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Credible and Authoritative Enforcement of State Cooperation with the International Criminal Court

Göran Sluiter and Stanislas Talontsi

1 Introduction

One of the greatest threats to the effective functioning of the ICC is the lack of adequate cooperation by States. The attention gradually shifts from determining the scope of legal obligations under the ICC Statute and applicable UNSC resolutions to proving a proper response to States which have violated their cooperation obligations. One is in this respect compelled – in the interests of an effective ICC – to critically assess the law and practice of the Court in the area of enforcement of cooperation. Aware that enforcement of the international obligation to cooperate with the Court is only a legal matter, one should indeed not underestimate the potential that political and financial pressure may have on the enforcement of non-cooperation based on the lessons learned from the practice of the ICTY.¹ While the political context and considerations may be decisive in the provision of assistance to the Court, the starting point should, in our opinion, be the availability and quality of legal mechanisms in securing cooperation.

In this chapter, the present authors adopt as a working hypothesis that effectively enforcing States' cooperation obligations with the ICC is ultimately dependent upon the availability and logical use of three consecutive steps. The first is the availability and consistent initiation of the procedure leading to a judicial finding of non-compliance ('non-cooperation'). The second concerns the quality of the 'non-compliance' procedure, including the respect of due process elements by the Court *vis-à-vis* the requested State. The third is the availability and consistent use of credible enforcement mechanisms by the ASP, the UNSC, and/or individual States.

It will be examined whether each of these steps is available and properly used in the law and practice of the ICC. At the end, the conclusion sets out some tentative recommendations.

1 See ICTY Prosecutor Brammertz, 'ASP 11 Keynote Speech: Arresting Fugitives from International Justice and Other Aspects of State Cooperation: Insights from ICTY Experience', ICC, 16 November 2012, available at: www.icc-cpi.int/en_menus/asp/sessions/documentation/11th%20session/Pages/ASP11-Supporting-documents.aspx (last accessed on 24 February 2015) at 22.

2 Availability and Consistent Use of the Procedure Leading to a Judicial Finding of Non-Compliance

Art. 87(7) ICC Statute mentions the finding of non-cooperation that the Chamber may make without further elaboration. Regulation 109 RoC then provides further rules regarding the applicable procedure for such a finding and its referral to the relevant political bodies.² It is noteworthy that the ICC RPE³ and even the Court's jurisprudence have not elaborated on the nature of such an important mechanism.⁴ The reality is that this finding is not a regular decision of the Court, as the main jurisdiction of the ICC is to decide on the criminal responsibility of individuals. When the ICC Chamber decides on the matter of non-cooperation by a State, it assumes a position akin to an administrative Judge, as opposed to its normal duties of determining individual criminal responsibility. In this sense, the judicial finding on States' cooperation is a form of dispute settlement that does not fit into the realm of criminal procedure, and, as a result, should be governed by different principles.

For a comprehensive analysis, this first of the abovementioned three consecutive steps (i) revisits the existing findings of non-compliance by the Chambers and (ii) questions the late involvement of the Court in the use of the procedure under Art. 87(5) and (7) ICC Statute. It is remarkable that there are certain differences between available decisions, including similar cases dealing with non-cooperation by two or more States, but which result in a judicial finding against one and not the other(s).⁵ This raises, amongst other things, the question whether the impact of non-cooperation for the functioning of the Court is a relevant factor for a judicial finding of non-compliance.

A *Judicial Findings of Non-Cooperation of the Court to Date*

The following Table 3.1 details existing instances where the Court made a judicial finding of non-cooperation and referred the decision to the UNSC and/or the ASP. The Table 3.1 is completed by two other decisions including

² See ICC, Regulations of the Court: adopted by the Judges of the Court on 26 May 2004: Fifth Plenary Session, May 2004, ICC-BD/01-01-04.

³ See ICC, Rules of Procedure and Evidence of the International Criminal Court, 3–10 September 2002, ICC-ASP/1/3 at 10 and Corr. 1, U.N. Doc. PCNICC/2000/1/Add.1 (2000).

⁴ See in contrast, the ICTY suggested definition of the judicial finding of non-compliance in ICTY, *Prosecutor v Tihomir Blaškić*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, IT-95-14 (29 October 1997) at para 35.

⁵ This includes instances of non-compliance in arrest of Al Bashir by Nigeria and the DRC that will be analysed in detail in subsequent sections of this chapter.

TABLE 3.1 *Judicial Findings of Non-cooperation*

Situations	Requested State	Party requesting cooperation and date	Issue(s)	Decision under Art. 87(7) ICC Statute	Essential grounds underlying Decision
Darfur, Sudan	Sudan	The Prosecutor, date: 19 April 2010	Failure to enforce arrest warrant against Ahmad Harun and Ali Kushayb.	ICC-02/05-01/07-57, ⁶ date: 26 May 2010	Failure to comply with cooperation obligations stemming from UNSC Resolution 1593 (2005). ⁷
Sudan		The Prosecutor, date: 19 December 2014	Arrest and surrender of Omar Al Bashir.	ICC-02/05-01/09-227, ⁸ date: 9 March 2015	– Failure to consult the Court implies waiver of the right of the State to be heard. ⁹ – Failure to arrest Omar Al Bashir.
	Chad	Pre-Trial Chamber I, date: 27 August 2010	Omar Al Bashir visit of 21–23 July 2010.	ICC-02/05-01/09-109, ¹⁰ date: 27 August 2010	Non-compliance with cooperation obligation stemming both from UNSC Resolution 1593 (2005) and Art. 87 ICC Statute.
		Pre-Trial Chamber I, date: 11 August 2011	Omar Al Bashir visit of 7–8 August 2011.	ICC-02/05-01/09-140-t ENG, ¹¹ date: 13 December 2011	– Failure to consult the Court regarding Art. 98 ICC Statute issue. – Failure to arrest and surrender.
		Pre-Trial Chamber II, date: 22 February 2013	Omar Al Bashir visit of 15 and 16 February 2013, as well as on 11 May 2013.	ICC-02/05-01/09-151, ¹² date: 27 March 2013	– Failure to arrest and surrender. – Delay in Chad reply amounts to waiving State's right to be heard of Regulation 109 RoC. ¹³

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|----------|---|---|---|--|
| Kenya | Pre-Trial Chamber I, date: 27 August 2010 | Omar Al Bashir visit of 27 August 2010. | ICC-02/05-01/09-107, ¹⁴ (inform) | Non-compliance with obligation stemming from both UNSC Resolution 1593 (2005) and Art. 87 ICC Statute. |
| Djibouti | Pre-Trial Chamber I, date: 12 May 2011 | Omar Al Bashir visit of 8 May 2011. | ICC-02/05-01/09-129, ¹⁵ (inform) | Non-compliance with obligation stemming from both UNSC Resolution 1593 (2005) and Art. 87 ICC Statute. |
- 6 ICC, *Prosecutor v Ahmad Muhammad Harun And Ali Muhammad Ali Abd-Al-Rahman* Decision informing the United Nations Security Council about the lack of cooperation by the Republic of the Sudan, ICC-02/05-01/07-57 (25 May 2010).
- 7 UNSC Res 1593, 31 March 2005, S/RES/1593 (2005).
- 8 ICC, *Prosecutor v Omar Hassan Ahmad Al Bashir* Decision on the Prosecutor's Request for a Finding of Non-Compliance Against the Republic of the Sudan, ICC-02/05-01/09-227 (9 March 2015).
- 9 Ibid at para 19.
- 10 ICC, *Prosecutor v Omar Hassan Ahmad 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).
- 11 ICC, *Prosecutor v Omar Hassan Ahmad 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-02/05-01/09-146-ENG (13 December 2011).
- 12 ICC, *Prosecutor v Omar Hassan Ahmad 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).
- 13 Ibid at para 19.
- 14 ICC, *Prosecutor v Omar Hassan Ahmad 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).
- 15 ICC, *Prosecutor v Omar Hassan Ahmad 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).

TABLE 3.1 (cont.)

