

**Tenth session**

New York, 12-21 December 2011

**Report of the Bureau on potential Assembly procedures
relating to non-cooperation****Note by the Secretariat**

Pursuant to paragraph 12 of resolution ICC-ASP/9/Res.3 of 10 December 2010, the Bureau of the Assembly of States Parties hereby submits for consideration by the Assembly the report on non-cooperation.

I. Background

1. Article 112, paragraph 2, of the Rome Statute provides that:

“2. The Assembly shall:

(f) Consider pursuant to article 87, paragraphs 5 and 7, any question relating to non-cooperation;

(g) Perform any other function consistent with this Statute or the Rules of Procedure and Evidence.”

2. Article 87, paragraphs 5 and 7, provide that:

“5. (a) The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.

(b) Where a State not party to this Statute, which has entered into an ad hoc arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States Parties, or, where the Security Council referred the matter to the Court, the Security Council.”

“7. Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.”

3. Paragraph 12 of the Assembly's omnibus resolution adopted on 10 December 2010 provides as follows:¹

“12. Recognizes the negative impact that the non-execution of Court requests can have on the ability of the Court to execute its mandate, and requests the Bureau to prepare a report on which Assembly procedures could be required to enable it to discharge its mandate to consider any question relating to non-cooperation and to submit that report to the Assembly for consideration at its tenth session;”.

II. General scope and nature of non-cooperation procedures

4. For the purpose of relevant Assembly procedures, non-cooperation could be understood as the failure by a State Party or a State which has entered into an ad hoc arrangement or an agreement with the Court (hereafter: “requested State”) to comply with a specific Court request for cooperation (articles 89 and 93 of the Statute), as defined in article 87, paragraphs 5(b) and 7 of the Statute.

5. This needs to be distinguished from a situation where there is no specific Court request and a State Party has yet to implement the Rome Statute domestically in such a manner as to be able to comply with Court requests, which may lead to non-cooperation in the medium or longer-term future. This scenario is not under consideration here, as it is already dealt with by the Assembly in the context of the ongoing work on cooperation, in particular the discussions held in The Hague Working Group of the Bureau.

6. Given the respective roles of the Court and the Assembly, any response by the Assembly would be non-judicial in nature and would have to be based on the Assembly's competencies under article 112 of the Statute. The Assembly may certainly support the effectiveness of the Rome Statute by deploying political and diplomatic efforts to promote cooperation and to respond to non-cooperation. These efforts, however, may not replace judicial determinations to be taken by the Court in ongoing proceedings.

7. Regarding concrete instances of non-cooperation, the following two scenarios may require action by the Assembly:

(a) A scenario where the Court has referred a matter of non-cooperation to the Assembly.² Depending on the circumstances, the matter may or may not require urgent action by the Assembly to bring about cooperation.

(b) Exceptionally, a scenario where the Court might not yet have referred a matter of non-cooperation to the Assembly, but there are reasons to believe that a specific and serious incident of non-cooperation in respect of a request for arrest and surrender of a person (article 89 of the Rome Statute) is about to occur or is currently ongoing and urgent action by the Assembly may help bring about cooperation;³

8. The proposed procedures outlined herein only refer to requested States as defined above, and would not refer to non-States Parties that have not entered into any relevant arrangements or agreements with the Court.⁴ These procedures would however be without any prejudice whatsoever to any steps the Assembly (and its sub-organs) might decide to take in regard of cooperation (and lack thereof) in respect of such States.

¹ *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Ninth session, New York, 6 – 10 December 2010* (ICC-ASP/9/20), vol. I, part III, ICC-ASP/9/Res.3.

² See e.g. the decisions of Pre-Trial Chamber I “Decision informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al-Bashir's presence in the territory of the Republic of Kenya”, 27 August 2010, ICC-02/05-01/09; “Decision informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Chad”, 27 August 2010, ICC-02/05-01/09; and “Decision informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al-Bashir's recent visit to Djibouti, 12 May 2011 2011, ICC-02/05-01/09.

³ Where the matter has not yet been referred to the Assembly by the Court but is also not urgent in nature, it appears that no specific procedures need to be adopted. Instead, it would be up to the Court to decide whether to trigger the Assembly's action by referring the matter to the Assembly or not.

⁴ The Rome Statute does not contain any provisions regarding “non-cooperation” by such third States.

III. General approach for non-cooperation procedures

9. The non-cooperation scenarios 7(a) and 7(b) require different procedures to be adopted, which may however partially overlap.

10. Scenario 7(a) would require a formal response, including some public elements, given that it has been triggered by a formal decision of the Court referring the matter to the Assembly. Depending on the specifics of the case, there may be merit in pursuing an informal and urgent response as a precursor to a formal response, in particular where it is still possible to achieve cooperation.

11. Scenario 7(b) would require an urgent, but entirely informal response at the diplomatic and political levels that is difficult to reconcile with the usual calendar of meetings of the Assembly and its current subsidiary bodies. Past experience has shown that the Bureau, which meets every month at United Nations Headquarters, New York, may need to adapt its working methods to be able to respond quickly enough to an immediate situation of non-cooperation, as outlined below.

IV. Specific suggestions for non-cooperation procedures

12. The procedures outlined below would have to be carried out by the Bureau and the Assembly in full respect for the authority and independence of the Court and its proceedings, as enshrined in the Rome Statute and the Rules of Procedure and Evidence⁵. These procedures are aimed at enhancing the implementation of the Court's decisions. All actors involved must ensure that their participation in these procedures do not lead to discussions on the merits of the Court request or otherwise undermine the findings of the Court. These procedures address the role of the Assembly and its subsidiary organs, and are without prejudice to actions taken by States at the bilateral or regional levels to promote cooperation.

