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**Thirteenth session**

New York, 8-17 December 2014

**Report of the Bureau on non-cooperation****I. Introduction**

1. Article 112(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”<sup>1</sup>. Paragraph 14, sub-paragraph (e) of these procedures calls on the Bureau to report on the outcome of any activities it undertook with regard to non-cooperation, including any recommendations for action. The present report is submitted pursuant to this provision.
3. Operative paragraph 2(a) of Annex I of resolution ICC-ASP/12/Res.8 entitled “Strengthening the International Criminal Court and the Assembly of States Parties” of 27 November 2013, requested “the President of the Assembly, to continue to engage actively and constructively with all relevant stakeholders, in accordance with the Bureau procedures on non-cooperation, both to prevent instances of non-cooperation and to follow up on a matter of non-cooperation referred by the Court of the Assembly”.
4. Operative paragraph 10 of resolution ICC-ASP/12/Res.8 “[r]ecognizes the negative impact that the non-execution of Court requests can have on the ability of the Court to execute its mandate, *takes note* of the report of the Bureau on non-cooperation<sup>2</sup>, and *calls upon* all stakeholders to continue assisting the President of the Assembly of States Parties, including when accomplishing her task with the support of the regional points for non-cooperation”.
5. Operative paragraph 8 of resolution ICC-ASP/12/Res.3 entitled “Cooperation”, “[w]elcomes the continued efforts of the President of the Assembly in implementing the non-cooperation procedures” and “*encourages* the Assembly to keep said procedures and their implementation under review in order to secure their effectiveness, including with regard to ensuring early notification to States Parties of opportunities to work together to avoid non-cooperation”.
6. Paragraph 16 of the Assembly procedures on non-cooperation calls for the appointment of four regional focal points on non-cooperation from among the members of the Bureau; the President serves *ex officio* as focal point for her own region. In 2012, the Assembly decided to amend paragraph 16 of the procedures on non-cooperation<sup>3</sup> in order to allow the Bureau to appoint 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.
7. At the 24 January 2014 Bureau meeting, the President recalled that the Bureau had previously appointed Belgium, Japan and Uruguay as non-cooperation focal points for their

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<sup>1</sup> ICC-ASP/10/Res.5, para. 9 and annex, amended via ICC-ASP/11/Res.8, para. 10 and annex.<sup>2</sup> ICC-ASP/12/42.<sup>3</sup> ICC-ASP/11/Res.8, annex I.

respective regional groups and appealed and encouraged representatives of the remaining regional groups to consider taking up this responsibility on behalf of the Assembly. 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 where appropriate, in other embassies.

8. During the reporting period, from 7 November 2013 to 26 November 2014, the Assembly was seized with potential or confirmed instances of non-cooperation related to the situation in Darfur, Sudan, which had been referred to the Court by the UN Security Council through resolution 1593 (2005), and are in relation to the two outstanding warrants of arrest against the President of Sudan, Mr. Omar Al-Bashir, issued by the Court on 4 March 2009 and 12 July 2010, respectively, and to the outstanding warrant of arrest against the Minister of National Defence of the Sudanese Government, Mr. Abdel Raheem Muhammad Hussein, issued on 1 March 2012.

## II. Court proceedings and findings: States Parties

9. Pursuant to articles 86 and 89 of the Rome Statute, States Parties are obliged to execute the Court's pending orders for the arrest and surrender.

10. In the Bureau's report on non-cooperation submitted to the twelfth session of the Assembly,<sup>4</sup> it was indicated that Mr. Hussein had visited Chad from 24 to 25 April 2013 and the Central African Republic (CAR) on 19 August 2013. Mr. Al-Bashir was also reported to have visited Chad to address the "Forum of border tribes between Sudan and Chad", taking place from 25 to 29 March 2014. Further, during the period covered by this report, Mr. Al-Bashir visited the Democratic Republic of the Congo (DRC) from 26 to 27 February 2014 to attend the Common Market for Eastern and Southern Africa summit in Kinshasa. Chad has been a State Party since 1 January 2007; the Central African Republic has been a State Party to the Statute since 3 October 2001; and the Democratic Republic of the Congo (DRC) has been a State Party since 11 April 2002.