Situations Requested State	Party requesting cooperation and date	Issue(s)	Decision under Art. 87(7) ICC Statute	Essential grounds underlying Decision
Malawi	Pre-Trial Chamber I, date: 19 October 2011	Omar Al Bashir visit of October 2011.	ICC-02/05-01/09-139-Cor ¹⁶ date: 13 December 2011	– Failure to consult the Court regarding Art. 98 ICC Statute issue. – Failure to arrest and surrender.
DRC	Pre-Trial Chamber II, date: 26 February 2014	Omar Al Bashir visit of 26–27 February 2014.	ICC-02/05-01/09-195, ¹⁷ date: 9 April 2014	– Failure to consult the Court regarding Art. 98 ICC Statute issue. – Failure to arrest and surrender.
Nigeria	Pre-Trial Chamber II, date: 15 July 2013	Omar Al Bashir visit of 12–6 July 2013.	ICC-02/05-01/09-159 ¹⁸ (no referral)	– The suspect was not invited by Nigeria. ¹⁹ – Sudden departure of the suspect prevented arrest. ²⁰
Libya	The defence via Pre-Trial Chamber I, date: 15 May 2014	– Surrender of Saif Al-Islam Gaddafi. – Documents seized from the defence.	ICC-01/11-01/11-577 ²¹ , date: 10 December 2014	– Non surrender of the accused. – Non-return of documents.

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|-------|-------|--|---|--|--|
| Kenya | Kenya | The Prosecutor,
date: 29
November 2013 | Failure to comply with
Art. 93 ICC Statute
request. | ICC-01/09-02/11-982 ²² ,
date: 3 December 2014 | – No finding although establishment of a breach of the cooperation obligation. |
|-------|-------|--|---|--|--|
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- 16 ICC, *Prosecutor v Omar Hassan Ahmad Al Bashir* Corrigendum to the 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) at para 7.
- 17 ICC, *Prosecutor v Omar Hassan Ahmad 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) at para 33.
- 18 ICC, *Prosecutor v Omar Hassan Ahmad Al Bashir* Decision on the Cooperation of the Federal Republic of Nigeria Regarding Omar Al-Bashir's Arrest and Surrender to the Court, ICC-02/05-01/09-159 (5 September 2013).
- 19 Ibid at para 11.
- 20 Ibid at para 13.
- 21 ICC, *Prosecutor v Saif Al-Islam Gaddafi* Decision on the non-compliance by Libya with requests for cooperation by the Court and referring the matter to the United Nations Security Council, ICC-01/11-01/11-577 (10 December 2014) at paras 31 and 33.
- 22 ICC, *Prosecutor v Uhuru Muigai Kenyatta* Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute, ICC-01/09-02/11-982 (3 December 2014).

non-cooperation by Kenya and Nigeria in which, although the Court notes non-compliance by the two States, decided not to make a judicial finding and/or decided not to refer its decision to the political bodies for enforcement purposes.

B *Timing of Applications for a Judicial Finding*

It is the position of the present authors that, for the credibility and authority of the ICC's enforcement mechanisms, a procedure leading up to a judicial finding of non-compliance ought to be initiated without delay and directly in each instance where a State has violated its obligation to cooperate with the Court. Yet, the practice of the Court shows a number of instances in which State and non-State Parties have violated their obligations to cooperate with the Court and this violation has not been addressed – or has only been addressed a significant time after the violation.

It is submitted that the credibility and authority of the cooperation obligations require an instant reaction to all violations of the duty to cooperate. If not, States that are confronted with the late use of procedures under Art. 87(5) and (7) ICC Statute may, with reason, challenge that there is no equality before the law. Moreover, there is also the risk that a practice of non-cooperation – followed by a practice of non-enforcement – may be used as argument to modify the scope of cooperation obligations.²³ In this respect, the absence of further enforcement measures can be used as an unwelcome argument that the scope of the obligation may have changed, or that the violation is apparently not serious enough to justify further action.

As such, the delayed involvement of the Court in the use of its Art. 87(5) and (7) ICC Statute procedure and the Prosecutor's relatively late application for a non-cooperation finding against Sudan in the *Al Bashir* case – in December

23 For instance, with at least three non-cooperation decisions against Chad, (including: ICC, *Prosecutor v Omar Hassan Ahmad 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 (2010) *supra* n 10; ICC, *Prosecutor v Omar Hassan Ahmad 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 (2011) *supra* n 11; ICC, *Prosecutor v Omar Hassan Ahmad 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 (2013) *supra* n 12) followed by non-enforcement, one may doubt whether Chad perceives itself as obligated to cooperate with the Court.

2014 – may help to illustrate this point.²⁴ It is also questionable that the Court omitted to make findings of non-compliance following certain visits of the accused, including Al Bashir's trip to Chad on 25–29 March 2014.²⁵ Other interesting issues include those events where the Court's requests for observations to the concerned States were made a few months after an accused person visited the country, as was the case with Chad and the CAR following their failure to arrest Abdel Raheem Muhammad Hussein in 2013.²⁶ Although, it is clear that a timely Court request for observations to a State Party may at least trigger national proceedings against the government regarding its implementation of obligations assumed towards the Court or, at most, emphasise the outstanding State obligation to cooperate. This has been the case with South Africa, following recent trip by Al Bashir on 13 June 2015.²⁷

As regards the Situation in Darfur, Sudan, which has arguably produced the most important and persistent instances of non-cooperation, the issue of State cooperation has always represented an important aspect of the Prosecutor's Reports to the UNSC. These Reports changed in tone and evaluation of the cooperation situation over time: Sudan's cooperation was 'forthcoming'²⁸ in the early stages, but quickly decreased and even became non-existent in

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- 24 See Sluiter, 'Obtaining Cooperation from Sudan – Where is the Law?' (2008) 6 *Journal of International Criminal Justice* 871 at 873 et seq.
- 25 ICC, *Prosecutor v Omar Hassan Ahmad Al Bashir* Decision Regarding Omar Al-Bashir's Potential Visit to the Republic of Chad, ICC-02/05-01/09-194 (25 March 2014) and also ASP, Report of the Bureau on non-cooperation, ICC-ASP/13/40 (5 December 2014) at para 10.
- 26 The Court's request for observations following to Abdel Raheem Muhammad Hussein's (Hussein) visit to the Republic of Chad was made on 18 September 2013 for a visit on 25–6 April 2013 and on 10 September 2013 following to the accused's visit on 19 August 2013 to the CAR. See respectively in this sense ICC, *Prosecutor v Abdel Raheem Muhammad Hussein* 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) at para 8 and ICC, *Prosecutor v Abdel Raheem Muhammad Hussein* 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) at paras 5 and 11.
- 27 ICC, *Prosecutor v Omar Hassan Ahmad Al Bashir* Decision following the Prosecutor's request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir, ICC-02/05-01/09-242 (13 June 2015) at paras 5–10. The non-arrest of Al-Bashir has further triggered national proceedings against the South African Government; see in this sense The High Court of South Africa (Gauteng Division, Pretoria), *Southern Africa Litigation Centre v Minister of Justice And Constitutional Development and Others* Judgment, (27740/2015) [2015] ZAGPPHC 402 (24 June 2015).
- 28 See ICC, *Prosecutor v Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman* Publicly Redacted Version of "Prosecution request for a finding on the non-cooperation of

2007.²⁹ The Prosecutor then reported his intent to inform the competent Chamber of the difficulties to secure Sudan's cooperation.³⁰ A request for a finding of non-cooperation against Sudan in the case against Ahmad Harun and Ali Kushayb was only filed on 19 April 2010.³¹

The Prosecutor's request for a finding of non-compliance against Sudan in the arrest and surrender of Al Bashir was not made until December 2014. However, in the request for non-compliance in the cases against Ahmad Harun and Ali Kushayb, the Prosecutor already provided the Chambers with various arguments that demonstrated a trend of non-cooperation on the part of Sudan. Following the Prosecutor's successful application and the Chamber's judicial finding of non-cooperation in 2010, Sudan continued to claim that it did not recognise the Court's authority and made it clear that Sudanese authorities 'cannot receive any document from the Court and that this position will not change'.³² In his ninth report to the UNSC on 5 June 2009, the Prosecutor even quoted the Sudanese presidential assistant saying that, '[n]o Sudanese, not Al-Bashir and not a non-Al-Bashir, will appear before the [Court], and we will

the Government of the Sudan in the case of The Prosecutor v Ahmad Harun and Ali Kushayb, pursuant to Article 87 of the Rome Statute", filed on 19 April 2010, ICC-02/05-01/07-48-Red (19 April 2010) at para 4 and also ICC-OTP, 'Statement of the Prosecutor of the ICC, Mr Luis Moreno Ocampo, to the UN Security Council pursuant to UNSCR 1593 (2005)', ICC, 7 June 2007, available at: www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/statement%20of%20the%20prosecutor%20of%20the%20icc%20%20mr%20%20luis%20moreno%20ocampo%20%20to%20the%20un%20secur.aspx (last accessed 10 August 2015) at 6.

