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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.”¹ At its fourteenth session, the Assembly approved mandates with regard to non-cooperation, and requested the Bureau to submit a report at its fifteenth session on the implementation of the non-cooperation procedures. The present report is submitted pursuant to this mandate.²

3. In operative paragraph 15 of resolution ICC-ASP/14/Res.4, entitled “Strengthening the International Criminal Court and the Assembly of States Parties”, at its fourteenth session the Assembly “[r]ecall[ed] the non-cooperation procedures 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, [took] note of the decisions of the Court conveyed to the Assembly to date and of the report of the Bureau on non-cooperation, welcome[d] the efforts of the President of the Assembly in implementing the procedures on non-cooperation during his tenure and recal[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 task with the support of the regional focal points for non-cooperation, and encourage[d] all States Parties to cooperate towards a successful outcome of the review of the non-cooperation procedures.”

4. In operative paragraph 16 of resolution ICC-ASP/14/Res.4, the Assembly also “[r]ecall[d] 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, welcome[d] the efforts of States Parties to strengthen the relationship between the Court and the Council, call[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.”

5. At its fourteenth 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 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 to the Assembly.”³ 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 non-cooperation procedures.”⁴

6. In operative paragraph 6 of resolution ICC-ASP/14/Res.3 entitled “Cooperation”, the Assembly, “[w]elcome[d] the continued efforts of the President of the Assembly in implementing the non-cooperation procedures” and “encourage[d] 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”.

7. 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 his own region. In 2012, the Assembly decided to amend paragraph 16 of the procedures on non-cooperation⁵ in order to allow the Bureau to appoint four or, if so requested by the President of the Assembly, five

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

² ICC-ASP/14/Res.4, annex I, para.2(j).

³ ICC-ASP/14/Res.4, annex I, para 2(a).

⁴ Ibid, para 2(j).

⁵ ICC-ASP/11/Res.8, annex I.

focal points from among all States Parties, on the basis of equitable geographical representation.

8. At its 1 April 2016 meeting, the Bureau appointed Australia, Czech Republic, Japan and Peru as non-cooperation focal points (“focal points”) for their respective regional groups. The President serves *ex officio* as focal point of his region, Africa. 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.

9. During the reporting period, the Court referred to the United Nations Security Council and the Assembly of States Parties two findings of non-compliance in relation to the situation in Darfur, dated 11 July 2016:

(a) Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court, (ICC-02/05-01/09-266).⁶

(b) Decision on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al-Bashir to the Court (ICC-02/05-01/09-267).⁷

10. During the reporting period, the Court referred to the Assembly of States Parties one finding of non-compliance in relation to the situation in the Republic of Kenya, dated 18 September 2016: Second Decision on the Prosecution’s application for a finding of non-compliance under Article 87(7) of the Statute (The Prosecutor v. Uhuru Muigai Kenyatta) (ICC-01/09-02/11-1037).

II. Court proceedings and findings: States Parties

11. 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.

12. In relation to the situation in Darfur, during the period covered by this report, President Omar Al-Bashir of Sudan visited Djibouti on 8 May 2016, and on 11 May 2016 travelled to Uganda. Both Djibouti and Uganda are States Parties to the Rome Statute.

13. On the basis of a request from the Prosecutor, on 11 July 2016, the Presiding Judge of the Pre-Trial Chamber II, issued a “Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of States Parties to the Rome Statute”.⁸ The decision stated that “the Republic of Djibouti has failed⁹ to comply with the request for arrest and surrender of Omar Al-Bashir to the Court, thereby preventing the Court from exercising its functions and power under the Statute”.¹⁰

14. On the basis of a request from the Prosecutor, on 11 July 2016, the Presiding Judge of the Pre-Trial Chamber II, issued a “Decision on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of States Parties to the Rome Statute”.¹¹ The decision stated that “the Republic of Uganda has failed to comply with the request for arrest and surrender of Omar Al-Bashir to the Court, thereby preventing the Court from exercising its functions and power under the Statute”.¹²

⁶ UN document S/2016/716.

⁷ UN document S/2016/674.

⁸ ICC-02/05-01/09-266.

⁹ Refer to the explanations provided by the Republic of Djibouti to the Court by Note Verbale dated 8 June 2016 (ICC-02/05-01/09).

¹⁰ Ibid.

¹¹ ICC-02/05-01/09-267.

¹² Ibid.

