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# Enforcing Cooperation

Did the Drafters Approach It the Wrong Way?

Göran Sluiter\*

## Abstract

*Non-compliance with requests from the International Criminal Court (ICC) for cooperation — mainly arrest warrants and orders for surrender of persons — appears to be an increasing concern. The author illustrates the cooperation model underlying the ICC Statute and highlights the limitations of what he describes as the ‘harmony approach’ which the drafters had in mind. He then shows a number of perplexing issues in the Court’s case law on non-compliance, and emphasizes distinctions to be made between political, administrative and judicial aspects of non-cooperation proceedings. Finally, he argues in favour of a more robust role for the Assembly of States Parties (ASP) and suggests a system of reactions to non-cooperation which the ASP should adopt.*

## 1. Introduction

With the sudden death of Håkan Friman the ‘international criminal justice community’ has lost one of its most loyal and important members. Håkan was involved in the creation of the International Criminal Court (ICC) as member of the Swedish delegation to the Rome Conference, and had since then supported the work and functioning of the ICC in so many ways, not always noticeably, but rather, as he preferred, in the background.

I vividly remember Håkan would more than often assess the development of the ICC through the lens of the drafters. Sometimes he approved of new and innovative approaches to issues not anticipated by the drafters. But there would be times when he disapproved of policies and practices of the Court’s organs which were, in his view, not in keeping with the intentions of the drafters and, most importantly, not beneficial to the fair and effective functioning of the Court.

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Håkan always took a keen interest in matters of cooperation between states and the ICC, including the issue of the Court's enforcement capacity. The enforcement of cooperation, which is so important to the Court at present, is the object of this article in honour of Håkan.

We have witnessed in recent times a significant increase in instances of failure to cooperate with the Court. The question to be answered in this article is what the intention of the drafters was in respect of enforcing cooperation, and whether the approach of the drafters — if it can be discerned — constitutes a proper basis for the effective enforcement of the obligations to cooperate with the court. Or: did the drafters get it wrong, and should, in the interests of preserving the authority of the Court, new and unprecedented steps be envisaged in the enforcement of cooperation?

In order to address these questions, the overall design of the cooperation regime inscribed in the Statute will be highlighted and a critical analysis of the Court's case law in respect of failures to cooperate will follow. Thereafter, I will focus on existing Assemblies of States Parties (ASP)-procedures on findings of non-cooperation and offer some thoughts on a possible new framework.

## 2. The 'Harmony-Approach' to Cooperation

Much has already been written about the nature of the ICC cooperation regime, and of it being considerably less vertical than the approach to (and law of cooperation of) the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR).<sup>1</sup> The explanation for this difference can be found in the negotiation-setting of the Court's creation — a diplomatic conference — in which there may have been reluctance to emphasize problems and conflicts that may arise in the cooperation relationship between States Parties and the Court. This 'harmony approach' towards cooperation is clearly discernible throughout Part 9 of the ICC Statute on International Cooperation and Judicial Assistance but is — as will be explored later on — also reflected in the law and practice dealing with enforcement of cooperation.

Those who were present at the negotiations in Working Group 9 of the Rome Diplomatic Conference in the Summer of 1998 — and in an academic capacity I happened to be one of them — will indeed recall that the drafters did not focus to any significant degree on a situation of conflict between States Parties and the Court. The overall idea was, as follows from the provisions in Part 9, that cooperation disputes would not easily occur between states supportive of the ICC, and if they did, they would be settled amicably, in constructive consultations between the Court and the State Party.

1 B. Swart and G. Sluiter, 'The International Criminal Court and Criminal Cooperation', in H.A.M. von Hebel et al. (eds), *Reflections on the International Criminal Court – Essays in Honour of Adriaan Bos* (T.M.C. Asser, 1999) 91, at 99–101; G. Sluiter, *International Criminal Adjudication and the Collection of Evidence: Obligations of States* (Intersentia, 2002), at 88.

This 'harmony-approach' to cooperation is evidenced by a number of provisions in Part 9, in which there is reference to 'consultations' between the State Party and the Court, in case the State Party is not able to provide the requested assistance.<sup>2</sup> These references appear to a large degree superfluous, as Article 97 of the Statute is the general provision obliging a state to consult with the Court in case of *any* problem in the execution of a request for cooperation. The question then arises as to what was precisely the drafters' intention/idea behind this provision, and also what was to be done if such consultations were to fail?

Claus Kress and Kimberly Prost say the following on the drafting history related to Article 97:

In the Draft Statute Article 87 para. 5 provided for a formal dispute resolution mechanism to address circumstances where there were problems with execution of the request. However, it became evident that it would be difficult, if not impossible, to reach consensus on such a mechanism, as there was no agreement, once again, as to whether the Court or the State should have the final say. In addition, to include or require resort to a formal mechanism was viewed by some States as contrary to the very nature of the obligation in this Part — cooperation. As an alternative, a text on consultations was proposed. ... Article 97 signals a cooperative approach to the resolution of problems and presumes good faith efforts on the part of the Court and the State.<sup>3</sup>

Interestingly, Article 97 was inserted as a compromise between states which were in favour of the Court having the final say, *thus a vertical approach to cooperation*, and those states which were not, and believed the cooperation model should be of a more horizontal nature. Article 97, according to the drafting history, is also strongly rooted in the assumption of a good faith partnership between the Court and States Parties, something which we know now is not always the case.