29 ICC-OTP, 'Sixth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005)', ICC, 5 December 2007, available at: www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/sixth%20report%20of%20the%20prosecutor%20of%20the%20international%20criminal%20court_%20to%20the%20un%20secur.aspx (last accessed 10 August 2015) at para 22.

30 Ibid at para 28.

31 See generally, ICC, *Prosecutor v Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman* Publicly Redacted Version of "Prosecution request for a finding on the non-cooperation of the Government of the Sudan in the case of The Prosecutor v Ahmad Harun and Ali Kushayb, pursuant to Article 87 of the Rome Statute" filed on 19 April 2010' (2010) *supra* n 28.

32 ICC, *Prosecutor v Omar Hassan Ahmad Al Bashir* Decision on the Prosecutor's Request for a Finding of Non-Compliance Against the Republic of the Sudan, (2015) *supra* n 8 at para 10. Also ICC, *Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus* Defence Application to restrain legal representatives for the victims a/1646/10 & a/1647/10

not even send a lawyer to represent us there'.³³ In light of the aforementioned facts, it is the more puzzling that the first application for a finding in the case against Al Bashir was made only in December 2014; that is, seven years after the last reception of Court documents³⁴ by Sudan and five years after the indictment of Al Bashir.

Inaction on the part of ICC organs to trigger the procedure under Art. 87(7) ICC Statute raises the question whether the law is sufficiently clear as to who shall apply for a finding and when such an application should be submitted. It cannot be excluded that there have been situations in which the Chamber and the Prosecutor might have been waiting for each other to set in motion the Art. 87(7) ICC Statute procedure. Yet, under Regulation 109(1) RoC, an application for a finding pursuant to Art. 87(7) ICC Statute may be made by 'the requesting body', which can be the Chamber, the Prosecutor, the Defence and possibly even the Registrar.

The aspect left out of the current regime may be the determination of the timeline for such an application. However, a recent decision by Trial Chamber v(B) on the Prosecutor's application for a finding of non-cooperation against Kenya rightly indicates that an application for a finding of non-cooperation should be made at the earliest possible opportunity. As such, the Chamber found:

[T]he issue of the Kenyan Government's cooperation with the Records Request should have been addressed at a much earlier stage; doing so would, to a significant degree, have mitigated the impact that the non-compliance has had on the proceedings in this case.³⁵

from acting in proceedings and for an order excluding the involvement of specified intermediaries, ICC-02/05-01/09-113-Conf-Exp (6 December 2010) at para 8 and Annex 3.

33 See ICC-OTP, 'Ninth Report of the Prosecutor of the ICC to the UN Security Council Pursuant to UNSCR 1593 (2005)', ICC, 5 June 2009, available at: www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/ninth%20report%20of%20the%20prosecutor%20of%20the%20icc%20to%20the%20un%20security%20council%20pursuant.aspx (last accessed 10 August 2015) at para 37.

34 ICC, *Prosecutor v Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman* Publicly Redacted Version of "Prosecution request for a finding on the non-cooperation of the Government of the Sudan in the case of The Prosecutor v Ahmad Harun and Ali Kushayb, pursuant to Article 87 of the Rome Statute" filed on 19 April 2010 (2010) *supra* n 28 at para 10.

35 See ICC, *Prosecutor v Uhuru Muigai Kenyatta* Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute (2014) *supra* n 22 at paras 86–87.

C *The Chamber's Discretionary Power in Making Its Judicial Finding and/or Referring a Non-Cooperating State should be used in a Transparent and Consistent Manner*

The terms 'the Court may so inform the Assembly of States Parties [...]' in Art. 87(5)(b) ICC Statute and 'the Court may make a finding [...]' at paragraph (7) of that provision suggest that making a judicial finding and its further referral to the political bodies is a discretionary power of the Judges. A Chamber has ruled that 'resort to the measure under article 87 (7) of the Statute is not a mandatory course of action that the Chamber is obliged to pursue in case of a State's failure to cooperate with the Court'.³⁶ Similar wording was used by the Appeals Chamber when reversing the decision on the Prosecutor's application for a finding of non-compliance under Art. 87(7) ICC Statute.³⁷ As such, there appears no doubt that the use of the Art. 87(7) ICC Statute procedure is, *in se*, discretionary. However, as will be examined in the present section, it is a matter of concern when discretion is exercised in a non-transparent and, arguably, even an arbitrary manner.

There are remarkable differences in the exercise of the discretion under Art. 87(7) ICC Statute in the decisions issued thus far. For instance, as regards the arrest of Al Bashir, a violation of the obligation to cooperate has been established in some instances but not in all, as the Chamber's decisions related to Nigeria³⁸ and the DRC³⁹ reflect. Both States presented similar, as good as identical, arguments justifying failure to arrest Al Bashir, but diametrically opposed decisions were issued.

The arguments used in the DRC's defence of non-cooperation included that Al Bashir was invited 'by a regional organization and not by the [DRC]'⁴⁰ and:

36 ICC, *Prosecutor v Saif Al-Islam Gaddafi* Decision on the non-compliance by Libya with requests for cooperation by the Court and referring the matter to the United Nations Security Council (2014) *supra* n 21 at para 23.

37 ICC, *Prosecutor v Uhuru Muigai Kenyatta* Judgment on the Prosecutor's appeal against Trial Chamber v(B)'s "Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute", ICC-01/09-02/11-1032 (19 August 2015) at paras 2, 53 and 55.

38 ICC, *Prosecutor v Omar Hassan Ahmad Al Bashir* Decision on the Cooperation of the Federal Republic of Nigeria Regarding Omar Al-Bashir's Arrest and Surrender to the Court (2013) *supra* n 18.

39 ICC, *Prosecutor v Omar Hassan Ahmad Al Bashir* Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court (2014) *supra* n 17.

40 *Ibid* at para 12; see also the annexed documents presented by the DRC; ICC, *Prosecutor v Omar Hassan Ahmad Al Bashir* Transmission to Pre-Trial Chamber II of the observations

Moreover, the shortage of time between the arrival of Omar Al Bashir in the evening of 25 February 2014, the receipt of the Chamber's decision on 26 February 2014, and his early departure in the morning of the following day made it 'materially impossible' to take a decision with such 'legal, diplomatic and security implications'.⁴¹

To sum up, the DRC used arguments relating to the legal difficulties to effect the arrest and time constraints.⁴²

Likewise, Nigeria argued that Al Bashir 'was not invited to "undertake a visit to Nigeria"'.⁴³ According to the Nigerian authorities, representatives of Member States of the AU do not require an invitation of the host governments to attend 'such [AU] Summits in line with the [decision of the Assembly of Heads of State and Government of the African Union at its Session in May 2013] and the tradition of the AU Assembly'.⁴⁴ Moreover, the second argument by the DRC, relating to time constraints, is similar to Nigeria's argument:

[T]he sudden departure of President Al-Bashir prior to the official end of the AU Summit occurred at the time that officials of relevant bodies and agencies of [...] Nigeria were considering the necessary steps to be taken in respect of his visit in line with Nigeria's international obligations.⁴⁵

As regards the first argument of the DRC that relates to its membership with the AU and the fact that it was the AU that invited its members to the event,

submitted by the Democratic Republic of Congo pursuant to the "Decision requesting observations on Omar Al-Bashir's visit to the Democratic Republic of Congo" dated 3 March 2014, ICC-02/05-01/09-190-AnxII-tENG (17 March 2014) at para 6.

41 Ibid.

42 Ibid.

43 ICC, *Prosecutor v Omar Hassan Ahmad Al Bashir* Decision on the Cooperation of the Federal Republic of Nigeria Regarding Omar Al-Bashir's Arrest and Surrender to the Court (2013) *supra* n 18 at para 11.

