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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.”
2. At its tenth session, the Assembly of States Parties (“the Assembly”) adopted the Assembly procedures relating to non-cooperation (“the Procedures”).¹ 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.² The present report is submitted pursuant to the mandate approved at the eighteenth session of the Assembly.³
3. In operative paragraph 22 of resolution ICC-ASP/18/Res.6, entitled “Strengthening the International Criminal Court and the Assembly of States Parties”, adopted at its eighteenth session, the Assembly “[r]ecall[ed] 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, recognize[d] with concern the negative impact that the non-execution of Court requests continue[d] to have on the ability of the Court to execute its mandate, [took] note of the decision of the Court on non-cooperation in relation to the Jordan Referral re. Al-Bashir Appeal.”⁴
4. In operative paragraph 23 of resolution ICC-ASP/18/Res.6, the Assembly also “[r]ecall[ed] the Toolkit for the implementation of the informal dimension of the Assembly procedures relating to non-cooperation, which [had been] revised as annex III to ICC-ASP/17/31 and encourage[d] States Parties to make use of it as they [saw] fit in order to improve the implementation of the Assembly procedures relating to non-cooperation.”⁵
5. In operative paragraph 24 of resolution ICC-ASP/18/Res.6, 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.”⁶
6. In operative paragraph 25 of resolution ICC-ASP/18/Res.6, 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.”⁷
7. In operative paragraph 26 of resolution ICC-ASP/18/Res.6, the Assembly also “[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.”⁸
8. In operative paragraph 27 of resolution ICC-ASP/18/Res.6, 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

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/18/Res.6, annex I, paras.3(j)-(l).

⁴ ICC-ASP/18/Res.6, para. 22.

⁵ ICC-ASP/18/Res.6, para. 23.

⁶ ICC-ASP/18/Res.6, para. 24.

⁷ ICC-ASP/18/Res.6, para. 25.

⁸ ICC-ASP/18/Res.6, para. 26.

focal points on non-cooperation any information concerning potential or confirmed travel of persons against whom an arrest warrant [had been] issued.”⁹

9. At its eighteenth 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 “*request[ed]* 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 nineteenth 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 6 February 2020, 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, via silence procedure.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 eighteenth and nineteenth sessions of the Assembly.

13. The focal points on non-cooperation welcomed the “Independent Expert Review of the International Criminal Court and the Rome Statute System”, dated 30 September 2020, issued as the final report of the Group of Independent Experts, following the interim report dated 30 June 2020, prepared by the Experts, 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.

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. No Court proceedings concerning non-cooperation took place in relation to States Parties.

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.

⁹ ICC-ASP/18/Res.6, para. 27.

¹⁰ ICC-ASP/18/Res.6, annex I, para. 3(j).

¹¹ ICC-ASP/18/Res.6, annex I, para. 3(k).

¹² ICC-ASP/18/Res.6, annex I, para. 3(l).

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

¹⁴ Decision of the Bureau of the Assembly of States Parties, 25 February 2020, available at https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/Bureau2%20-%20Agenda%20and%20decisions.pdf.

17. While no Court proceedings concerning non-cooperation took place in relation to States under an obligation to cooperate with the Court pursuant to a decision of the United Nations Security Council, the focal points note that during the intersessional period, the ICC Prosecutor, Ms. Fatou Bensouda, conducted an official visit to Khartoum, Sudan from 17 to 20 October and met with the Sudanese authorities with a view to lay the ground for cooperation between her Office and the Government of the Republic of the Sudan. The focal points encourage this opportunity of engagement and call on all parties to support this positive development with the view to strengthening the cooperation in support of the Court's mandate and activities.

18. 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.

19. No Court proceedings concerning non-cooperation 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

20. 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.

21. No Court proceedings concerning non-cooperation took place regarding States not Parties to the Statute.

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.

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.

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 thirtieth and thirty-first reports to the Security Council pursuant to resolution 1593 (2005), on 18 December 2019 and 10 June 2020, 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.¹⁵ 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.¹⁶ She renewed her appeal to 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 1593.¹⁷

28. The Prosecutor informed that Ali Kushayb, one of the five suspects in the Darfur situation, had been transferred to the custody of the Court on 9 June 2020. From her view, this development demonstrated the effectiveness of timely and devoted collaborative action under the Rome Statute system and she called on the members of the Security Council, States Parties and the international community to continue providing support and cooperation with an aim to ensuring the arrest and surrender of the remaining Sudanese persons against whom arrest warrants are still in force.¹⁸

29. The Prosecutor presented her nineteenth and twentieth reports to the Security Council pursuant to resolution 1970 (2011), with reference to several aspects relevant to cooperation and non-cooperation, on 5 May 2020 and 10 November 2020, 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.¹⁹

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 nineteenth session.

31. On 16 June 2020, the focal points informed the New York Working Group at its second 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.

32. On 5 October 2020, the focal points, together with the cooperation facilitators, co-organized a joint panel discussion with States Parties, Observers, the Court and civil society, in which H.E. Mr. O-Gon Kwon, President of the Assembly of States Parties delivered opening remarks and H.E. Mr. Momar Gueye, Ambassador of Senegal to The Netherlands, H.E. Mr. Luis Vassy, Ambassador of France to The Netherlands, H.E. Mr. Christian Wenaweser, Permanent Representative of Liechtenstein to the United Nations, Mr. Peter Lewis, Registrar of the Court, Mr. Amady Ba, Head of International Cooperation in the Office of the Prosecutor of the Court and Mrs. Hanna Driefeldt Laine, Senior Legal Officer in the United Nations Office of Legal Affairs participated as panelists, with Mr. Richard Dicker, Director for International Justice at Human Rights Watch as the moderator of the event, focusing on how to minimize the instances of non-cooperation and strengthen cooperation under the current challenges and international political climate that the Court would have to continue navigating.

¹⁵ See Thirtieth and Thirty-first Reports of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to UNSCR 1593 (2005), available at <https://www.icc-cpi.int/about/otp/Pages/otp-news.aspx>; see also S/PV.8691 and S/2020/538, the relevant verbatim and other meeting records of the United Nations Security Council for the briefings of the Prosecutor of the International Criminal Court.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See Nineteenth and Twentieth Reports of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1970 (2011), available at <https://www.icc-cpi.int/about/otp/Pages/otp-news.aspx>; see also S/2020/371 and S/2020/1108, the relevant meeting records of the United Nations Security Council for the briefing of the Prosecutor of the International Criminal Court.

VIII. Recommendations

33. 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.
34. 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.
35. 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.
36. 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.
37. Additionally, during the inter-sessional period, the focal points will continue consultations on means to strengthen the application of the Procedures.
38. 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.
39. 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.
40. 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 past decisions of the Court on non-cooperation;
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. *Takes note with appreciation* the positive development in Sudan after a situation of non-cooperation that prevailed over a decade and encourages the new authorities to meaningfully contribute through effective cooperation to the fulfilment of the mandate of the Court and Security Council resolution 1593/resolution 1593.
7. *Noting* the past orders of the Pre-Trial Chamber to the Registrar concerning action to be taken in case of information relating to travel of suspects, *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 twentieth 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.

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.