15. In relation to the situation in the Republic of Kenya, on 19 September 2016, the Presiding Judge of the Trial Chamber V issued the “Second decision on Prosecution’s application for a finding of non-compliance under Article 87 (7) of the Statute”.¹³ The decision stated that “the Republic of Kenya has failed to: (i) comply with its statutory obligations to consult with the Court, including by not raising challenges to the legal basis of a request for cooperation within a reasonable timeframe; and (ii) take all reasonable steps to execute a request for cooperation from the Court, including by not providing clear, relevant and timely responses or taking any meaningful steps to compel production of a requested information”. This decision was transmitted to the President of the Court for referral pursuant to Regulation 109 of the Regulations of the Court.¹⁴ In the course of its decision, the Trial Chamber noted that it considered “the ASP would be best placed to address the lack of cooperation, in order to provide an incentive for the Kenyan Government to cooperate with the Court, in relation to both the Revised Request and more generally.”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. With respect to Libya and in relation to the request to surrender Saif Al-Islam Gaddafi and as part of the efforts to secure his surrender, on 26 April 2016, the Office of the Prosecutor filed a request with Pre-Trial Chamber I for an order directing the Registry to transmit the request for arrest and surrender of Mr. Gaddafi directly to the commander of the Abu-Bakr al-Siddiq Battalion in Zintan in which custody Mr. Gaddafi continues to be detained. Pre-trial Chamber I has not issued a decision at the time of writing of this report.

IV. Court proceedings and findings: States not Parties

18. While States not party to the Rome Statute have no obligation under the 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.

19. With respect to Sudan, on 30 May 2016, the Pretrial Chamber II issued a “Report of the Registry on information received regarding Omar Al-Bashir’s travels to Non-States Parties from 18 November 2015 to 18 April 2016 and other efforts conducted by the Registry regarding purported visits”.¹⁶

20. During the reporting period, the Court, via the Registry, invited the competent authorities of numerous non-States Parties to the Statute to arrest President Omar Al-Bashir, in the event he entered their territories, and to surrender him to the Court, reminding them of the Security Council resolution 1593 (2005), and invited the said States to cooperate in President Al-Bashir’s arrest and surrender to the Court. These States included: the United Arab Emirates, in relation to a visit from 28 November 2015 to 4 December 2015; the Federal Democratic Republic of Ethiopia on 9 December 2015, from 26 January to 31 January 2016, and from 16 to 17 April 2016; the Arab Republic of Egypt from 20 February to 21 February 2016; the Republic of Indonesia on 5 March 2016; and the Kingdom of Saudi Arabia on 9 March 2016.

21. None of the concerned authorities responded to the requests.

¹³ICC-01/09-02/11-1037.

¹⁴Regulation 109: Where a finding under article 87, paragraph 7, has been made, the President shall refer the matter to the Assembly or the Security Council in accordance with that provision and, as regards the Security Council, in accordance with the agreement to be concluded under article 2.

¹⁵See supra note 13 at para. 38.

¹⁶ICC-02/05-01/09-263.

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 forwarded 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 President Al-Bashir, the only person subject to a warrant 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, over the course of the year.

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 President Al-Bashir's 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. On 21 December 2015, the Secretary-General of the United Nations transmitted a letter from the President of the Security Council to the President of the International Criminal Court, informing that the decisions of the Pre-Trial Chambers of the Court on the situations in Darfur, Sudan and Libya had been brought to the attention of the Security Council.

28. The decisions of the Court concerning the non-compliance of Djibouti and Uganda were conveyed to the Security Council. To date, the Council has not taken any action in relation to these referrals.

29. During the reporting period the Prosecutor, on 14 December 2015 and 8 June 2015, respectively, presented her twenty-second and twenty-third reports to the Security Council pursuant to resolution 1593 (2005). The Prosecutor recalled that Sudan has the primary responsibility to implement outstanding arrest warrants and has consistently refused to do so. The Prosecutor stated that it is the responsibility of the Council to take the necessary action to ensure that the Government of Sudan complies with its obligations to arrest and surrender the five individuals against whom warrants of arrest have been issued without further delay.

30. The Prosecutor outlined the travel of President Al-Bashir and once again requested the Security Council to use its powers under the Charter of the United Nations to ensure the immediate arrest and surrender of all Sudanese persons against whom arrest warrants are in force, should they travel across international borders.

31. Recalling the non-cooperation findings referred to the Council, the Prosecutor stated that the Security Council's inaction invariably undermined the credibility of the Council and that of the referral mechanism, and in addition had a great adverse impact on victims. The Prosecutor said it was past due for the Security Council to address instances of non-cooperation and urged it to fully assume its responsibilities by taking strong and concrete measures to ensure compliance with the Rome Statute and Security Council resolution 1593 (2005). The Prosecutor said that unless the Council acts decisively and forcefully there was little prospect for the arrest of President Al-Bashir, meaning that justice would continue to elude the victims of Darfur.

30. During the reporting period, on 26 May 2016, the Prosecutor presented her eleventh report to the Security Council pursuant to resolution 1970 (2011). In this report, the Prosecutor noted that Libya had advised the Prosecution that Saif Al-Islam Gaddafi continued to be in Zintan and was unavailable to the Libyan State. The Prosecutor stated that it was the responsibility of the Council to ensure that Libya complies with its obligations and that Mr. Gaddafi is surrendered to the Court without further delay.

31. On 27 March 2015, the Security Council adopted resolution 2213 (2015) on Libya, whereby it called on the Libyan Government to cooperate fully with and provide any necessary assistance to the ICC and the Prosecutor as required by resolution 1970 (2011); this was recalled on 10 September 2015 by resolution 2238 (2015).