From the perspective of a result-oriented approach to cooperation, the insertion of Article 97 raises a number of problems. First, Article 97 suggests that a state may legitimately raise all kind of problems in the execution of cooperation requests. The situations mentioned in sub a, b and c are clearly not exhaustive and other 'problems' may be raised as well.<sup>4</sup> The provision could be interpreted in such a way that the situations in a, b and c are at least legitimate

2 Arts 89(2), 89(4), 91(4), 93(3), 93(9), 96(3), 97, 99(4), 100(1) ICCSt.

3 C. Kress and K. Prost, 'Article 97', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article* (2nd edn., Hart/Beck, 2008) 1599–1601, at 1599.

4 Art. 97 ICCSt.: '... Such problems may include, *inter alia*: (a) Insufficient information to execute the request; (b) In the case of a request for surrender, the fact that despite best efforts, the person sought cannot be located or that the investigation conducted has determined that the person in the requested State is clearly not the person named in the warrant; or (c) The fact that execution of the request in its current form would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State.' Kress and Prost, *ibid.*, at 1599 acknowledge that the reference to examples was certainly not meant to be exhaustive: 'It provides examples of some types of problems but is not restricted in application to those circumstances.'

problems, but other problems could fall in the same category too. One may wonder whether States Parties should be ‘invited’ with this type of open-ended language to raise a potentially wide variety of ‘problems’ of cooperation. It does not favour a result-oriented and vertical cooperation setting.

A second problem of Article 97 is the ambiguous language as far as the second step of the process is concerned: what is the purpose in raising cooperation problems and initiating consultations? According to the provision this is to ‘resolve the matter’. If we look at the drafting history, as analysed and summarized in various commentaries on the Rome Statute, we are not really informed what was meant by this. Kress and Prost in this regard do not mention more than that Article 97 ‘signals a cooperative approach to the resolution of problems and presumes good faith efforts on the part of the Court and the State’.<sup>5</sup>

To the critical reader, ‘in order to resolve the matter’ is imprecise; it could amount to changing, even withdrawing the request, in the face of a persistent, non-cooperative state. Bearing in mind the importance of result-oriented cooperation, such a resolution would seriously undermine an effective cooperation regime. However, the ordinary meaning of the provision clearly suggests this, maybe even as a primary mode of resolution. In fact, when the Court maintains its request for cooperation and dismisses the state’s ‘problems’ as invalid or contrary to Statute, the matter has not been resolved, as the cooperation dispute will continue. The essential problem with the consultations-provision, Article 97, appears to be that it does not sufficiently put the interests of the Court in achieving swift and effective cooperation above the possible interests of States Parties in not providing that cooperation. As follows from the drafting history of the Rome Statute this may have been the best compromise that could have been obtained, but it is very unhelpful in terms of an effective cooperation regime.

The next steps in the case of a persistent cooperation dispute, i.e. when the matter *is not* resolved, cannot be found in Article 97, nor in a subsequent provision. As indicated by Kress and Prost: ‘In case where such a cooperative approach does not yield a result, the Court will have to rely on its power under article 87 para. 7 ...’.<sup>6</sup> We thus have to go back to Article 87 in Part 9 entitled ‘requests for cooperation – general provisions’. In that provision, there is a section, Article 87(7), that enables the Court to make a determination of non-compliance and refer the matter to the ASP or to the Security Council (UNSC).<sup>7</sup>

In terms of a systematic organization of Part 9, it would have made more sense to combine, or at least develop a clear correlation, between Article 97 on consultations and Article 87(7) on a judicial finding of non-compliance.

5 *Ibid.*

6 *Ibid.*

7 Art. 87(7) ICCSt.: ‘Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.’

Logically, it is normally *after* failure of consultations that the procedure for a judicial finding of non-compliance can be put in motion. The logical sequence would be: a problem in the execution of a request, consultations, judicial finding of non-compliance and enforcement action by the ASP or the UNSC.

The rather isolated section in Article 87 dealing with the judicial finding of non-compliance, its paragraph 7, raises a number of important issues. Beneath these few sentences lies a unique and complex body of both substantive and procedural issues. Looking at the commentaries on the drafting history, it appears the drafters had no clear and developed ideas concerning the nature, scope and content of 'non-compliance' procedures. It is self-evident that these proceedings are not criminal in nature and thus require some flexibility and adaptation by a court that is as good as exclusively dealing with criminal proceedings. If one were to attempt to qualify the Article 87(7)-proceedings, they would need to be considered administrative in nature, as intended to regulate an organization, i.e. the Court, and aimed at the effective functioning of the Court. Moreover, the relationship between the litigating sides, the Court/Prosecutor, on the one side, and the non-cooperative state, on the other, would need to be described as unequal, the Court being akin to a public authority holding an entity bound by the law, the non-cooperative state, accountable for non-cooperation.

