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Report of the Bureau on non-cooperation

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I. Introduction

1. Article 112, paragraph (2) (f), of the Rome Statute provides that “the Assembly shall consider pursuant to article 87, paragraphs 5 and 7, any question relating to non-cooperation.”¹

2. At its tenth session, the Assembly of States Parties (“the Assembly”) adopted the Assembly procedures relating to non-cooperation (“the Procedures”).² At its subsequent sessions the Assembly approved mandates with regard to non-cooperation and requested the Bureau to submit reports on the implementation of the Procedures. At its seventeenth session, the Assembly adopted the revised Procedures and approved mandates accordingly with its request for the Bureau to submit reports on the implementation of the revised Procedures.³ The present report is submitted pursuant to the mandate approved at the seventeenth session of the Assembly.⁴

3. In operative paragraph 29 of resolution ICC-ASP/17/Res.5, entitled “Strengthening the International Criminal Court and the Assembly of States Parties”, adopted at its seventeenth session, the Assembly “[r]ecall[ed] the Assembly procedures relating to non-cooperation adopted by the Assembly in ICC-ASP/10/Res.5 recognize[d] with concern the negative impact that the non-execution of Court requests continues to have on the ability of the Court to execute its mandate, welcome[d] the engagement by States Parties toward the successful finalization of the review of the Assembly procedures relating to non-cooperation and decide[d] to adopt the revised Assembly procedures relating to non-cooperation annexed to [the] resolution.”⁵

4. In operative paragraph 30 of resolution ICC-ASP/17/Res.5, the Assembly also “[r]ecall[ed] the Toolkit for the implementation of the informal dimension of the Assembly procedures relating to non-cooperation, welcome[d] the revised Toolkit and encourage[d] States Parties to make use of it as they see fit in order to improve the implementation of the Assembly procedures relating to non-cooperation.”⁶

5. In operative paragraph 31 of resolution ICC-ASP/17/Res.5, the Assembly also “[took] note of the report of the Bureau on non-cooperation, welcome[d] the efforts of the President of the Assembly in implementing the Assembly procedures relating to non-cooperation and recall[ed] that the President serves ex officio as focal point for his or her region, call[ed] upon all stakeholders, at all levels, to continue assisting the President of the Assembly, including when accomplishing his or her task with the support of the regional focal points for non-cooperation.”⁷

6. In operative paragraph 32 of resolution ICC-ASP/17/Res.5, the Assembly also “[r]ecall[ed] the role of the Assembly of States Parties and the Security Council with respect to non-cooperation as provided for by articles 87, paragraph 5, and 87, paragraph 7, of the Rome Statute, and welcome[d] the efforts of States Parties to strengthen the relationship between the Court and the Council.”⁸

7. In operative paragraphs 33 and 34 of resolution ICC-ASP/17/Res.5, the Assembly also “[w]elcome[d] in this regard the Arria formula meeting of the Security Council on the relationship between the Court and the Security Council on 6 July 2018 and the follow-up meeting organized on 18 September 2018 by the co-facilitators on cooperation” and “[c]all[ed] upon States Parties to continue their efforts to ensure that the Security Council addresses the communications received from the Court on non-cooperation pursuant to the Rome Statute, encourage[d] the President of the Assembly and the Bureau to continue consulting with the Security Council and also encourage[d] both the Assembly and the Security Council to strengthen their mutual engagement on this matter.”⁹

¹ ICC-ASP/10/Res.5, para. 9 and annex, amended via ICC-ASP/11/Res.8, para. 10 and annex I.

² ICC-ASP/17/Res.5, para. 31 and annex II.

³ ICC-ASP/17/Res.5, annex I, paras.3(i)-(k).

⁴ ICC-ASP/17/Res.5, para. 29.

⁵ ICC-ASP/17/Res.5, para. 30.

⁶ ICC-ASP/17/Res.5, para. 31.

⁷ ICC-ASP/17/Res.5, para. 32.

⁸ ICC-ASP/17/Res.5, paras. 33 and 34.