11. On 13 November 2013, Pre-Trial Chamber II of the Court rendered a decision on Mr. Hussein's visit to Chad<sup>5</sup> and a decision on Mr. Hussein's visit to the CAR<sup>6</sup>. In both cases the Chamber took note of the explanations provided by the authorities of Chad and the CAR for the respective visit and found that the then-present circumstances did not warrant referral of the matter to the Assembly and/or the Security Council. In its decisions, the Chamber reminded Chad and the CAR of their obligations to execute the pending arrest warrant against Mr. Hussein, and requested Chad and the CAR to immediately arrest Mr. Al-Bashir and surrender him to the Court should he enter the territory of Chad or the CAR respectively.

12. On 9 April 2014, Pre-Trial Chamber II of the Court rendered a decision on the DRC's non-compliance with the Court's cooperation requests for the arrest and surrender of Mr. Al-Bashir<sup>7</sup>. The Chamber found that the DRC failed to comply with its obligations to consult with the Chamber in accordance with article 97 of the Statute on the problem(s) that have impeded the execution of the requests for Mr. Al-Bashir's arrest and surrender. The Chamber also found that the DRC failed to cooperate with the Court by deliberately refusing to arrest and surrender Mr. Al-Bashir, thus preventing the Court from exercising its functions and powers under the Statute. This decision was communicated both to the United Nations Security Council<sup>8</sup> and to the Assembly of States Parties. The Court also issued a press release on its communication to the Council and to the Assembly.<sup>9</sup>

<sup>4</sup> ICC-ASP/12/34

<sup>5</sup> "Decision on the Cooperation of the Republic of Chad Regarding Abdel Raheem Muhammad Hussein's Arrest and Surrender to the Court", ICC-02/05-01/12-20, 13 November 2013

<sup>6</sup> "Decision on the Cooperation of the Central African Republic Regarding Abdel Raheem Muhammad Hussein's Arrest and Surrender to the Court", ICC-02/05-01/12-21, 13 November 2013

<sup>7</sup> "Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court", ICC-02/05-01/09-195, 9 April 2014.

<sup>8</sup> UN Document S/2014/297 (24 April 2014).

<sup>9</sup> [http://icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr994.aspx](http://icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr994.aspx)

13. With regard to Mr. Al-Bashir's visit to Chad in March 2014 no decision pursuant to Article 87(7) has been issued by the Court.<sup>10</sup>

### III. Court proceedings and findings: States not Parties

14. The Bureau recalls that pursuant to paragraph 2 of Security Council Resolution 1593 (2005) the Government of Sudan, which is not a State Party to the Rome Statute, and all other parties to the conflict in Darfur shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor. Pursuant to the same resolution, all States and concerned regional and other international organizations are urged to fully cooperate with the Court.

15. During the reporting period, the Pre-Trial Chamber II of the Court has issued decisions with respect to travels of Mr. Al-Bashir to Kuwait on 18 and 19 November 2013<sup>11</sup> and on 25 and 26 March 2014;<sup>12</sup> to Ethiopia on 30 January 2014,<sup>13</sup> on 17 February 2014,<sup>14</sup> on 26 and 27 April 2014,<sup>15</sup> and on 5 November 2014;<sup>16</sup> to Qatar on 8 July 2014;<sup>17</sup> to Saudi Arabia on 1 October 2014,<sup>18</sup> and to Egypt on 18 and 19 October 2014.<sup>19</sup>

16. In these decisions, the Chamber invited the competent authorities to arrest Omar Hassan Ahmad Al-Bashir, in the event he enters the territory, and to surrender him to the Court, reminding of Security Council Resolution 1593(2005) and inviting said States to cooperate with the Court in Mr. Al-Bashir's arrest and surrender to the Court; ordered the Registrar to notify the competent authorities of the decision; and ordered the Registrar to prepare a report to be filed with the Chamber.