44 Ibid; see also ICC, *Prosecutor v Omar Hassan Ahmad Al Bashir* Public Document with four public annexes and one confidential annex: Report of the Registry on the "Decision regarding Omar Al-Bashir's Visit to the Federal Republic of Nigeria" ICC-02/05-01/09-158-Anx4 (13 August 2013) at 4.

45 ICC, *Prosecutor v Omar Hassan Ahmad Al Bashir* Decision on the Cooperation of the Federal Republic of Nigeria Regarding Omar Al-Bashir's Arrest and Surrender to the Court (2013) *supra* n 18 at para 12 and *ibid*, ICC, *Prosecutor v Omar Hassan Ahmad Al Bashir* Public Document with four public annexes and one confidential annex: Report of the Registry on the "Decision regarding Omar Al-Bashir's Visit to the Federal Republic of Nigeria" (2013) at 5.

including Al Bashir⁴⁶ as a Head of State, Pre-Trial Chamber II replied that ‘the Chamber cannot accept the argument that a regional organisation would carry out certain activities on the territory of a State without the latter’s prior knowledge and consent’.⁴⁷ The analysis and reasoning of the Chamber seems accurate and valid, although it was inconsistent with the ruling⁴⁸ by the same Chamber when the identical argument was presented by the State of Nigeria.

With regard to the second argument presented by the DRC that concerned the shortage of time between the specific request of the Court and the timing of the State’s reaction, the Chamber accepted the argument made by Nigeria and concluded that the issue of the timing of the arrest was left to the discretion of the State according to Art. 87(7) ICC Statute.⁴⁹ Again, this is an inconsistency that – without further and convincing reasoning – cannot be justified on account of the exercise of discretion under Art. 87(7) ICC Statute.

Another remarkable incoherence in the exercise of discretion by different Chambers can be found in developing the precise standard of failure to cooperate that may trigger a judicial finding of non-compliance. The question may arise whether a judicial finding of non-compliance is reserved to States acting in bad faith or applies to each and every instance of non-compliance.

The current jurisprudence of the ICC comprises at least three standards of failure. According to Pre-Trial Chamber II in the non-cooperation decision against the DRC, an ‘apparent failure’⁵⁰ to comply is a sufficient basis for the Chamber’s judicial finding and its referral. As quoted from the relevant decision:

46 ICC, *Prosecutor v Omar Hassan Ahmad Al Bashir* Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court (2014) *supra* n 17 at para 12; the passage reads as following ‘Omar Al Bashir was invited “by a regional organization and not by the [DRC]”’.

47 *Ibid* at para 17.

48 ICC, *Prosecutor v Omar Hassan Ahmad Al Bashir* Decision on the Cooperation of the Federal Republic of Nigeria Regarding Omar Al-Bashir’s Arrest and Surrender to the Court (2013) *supra* n 18 at 11 and ICC, *Prosecutor v Omar Hassan Ahmad Al Bashir* Public Document with four public annexes and one confidential annex: Report of the Registry on the “Decision regarding Omar Al-Bashir’s Visit to the Federal Republic of Nigeria” (2013) *supra* n 44 at 4.

49 ICC, *Prosecutor v Omar Hassan Ahmad Al Bashir* Decision on the Cooperation of the Federal Republic of Nigeria Regarding Omar Al-Bashir’s Arrest and Surrender to the Court (2013) *supra* n 18 at para 13.

50 ICC, *Prosecutor v Omar Hassan Ahmad Al Bashir* Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court (2014) *supra* n 17 at para 33.

When the SC, acting under Chapter VII of the UN Charter, refers a situation to the Court as constituting a threat to international peace and security, it must be expected that the Council would respond by way of taking such measures which are considered appropriate, if there is an apparent failure on the part of States Parties to the Statute or Sudan to cooperate in fulfilling the Court's mandate as entrusted to them by the Council.⁵¹

Pre-Trial Chamber I in the non-cooperation decision against Libya apparently uses the standard 'objective failure' to comply. As such, the relevant aspect of the decision states that '[t]here must be an objective failure on the part of the State to comply with a cooperation request'.⁵² In Pre-Trial Chamber I's view, following its 'objective failure' standard, the State's underlying motives for non-compliance are irrelevant.

Finally, in its recent decision concerning Kenya, Trial Chamber V(B) held that the finding of non-cooperation should be based on a 'complete failure'⁵³ to comply with the Court. The Chamber elaborated that for non-compliance to meet the threshold of Art. 87(7) ICC Statute, there should be an 'unjustified inaction or delay, or a clear failure to have in place appropriate procedures for effecting the cooperation'⁵⁴ and that the party moving for a determination under Art. 87(7) ICC Statute should be able to demonstrate that the requested State's conduct breached the 'standard of good faith cooperation required from States Parties'.⁵⁵

The matter was most recently addressed by the Appeals Chamber in the *Kenyatta* case:

[T]he Appeals Chamber considers that a Chamber, when deciding whether to refer a matter of non-cooperation to the ASP or UNSC, should consider whether a referral of a State's failure to comply with a request for cooperation is an appropriate measure to either seek assistance from external actors to obtain the requested cooperation or otherwise address the lack of cooperation from the requested State. In this regard, it is

⁵¹ Ibid.

⁵² ICC, *Prosecutor v Saif Al-Islam Gaddafi* Decision on the non-compliance by Libya with requests for cooperation by the Court and referring the matter to the United Nations Security Council (2014) *supra* n 21 at paras 24 and 33.

⁵³ ICC, *Prosecutor v Uhuru Muigai Kenyatta* Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute (2014) *supra* n 22 at para 75 and also ICC, *Prosecutor v Uhuru Mulgai Kenyatta* Decision on the Prosecution's request for leave to appeal, ICC-01/09-02/11-1004 (9 March 2015) at para 21.

⁵⁴ Ibid at para 42.

⁵⁵ Ibid at paras 42 and 67.

important to note that a referral may be value-neutral and not necessarily intended to cast a negative light on the conduct of a State. Since the ultimate goal is to obtain cooperation, a Chamber has discretion to consider all factors that may be relevant in the circumstances of the case, including whether external actors could indeed provide concrete assistance to obtain the cooperation requested taking into account the form and content of the cooperation; whether the referral would provide an incentive for cooperation by the requested State; whether it would instead be beneficial to engage in further consultations with the requested State; and whether more effective external actions may be taken by actors other than the ASP or the UNSC, such as third States or international or regional organisations. In conclusion, the Appeals Chamber considers that it is clear that, in determining whether a referral is appropriate, a Chamber will often need to take into account considerations that are distinct from the factual assessment of whether the State has failed to comply with a request to cooperate. The Appeals Chamber therefore considers that a referral is not an automatic consequence of a finding of a failure to comply with a request for cooperation, but rather this determination falls within the discretion of the Chamber seized of the article 87(7) application.⁵⁶

In light of the foregoing, there remains persisting uncertainty as to the applicable standard of failure to cooperate, as this may mean several things. The latest Appeals Chamber's ruling in the *Kenyatta* case has been far from helpful and was clearly not in the interests of an effective and non-politicised regime on the enforcement of cooperation. Emphasising discretion on the part of the Trial Chamber, including reference to include all relevant factors, without further explanation as to what these might be, is, in the view of the authors, not a wise approach. It fuels the concerns that discretion under Art. 87(7) ICC Statute is used in an inconsistent, possibly even arbitrary, manner. This concern is aggravated by the fact that the two States which have escaped a finding of non-compliance under Art. 87(7) ICC Statute happen to be two of the most powerful Member States of the AU, which is extremely critical of the ICC. It would indeed be a negative development of politicisation if the enforcement process already starts with unjustifiably diverging decisions under Art. 87(7) ICC Statute.

Therefore, with a view to minimise politicisation of the enforcement procedures, it is advised that the exercise of discretion is minimised and the

56 ICC, *Prosecutor v Uhuru Muigai Kenyatta* Judgment on the Prosecutor's appeal against Trial Chamber v(B)'s "Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute" (2015) *supra* n 37 at para 53.

standard applied by Pre-Trial Chamber I in relation to Libya is reinstated, namely ‘objective failure to comply’.