What does this mean for the determination of the applicable law? It is interesting that there is so far no serious attempt to develop a coherent theoretical framework to govern the determination of both the substantive and procedurally applicable law to Article 87(7)-proceedings. Rather, as will be described in the next paragraph, the development of both substantial and procedural rules for these proceedings appears rather haphazard. It has remained unclear what the precise substantive norms are on the basis of which a non-compliance finding can be made. Also, in terms of procedure, the rights of the (presumed) non-cooperative state and obligations for the Court are still relatively unclear. Important procedural safeguards, such as the *audi alterem partem* principle, have not always been adhered to.<sup>8</sup> In addition, there is no possibility to appeal the judicial finding of non-compliance.<sup>9</sup>

The impression one gets from a number of Articles 87(7) cases is that the relevant Chamber, not being specialized in these matters, has not always given the matter due attention. One element that could play a role in a hasty conclusion and judgement is that in the entire process of enforcement of cooperation, the relevant Chamber does not actually bear the final responsibility. In fact, one could consider the judicial finding of non-compliance as a mere stepping stone to further enforcement measures by either the ASP or the

8 Although the right for the non-cooperating state to present its case finds protection in Reg. 109(3) RoC; see G. Sluiter and S. Talontsi, 'Credible and Authoritative Enforcement of State Cooperation with the International Criminal Court', in O. Bekou and D. Birkett (eds), *Cooperation and the International Criminal Court: Perspectives from Theory and Practice* (2016) 80, at 97–99, pointing out a number of instances where the *audi alterem partem* rule has not been respected.

9 *Ibid.*, at 99–100.

UNSC. However, when the Article 87(7) proceedings are of insufficient quality, this will inevitably affect the follow-up phase at the ASP or UNSC. The non-cooperative state may use these fora to seek re-litigation of issues that should have been convincingly settled by the Chamber. As will be shown later on, this has been the case with some non-cooperating states. The applicable substantive and procedural law to Article 87(7) proceedings thus needs to be a matter of continuing attention. This is also evidenced by the recent case law of the Court under Article 87(7).

The endpoint in the chain ‘consultations–finding of non-compliance–enforcement measures’, is governed by the law applicable to the functioning of the ASP and the UNSC. Regarding the UNSC, the law under which it can take measures against uncooperative states in situations referred to the ICC by the UNSC, can be found in Chapter VII of the UN Charter. In this article, I will not deal with that body of law or the (lack of) practice of the UNSC regarding states that refuse to cooperate with the Court in the Sudan or Libya situations. Suffice it to say that I fully understand and share the frustration about the fact that the UNSC has referred the Libya and Sudan cases to the Court but does not support the Court at all in being able to effectively fulfil its mandate in these cases.<sup>10</sup>

I will instead concentrate only on the procedures within the ASP, as this is something within the control of the ICC States Parties.

Article 112 of the ICC Statute governs the functioning of the ASP. According to Article 112(2)(f), the ASP shall consider any question of non-cooperation.<sup>11</sup> Looking at the drafting history of the ASP, it appears that the attribution of powers on non-cooperation issues to the Assembly were not self-evident.<sup>12</sup> Moreover, nothing in the drafting history clarifies what powers or concrete measures fall within the ambit of ‘considering any question of non-cooperation’.

The work of the ASP on cooperation thus had to develop in its own right, without any guidance from the drafters. Many of the drafters have ratified the Rome Statute and have as ASP members been able to further shape ASP law and practices on non-cooperation matters. The question to be addressed

10 See, for example, Statement of ICC Prosecutor, Fatou Bensouda, before the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005), 13 December 2016, available at <https://www.icc-cpi.int/Pages/item.aspx?name=161213-otp-stat-unscc-darfur> (visited 3 March 2018): ‘A further aggravating factor is this Council’s inaction. It is no surprise then that victims and witnesses of the Office are slowly but surely losing faith in the process of international criminal justice in Darfur. We must ask ourselves some tough but honest questions. What are we to say to victims that continue to suffer in Darfur, to the individuals who have uprooted their lives to be witnesses and had the courage to tell their story? How can we maintain their trust in the judicial process when they continue to observe Mr Al Bashir and other suspects traversing the globe with impunity? Victims, including some I have met with personally, are puzzled and dismayed by the Council’s lack of action.’

11 Art. 112(2)(f) ICCSt.: ‘[The Assembly shall] ... [c]onsider pursuant to article 87, paragraphs 5 and 7, any question relating to non-cooperation; ...’.

12 S. Rama Rao, ‘Article 112’, in Triffterer (ed.), *supra* note 3, at 1692.

below (Section 4) is whether they have adopted the right steps and initiatives in this regard.

### 3. Practice of the Court in Dealing with Instances of Non-cooperation

There is a growing amount of Article 87(7) case law of the ICC. Almost all of these procedures have to do with States Parties which have failed to comply with the *Al Bashir* arrest warrant, while Al Bashir was visiting these countries.<sup>13</sup> The increasing volume of Article 87(7) decisions can on the one hand be seen as a positive development, in the sense that instances of non-cooperation appear to increasingly receive a judicial response. There is, however, reason for pessimism in that none of these decisions has (i) led to effective sanctions/measures by the ASP (or UNSC); or (ii) appeared to have a preventive and remedial effect; non-cooperation, especially as far as Al Bashir and the African Union is concerned, remains hugely problematic.