17. In one occasion a State concerned, Kuwait, provided a response to the Court.<sup>20</sup>

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

18. When the office of the President of the Assembly has received information about a planned visit to a State Party by a person whose arrest has been ordered by the Court, her office, in coordination with the focal points on non-cooperation and with the relevant organs of the Court, has verified the information with the State concerned, as well as other stakeholders who may have had relevant information. The President then notified States Parties, observer States and civil society organizations, and encouraged them to join efforts to prevent instances of non-cooperation. Also, in the situation in which an individual sought by the Court attended a multilateral meeting with the presence of officials of States Parties, the President reminded States Parties that, as provided by Assembly Resolution ICC-ASP/12/Res.3, "contacts with persons in respect of whom an arrest warrant issued by the Court is outstanding should be avoided when such contacts undermine the objectives of the Rome Statute".

<sup>10</sup> "Decision Regarding Omar Al-Bashir's Potential Visit to the Republic of Chad", ICC-02/05-01/09-194, 25 March 2014.

<sup>11</sup> "Decision regarding Omar Al-Bashir's potential travel to the State of Kuwait," ICC-02/05-01/09-169, 18 November 2013.

<sup>12</sup> "Decision regarding Omar Al-Bashir's potential travel to the State of Kuwait," ICC-02/05-01/09-192, 24 March 2014.

<sup>13</sup> "Decision on the 'Prosecution's urgent notification of travel in the case of The Prosecutor v Omar Al Bashir,'" ICC-02/05-01/09-180, 30 January 2014.

<sup>14</sup> "Decision on the 'Prosecution's Urgent Notification of Travel in the Case of The Prosecutor v Omar Al Bashir,'" ICC-02/05-01/09-184, 17 February 2014.

<sup>15</sup> "Decision Regarding the Visit of Omar Hassan Ahmad Al Bashir to the Federal Republic of Ethiopia," ICC-02/05-01/09-199 29 April 2014.

<sup>16</sup> "Decision on the 'Prosecution's Urgent Notification of Travel in the Case of The Prosecutor v Omar Al Bashir,'" ICC-02/05-01/09-215 4 November 2014.

<sup>17</sup> "Prosecution's Urgent Notification of Travel in the Case of The Prosecutor v Omar Al Bashir," ICC-02/05-01/09-203 7 July 2014.

<sup>18</sup> "Decision on the 'Prosecution's notification of travel in the case of The Prosecutor v Omar Al Bashir,'" ICC-02/05-01/09-208, 1 October 2014.

<sup>19</sup> "Prosecution's Notification of Travel of Suspect Omar Al Bashir in the Case of The Prosecutor v Omar Al Bashir," ICC-02/05-01/09-210, 14 October 2014.

<sup>20</sup> Response in confidential annex referred to in the "Second report of the Registry on the 'Decision Regarding Omar Al-Bashir's Potential Travel to the State of Kuwait,'" ICC-02/05-01/09-197, 25 April 2014.

19. The President further alerted about the visits of persons against whom the ICC issued an arrest warrant to States Parties and not Parties to the Statute via her Twitter account. The President also sent letters to the Foreign Ministers of the countries concerned, requesting the full cooperation with the Court. The President also issued press releases appealing to all stakeholders to join efforts to prevent instances of non-cooperation. The President also held meetings with representatives of the State concerned. She kept the Bureau informed about her activities.

20. With regard to Mr. Hussein's visit to Chad and the CAR, the President had reached out to representatives of Chad and the CAR and sent messages in 2013, as reported in the Bureau non-cooperation report ICC-ASP/12/34. In response to the visit of Mr. Al-Bashir to the DRC and to Chad described above, the President sent messages to States Parties and other stakeholders on 25 February 2014 and 26 March respectively. The President sent a letter addressed to the Foreign Minister of the DRC on 25 February. The Foreign Minister of the DRC in his response letter of 5 March to President Intelmann underlined the DRC's commitment to the ICC and informed about the circumstances with regard to Mr. Al-Bashir's visit to Kinshasa. In light of the information that Mr. Al-Bashir arrived in the DRC, the President further issued a press release on 26 February 2014. President Intelmann met with the Permanent Representatives of the DRC and Chad to the United Nations in New York to discuss the above mentioned visits, on 25 March 2014 and 3 April, respectively.