3 Quality of the Article 87(7) Procedure, Including Due Process Elements and the Possibility for the Requested State to Appeal

The procedure under Art. 87(7) ICC Statute is not the Court’s core business and the due process elements governing criminal trials are clearly not applicable to it. However, this is not to say that in this type of administrative proceedings the requested State does not enjoy rights at all. On the contrary, proceedings pursuant to Art. 87(7) ICC Statute can, in the view of the present authors, only be credible and authoritative when the following due process-elements – or requirements of natural justice – are adequately protected: (i) the State accused of having violated its cooperation obligations should be given a fair opportunity to present its case (ii) before an impartial Judge and (iii) with recourse to judicial review of a negative decision; (iv) following a fair and adversarial procedure; and, finally, (v) the Chamber should provide a reasoned decision, which adequately explains why arguments and the position of the targeted State should be rejected.

A *A State Subjected to an Article 87(7) Procedure should be given a Fair Opportunity to Present its Case*

The opportunity for a State to present its case – or defence – related to an alleged failure to cooperate appears adequately protected in the law of the ICC, in two ways.

First, pursuant to Regulation 109(3) RoC, a Chamber must provide the requested State with the opportunity to present its views, prior to issuing any finding under Art. 87(7) ICC Statute.

Second, under Regulation 108(1) RoC, where there is a dispute regarding the legality of a request for cooperation under Art. 93 ICC Statute, a requested State may apply for a ruling from the competent Chamber. The purpose of Regulation 108 RoC is to have the Court withdraw or amend a request for legal assistance which is unlawful – or would require the requested State to act unlawfully.⁵⁷ It is indeed in the interests of justice to offer such an opportunity for a state to actively challenge a request, prior to any Art. 87(7) ICC Statute procedure. It is then submitted that Regulation 108 RoC should also extend to cooperation disputes beyond Art. 93 ICC Statute, essentially including requests

⁵⁷ Regulation 108(1) RoC restrictively mentions only requests under Art. 93 ICC Statute.

for arrest and surrender. One ought to be aware of the content of Art. 59(4) ICC Statute, namely that: 'It shall not be open to the competent authority of the custodial State to consider whether the warrant of arrest was properly issued in accordance with article 58, paragraph 1 (a) and (b)'. However, this provision does not rule out a broader challenge to the legality of a request for arrest or surrender, such as the compliance of the request with Arts. 98 or 91(2)(c) ICC Statute. In this sense, a State may challenge the execution of a request if it faces difficulties to secure cooperation of a third State, with respect to waiver of immunity and consent to surrender a national of that State under Art. 98 ICC Statute. A further potential challenge under 91 (2)(c) ICC Statute may be based on the lack of, or the insufficiency of, supporting documents, statements or information to effect arrest on the territory of the requested State, considering that these requirements are less burdensome than those allowed under its national law for extradition pursuant to treaties or arrangements between the requested State and other States.

It is uncertain at what moment and under what circumstances a requested State can apply for a ruling of the legality of the cooperation request. In the current findings of non-cooperation, requested States are either addressed by the Court only a few days before, or even after, the visit of the accused person or they are not individually invited to execute their arrest obligation.

State Parties are not allowed to apply for a ruling on the legality of a *general* request to arrest and surrender. They need to be addressed individually to have an occasion to do so. In the current practice of the Court, requested States are not given the time to apply for such a ruling, as the DRC tried to point out unsuccessfully.⁵⁸ Furthermore, they are placed in a situation in which a late request from the Court puts the State in a materially difficult position to execute the arrest, as Nigeria successfully mentioned in respect of its non-cooperation in the arrest of Al Bashir.⁵⁹

58 ICC, *Prosecutor v Omar Hassan Ahmad Al Bashir* Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court (2014) *supra* n 17 at para 12.

59 ICC, *Prosecutor v Omar Hassan Ahmad Al Bashir* Decision on the Cooperation of the Federal Republic of Nigeria Regarding Omar Al-Bashir's Arrest and Surrender to the Court (2013) *supra* n 18 at para 12.

B *A State Subjected to an Article 87(7) Procedure should be given an Opportunity to be Heard*

Regulation 109(3) RoC stipulates in clear terms that '[b]efore making a finding in accordance with article 87 paragraph 7, the Chamber shall hear from the requested State'.⁶⁰ The Regulation uses the word 'shall', which means that it is an obligation⁶¹ for the Chamber to learn the reasons for non-compliance by the requested State before a possible finding of non-compliance. One may even add that the term 'hear' suggests that the arguments of the requested State should in principle be presented in a public hearing in front of a Judge.

Although Chambers have stressed the importance of the right of the requested State to be heard, the current practice seems to indicate otherwise. Some of the non-cooperation findings by the Court did not refer to that important right and no opportunity was given to the requested State to justify its non-compliance. Even more disturbing are the cases where the Chamber decided that the requested State's right to be heard was waived.

Decisions with such irregularities include findings relating to visits by Al Bashir to Kenya,⁶² Djibouti⁶³ and Chad.⁶⁴ In another instance of non-cooperation by Chad,⁶⁵ even when the requested State explicitly requested the opportunity to present its arguments in front of the Court, the Chamber rejected the State's request.

In the instance of Al Bashir's visit to Kenya, Pre-Trial Chamber I's relevant decision stated that, from public information available to it, Al Bashir visited the Republic of Kenya on 27 August 2010 to attend the promulgation of the new

⁶⁰ See Regulation 109(3) ICC RoC.

⁶¹ ICC, *Prosecutor v Omar Hassan Ahmad Al Bashir* Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court (2014) *supra* n 17 at para 11.

⁶² ICC, *Prosecutor v Omar Hassan Ahmad 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 (2010) *supra* n 14.

⁶³ ICC, *Prosecutor v Omar Hassan Ahmad 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 (2011) *supra* n 15.

⁶⁴ ICC, *Prosecutor v Omar Hassan Ahmad 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 (2010) *supra* n 10.

⁶⁵ ICC, *Prosecutor v Omar Hassan Ahmad 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 (2011) *supra* n 11 at para 7.

Kenyan Constitution. On the same day as the accused's visit, the Chamber took its decision to inform both the UNSC and the ASP of non-compliance. In this case, the Chamber failed to invite the requested State to explain the reasons for its non-compliance, as required under Regulation 109 RoC.

Al Bashir's visit for the inauguration ceremony of Djibouti's President Ismael Omar Guelleh on 8 May 2011 was reported to the Chamber on 9 May 2011.⁶⁶ Here again, the Court decided to inform the competent enforcement bodies, just as in the case of the visit to Kenya, without observing the requirement of Regulation 109 RoC to hear the views of Djibouti.

In another instance, Al Bashir visited N'Djamena in Chad, according to a Registry report, to attend the Summit of the Sahel-Saharan States on 21 July 2010, and allegedly left Chad on 23 July 2010.⁶⁷ The visit was reported by the Registry to the Chamber on 27 July, which was four days after the visit. Pre-Trial Chamber I failed to invite Chad to explain the reasons for its non-cooperation and/or its lack of consultation with the Court.⁶⁸

What is equally disturbing is the Chamber's practice in certain instances to consider the State's right to be heard as waived.⁶⁹ This has happened on at least two occasions, namely the finding of non-cooperation by Sudan in the *Al Bashir* case and one instance of non-cooperation by Chad in 2013. In the case of Chad, following a delay in presenting the observations requested, the Chamber decided not only to waive Chad's right to be heard but also to disregard the State's reply.⁷⁰ The waiver of Sudan's right to be heard followed the Chamber's holding that the State has constantly refused to engage in a dialogue with the

66 See ICC, *Prosecutor v Omar Hassan Ahmad 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 (2011) *supra* n 15 at para 2.

67 ICC, *Prosecutor v Omar Hassan Ahmad 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 (2010) *supra* n 10.

68 See ICC, *Prosecutor v Omar Hassan Ahmad 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 (2010) *supra* n 10.

69 ICC, *Prosecutor v Omar Hassan Ahmad 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 (2013) *supra* n 12 at para 18 and also ICC, *Prosecutor v Omar Hassan Ahmad Al Bashir* Decision on the Prosecutor's Request for a Finding of Non-Compliance Against the Republic of the Sudan (2015) *supra* n 8 at para 19.

70 ICC, *Prosecutor v Omar Hassan Ahmad 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 (2013) *supra* n 12 at para 19.

Court's organs over the past six years.⁷¹ It appears that – in both instances – the right to present views was not unequivocally waived. Rather, the Chamber denied the State the opportunity to make submissions on grounds which do not appear convincing. For the credibility and authority of findings under Art. 87(7) ICC Statute, Chambers should exercise more caution in assuring a State's right to present views and make submissions.