The Court's dealings with Article 87(7) situations have been analysed and criticized elsewhere recently.<sup>14</sup> There is no need to repeat that analysis here. I will focus on the most recent decisions, dealing with South Africa and Jordan,<sup>15</sup> and in light of that very recent case law highlight a few persistent problems in the current approach of the Court to enforcement of cooperation.

As has been mentioned, the judicial finding of non-compliance and corresponding subsequent referral to the ASP and/or UNSC is the linchpin between consultations which have failed or were not held at all under Article 97 and further enforcement steps and measures by the ASP (or UNSC). The South Africa and Jordan decisions offer some very interesting and insightful views of how the Court positions itself in respect of the two-step process.

First, as far as Article 97 is concerned, the Pre-Trial Chamber has acted contrary to that provision's ordinary meaning and has also ignored the intention

13 One exception of Art. 87(7)-proceedings not dealing with Darfur, relates to the Kenya situation: Judgement 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', *Kenyatta* (ICC-01/09-02/11-1032), Appeals Chamber, 19 August 2015 (hereinafter, 'Kenya decision'). Another exception concerns the Libya situation: Decision on the non-compliance by Libya with requests for cooperation by the Court and referring the matter to the United Nations Security Council, *Gadaffi* (ICC-01/11-01/11-577), Pre-Trial Chamber I, 10 December 2014. However, the latter case falls outside the scope of this article because it relates to a state non-party, Libya.

14 Sluiter and Talontsi, *supra* note 8; for an overview of Art. 87(7) rulings, see especially, *ibid.*, 82–85.

15 Decision under Article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, *Al-Bashir* (ICC-02/05-01/09), Pre-Trial Chamber II, 6 July 2017; Decision under Article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir, *Al-Bashir* (ICC-02/05-01/09), Pre-Trial Chamber II, 11 December 2017. Hereinafter these decisions are referred to as the South Africa ruling and the Jordan ruling, respectively.

of the drafters. Pre-Trial Chamber II stated in the South Africa ruling that Article 97 ‘... is built on the implicit and realistic expectation that, due to practical reasons, straightforward cooperation may occasionally not be possible.’<sup>16</sup> It also said that ‘... consultations ... between a State and the Court do not, as such, suspend or otherwise affect the validity of the Court’s request for cooperation.’<sup>17</sup> In light of the criticism made earlier on the content of Article 97, it appears to make sense that the Chamber is keen on reducing its effect on, and role within, the cooperation regime; the intent to abandon the harmony approach to cooperation and develop a more vertical and robust cooperation regime is understandable. However, the Chamber’s interpretation of that provision is not correct. Under Article 97, the requested state is entitled to raise a variety of problems which impede the execution of the request and seek to obtain a resolution of the matter. The Chamber is wrong, on the basis of the wording and drafting history of Article 97, that this resolution has to be by definition favourable to the Court. In fact, resolution could also amount to withdrawal of the request for cooperation.

It is furthermore remarkable that the Pre-Trial Chamber, with its own robust interpretation of Article 97 directed towards the creation of a more vertical cooperation regime, has nevertheless elected to use the application of Article 97 by states as a circumstance in mitigation as far as a referral pursuant to Article 87(7) is concerned. In the Article 87(7) proceedings concerning South Africa, the Chamber substantially based its decision not to refer South Africa’s non-compliance to the ASP or UNSC on the fact that South Africa was the first state which more or less genuinely invoked Article 97 and engaged in a consultation process with the Court.<sup>18</sup> However, this precedent was not followed in the Article 87(7) proceedings concerning Jordan. Like South Africa, Jordan had refused to arrest Al Bashir and in that context had sought to consult with the Court, pursuant to Article 97. However, contrary to the situation of South Africa, this time the use of Article 97 was not considered a factor against referral of non-compliance: ‘While the Chamber has previously held that the fact that South Africa was the first State Party to approach the Court with a request for consultations militated against a referral of non-compliance, this circumstance does not exist in the case at hand.’<sup>19</sup>

One has difficulty in understanding this difference in treatment of South Africa and Jordan. What is more, if Article 97 — in the interpretation of the Chamber — could not suspend cooperation, then it does not make sense to use the mere fact that consultations have taken place in mitigation, as a factor justifying non-referral to the ASP.

The Court’s jurisprudence is puzzling in another respect when it comes to the question whether or not to refer an instance of non-compliance to the ASP or UNSC. Since the 2015 ruling of the Appeals Chamber in the Article

16 South Africa ruling, § 112.

17 *Ibid.*, § 119.

18 *Ibid.*, §§ 127–134.

