experts, analysts, investigators and forensic personnel. Such teams could be organised as to ensure their ready deployment at short and medium term notice on a case by case basis, and would be provided with operational capacity. The EU and its Member States should also consider supporting existing mechanisms, such as the Justice Rapid Response.
- g) The EU and its Member States should share, as appropriate, information on the activities of the European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes. This exchange should take place in the Council working parties be it in COJUR ICC or in CATS or any other appropriate preparatory body.

The EU Focal Point is mandated, inter alia, to perform the following tasks, in close cooperation with the Chair of COJUR ICC and in co-operation with Member States and the Commission:

- a) Establishing appropriate contacts and exchange of information from all relevant actors and sources including the ICC and other international organisations, third countries and non-governmental organisations.
- b) Establishing, when appropriate, contacts and exchange of information with EU focal point of the European Network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes.
- c) Updating the means of the communication of and within the EU, such as a dedicated web-site and an e-mail list of national Focal Points of the EU Member States and relevant personnel from the EEAS and the Commission.
- d) Making available information disseminated, including information on relevant meetings and other events which have taken place or will take place.
- e) Liaising with the national Focal Points for the purpose of co-ordinating the activities of the EU and its Member States.
- f) Maintaining the list of experts available for various forms of assistance and liaising with Member States for their secondment or any other form of deployment.
- g) Facilitating a full exchange of information and co-ordination with all relevant Working Parties of the Council as well as seeking to promote coherence with other EU activities.
- h) Updating on a regular basis documents and reports on the implementation of the Rome Statute and its related instruments, of the Decision and of this Action Plan.

- i) Preparing, as appropriate, documents and papers for discussion as well as drafting detailed projects for planned activities.
 - j) Suggesting to the Chair, whenever appropriate, concrete measures to be taken, based upon the strategies and other available material.
 - k) Preparing, as appropriate, elements for demarches on the integrity of the Rome Statute and on the universality and effectiveness of the ICC as well as maintaining an updated list of EU demarches.
 - l) Identifying opportunities for the inclusion of the ICC on the draft list of issues to be discussed in negotiations and political dialogues.
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