C *A State Subjected to an Article 87(7) Procedure should be Able to Appeal the Chamber's Finding of Non-Cooperation*

In the view of the present authors, the possibility of appealing a finding of non-compliance is an essential ingredient of fair enforcement proceedings. Such a second chance for the requested State is not only important because of what may be at stake for the State concerned. It must also be borne in mind that in the institutional configuration of the ICC it is, at present, only the Appeals Chamber that may be able to rule at a later stage on a cooperation dispute. In first instance, the Chamber ruling on the refusal to cooperate is likely to be the same ICC organ which has issued the request for cooperation in the first place. This – with good reason – can raise concern with the requested State that it is facing a situation at odds with the maxim *nemo iudex in sua causa*, namely that no one shall be a Judge in his or her own cause.

In light of the importance of the availability of appellate recourse for review and bearing in mind that the predecessors of the ICC – the ICTY and ICTR – explicitly allow for appeal proceedings,⁷² it is remarkable that the law of the ICC does not explicitly provide for a similar opportunity.

Rather, in the current practice, findings of non-compliance are directly transmitted for referral to the political bodies as the dates of referral in our previous table demonstrate. Neither within Art. 87(5) and (7) ICC Statute, nor in Regulation 109 RoC, and not even in the ICC RPE, is there mention of the possibility to appeal for the requested State. Furthermore, the ASP and UNSC, when in receipt of the Court's finding, cannot act as an appeal mechanism for ICC decisions. The ASP has emphasised that, given the respective roles of the Court and the ASP, any response by the ASP is non-judicial in nature and is based on its competencies under Art. 112 ICC Statute.⁷³

71 ICC, *Prosecutor v Omar Hassan Ahmad Al Bashir* Decision on the Prosecutor's Request for a Finding of Non-Compliance Against the Republic of the Sudan (2015) *supra* n 8 at para 19.

72 See Rule 108 *bis* of the ICTY and ICTR RPE.

73 See ASP, Assembly Procedures Relating to Non-Cooperation, 12 December 2011, ICC-ASP/10/Res.5 as amended by ASP, Strengthening the International Criminal Court and the Assembly of States Parties, 21 November 2012, ICC-ASP/11/Res.8. Annex 1 at 6.

It is true that a State could try to initiate appeal proceedings under the general provision, namely Art. 82(1)(d) ICC Statute. But, in light of the Appeals Chamber's jurisprudence, it is likely that such an appeal would be declared inadmissible, as the requested State is unlikely to be considered a party or the matter would not be considered to fall within the material scope of permissible appeals. Moreover, just as is the case with the ICTY and ICTR, the law of the ICC should not have States second-guess about the availability of an appeals procedure, but should explicitly provide for it. Finally, it is regrettable that the Appeals Chamber failed to seize the opportunity to elaborate on the scope of appeals in the context of decisions related to Art. 87(7) ICC Statute. The Appeals Chamber in the *Kenyatta* case handled an appeal filed by the Prosecutor against a Trial Chamber decision denying a referral pursuant to Art. 87(7) ICC Statute.⁷⁴ There was no discussion in respect of admissibility, as the Prosecutor's appeal fell obviously within the scope of Art. 82 ICC Statute; yet, a truly adversarial and fair hearing would – of course – require that if such an appeal is available to the Prosecutor, it should also be available to the requested State in case a ruling does not turn out to be in its favour. Unfortunately, the Appeals Chamber did not address this matter.

The apparent absence of appellate proceedings in case of a judicial finding of non-compliance is a serious shortcoming in the quality and fairness of enforcement procedures.

D *A Judicial Finding of Non-Compliance should be Well-Reasoned*

That there should be a judicial finding of non-compliance of sufficient quality is not only a goal in and of itself, it also serves the important purpose of not undermining the subsequent enforcement process. In case the judicial finding is poorly reasoned, or taken after a flawed procedure, it may influence the discussions on further measures in the ASP and/or the UNSC. Poorly reasoned decisions have hardly gathered legitimacy and may fuel criticism within the ASP, thus potentially leading to a practice of non-enforcement.⁷⁵

It is notable that, apart from the December 2014 decision of Trial Chamber v(B), which extensively clarified some of the concepts of an Art. 87(5) and (7) ICC Statute procedure, the average decision by a Chamber on this issue is fewer than ten pages and the scope and content of the Chambers' reasoning is hardly

74 ICC, *Prosecutor v Uhuru Muigai Kenyatta* Judgment on the Prosecutor's appeal against Trial Chamber v(B)'s "Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute" (2015) *supra* n 37.

75 Our following discussion on the current debate within the ASP will return to the diverging views of States Parties.

consistent from one decision to another.⁷⁶ It has already been alluded to, that each Chamber may have its own understanding of the standard of non-compliance that reaches the threshold for a judicial finding.

It exceeds the scope of this chapter to analyse the quality of legal argument in all Art. 87(7) ICC Statute decisions. The following section merely offers the most striking example.

In respect of the failure to arrest Al Bashir, the cooperation disputes raise a very complex issue, namely the tension between the duty to cooperate and respecting the immunities that sitting Heads of State enjoy under international law. Certain States that have refused to arrest Al Bashir have invoked Art. 98(1) ICC Statute as a justification; this provision obliges the Court to respect and act in accordance with the obligations a State Party may have under international law with respect to State immunity of a third State (Sudan). The obligation to respect the immunity of Al Bashir is – whatever political motives may drive a State – in principle a reasonable legal argument potentially justifying non-compliance. The matter has been hotly debated in the literature, with no one clear outcome in favour of arresting and surrendering Al Bashir.

One scholar, Akande, has adopted the position that a State Party may not claim immunity obligations towards third States as a ground justifying the refusal to arrest and surrender of the suspect.⁷⁷ Another scholar, Gaeta, is of the contrary view, and provides a number of arguments in favour of that position.⁷⁸ In none of the first Al Bashir enforcement decisions has this debate been adequately captured and analysed; as a result, these decisions were, in terms of their analysis, weak and thus unconvincing.

The initial position of the Court was that the requested State cannot validly rely on Art. 98(1) ICC Statute to justify its failure to arrest a sitting Head of State. In its reasoning the Chamber uses argumentation which comes down to an overall rejection of the applicability of international law on State immunities

76 The length of the decision itself may not be a criterion upon which to evaluate its quality but serious doubt can be cast on a four page decision (ICC, *Prosecutor v Omar Hassan Ahmad 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, (2010) *supra* n 14) that comprises a two page heading and a page of summary on historical background of the decision on such an important issue, that is a State's cooperation to arrest and surrender a sitting Head of State.

77 See generally Akande, 'International Law Immunities and the International Criminal Court' (2004) 98 *The American Journal of International Law* 407.

78 See Gaeta, 'Does President Al-Bashir Enjoy Immunity from Arrest?' (2009) 7 *Journal of International Criminal Justice* 315.

in relation to the functioning of the Court.⁷⁹ However, this entire line of argumentation deprives Art. 98(1) ICC Statute of any meaningful effect, contrary to what the drafters must have had in mind. The over-simplification is also painful in light of the complex debate in the literature, between, amongst others, the abovementioned authors Akande and Gaeta.

Another judicial finding of non-compliance that did little to repair the damage in the reasoning of the first ‘reasoned’ decision dealing with the complex immunities issue in the *Al Bashir* case is the decision against Chad of December 2011.⁸⁰ It was only after some time that another Chamber reversed and considerably improved on the reasoning regarding immunities available to Al Bashir in the judicial finding of non-cooperation against the DRC.⁸¹ In fact, Pre-Trial Chamber II recognised that on the basis of Art. 98(1) ICC Statute, the DRC could be barred from arresting and surrendering Al Bashir if it did not previously seek to obtain the lifting of the immunities by the non-State Party, Sudan. However, the Chamber then argued that UNSC Resolution 1593 (2005) had the effect of implicitly lifting Al Bashir’s immunities. Moreover, the Chamber added that since Al Bashir’s arrest originated from a UNSC resolution, it created an obligation towards UN Member States that prevailed over any other obligation a State may have assumed under other treaties.⁸²

This Chamber’s decision does more justice to the complexities of the arguments involved. However, it may have been too late and also too little. The absence of cooperation in arresting Al Bashir is at present at the heart, if not to say symbolic, of the procedures under Art. 87(7) ICC Statute at the Court. For these procedures to live up to their potential, to be credible and effective, the quality of the Chambers’ reasoning should have been better from the beginning.