21. At the 17 March 2014 Bureau meeting, the President informed Bureau members about the visit of Mr. Al-Bashir to the DRC, her letter to the DRC's Foreign Minister in this regard, and his letter in response. At that meeting, one non-cooperation focal point informed about actions undertaken by some States Parties and regional organizations to prevent this visit, such as bilateral demarches, press statements and statements on social media. At its 16 April 2014 meeting, the Bureau took note of the 9 April 2014 decision of Pre-Trial Chamber II on the DRC's cooperation, conveyed to the President of the Assembly by the President of the Court on 11 April 2014.

22. States Parties made use of the UN Human Rights Council to signal the importance of cooperation with the Court. During the interactive dialogue for the 19<sup>th</sup> session of the Universal Periodic Review (UPR) held on 29 April 2014, some States reiterated the importance of cooperation of the DRC with the Court. Furthermore, the DRC accepted the recommendations to "fully cooperate with the International Criminal Court for all open cases, especially for the execution of arrest warrants issued by the Court".<sup>21</sup>

## V. States concerned

23. The Democratic Republic of the Congo submitted observations to the Court on the issues requested by the Pre-Trial Chamber II.<sup>22</sup> In a Note Verbale, dated 1 December 2014, from the Permanent Mission of the DRC to the United Nations addressed to the Bureau of the Assembly of States Parties, the DRC reaffirmed its commitment of full cooperation with the Court.

24. At the meeting of the New York Working Group on 28 March 2014, the Permanent Representative of Chad informed States Parties and observers that the visit of Mr. Al-Bashir earlier that month had taken place in the context of border security imperatives and of the role of mediator that Chad is playing in favor of peace agreements among various ethnic groups. He reiterated that the recent visit should not be read as a refusal to comply with the obligations of Chad towards the Court. Furthermore, he recalled Chad's ongoing support to the ICC to conduct investigations and the country's support to the Rome Statute. In this regard, he reiterated that Chad would continue engaging with Court officials, as it has done so recently, including with the President of the Court and the President of the Assembly, and would be making use of article 97 of the Rome Statute to consult with the Court in relation to possible future incidents. The Permanent Representative of Chad also

<sup>21</sup> UN Human Rights Council, Report of the Working Group on the Universal Periodic Review, Democratic Republic of the Congo, UN Doc. A/HRC/27/5, 7 July 2014, para. 134.12.

<sup>22</sup> See, ICC-02/05-01/09-190-AnxI; ICC-02/05-01/09-190-AnxII-tENG; See also, "Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court", ICC-02/05-01/09-195, 9 April 2014, paras. 12-34.

raised the importance of discussing the challenges faced by African Union countries in relation to cooperation, in light of AU decisions, and called on States Parties to discuss together how to overcome such challenges. He appealed for increased dialogue to reinforce the mechanisms on non-cooperation especially within the Assembly, and expressed that he did not support the involvement of the Security Council in such issues. Delegates expressed appreciation of the availability of Chad to engage with States Parties to explain their position and the recent incident. Other delegates also appreciated the need to start discussing within the Assembly measures that could be taken when the Court issues findings on non-cooperation. The President concurred with the importance of engagement and dialogue among States Parties, and reiterated her appreciation to the presence and engagement of the representative of Chad.

## VI. The Security Council

25. In her reports to the Security Council pursuant to Resolution 1593 (2005), the Prosecutor has repeatedly expressed concern with respect to the current situation in Darfur, in particular regarding the on-going impunity for Rome Statute crimes reflected in the failure to arrest the four individuals subject to five separate warrants of arrest issued by the ICC against Mesrs Omar Al-Bashir, Abdel Rahem Husein, Ahmad Harun, and Ali Kushayb.