A. Formal response procedure: successive steps to be taken by the Bureau and the Assembly

1. Trigger

13. A formal, and to some extent public, procedure for the Assembly to address occurrences of non-cooperation should only be triggered by a decision of the Court regarding non-cooperation addressed to the Assembly.⁶ Any such decision should be forwarded to all States Parties without delay. The general public should be informed by way of a press release of the Secretariat of the Assembly of States Parties.

2. Possible procedure

14. Subsequent to the Court decision, several steps could be undertaken to address the issue, bearing in mind that the good offices by the President of the Assembly may also continue as described below:

(a) Emergency Bureau meeting: where the matter is such that urgent action by the Assembly may still bring about cooperation, a meeting of the Bureau could be convened at short notice. The meeting would be an opportunity to receive the oral report from the President on any action taken, and to decide on what further action would be required;

⁵ *Official Records ... First session ... 2002* (ICC-ASP/1/3 and Corr.1), part II.A.

⁶ E.g. International Criminal Court Pre-Trial Chamber I, ICC-02/05-01/09, 27 August 2010 (Kenya), International Criminal Court Pre-Trial Chamber I, ICC-02/05-01/09, 27 August 2010 (Chad) and International Criminal Court Pre-Trial Chamber I, ICC-02/05-01/09, 12 May 2011 (Djibouti).

(b) Open letter from the President of the Assembly, on behalf of the Bureau, to the State concerned, reminding that State of the obligation to cooperate and requesting its views on the matter within a specified time limit of no more than two weeks.⁷ The President of the Assembly could send a copy of the letter to all States Parties, encouraging them to raise the matter in bilateral contacts with the requested State, where appropriate;

(c) Upon expiration of the time limit or upon receipt of a written response, a meeting of the Bureau could be held (at the ambassadorial level), at which a representative of the State concerned would be invited to present its views on how it would cooperate with the Court in the future;

(d) Subsequently, and provided the next session of the Assembly is scheduled to take place more than three months after the Bureau meeting referred to under (c), the Bureau could request the New York Working Group to hold a public meeting on the matter to allow for an open dialogue with the requested State. This would include the participation of States Parties, observers and civil society representatives as currently provided under the Rules of Procedure of the Assembly of States Parties⁸;

(e) Subsequently, a Bureau report on the outcome of this dialogue could be submitted to the next (or ongoing) session of the Assembly, including a recommendation as to whether the matter requires action by the Assembly; and

(f) At the next (or ongoing) session of the Assembly, the report could be discussed in plenary session of the Assembly under the agenda item on cooperation. Furthermore, the Bureau could, if necessary, appoint a dedicated facilitator to consult on a draft resolution containing concrete recommendations on the matter.

B. Informal response procedure: good offices by the President of the Assembly

15. In order for the Assembly to be able to respond to an impending or ongoing situation of non-cooperation, which may still lead to actual cooperation in that specific case, a flexible mechanism would be required for urgent action. One possibility would be to build on and institutionalize the good offices that the President of the Assembly has undertaken in the past, on an ad-hoc basis, in relation to requested States. The proposed mandate for the President builds on this past work, but is intended to make it more effective through the activities and personal connections of Bureau members from other regions, and to signal the importance placed on cooperation by the Assembly.

1. Regional focal points for cooperation

16. In order to assist the President in his or her good offices, the Bureau would appoint among its members four focal points on the basis of the principle of equitable geographic representation.

2. Trigger

17. The President of the Assembly would become active on his or her own initiative where he or she assesses that the conditions of scenario 7(b) described above are met. Furthermore, the President would also become active on his or her own initiative where the President assesses that the conditions of scenario 7(a) are met, and that the opportunity to fulfill a request for arrest and surrender may no longer exist by the time the Bureau would be able to convene an emergency meeting to discuss the matter. In any event, the President would immediately notify Bureau members of the initiative.

18. Otherwise, the President shall become or remain active as decided by the Bureau.

⁷ See the precedent of the President's letters to the Foreign Ministers of Kenya, Chad and Djibouti, respectively, of 28 August 2010, 13 September 2010 and 17 May 2011.

⁸ *Official Records ... First session ... 2002* (ICC-ASP/1/3 and Corr.1), part II.c; part XX.

3. Possible mandate and procedures

19. Where the President's good offices have been triggered as outlined above, he or she would, as appropriate, raise the issue informally and directly with officials from the requested State and other relevant stakeholders, with a view to promoting full cooperation. The purpose of this interaction with the requested State would be to raise awareness of the issue and to promote full cooperation while that would still be possible, but not to make findings of judicial nature, which is the sole prerogative of the Court. The President may also remind the requested State of the possibility under article 97 of the Statute to consult with the Court. The President may request any of the regional focal points, or any other Bureau member, as appropriate, to provide assistance in this interaction. In the case of scenario 7(b) above, the President should use the interaction with officials from the requested State to verify the information on the basis of which he or she became active.

20. The President would report orally to the Bureau immediately after such interaction takes place, if necessary in the context of a Bureau meeting to be convened at short notice. Once the President has reported to the Bureau, he or she shall continue engaging in the matter as decided by the Bureau.

V. Recommendation

The Bureau recommends that the Assembly welcome this report and the procedures outlined herein in the context of the omnibus resolution to be adopted at the tenth session of the Assembly in December 2011.