79 See generally ICC, *Prosecutor v Omar Hassan Ahmad Al Bashir* Corrigendum to the 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 (2011) *supra* n 16 at paras 37–43.

80 ICC, *Prosecutor v Omar Hassan Ahmad 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 (2011) *supra* n 11.

81 ICC, *Prosecutor v Omar Hassan Ahmad Al Bashir* Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court (2014) *supra* n 17 at paras 26–31.

82 *Ibid* at para 31.

4 Availability and Use of Credible Enforcement Mechanisms after a Judicial Finding of Non-Compliance

The judicial finding of non-compliance has a two-sided, pivotal, function in securing cooperation. It establishes first of all that an international legal obligation to cooperate has been violated. Secondly, it is the basis for adopting measures aimed at securing that cooperation and/or enforcing the lack thereof. It is thus the position of the present authors that a judicial finding of non-compliance is the basis for further measures of enforcement. One cannot do without the other. Without a judicial finding of non-compliance, enforcement measures are of an arbitrary, possibly also illegal, nature. But a finding of non-compliance without a follow-up action weakens the authority of cooperation obligations and, one may add, the authority of the Court as a whole.

The last of the three proposed consecutive steps focuses on the enforcement avenues within the ASP and the UNSC, as the bodies that are the main addressees of the judicial findings under Art. 87(5) and (7) ICC Statute. This is not to undermine the potential use of other international law mechanisms that include the involvement of individual States and regional organisations. In fact, it is established under the law of international responsibility that individual States may enforce non-compliance as an internationally wrongful act of the wrongdoer. Also, the practice of the ICTY has shown the importance of measures that regional organisations may take against a State that is non-compliant towards an international tribunal. However, addressing in full the potential of enforcement initiatives outside the context of the ASP and the UNSC would exceed the scope of this chapter. Moreover, with two bodies available to deal with enforcement of cooperation, the ASP and the UNSC, the political reality seems that States are not keen on seeking to obtain enforcement of cooperation outside these fora.

A *The United Nations may Enforce Non-Cooperation under Chapter VII of the United Nations Charter*

To date, ten non-cooperation judicial findings of the Chambers have been referred to the UNSC for consideration,⁸³ none of which have, thus far, triggered

83 Apart from ICC, *Prosecutor v Omar Hassan Ahmad Al Bashir* Decision on the Cooperation of the Federal Republic of Nigeria Regarding Omar Al-Bashir's Arrest and Surrender to the Court (2013) *supra* n 18 and ICC, *Prosecutor v Uhuru Muigai Kenyatta* Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute (2014) *supra* n 22, all other decisions in the table at the start of the chapter have been referred to the UNSC.

any concrete and effective enforcement measure by the UNSC. One may wonder what is behind this inactivity. Does it mean that non-compliance in the arrest of an ICC suspect is not considered to amount to a threat to international peace and security? Or does it demonstrate mistrust by the UNSC towards the judicial proceedings pursuant to Art. 87(5) and (7) ICC Statute even for situations referred by the UNSC? Or is there insufficient political will to support the Court in the fulfilment of its mandates given by the UNSC?

It is important to point out that the possibility of a referral of non-compliance to the UNSC has been interpreted as including both situations referred to the Court by the UNSC under Art. 13(b) ICC Statute and other situations, provided that the UNSC may define the latter as constituting a threat to international peace and security.⁸⁴ The competence of the UN in receiving judicial findings of non-compliance is further supported by Art. 17(3) Negotiated Relationship Agreement between the International Criminal Court and the United Nations (UN-ICC Agreement).⁸⁵

The UNSC has on two occasions referred situations to the Prosecutor, namely Darfur, Sudan and Libya. It cannot be said that the UNSC has paid no attention at all to cooperation with the ICC in respect of these two and other situations presently before the Court. For example, the UNSC held a meeting on 17 October 2012⁸⁶ on the promotion and strengthening of the rule of law in the maintenance of international peace and security, during which the main focus was the ICC. Moreover, in several of its resolutions on the DRC, the UNSC has not only called upon the UN Organization Stabilization Mission in the DRC ('MONUSCO')⁸⁷ and other UN peacekeeping forces to cooperate with national authorities to arrest ICC suspects, but it has, also explicitly targeted individuals allegedly responsible for serious violations of international humanitarian law in the DRC in its sanction list.⁸⁸ The UNSC has, on other occasions, not only urged Côte d'Ivoire to cooperate with the ICC, but also lifted the travel ban on the suspects in that situation to facilitate their transfer to The Hague. In other

84 See Arts. 39 and 41 UN Charter; see also in this sense Reisinger-Coracini, 'Coping with non-compliance' in Sluiter, Friman, Linton, Zappala and Vasiliev (eds), *International Criminal Procedure Principles and Rules* (Oxford: OUP, 2013) 105 at 107.

85 See Art. 17 (3) Negotiated Relationship Agreement between the International Criminal Court and the United Nations (UN/ICC relationship agreement); concluded between the UN and the ICC pursuant to Art. 2 of the ICC Statute and entered into application on 4th October 2004.

86 See UNSC, SC 67th Year Report for the 6849th Meeting, 17 October 2012, S/PV.6849.

87 See UNSC Res 2053, 27 June 2012, S/RES/2053 (2012) at 1 and 13.

88 See UNSC Res 2136, 30 January 2014, S/RES/2136 (2014).

instances, the UNSC has expanded its practice of enlisting individuals that represent a threat to international peace and security to include persons subject to an arrest warrant issued by the ICC. Surprisingly, Al Bashir and other indicted individuals in the Situation in Darfur, Sudan are not part of the UN list of sanctioned individuals.⁸⁹

Records of the UNSC on the specific issue of the enforcement of non-cooperation with the ICC are, however, quite poor. In fact, apart from a Presidential Statement following the UNSC's meeting on the rule of law in the context of peace and security,⁹⁰ the UNSC has hardly taken any measures against non-cooperating States, including in situations it has itself referred to the Court. It is argued that this undermines the role that the UN should play in the maintenance of international peace and security.

The UNSC's current debate on issues of non-compliance with ICC arrest appears to be dominated more by political considerations than *legal* ones. Reports of the ASP indicate that on more than one occasion when the ASP President contacted her UNSC counterpart regarding possible measures that the UNSC may take against States, she was told that UNSC permanent members were unwilling to use their available powers under Chapter VII UN Charter against non-compliant States.⁹¹

B *The Assembly of States Parties and the Enforcement of Non-Cooperation*

The competence of the ASP on matters of non-cooperation is based on Art. 87(5) and (7) ICC Statute, in conjunction with Art. 112 ICC Statute. While Art. 87(5) and (7) ICC Statute already suggest that the ASP can exercise powers in respect of non-cooperating States, it is Art. 112 ICC Statute that explicitly attributes such powers. In fact, Art. 112(1)(f) ICC Statute stipulates that the ASP shall consider pursuant to Art. 87(5) and (7) ICC Statute any question relating to non-cooperation. The word 'consider' leaves much to be desired in terms of clarity; it remains ambiguous what type of concrete action and measures the ASP could take in response to non-cooperative States. It is submitted that a teleological interpretation of Art. 112(1)(f) ICC Statute would be fully justified:

89 Ibid.

90 See UNSC, Statement by the President of the Security Council, 16 June 2008, S/PRST/2008/21 and UNSC, Statement by the President of Security Council, 29 June 2010, S/PRST/2010/11.

91 ASP, Report of the Bureau on non-cooperation, 7 November 2013, ICC-ASP/12/34 at para 14 and also ASP, Report of the Bureau on non-cooperation, 5 December 2014, ICC-ASP/13/40 at paras 25–30.

the ASP should be able, under the umbrella of ‘considering’, to take all measures necessary to continue to ensure the effective functioning of the Court.

To date, seven out of the ten judicial findings of the Court have been referred to the ASP as they concerned non-cooperation instances of State Parties.⁹²

The ASP has developed and implemented a range of measures in order to encourage cooperation, entering into a dialogue with non-cooperating States and advocating the avoidance of instances of non-cooperation.⁹³ Such measures further include the ASP procedures relating to non-cooperation,⁹⁴ the creation of regional focal points on the issue,⁹⁵ communication through yearly reports by the ASP Bureau on non-cooperation, presidential press releases following the Court’s referrals of non-cooperation findings and the use of social media to inform the general public about the ASP’s activities.