19 Jordan ruling, § 54.

87(7) proceedings regarding Kenya, it has been determined that in a case of non-compliance an automatic referral to external actors is not required as a matter of law.<sup>20</sup> Having granted such discretion to a Chamber, the issue of the exact standard for referral is of paramount importance. However, what this standard actually is remains obscure until this day; according to the Appeals Chamber, 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 cooperation requested taking into account the form and content of the cooperation'.<sup>21</sup>

This interpretation of Article 87(7) does not appear to be in keeping with the intent of the drafters. The idea behind Article 87(7) was a clear distinction between tasks and responsibilities of the Court, on the one hand, and those of political organs, the ASP and UNSC, on the other. Instances of non-compliance that have been considered serious enough to justify proceedings under Article 87(7) should trigger referrals to the competent political organs; it also raises the question of the value of time-consuming proceedings that do nothing more than simply record non-compliance.

Another problem in the exercise of discretion in the referral of instances of non-compliance relates to a lack of foreseeability and accessibility. It is at present uncertain what guides the Chamber in its discretion. The exercise of discretion in referral decisions could mean that the Chamber anticipates steps that could be taken by the political organs (ASP or UNSC) ending up in conflating the judicial and political roles in the enforcement of cooperation. In this regard, it is useful to recall the ICTY Appeals Chamber's Decision in the *Blaškić* case.<sup>22</sup> In that case, the Appeals Chamber concluded that it could only issue a judicial finding of non-compliance regarding the non-cooperation of Croatia; it could not give any recommendation or suggestion to the political organ, in this case the UNSC, as to the further course of action to be taken.<sup>23</sup> This strict separation between the judicial and political roles regarding enforcement of cooperation should also be applied to the ICC context.<sup>24</sup>

The risks in not taking that distinction seriously are evidenced by the recent judicial finding of non-compliance regarding South Africa, especially one of the factors on which that non-referral of the South African non-compliance was based. In that case, the Chamber addressed the question whether a referral of

20 Kenya ruling, § 49.

21 *Ibid.*, § 53.

22 Judgement on the request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, *Blaškić* (IT-95-14-A), Appeals Chamber, 29 October 1997.

23 *Ibid.*, § 36: 'Furthermore, the finding by the International Tribunal must not include any recommendations or suggestions as to the course of action the Security Council may wish to take as a consequence of that finding. As already mentioned, the International Tribunal may not encroach upon the sanctionary powers accruing to the Security Council pursuant to Chapter VII of the United Nations Charter. ...'

24 See C. Kress and K. Prost, 'Article 87(7)', in Triffterer (ed.), *supra* note 3, at 1530.

South Africa's non-compliance would be an effective way to foster cooperation<sup>25</sup>; more precisely, the Chamber considered 'whether engaging external actors would, in the circumstances of the case, be an effective way to obtain cooperation.'<sup>26</sup> One may wonder whether it is within the competence of a judicial organ to estimate what would be an efficient way to obtain cooperation.

What follows after raising this as a standard for non-referral is an analysis that is as unconvincing as it is unnecessary. The Chamber first posits that, as a result of the present Article 87(7) proceedings, a referral of South Africa's non-compliance would be of no consequence as a mechanism for the Court to obtain cooperation.<sup>27</sup> The Chamber continues on this slippery path by asserting that six referrals of non-compliance and many meetings of the UNSC have not resulted in measures against States Parties that have violated their cooperation duties towards the Court.<sup>28</sup> The Chamber concludes by saying that these considerations — i.e. the UNSC's inaction regarding enforcement of cooperation — strengthen its belief that a referral of South Africa is not warranted as a way to obtain cooperation.<sup>29</sup>

The underlying message of these considerations — and especially the conclusion drawn by the Pre-Trial Chamber — is that it appears to forego referral and enforcement mechanisms in the anticipation of this having no positive effect on obtaining cooperation. This negative attitude is without doubt occasioned by the inaction within the UNSC in this area — but possibly also by the problems in the ASP regarding effective enforcement of cooperation (which will be further analysed below). However, such interference with the effectiveness of enforcement action should arguably not be a matter for the Pre-Trial Chamber to decide upon, as has been already mentioned, it also amounts to giving up on enforcement mechanisms. In a way, it is merely rewarding an uncooperative state.

Matters have not gone much better in the Article 87(7) decision of 11 December 2017 dealing with non-cooperation by Jordan.<sup>30</sup> If, according to the Chamber, an effective enforcement mechanism, either within the UNSC or the ASP, is missing to obtain cooperation in execution of the Al Bashir arrest warrant, and if this is to be considered a substantial factor in deciding not to refer the non-compliance to the UNSC and the ASP, one would have expected this to be applied in a consistent manner, i.e., to Jordan as well as to South Africa. However, there is no mention of this at all in the Jordan case,<sup>31</sup> while it is clear to every observer that also in regards to Jordan effective enforcement

25 South Africa ruling, §§ 135–138.

26 *Ibid.*, §135.

27 *Ibid.*, § 138.

28 *Ibid.*

29 *Ibid.*

30 See Jordan ruling; Jordan, like South-Africa, had failed to execute the request for arrest and surrender concerning Al Bashir. Al Bashir was visiting Jordan for a summit of the Arab League on 29 March 2017.

31 The part in the decision where one would expect this factor to resurface is in §§ 51–55 of the Jordan ruling.

measures are equally unavailable. It is puzzling why Jordan is treated so differently in comparison to South Africa; under similar circumstances in practice, the non-cooperation of Jordan is referred to the ASP, whereas the same Chamber refrained from doing so in respect of South Africa. This again highlights the problematic aspect of the Appeals Chamber's ruling to make referral of non-cooperation to the ASP a matter within the Chamber's discretion.