VII. Consultations on non-cooperation

32. Pursuant to the mandate of the Bureau, the focal points on non-cooperation engaged in consultations in order to issue recommendations on how to improve the implementation of the non-cooperation procedures. Pursuant to the roadmap contained in resolution ICC-ASP/13/Res.5, on 1 April 2016, the focal points informed the New York Working Group that their work would focus on: a) sharing any information concerning potential or confirmed travel of persons against whom an arrest warrant has been issued with the focal points; and b) the development of a “toolkit” for the implementation of the informal dimension of the non-cooperation procedures.

33. On 13 April 2016, the focal points convened the first consultation, where they asked for suggestions regarding the content of the draft toolkit for the implementation of the informal dimension of the non-cooperation procedures (the Toolkit). States Parties expressed their support for the development of this resource. A number of States Parties also expressed their interest in reviewing the Assembly Procedures on Non-Cooperation. The focal points indicated that this work would be commenced upon the completion of the Toolkit.

34. On 19 May 2016, the focal points held a videoconference with representatives of the Court to discuss the Toolkit and how to increase engagement, with a view to enhancing the exchange of information to assist the Court with its work in relation to the execution of arrest warrants. This resulted in a number of working methods being identified to facilitate this work.

35. On 16 September 2016, the Toolkit was circulated to States Parties, the Court and civil society. The points advised that while they welcomed feedback and comments on the Toolkit in order to make it as useful as possible, they did not propose that the Assembly of States Parties endorse the Toolkit. Rather it was proposed that the Toolkit be considered as a resource produced by the focal points for States Parties to draw on as they see fit.

36. On 26 September 2016, the focal points convened a second consultation on the Toolkit and invited comments from States Parties and civil society. Positive and constructive feedback was provided on the Toolkit, with some States Parties providing concrete suggestions for additions. A number of States Parties again recorded their desire to review the Assembly Procedures on Non-Cooperation.

37. On 5 October 2016, a revised version of the Toolkit was circulated to States Parties, the Court and civil society, which incorporated comments received from States Parties and the Court.

38. On 11 October 2016, the focal points convened a third consultation on the Toolkit. States Parties reiterated their support for the Toolkit at this meeting.

39. The final version of the Toolkit is attached to this report for States Parties to make use of as they see fit. The focal points will work with the Secretariat to make the Toolkit available on the Assembly’s webpage and to have the Toolkit translated.

VIII. Recommendations

40. The focal points recommend that the Assembly take note of the present report and adopt the proposed language concerning mandates on non-cooperation that are contained in annex I of this report.
41. 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.
42. Furthermore, the focal points encourage States Parties to take full advantage of the Toolkit in order to improve the implementation of the informal measures of the procedures on non-cooperation (see annex II of this report).
43. With respect to the formal dimension of the procedures on non-cooperation, the Assembly should request the Bureau, including the President and the focal points to apply the Assembly procedures relating to non-cooperation more consistently.
44. The focal points suggest that future sessions of Assembly include an agenda item to consider non-cooperation issues arising throughout the inter-sessional periods.
45. Additionally, during the inter-sessional period, the focal points will continue consultations on means to strengthen the formal dimension of the procedures on non-cooperation.
46. 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.
47. 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.
48. 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

15. *Recalls* the non-cooperation procedures adopted by the Assembly in ICC-ASP/10/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 decisions of the Court on non-cooperation findings in relation to Djibouti, Uganda and Kenya, and of the report of the Bureau on non-cooperation, *welcomes* the efforts of the President of the Assembly in implementing the procedures on non-cooperation during his tenure and *recalls* that the President serves ex officio as focal point for his or her region, *calls upon* all stakeholders, at all levels, to continue assisting the President of the Assembly, including when accomplishing his task with the support of the regional focal points for non-cooperation, and *encourages* all States Parties to cooperate towards a successful outcome of the review of the non-cooperation procedures;

16. *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, *welcomes* the efforts of States Parties to strengthen the relationship between the Court and the Council, *takes note* of the letter dated 21 December 2015 from the UN Secretary-General to the President of the ICC transmitting a letter from the President of the Security Council, which advised that letters transmitting decisions of the Pre-Trial Chambers of the International Criminal Court on the situations in Darfur, Sudan and Libya had been brought to the attention of Members of the Security Council;

16 *bis.* *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;

17. *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, *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;

17 *bis.* *Welcomes* the finalization by the focal points on non-cooperation of the Toolkit for the Implementation of the Informal Dimension of the Assembly Procedures Relating to Non-Cooperation and encourages States Parties to make use of the Toolkit as they see fit in order to improve the implementation of the Assembly Procedures Relating to Non-Cooperation¹;

Appendix

2(a). *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 a matter of non-cooperation referred by the Court to the Assembly;

2(i). *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;

2(j). *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 sixteenth session;

2(j) *bis.* *requests* the Bureau, through focal points on non-cooperation, to engage with all relevant stakeholders to conduct a review of the Assembly Procedures Relating to Non-Cooperation, with a view to recommending any necessary additions or amendments;

¹ ICC-ASP/10/Res.5.

Annex II

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

(See ICC-ASP/15/31/Add.1)