In the current practice of the ASP, when the office of the ASP President is aware of a visit of an accused to a State Party, it verifies this information with authorities of the concerned State. The President further notifies all State Parties and other stakeholders and encourages them to act to avoid an instance of non-compliance. In the event the accused individual visits the State Party without being arrested, the New York Working Group of the ASP convenes an informal meeting to discuss the measures they may adopt against the concerned State. The ASP President issues a press release to condemn the State’s failure and sends an open letter to the non-cooperating States inviting its representatives to discuss the issue in the ASP forum. As a follow-up, the ASP President meets with the UNSC President to enquire about the measures that the UNSC may take against the non-cooperating State. Such a procedure has been used on various occasions, including against Malawi and Chad following the non-arrest of Omar Al Bashir in 2012,⁹⁶ the CAR, Chad and Nigeria in 2013

92 These referrals include the three instances of non-cooperation of Chad in the arrest of Al Bashir, non-cooperation instances against Kenya in the arrest of Al Bashir, Djibouti, Malawi, the DRC and Libya as detailed in the table at the start of the chapter.

93 This is currently done by the The Hague Working Group of the Bureau, see generally in this sense ASP, Report of the Bureau on non-cooperation, 1 November 2012, ICC-ASP/11/29.

94 See in this sense, ASP, Assembly Procedures Relating to Non-Cooperation (2011) *supra* n 66.

95 To date, Belgium, Japan and Uruguay are non-cooperation focal points for their respective regions, see in this sense ASP, ‘Bureau of the Assembly of States Parties First meeting’, ICC, 24 January 2014, available at: [www.icc-cpi.int/en_menus/asp/bureau/decisions/2014/Pages/Decisions-of-the-Bureau-\(01\).aspx](http://www.icc-cpi.int/en_menus/asp/bureau/decisions/2014/Pages/Decisions-of-the-Bureau-(01).aspx) (last accessed 11 August 2015) at 2.

96 ASP, Report of the Bureau on non-cooperation (2012) *supra* n 93 at paras 4–11.

following non-compliance by the CAR and Chad in arresting Hussein during his visit to their respective territories and Nigeria and Chad following the non-arrest of Al Bashir⁹⁷ and, recently, against the DRC and Chad again in 2014.⁹⁸

Although ASP reports mention discrepancies in the Chamber's decision, including an instance of non-arrest of Al Bashir by Chad in 2014 where no decision was made under Art. 87(5) and (7) ICC Statute,⁹⁹ the real attention lies elsewhere. The general debate within the ASP points to diverging views of State Parties on the issue of the immunities of sitting Heads of State and the related arrest obligation. On the one hand, one should mention the position of African State Parties,¹⁰⁰ according to which sitting Heads of State and other senior officials enjoy immunities during their tenure of office pursuant to principles deriving from national laws and customary international law.¹⁰¹ In addition to the common African State Parties' position, Chad reiterated the need to discuss the challenges faced by AU countries in relation to cooperation, in light of the AU decisions.¹⁰²

On the other hand, there is the contrary EU State Parties' position within the ASP, according to which 'the irrelevance of the official capacity of the person concerned with regard to his or her personal criminal responsibility, in proceedings before the ICC, has been an essential achievement in international criminal justice.'¹⁰³

This debate within the ASP is a matter of concern, since it reveals some form of continuation of the Art. 87(7) ICC Statute procedure within the ASP. It is clear that this should be avoided, and State Parties should be reminded that Court decisions must be respected. However, as argued earlier, the Art. 87(7) ICC Statute procedure – in terms of its overall quality and consistency – leaves

97 ASP, Report of the Bureau on non-cooperation (2013) *supra* n 91 at paras 9–16.

98 ASP, Report of the Bureau on non-cooperation (2014) *supra* n 91 at paras 20–22.

99 *Ibid* at para 13.

100 It is worth noticing that for the first time in the ASP history, African States Parties of the ICC represented by Lesotho presented a common position on the issue.

101 See Maope, 'Ambassador and Permanent Representative of Lesotho to the UN: Statement on behalf of African state parties to the Rome Statute at the 13th session of the Assembly of States Parties to Rome statute of the ICC', ICC, 8 December 2014, available at: www.icc-cpi.int/EN_Menu/asp/sessions/general%20debate/pages/generaldebate_13th_session.aspx (last accessed 11 August 2015).

102 See ASP, Report of the Bureau on non-cooperation (2014) *supra* n 91 at para 24.

103 See Politi, 'Chair of COJUR-ICC: Statement on behalf of the European Union and its Members States', ICC, 10 December 2014, available at: www.icc-cpi.int/EN_Menu/asp/sessions/general%20debate/pages/generaldebate_13th_session.aspx (last accessed 11 August 2015) at 5.

much to be desired and affected States did not have a possibility to appeal negative outcomes. As a result, that the legal discussion resurfaced within the ASP cannot come as a complete surprise.

It is argued that the ASP has – in the area of enforcement of cooperation – until now acted below expectations. The starting point for the ASP should be a firm position and credible enforcement measures upon receipt of findings of non-compliance under Art. 87(7) ICC Statute. The reality is, however, that no concrete and effective measures are taken by the ASP. Non-cooperative States do not appear impressed at all by the soft and diplomatic initiatives, such as the initiation of a dialogue with the non-cooperative State. To the best available knowledge, no State has improved cooperation as a result of ASP involvement. What is more, the enforcement of cooperation within the ASP appears highly politicised, with a powerful block of AU States opposed against concrete and effective enforcement measures. It appears that the solution should be found in automatic follow-up action, with no or extremely little room for discretion within the ASP. Radical transformation and improvement of addressing enforcement of cooperation within the ASP should be an absolute priority. Each new instance of judicially established non-cooperation without credible response increases and confirms the impression that there is no harm in refusing cooperation with the Court.

5 Conclusion

This chapter has been based on the working hypothesis that credible and authoritative enforcement of cooperation obligations in the context of the ICC will ultimately depend on three basic conditions: (i) availability and consistent use of the Art. 87(7) ICC Statute procedure (judicial finding of non-compliance); (ii) high-quality procedures, in conformity with the requirements of natural justice, and well-reasoned decisions; (iii) availability of and consistent use of effective enforcement measures within the UNSC and ASP.

After a substantial number of years of practice regarding the enforcement of cooperation, regrettably, only negative conclusions can be drawn in respect of the aforementioned basic conditions underlying effective enforcement of cooperation. None of these basic conditions have, at the time of writing, functioned adequately in the context of the ICC.

The procedure under Art. 87(7) ICC Statute has not been used in a timely and consistent fashion. The quality of the process and the decisions leave much to be desired; there is no recognised possibility for appeal by affected

States. Finally, within the UNSC and ASP there is an apparent apathy when it comes to taking effective measures directed at non-cooperative States. This begs the question what can and should be done to remedy the situation. It is suggested that the key to improving the situation lies in a combination of specialisation and de-politicisation. It is the impression of the present authors that issues of non-cooperation do not get sufficient attention both within the Court and the ASP. This can be improved by making the issue of non-cooperation within the Court and the ASP a priority and an important area of specialisation. If necessary, this could develop, for example, into a specialised Chamber dealing with procedures under Art. 87(7) ICC Statute.

In addition, de-politicisation is the key to a more active ASP. Of course, the ASP is a political body by nature. As is already evidenced, cooperation issues may seriously divide States within the ASP, carrying the risk that the cooperation litigation finds some form of continuation within the ASP. This should be avoided. This can be done by laying some ground rules: (a) judicial findings of non-compliance cannot be challenged or subject to debate within the ASP, and (b) enforcement measures are as good as automatic and to be taken by a specifically designated committee within the ASP. In addition, it is recommended that enforcement measures are developed – and taken – which are more effective, and really affect the non-complying State. In this regard, one can think of financial measures – temporary increase in contribution, temporary loss of voting rights in the ASP (see Art. 112(8) ICC Statute, which provides for this sanction in case of failure to pay financial contributions to the Court in time), temporary loss of right to submit candidates for judicial vacancies etc.

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