#### 4. ASP Procedures and Practices on Non-cooperation

The ASP is the administrative, legislative and political organ of the Rome Statute. Pursuant to Article 112(2)(f) the ASP shall, pursuant to Articles 87(5) and (7), consider any question relating to non-cooperation. As was already examined, neither the Statute nor the drafting history offer any guidance as to what steps or measures could be taken by the ASP in response to non-cooperation. Further development of regulations and practices was thus fully left to the ASP.

It took a while before the ASP started organizing in a more structural fashion its work on non-cooperation. In 2011, at its 10th session, the ASP adopted the 'Assembly procedures relating to non-cooperation'.<sup>32</sup> In this document, a distinction is made between two scenarios of non-cooperation that may come to the attention of the ASP. The first scenario is the focus of the present paper, namely a referral of non-cooperation by the Court pursuant to Article 87(7). The second scenario is not about a situation of referral, but about a situation in which 'there are reasons to believe that a specific and serious incident of non-cooperation in respect of a request for arrest and surrender of a person ... is about to occur or is currently ongoing and urgent action by the Assembly may help bring about cooperation'.<sup>33</sup>

Obviously, this second scenario is far more delicate to deal with, as it has not yet been legally determined whether or not such non-cooperation would be in violation of international obligations; responses in this field would therefore have to be more of an informal nature.<sup>34</sup> In the framework of this paper, I will not comment on the organization of these non-referral related informal steps taken within the ASP towards non-cooperation. Suffice it to say that drawing a State Party's attention to the importance of cooperation with the Court can never harm, but it does not seem to have helped much in preventing instances of non-cooperation or in enforcing cooperation where a State Party has already violated its obligation to cooperate with the Court.

How does the ASP view its approach towards referrals of non-compliance? According to the 'Assembly procedures' document, a referral 'would require a

32 Annex: Assembly procedures relating to non-cooperation, in *Strengthening the International Criminal Court and the Assembly of States Parties*, ICC-ASP/10/Res.5, November 2011 (adopted 21 December), at 38–41 (hereinafter 'ICC-ASP/10/Res.5 Annex').

33 *Ibid.*, § 7(b) (underlining in original).

34 *Ibid.*, § 11.

formal response, including some public elements, given that it has been triggered by a formal decision of the Court referring the matter to the Assembly.<sup>35</sup> In addition, an informal and urgent response may be considered as a precursor to the formal response, ‘in particular where it is still possible to achieve cooperation’.<sup>36</sup>

Paragraph 12 of the ‘Assembly procedures’ document contains a number of important observations regarding the nature and purpose of non-cooperation procedures within the ASP. First, it is mentioned that non-cooperation procedures ‘would have to be carried out by the Bureau and the Assembly in full respect for the authority and independence of the Court and its proceedings ...’.<sup>37</sup> In addition, it is said that the non-cooperation procedures must ‘not lead to discussions on the merits of the Court request or otherwise undermine the findings of the Court’.<sup>38</sup>

One may wonder, however, whether this purpose has always been met by practice. Two problems occur in this regard. First, the non-cooperating State Party, which is the object of the referral, is also a member of the ASP. It may try to call into question the findings of the Court under Article 87(7) proceedings in the context of the subsequent ‘consideration’ of the matter within the ASP and may also be supported in these efforts by befriended states, including states that have already been, or could be in the future, the object of non-cooperation procedures. This group of states within the ASP may grow larger with every non-cooperation referral. In order to avoid *iudex in sua causa*, either in a negative or positive sense, the argument can be made in favour of exclusion of the non-cooperating state, and possibly also other states which have failed to cooperate in the past, especially if it concerns the same act or problem of cooperation (like the arrest and surrender of Al Bashir), in ASP procedures concerning the relevant non-cooperation.

Secondly, whether there will be discussions on the Court’s findings under Article 87(7) proceedings will inevitably also depend on the quality of these findings. It has already been reported elsewhere that the analysis of the ‘immunity defence’, which was used by a number of states with a view to justifying their non-compliance with the *Al Bashir* arrest warrant, was not particularly persuasive in the initial non-compliance decisions.<sup>39</sup> In addition, the different treatment of states, with some states’ non-cooperation not being referred to the ASP, is a further element of criticism regarding the consistency and quality of Article 87(7) rulings.<sup>40</sup>

35 *Ibid.*, § 10.

36 *Ibid.*, § 15.

37 *Ibid.*, § 12.

38 *Ibid.*, § 12.

39 Sluiter and Talontsi, *supra* note 8, at 100–102.

40 ‘Non-referral’ of Nigeria: Decision on the cooperation of the Federal Republic of Nigeria regarding Omar Al-Bashir’s arrest and surrender to the Court, *Al Bashir* (ICC-02/05-01/09-159), Pre-Trial Chamber, 5 September 2013. See for critical analysis of the inequality in treatment in the past between states that have failed to arrest and surrender A Bashir, the DRC (referred) and Nigeria (not referred), Sluiter and Talontsi, *supra* note 8, at 90–95.

