



## Assembly of States Parties

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## Report of the Bureau on non-cooperation

### Note by the Secretariat

Pursuant to paragraph 9 of resolution ICC-ASP/10/Res.5 of 21 December 2011, the Bureau of the Assembly of States Parties hereby submits for consideration by the Assembly the report on non-cooperation.

## I. Introduction

1. At its tenth session, the Assembly of States Parties adopted the “Assembly Procedures relating to non-cooperation”.<sup>1</sup> Paragraph 14, sub-paragraph (e) of these procedures call on the Bureau to report on the outcome of any activities it undertook with regards to non-cooperation, including any recommendations for action. The present report is submitted pursuant to this provision.

2. In December 2011, Pre-Trial Chamber I of the Court rendered two decisions pursuant to article 87(7) of the Rome Statute, finding that both Malawi and Chad had failed to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Al Bashir.<sup>2</sup> These decisions were communicated both to the United Nations Security Council and to the Assembly of States Parties (“the Assembly”).

## II. Actions undertaken by the President and the Bureau of the Assembly

3. Upon receipt of the Court’s decisions, the President of the Assembly met with the President of the Security Council for the month of December 2011, H.E. Ambassador Vitaly Churkin (Russia). At the 19 December 2011 meeting, she was informed that Security Council action was dependent on whether any Security Council member was going to initiate action concerning this issue. The President’s assessment that Security Council action was not likely to be forthcoming was later confirmed when the President of the Security Council for the month of January 2012, H.E. Ambassador Baso Sangqu (South Africa), whom the President of the Assembly met on 20 January 2012 informed the President of the Assembly that action in the Security Council would depend on the dynamics within the Council.

4. In line with paragraph 14 (b) of the Assembly Procedures, on 16 January 2012 the President sent letters to the Foreign Ministers of Chad and Malawi, requesting a response within two weeks. The Foreign Minister of Malawi replied with a letter dated 25 January, reaffirming Malawi’s commitment to its Rome Statute obligations, of which the Bureau took note at its seventh meeting on 28 February 2012. The President subsequently met with the Permanent Representative of Malawi to the United Nations; the Ambassador of Malawi based in Brussels also visited the Court to discuss the matter. The issue was also addressed with the Permanent Representative of Malawi to the African Union during the President’s visit to Addis Ababa in May 2012.

5. The authorities of Malawi developed a dialogue with the President of the Assembly. In all contacts Malawi reaffirmed its intention to meet its obligations under the Rome Statute. The President offered assistance and support in raising wider awareness about legal obligations of States Parties stemming from the Rome Statute, inter alia by organising a relevant workshop. This idea was received favourably by the authorities of Malawi.

6. The establishment of contact with representatives of Chad proved difficult. A meeting between the Permanent Representative of Chad to the United Nations and the President of the Assembly did, however, take place on 29 February 2012. In that meeting, the Permanent Representative of Chad noted that Chad was in full compliance with international law and was cooperating with the Court. He had also referred to the decisions of the African Union on this matter, especially the decision that African Union members would not cooperate with the Court pursuant to the provisions of article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of Sudan.

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<sup>1</sup> ICC-ASP/10/Res.5, annex, para. 9.

<sup>2</sup> “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, 12 December 2011; and “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, 13 December 2011.

7. The President kept the Bureau informed of her activities at a number of Bureau meetings. The agenda item “non-cooperation” was discussed among other issues at Bureau meetings on 17 January, 28 February, 10 April, 29 May 15 June, 9 July 18 September and 15 October 2012.

8. On 1 March 2012, the Bureau convened in a special meeting to consider the two instances of non-cooperation. At this meeting, attention was drawn to the fact that the two States in question had breached treaty obligations owed to all other States Parties. The different response from Malawi and Chad was noted. Given the differing responses, it was suggested that a flexible but consistent approach be adopted. Accordingly the President, in a letter dated 2 March 2012, informed all States Parties of the state of consideration of decisions of non-cooperation and called upon States Parties to raise the decision of the Pre-Trial Chamber I in their bilateral contacts with the authorities of Chad.

9. On 31 May 2012, the Embassy of Chad in Brussels transmitted to the Registry of the Court a *note verbale* from the Foreign Ministry of Chad. The Chadian Ministry of Foreign Affairs referred to the principles of international law pertaining to head of State immunity and its duties under the common position of the African Union. It also referred to calls by the United Nations on Chad to normalize its relations with the Sudan.

10. On 8 June 2012, the Government of Malawi declined to host President Omar Al-Bashir in the framework of an African Union summit that was initially planned to be held in Lilongwe, Malawi. The summit subsequently took place in Addis Ababa, Ethiopia.

11. The President also raised the issue of non-cooperation decisions at her 16 July 2012 meeting with States Parties to the Rome Statute currently represented in the Security Council. At that meeting, it was underscored again that no Security Council action on this matter was to be expected.

### III. Focal points on non-cooperation

12. 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.

13. The President repeatedly emphasized that the commitment of these regional focal points must extend beyond the individuals attending the Bureau meetings and must extend to the Permanent Representatives in New York and to capitals. She noted that this was the only way that the regional focal points could play the good offices role in preventing instances of non-cooperation that is foreseen in the Assembly procedures on non-cooperation.

14. At its 29 May 2012 meeting, the Bureau appointed Japan as focal point for non-cooperation for the Asia-Pacific Group.

### IV. Conclusions

15. The Assembly procedures on non-cooperation state the following as their goal: “these procedures are aimed at enhancing the implementation of the Court’s decisions.”<sup>3</sup> It is against this background that the effect of the President and the Bureau’s actions must be judged.

16. In the case of Malawi, the implementation of the Court’s decisions has indeed been enhanced. The Government of Malawi reacted promptly to the communications by the President and engaged in a dialogue aimed at the non-repetition of the instance of non-cooperation that triggered the President’s actions.

17. The situation with regards to Chad is different. Interactions between the President, the Bureau and the authorities of Chad do not indicate a shift in attitude on the part of the government of Chad. It will be recalled that that the specific instance of non-cooperation

<sup>3</sup> Assembly procedures on non-cooperation, para. 12.

under consideration is the second such act that has come to the attention of the Court.<sup>4</sup> The Government of Chad, in its communications, has pointed to obligations under international law concerning head of state immunity and obligations arising from decisions of the African Union. There are no indications that the application of the Assembly procedures on non-cooperation have had any effect.

## V. Recommendations

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

19. The Bureau recommends that the Assembly modify “The Assembly Procedures on Non-Cooperation” to allow the appointment of regional focal points on non-cooperation from among States Parties not belonging to the Bureau.

20. The Bureau recommends that the Assembly, at its eleventh session, consider non-cooperation by Chad in the light of the Court’s decision.<sup>5</sup>

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<sup>4</sup> “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”, ICC-02/05-01/09-109, 27 August 2010.

<sup>5</sup> See note 2, *supra*.