8. In operative paragraph 35 of resolution ICC-ASP/17/Res.5, the Assembly further “*note[d]* the orders of the Pre-Trial Chamber to the Registrar concerning action to be taken in case of information relating to the travel of suspects and *urge[d]* States to share with the focal points on non-cooperation any information concerning potential or confirmed travel of persons against whom an arrest warrant is issued.”⁹

9. At its seventeenth session, the Assembly “*request[ed]* the President of the Assembly to continue to engage actively and constructively with all relevant stakeholders, in accordance with the Assembly procedures relating to non-cooperation, both to prevent instances of non-cooperation and to follow up on any matter of non-cooperation referred by the Court to the Assembly.”¹⁰ The Assembly also “*request[ed]* that any information concerning potential or confirmed travel of persons against whom an arrest warrant has been issued be promptly shared with the Court by the focal points on non-cooperation.”¹¹ The Assembly further requested the Bureau to “continue to actively engage throughout the inter-sessional period with all relevant stakeholders to continue to ensure effective implementation of the Assembly procedures relating to non-cooperation and to submit a report on its activities to the Assembly at its eighteenth session.”¹²

10. Paragraph 17 of the Procedures on non-cooperation calls for the appointment of four or, if so requested by the President of the Assembly, five focal points from among all States Parties, on the basis of equitable geographical representation; the President serves ex officio as focal point for his own region.¹³

11. On 7 February 2019, the Bureau appointed Colombia, Croatia, Liechtenstein, Republic of Korea and Senegal as ad country focal points on non-cooperation (“focal points”) for their respective regional groups.¹⁴ The focal points are appointed on an ad country mandate, which implies that the respective countries are engaged at high diplomatic and political levels in New York, The Hague, capitals and in other embassies, where appropriate.

12. The present report covers activities during the inter-sessional period between the seventeenth and eighteenth sessions of the Assembly.

13. The focal points on non-cooperation noted the “Matrix over possible areas of strengthening the Court and the Rome Statute System”, dated 11 October 2019, prepared by the Presidency of the Assembly, as well as the draft Terms of Reference for the Independent Expert Review, which could provide elements for future work on the topic.

II. Court proceedings and findings: States Parties

14. Pursuant to article 86 of the Rome Statute, States Parties shall, in accordance with the provisions of the Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court. Pursuant to article 89, States Parties are obliged to execute the Court’s pending orders for the arrest and surrender of a person.

15. As regards the case of *The Prosecutor v. Omar Hassan Ahmad Al Bashir* on 6 May 2019, the Appeals Chamber confirmed the Pre-Trial Chamber’s finding that Jordan had failed to comply with its obligation to cooperate with the Court. It found that Mr Al-Bashir did not enjoy immunity as a Head of State vis-à-vis the Court under customary international law, including in respect of an arrest by a State Party to the Rome Statute at the request of the Court, and that United Nations Security Council resolution 1593 imposes upon Sudan a specific obligation to ‘cooperate fully’ with the Court. As to whether Jordan’s non-cooperation with the ICC should be referred to the Assembly of States Parties and the Security Council, the Appeals Chamber found, Judge Ibáñez and Judge Bossa dissenting,

⁹ ICC-ASP/17/Res.5, para. 35.

¹⁰ ICC-ASP/17/Res.5, annex I, para. 3(i).

¹¹ ICC-ASP/17/Res.5, annex I, para. 3(j).

¹² ICC-ASP/17/Res.5, annex I, para. 3(k).

¹³ ICC-ASP/17/Res.5, annex II, para. 17.

¹⁴ Decision of the Bureau of the Assembly of States Parties, 7 February 2019, available at https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/ICC-ASP-2019-Bureau-1-b.pdf.

that the Pre-Trial Chamber had erred in the exercise of its discretion, and reversed this part of the Pre-Trial Chamber's decision.¹⁵

III. Court proceedings and findings: States under an obligation to cooperate with the Court pursuant to a decision of the United Nations Security Council

16. Pursuant to Security Council resolution 1593 (2005), the Government of Sudan and all other parties to the conflict in Darfur shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor.

17. Pursuant to Security Council resolution 1970 (2011), the Libyan authorities shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor.¹⁶

18. No Court proceedings took place in relation to States under an obligation to cooperate with the Court pursuant to a decision of the United Nations Security Council.

IV. Court proceedings and findings: States not Parties

19. While States not party to the Rome Statute have no obligation under it, pursuant to Security Council resolutions 1593 (2005) and 1970 (2011), all States and concerned regional and other international organizations are urged to fully cooperate with the Court and the Prosecutor.