26. The President of the Assembly met with the President of the Security Council for the month of March 2014, Luxembourg. In this meeting, the President of the Assembly underlined that the assistance and support of the Security Council was essential since it had referred the situation in Darfur to the Court. She also underlined the importance of cooperation with the ICC and for States Parties to comply with their obligations under the Rome Statute. The President recalled that under Articles 87(5) and 87(7) of the Rome Statute, the Security Council is to be seized of decisions on non-cooperation from the Court related to situations referred by the Council to the Court and underlined the dual responsibility of the Assembly and the Security Council in such instances. The President recalled the communications and findings transmitted by the Court to the UN Security Council to that date,<sup>23</sup> and highlighted the importance of the Council following up on this issue and addressing these communications.

27. The Council discussed the communications from the Court in consultations under “any other business”, and considered, throughout 2014 proposals from States Parties to address the communications from the Court, notably a draft response to these communications. To date, the Council has not been in a position to take action on such a response. The Council is continuing its consideration of the proposals from States Parties.

28. With a recent incident of non-cooperation as background, on 28 March 2014, the Council adopted for the first time in a country-specific resolution, a reference stressing the need for cooperation with the International Criminal Court (ICC) and stressing the importance of actively seeking to hold accountable those responsible for war crimes and crimes against humanity in the country and of regional and international cooperation to this end.<sup>24</sup>

29. In addition, following her practice of meeting with the President of the Security Council following a finding on non-cooperation, and pursuant to the decision of the Court dated 9 April 2014 which was circulated to the Council on 24 April 2014, the President met with the President of the Security Council for the month of May 2014, the Republic of Korea, in relation to the finding on non-cooperation by the Court.

30. In the context of debates at the UN Security Council<sup>25</sup> States Parties have supported the need for the Council to address the communications from the Court.

<sup>23</sup> See Annex I.

<sup>24</sup> SC Resolution 1247 (2014), UN Doc S/Res/2147, 28 March 2014, preambular paragraph 21. See also operative paragraph 21.

<sup>25</sup> 7081st meeting of the UN Security Council UN Doc S/PV.7081, 11 December 2013; 7199<sup>th</sup> meeting of the UN Security Council UN Doc S/PV.7199, 17 June 2014; and 7285<sup>th</sup> meeting of the UN Security Council UN Doc S/PV/7285, 21 October 2014.

## VII. Consultations on Non-Cooperation

31. The focal points and the President engaged in consultations with several stakeholders to improve the implementation of the procedures on non-cooperation. The focal points held several consultations with the Office of the Prosecutor with a view to develop internal tools to monitor, compile and react systematically to potential or confirmed instances of non-cooperation.

32. On 18 June 2014, Belgium and Uruguay, in cooperation with the office of the President, organized a brainstorming session on cooperation and non-cooperation in the Darfur situation. The session benefited from the presence of the Prosecutor, as well as from the testimony of a victim from Darfur. Participating States Parties submitted a list of issues to be considered by the focal points and the Assembly, which will serve for ongoing discussions throughout 2015.

33. The focal points and the President concur on the important role played by civil society in monitoring the travels of persons sought by the Court, and by the Office of the Prosecutor in systematically addressing potential or confirmed instances of non-cooperation.

34. The Bureau deems it important to improve the diplomatic measures to address instances of non-cooperation, to enhance the collaboration among States Parties in assisting each other in preventing instances of non-cooperation and enabling targeted states to execute the orders of the Court, and strengthening dialogue within the Assembly on obstacles and lessons-learned in dealing with instances of non-cooperation.

35. In this regard, the focal points were informed of the “Note on the EU’s response to non-cooperation with the International Criminal Court by third states issued by International Criminal Court Sub-area of the Public International Law Working Group (COJUR-ICC)” dated 27 November 2013.<sup>26</sup>

## VIII. Conclusions

36. The Assembly procedures on non-cooperation are aimed at enhancing the implementation of the Court’s decisions. It is against this background that the effect of the President and the Bureau’s actions must be assessed.