In light of these aforementioned problems, it can be expected that, in spite of intentions to the contrary, the judicial findings under Article 87(7), which underlie ASP enforcement procedures, will continue to be the object of debate and criticism.

The formal responses the ASP envisages adopting following a referral of non-cooperation are listed in paragraph 14 of the 'Assembly procedures' document.<sup>41</sup> Although not clear on the basis of the text, it appears the list is not intended to be exhaustive. These are the possible steps:

- Emergency Bureau meeting, at which it can be decided what further action can be taken;
- Open letter from the President of the ASP, on behalf of the Bureau, to the state concerned, reminding that state of the obligation to cooperate and requesting its view on the matter;
- A meeting of the Bureau, at which a representative of the state concerned would be invited to present its views on how it would cooperate with the Court in the future;
- Holding a public meeting on the matter to allow for an open dialogue with the requested state;
- Submission of a Bureau report on the outcome of the aforementioned dialogue to the plenary session of the ASP, including a recommendation as to whether the matters requires action by the Assembly;
- Appointment in the plenary session of the ASP of a dedicated facilitator to consult on a draft resolution containing concrete recommendations on the matter.

In addition to these specifically mentioned steps, reference is also made in the 'Assembly procedures' document to the good offices by the President of Assembly, but only to respond to an impending or ongoing situation of non-cooperation.<sup>42</sup>

These steps that are mentioned in paragraph 14 of the 'Assembly procedures' document as means to foster, or enforce cooperation, warrant the following observations.

First, there is an inherent tension between the implication of some of these steps and an important starting point of non-cooperation procedures before the ASP. For example, holding an open dialogue with the non-cooperating state and inviting the non-cooperating state to present its views on how to cooperate in the future are 'steps' which carry with them the potential for the non-cooperating state discussing, challenging, and thus undermining the judicial finding of non-compliance. It raises the broader question of what purpose can there be in organizing an open dialogue and allowing the non-cooperating state to present its views following a judicial intervention. It is in the context of the Article 87(7) proceedings that the non-cooperating state could and should submit all observations and views that could be relevant in the context

41 ICC-ASP/10/Res.5 Annex, § 14.

42 *Ibid.*, § 15.

of its non-compliance. One wonders what the purpose would be of rehashing this in the framework of the ASP.

Another puzzling and problematic aspect of the list of enumerated steps is that reference is made repeatedly to follow up measures. This consists of phrases or words such as ‘what further action would be required’, ‘a recommendation as to whether the matter requires action by the Assembly’, and ‘containing concrete recommendations on the matter’.<sup>43</sup> Not only is this unlikely to impress any present or future non-cooperating state, but references to ‘further action’ also raise the question what measures this would entail. It appears that the process is not assisted by different, fragmented stages and *fora* within the ASP where non-cooperation is ‘considered’ and enforcement action can be taken. A specialized Bureau on non-cooperation within the ASP has the advantage of building expertise and routine, but such an advantage risks to be compromised when in case of ‘further action’ (whatever this may mean) the plenary of the ASP needs to be involved.

This brings me to the third problem with the ‘enforcement measures’ that are mentioned in the ‘Assembly procedures’ document. They appear utterly ineffective. One has difficulty imagining these measures having a deterrent effect on states that have failed to cooperate or may do so in the future. This is the more so in the context of the *Al Bashir* arrest warrant, where non-cooperation is based on what the requested states have perceived as a competing obligation under international law (recognizing the immunity of a head of state of a non-party state) and obligations towards (or pressure from) the African Union not to arrest Al Bashir. Under these circumstances, the ASP procedures on non-cooperation will need to be more robust than is presently the case.

In the years following the established procedures relating to non-cooperation, the ASP Bureau on non-cooperation has issued reports on non-cooperation. These reports operationalize, so to speak, the aforementioned procedures.

The first report, adopted at the 11th ASP session in 2012, is just a few pages long.<sup>44</sup> It provided for a short account of contacts with Malawi and Chad, of which the non-cooperation was referred to the ASP in 2011. Regarding Malawi, it was said that a dialogue was developed and that Malawi reaffirmed its intention to comply with its cooperation obligations.<sup>45</sup> Chad seemed to pursue the non-cooperation litigation within the ASP, a problem already addressed above, by indicating towards the President of the ASP that ‘Chad was in full compliance with international law and was cooperating with the Court’.<sup>46</sup>

An interesting part of this report can be found in the conclusion. The Bureau proceeds to an evaluation of its own activities against the standard of enhancing cooperation. It concludes that ‘in the case of Malawi, the implementation

43 *Ibid.*, § 14.

44 Doc. ICC-ASP/11/29, 1 November 2012.

45 *Ibid.*, § 5.