20. With respect to Sudan, on 28 November 2018, the Registrar was informed of a possible visit of Mr Al Bashir to Belarus. The Court, via the Registry, on 4 December 2018, invited Belarus to cooperate in the Arrest and Surrender of Mr Al-Bashir and in this connection recalled Security Council resolution 1593 (2005).¹⁷

21. No Court proceedings took place regarding non-States Parties.

V. Actions undertaken by the President of the Assembly and the Bureau, States Parties and other stakeholders

22. Throughout the year, the President of the Assembly recalled the importance for States to spare no effort in executing the arrest warrants issued by the Court. The President transmitted to States Parties decisions of the Court related to non-cooperation.

23. The focal points were grateful to receive information about the possible travel of persons subject to warrants of arrest issued by the Court known to have engaged in international travel during the reporting period, from the Court, from various States Parties and from representatives of civil society.

24. Where such information originated from States Parties or civil society, the focal points shared such information with the Court.

25. Working through their respective regional groups, the focal points also kept States Parties informed regarding any proposed travel.

¹⁵ ICC-ASP/18/9, paras. 45 to 47 and *Situation in Darfur, Sudan, Prosecutor v. Omar Hassan Ahmad Al Bashir, "Judgment in the Jordan Referral re Al Bashir Appeal"*, ICC-02/05-01/09-397-Corr (6 May 2019), available at https://www.icc-cpi.int/CourtRecords/CR2019_02856.PDF

¹⁶ As regards the case of *The Prosecutor v. Saif Al-Islam Gaddafi* on 11 April 2019, Mr. Gaddafi filed an appeal against Pre-Trial Chamber I's decision rejecting his challenge to the admissibility of the case. ICC-ASP/18/9, para. 74. Situation in Libya, *Prosecutor v. Saif Al-Islam Gaddafi, "Order scheduling a hearing before the Appeals Chamber and inviting participation in judicial proceedings"*, ICC-01/11-01/11-672 (24 September 2019), available at https://www.icc-cpi.int/CourtRecords/CR2019_05757.PDF. A hearing before the Appeals Chamber was held on 11-12 November 2019 to hear submissions and observations in the appeal of Mr Gaddafi. Among others, the State of Libya, Lawyers for Justice in Libya and Redress, and the Libyan Cities and Tribes Supreme Council submitted oral observations.

¹⁷ *Situation in Darfur, Sudan, Prosecutor v. Omar Hassan Ahmad Al-Bashir, "Request to the Republic of Belarus for Cooperation in the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir"*, ICC-02/05-01/09-395 (4 December 2018), available at https://www.icc-cpi.int/CourtRecords/CR2018_05714.PDF.

26. The focal points were grateful that States Parties kept them informed of their diplomatic action with respect to such travel. The focal points commend those States Parties that took steps to encourage other States to meet their cooperation obligations in full.

VI. The United Nations Security Council

27. During the reporting period, the Prosecutor presented her twenty-eighth and twenty-ninth reports to the Security Council pursuant to resolution 1593 (2005), on 14 December 2018 and 19 June 2019, respectively. The Prosecutor recalled that Sudan, as the territorial State, has the primary responsibility to implement the arrest warrants, and the Office of the Prosecutor stood willing to engage with the Sudanese authorities to explore all possibilities for cooperation pursuant to resolution 1593, while the Office would remain fully respectful of the principle of complementarity enshrined in the Rome Statute.¹⁸ The Prosecutor stated that under the Rome Statute system, the Office also relied on States for the apprehension, arrest, and surrender of ICC fugitives, and that the Security Council plays a vital role in ensuring these obligations are honored.¹⁹ She renewed her appeal to the Council to take principled measures concerning States referred to it by the Court for failing to cooperate with the Court.²⁰ She called on the Council to provide the necessary support to enable the Court to carry out its mandate under the Rome Statute following the referral in resolution 1593.²¹

28. The Prosecutor once again requested the Security Council to use its powers to ensure the immediate arrest and surrender of all Sudanese persons against whom arrest warrants are in force.²²

29. The Prosecutor presented her seventeenth and eighteenth reports to the Security Council pursuant to resolution 1970 (2011), with reference to several aspects relevant to cooperation and non-cooperation, on 8 May 2019 and 6 November 2019, respectively, calling for greater support from, inter alia, the Council, including for the arrest and surrender of suspects against whom warrants have been issued by the Court in the situation.²³

VII. Consultations on non-cooperation

30. Pursuant to the mandate of the Bureau, the focal points on non-cooperation engaged in consultations with relevant stakeholders in order to ensure effective implementation of the Procedures and to submit a report on its activities to the Assembly at its eighteenth session.