37. Mr. Al-Bashir and Mr. Hussein visited several States in 2014, without the arrest warrants being executed. Pre-Trial Chamber II made a non-cooperation finding with regard to Mr. Al-Bashir’s visit to the DRC. With regard to Mr. Al-Bashir’s visit to Chad, there has been no conclusive decision issued by the Court. In the case of Mr. Hussein’s visits to Chad and the CAR, Pre-Trial Chamber II took note of the explanations of the authorities of Chad and the CAR and did not find it necessary to refer the matter to the Assembly or the Security Council.

38. The President undertook considerable efforts to prevent instances of non-cooperation, assisted by the Bureau, several States Parties and other stakeholders. In her letters to the Foreign Ministers of the Central African Republic, Chad and the DRC the President indicated that States Parties are giving specific and continued attention to the issue of non-execution of requests of the Court, and that the Assembly has repeatedly expressed its concerns regarding the negative consequences that failure to comply with such requests has on the Court’s ability to carry out its mandate.

39. The CAR, Chad and the DRC upon request of Pre-Trial Chamber II all submitted observations with regard to the alleged failure to arrest persons sought by the ICC and to the alleged failure to consult with the Court. This has not always been the case with regard to previous requests from the Court to States. In their submissions to the Court, the three States explained in detail the circumstances preventing them from executing the arrest warrant, and in their meetings with the President the representatives of all three States underlined their commitment and support to the Court.

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<sup>26</sup> [http://eeas.europa.eu/human\\_rights/icc/docs/st\\_16993\\_2013\\_init\\_en.pdf](http://eeas.europa.eu/human_rights/icc/docs/st_16993_2013_init_en.pdf).

40. The information provided by the Permanent Representative of Chad at the NY Working Group meeting was appreciated by other States Parties. In general, States Parties have started to focus increasingly on how to support each other in ensuring cooperation and on the importance of article 97 of the Rome Statute.

41. At the informal meeting organized by the non-cooperation focal points Belgium and Uruguay together with the office of the President, it was agreed that States Parties and the Assembly should collaborate with States Parties that are likely to receive visits of persons sought by the ICC to collectively prevent instances of non-cooperation.

42. At the said meeting, it was also agreed that the discussions to prevent non-cooperation and to strengthen the procedures on non-cooperation should take into consideration and emphasise the role of the judicial activities of the Court in bringing justice to victims of the most serious crimes under international law.

43. The Bureau recognises the importance of cooperation by all States and notes the increased attention given by the Court and by the Assembly of States Parties to the lack of execution of the warrants of arrest by States not Parties, especially in light of the Council's urge to all States to cooperate fully with the Court.

44. The Bureau also recognises the importance of the monitoring of potential travels by persons sought by the Court, as this seems to already have had an effect on the travels of persons sought by the ICC. The Bureau recognises the important role played by civil society organisations in monitoring and offering information in this regard to the Court and the President of the Assembly.

45. The Bureau recognises the efforts by States Parties to constructively engage with the Council regarding non-cooperation decisions with regard to situations referred to the Court by the Council, with a view to an appropriate follow-up to these instances.

## **IX. Recommendations**

46. The Bureau recommends that the Assembly, in its omnibus resolution, take note of the present report.

47. The Bureau recommends that the President and the focal points continue consultations with all the relevant organs of the Court and amongst themselves to keep on improving operative procedures to address potential or confirmed instances of non-cooperation;

48. The Bureau requests that all stakeholders continue assisting the President of the Assembly, *inter alia* by providing timely information to the President regarding instances of non-cooperation.

49. The Bureau recommends that focal points be appointed from all regions, that their work be reinforced by actions from their capitals and delegations in key locations outside New York, and that the President continue to implement the procedures on non-cooperation.

50. The Bureau recommends that consultations amongst States Parties continue with a view to share best practices in preventing non-cooperation and dealing with instances of non-cooperation.

51. The Bureau recommends that the Assembly, at its fourteenth session, discusses non-cooperation in the most appropriate forum.