31. The focal points convened in total five strategic planning meetings respectively on 28 February, 7 March, 1 April, 11 October and 1 November to discuss current affairs and challenges pertained thereto in relation to non-cooperation within the framework of the United Nations, the Court and the broader international community and their responsive activities, as well as organizational issues, including on meetings with and outreaches to States Parties, civil society and other stakeholders and also to discuss drafting a report to be submitted to the eighteenth session of the Assembly.

¹⁸ See Twenty-eighth and Twenty-ninth Reports of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to UNSCR 1593 (2005); see also S/PV.8425 and S/PV.8554, the relevant meeting coverage of the United Nations Security Council for the briefing of the Prosecutor of the International Criminal Court.

¹⁹ Id.

²⁰ Id.

²¹ Id.

²² Id.

²³ See Seventeenth (<https://www.icc-cpi.int/itemsDocuments/190508-rep-opt-UNSC-libya-ENG.pdf>) and Eighteenth (<https://www.icc-cpi.int/itemsDocuments/191024-report-icc-opt-UNSC-libya-eng.pdf>) Reports of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1970 (2011); see also S/PV.8523 and S/PV.8660, the relevant meeting coverages of the United Nations Security Council for the briefing of the Prosecutor of the International Criminal Court.

32. On 7 March 2019, the focal points convened a consultation with representatives of civil society organizations to solicit their views on how to improve the effectiveness of the revised Procedures relating to non-cooperation and the revised Toolkit that were adopted at the seventeenth session of the Assembly.

33. On 1 April 2019, the focal points met with the Director of the Secretariat of the Assembly of States Parties (“the Secretariat”) to exchange relevant information and updates on the implementation of the Procedures in relation to the activities of the Secretary-General of the United Nations as well as solicit the views of the Secretariat on how to improve and safeguard the effectiveness of implementing the revised Procedures and the revised Toolkit. During the meeting, the focal points recommended in reference to paragraph 25 of the revised Toolkit that the Secretariat take a more active role in sharing information with States Parties.

34. On 20 June 2019, the focal points informed the New York Working Group at its third meeting that in accordance with the revised Procedures and the revised Toolkit that had been adopted by the Assembly at its seventeenth session, they would continue widely sharing the Procedures and the toolkit with States Parties and collecting instances of non-cooperation and responses to those instances.

35. On 24 June 2019, the focal points convened a meeting with States Parties, Observers, the Court and civil society, in which Mr. Hirad Abtahi, then acting Chef de Cabinet of the Presidency, provided an informational briefing on the judgment issued by the Appeals Chamber on the Jordan Referral re. Al-Bashir Appeal in the case of the Prosecutor v. Omar Hassan Ahmad Al-Bashir.

VIII. Recommendations

36. The focal points recommend that the Assembly take note of the present report and adopt the proposed language concerning mandates on non-cooperation that is contained in annex I to this report.

37. The focal points consider that they and the President of the Assembly should continue to engage in any necessary measures that ensure knowledge, understanding and implementation of measures by States Parties and the Assembly, to prevent instances of non-cooperation.

38. With respect to the application of the Procedures on non-cooperation, the Assembly should request the Bureau, including the President and the focal points, to implement the Procedures more consistently.

39. The focal points suggest that future sessions of the Assembly include an agenda item to consider non-cooperation issues arising throughout the inter-sessional periods.

40. Additionally, during the inter-sessional period, the focal points will continue consultations on means to strengthen the application of the Procedures.

41. The focal points should continue to monitor judicial developments as well as travels of persons against whom warrants of arrest have been issued with the assistance of States Parties, and promptly inform the Court of any relevant information.

42. The focal points consider that the Court should continue to provide up-to-date information to the Assembly on judicial developments related to non-cooperation via the President and the focal points.

43. The focal points further recommend that States Parties continue to inform them on measures undertaken to prevent or to address instances of non-cooperation.

Annex I

Language for the omnibus resolution

1. *Recalls* the Procedures relating to non-cooperation adopted by the Assembly in ICC-ASP/10/Res.5 and revised by the Assembly in resolution ICC-ASP/17/Res.5, *recognizes* with concern the negative impact that the non-execution of Court requests *continues* to have on the ability of the Court to execute its mandate, *takes note* of the decision of the Court on non-cooperation in relation to the Jordan Referral re. Al-Bashir Appeal;
2. *Recalls* the Toolkit for the implementation of the informal dimension of the Assembly procedures relating to non-cooperation,¹ which was revised as annex III to ICC-ASP/17/31² and *encourages* States Parties to make use of it as they see fit in order to improve the implementation of the Assembly procedures relating to non-cooperation;
3. *Takes note* of the report of the Bureau on non-cooperation,³ *welcomes* the efforts of the President of the Assembly in implementing the Assembly procedures relating to non-cooperation and *recalls* that the President serves ex officio as focal point for his or her region,⁴ *calls upon* all stakeholders, at all levels, to continue assisting the President of the Assembly, including when accomplishing his or her task with the support of the regional focal points for non-cooperation;
4. *Recalls* the role of the Assembly of States Parties and the Security Council with respect to non-cooperation as provided for by articles 87, paragraph 5, and 87, paragraph 7, of the Rome Statute, and *welcomes* the efforts of States Parties to strengthen the relationship between the Court and the Council;
5. *Calls upon* States Parties to continue their efforts to ensure that the Security Council addresses the communications received from the Court on non-cooperation pursuant to the Rome Statute, *encourages* the President of the Assembly and the Bureau to continue consulting with the Security Council and also *encourages* both the Assembly and the Security Council to strengthen their mutual engagement on this matter;
6. *Noting* the orders of the Pre-Trial Chamber to the Registrar concerning action to be taken in case of information relating to travel of suspects,⁵ *urges* States to share with the focal points on non-cooperation any information concerning potential or confirmed travel of persons against whom an arrest warrant has been issued;

Language for omnibus resolution mandates annex

Requests the President of the Assembly to continue to engage actively and constructively with all relevant stakeholders in accordance with the Assembly procedures relating to non-cooperation, both to prevent instances of non-cooperation and to follow up on any matter of non-cooperation referred by the Court to the Assembly;

Requests that any information concerning potential or confirmed travel of persons against whom an arrest warrant has been issued be promptly shared with the Court by the focal points on non-cooperation;

Requests the Bureau to continue to actively engage throughout the intersessional period with all relevant stakeholders to continue to ensure effective implementation of the Assembly procedures relating to non-cooperation and to submit a report on its activities to the Assembly at its nineteenth session.

¹ ICC-ASP/15/31, Add.1, annex II.

² ICC-ASP/17/31 (*Report of the Bureau on non-cooperation – Annex III updated Toolkit*).

³ ICC-ASP/18/23.

⁴ ICC-ASP/11/29, para. 12.

⁵ See Corrigendum of “Orders to the Registrar concerning action to be taken in case of information relating to the travel of suspects”, ICC-02/05-01/09-235-Corr (15 April 2015).

Annex II

Assembly procedures relating to non-cooperation

The Assembly procedures relating to non-cooperation to address and respond to the failure by any State Party, or another State required to comply with a specific Court request for cooperation, can be found in annex II of resolution ICC-ASP/17/Res.5 at:
https://asp.icc-cpi.int/iccdocs/asp_docs/ASP17/RES-5-ENG.pdf.

Annex III

Toolkit for the implementation of the informal dimension of the Assembly procedures relating to non-cooperation

The toolkit for the implementation of the informal dimension of the Assembly procedures relating to non-cooperation has been developed by the non-cooperation focal points as a resource for States Parties to improve the implementation of the informal measures of the procedures on non-cooperation. Its text can be found in annex III of the report of the Bureau on non-cooperation (ICC-ASP/17/31) at:
https://asp.icc-cpi.int/iccdocs/asp_docs/ASP17/ICC-ASP-17-31-ENG.pdf#page=14.