**Annex I****Communications received by the Assembly or the Security Council, related to non-cooperation pursuant to the Rome Statute (as of 1 December 2014)****Situation in Darfur, Sudan**

<b>Case</b>	<b>Title of Document</b>	<b>ICC document</b>	<b>SC document</b>
1. Prosecutor v. Ahmed Harun and Ali Kushayb	Decision informing the United Nations Security Council about the lack of cooperation by the Republic of Sudan <sup>1</sup>	ICC-02/05-01/07-57 (25 May 2010)	S/2010/265 (1 June 2010)
2. Prosecutor v. Omar Al Bashir	Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Chad	ICC-02/05-01/09-109 (27 August 2010)	S/2010/456 (31 August 2010)
3. Prosecutor v. Omar Al Bashir	Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's presence in the territory of the Republic of Kenya	ICC-02/05-01/09-107 (27 August 2010)	S/2010/456 (31 August 2010)
4. Prosecutor v. Omar Al Bashir	Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to Djibouti	ICC-02/05-01/09-129 (12 May 2011)	S/2011/318 (19 May 2011)
5. Prosecutor v. Omar Al Bashir	Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir	ICC-02/05-01/09-139-Corr (13 December 2011)	S/2012/9 (9 January 2012)
6. Prosecutor v. Omar Al Bashir	Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir	ICC-02/05-01/09-140-tENG (13 December 2011)	S/2012/8 (9 January 2012)
7. Prosecutor v. Omar Al Bashir	Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir	ICC-02/05-01/09-151 (26 March 2013)	S/2013/229 (15 April 2013)
8. Prosecutor v. Omar Al Bashir	Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court	ICC-02/05-01/09-195 (9 April 2014)	S/2014/297 (24 April 2014)

<sup>1</sup> This decision was only transmitted to the Security Council.



## Annex II

### Assembly procedures relating to non-cooperation (ICC-ASP/10/Res.5, annex)

*The Assembly of States Parties,*<sup>1</sup>

[...]

9. *Recognizes* the negative impact that the non-execution of Court requests can have on the ability of the Court to execute its mandate, *welcomes* the report of the Bureau on potential Assembly procedures relating to non-cooperation<sup>2</sup> and *decides* to adopt the procedures annexed to the present resolution;

[...]

## Appendix<sup>1</sup>

### A. 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<sup>2</sup> adopted on 10 December 2010 provides as follows:

“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;”

<sup>1</sup> *Official Records ... Tenth session ... 2011* (ICC-ASP/10/20), vol. I, part III, ICC-ASP/10/Res.5, para. 9.

<sup>2</sup> ICC-ASP/10/37.

<sup>1</sup> *Official Records ... Tenth session ... 2011* (ICC-ASP/10/20), vol. I, part III, ICC-ASP/10/Res.5, annex.

<sup>2</sup> *Official Records ... Ninth session ... 2010* (ICC-ASP/9/20), vol. I, part III, ICC-ASP/9/Res.3.

## B. 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.<sup>3</sup> 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;<sup>4</sup>

8. The 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. 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.

## C. 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

<sup>3</sup> 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.

<sup>4</sup> 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.

need to adapt its working methods to be able to respond quickly enough to an immediate situation of non-cooperation, as outlined below.

## **D. Specific 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 Evidence<sup>5</sup>. These procedures are aimed at enhancing the implementation of the Court's decisions. All actors involved must ensure that their participation in these procedures does not lead to discussions on the merits of the Court request or otherwise undermines 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.

### **1. Formal response procedure: successive steps to be taken by the Bureau and the Assembly**

#### **(a) 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.<sup>6</sup> 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.

#### **(b) 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.

(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.<sup>7</sup> 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 Parties<sup>8</sup>.

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

<sup>6</sup> 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).

<sup>7</sup> 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.

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

(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.

(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.

## 2. 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 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.

### (a) Regional focal points for cooperation<sup>9</sup>

16. In order to assist the President in his or her good offices, the Bureau would appoint four, or, if so requested by the President of the Assembly, five focal points from among States Parties, on the basis of the principle of equitable geographical representation.

### (b) 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.

### (c) 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.

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<sup>9</sup> As amended by resolution ICC-ASP/11/Res.8, annex I.