46 *Ibid.*, § 6.

of the Court's decisions has indeed been enhanced.<sup>47</sup> But in the case of Chad, '[t]here are no indications that the application of the Assembly procedures on non-cooperation have had any effect'.<sup>48</sup> This then results in the recommendation to 'consider non-cooperation by Chad' in the ASP.<sup>49</sup>

Reports in the following years follow a similar pattern, in which the contacts and dialogues with non-cooperating, referred states are described; in addition, there is the mention of preventive steps that have been taken to ensure cooperation in case of impending visits of Al Bashir to States Parties.<sup>50</sup>

One notices that States Parties which acknowledge their non-cooperation and pledge commitment to cooperation in the future are praised and are let 'off the hook'; they are no longer the focus of the ASP attention and further 'measures'. Of course, one can wonder to what degree these commitments to cooperation are genuine; such statements further leave unaddressed the issue of whether the non-cooperating state should not be sanctioned for prior violations of its cooperation obligations.

States that are not responsive to requests for contacts and dialogue, instead, remain on the agenda of the ASP and recommendations are made that their non-cooperation will be further 'considered' by the ASP.

Other 'measures' aimed at improving cooperation taken in the ASP framework consist of creation of regional focal points on non-cooperation and elaboration of an operative toolkit on the informal aspects of the non-cooperation guidelines.<sup>51</sup>

The four regional focal points are ASP members of each of the regional groups and are to focus on non-cooperation within their respective regional groups; although not precisely clear, it appears that their mandate, including good offices, is limited to *preventing* instances of non-cooperation.<sup>52</sup>

The 'toolkit for the implementation of the informal dimension of the Assembly procedures relating to non-cooperation' has been developed as a resource to improve implementation of the informal measures regarding non-cooperation and intended to 'encourage more standardized responses to potential instances of non-cooperation, and to depoliticize action taken to encourage States to meet their cooperation obligations'.<sup>53</sup>

The 'standardised responses' relate to a number of aspects of non-cooperation, such as monitoring the travel of persons subject to warrants of arrest,

47 *Ibid.*, § 16.

48 *Ibid.*, § 17.

49 *Ibid.*, § 20.

50 See the following reports: report of the 12th session, doc. ICC-ASP/12/34, 7 November 2013; report of the 13th session, doc. ICC-ASP/13/40, 5 December 2014; report of the 14th session, doc. ICC-ASP/14/38, 18 November 2015; report of the 15th session, doc. ICC-ASP/15/31, 8 November 2016.

51 Focal points on non-cooperation were installed in report of the 12th session: ICC-ASP/12/34, 7 November 2013; the toolkit is annexed to the report of the 14th session, ICC-ASP/14/38, first version, and a second version is annexed to the report of the 15th session, ICC-ASP/15/31, 8 November 2016.

52 Doc. ICC-ASP/12/34, 7 November 2013, § 20.

53 Doc. ICC-ASP/15/31/Add.1, 8 November 2016, § 10.

preventing instances of non-cooperation and sensitizing interlocutors to non-cooperation issues.

It exceeds the scope of this article to analyse each of the elements of the toolkit. Suffice it to say that the toolkit is very much focused on reminding and emphasizing the cooperation obligations of states, something which should be clear and self-evident to each State Party from the letter of the Statute itself. The toolkit does nothing in terms of sanctions, or measures of a more punitive or remedial nature in response to non-cooperation.

Within the ASP, there appears certainly to be awareness of the enormous difficulty in improving cooperation. At the 14th session of the ASP, in 2015, delegates reiterated that attention to non-cooperation remained crucial, 'as non-cooperation instances should not become normalized and whenever there is failure to cooperate, business should not remain as usual'.<sup>54</sup> Yet, the contrary appears to be the case, as no non-cooperating State has ever suffered serious consequences as a result of its non-cooperation.

For the observer, the amalgamation of ASP procedures, reports, initiatives, dialogues, toolkits, focal points, standardized procedures, etc., in the area of non-cooperation is difficult to fathom. There can be no doubt that all of these efforts are replete with good intentions, but they lack focus, simplicity and accountability, and, most importantly, effectiveness.

The ASP does, simply, not appear capable of handling in a convincing and effective manner instances of non-cooperation. The proof of the pudding is in the eating, and in this regard the observer would find that the action of the ASP does not appear to have had any positive effect on instances of non-cooperation. Regrettably, it appears that non-cooperation has become, in the words of one of the ASP reports on non-cooperation, 'business as usual': non-cooperating states rather consider the ASP as a forum to continue to utter grievances against cooperation requests and Court proceedings, and not as a framework that is about accountability and sanctions because of their non-cooperation. The entire setup, starting with the—at times flawed—proceedings under Article 87(7) up to and including steps that should be taken within the ASP, appears incoherent and inefficient. In light of the importance of cooperation for the functioning of the Court and the increasing instances of non-cooperation, the present law and practice regarding enforcement of non-cooperation seriously undermine the effective functioning of the Court. In the next section, I will develop some ideas as to how the present law and practice could be improved.

## 5. Towards a Different Framework on Enforcement of Cooperation

The importance of effectively responding to instances of non-cooperation requires in my opinion a more robust legal framework and practice than is at

<sup>54</sup> Doc. ICC-ASP/14/38, 18 November 2015, § 45.

present the case. This framework should be addressed as a whole and thus should include both the Court, as a vital precursor to enforcement action within the ASP, and the ASP, where effective measures against non-cooperation should be taken. While, as will be mentioned below, an improved law and practice on non-cooperation could benefit from amendments to the Statute, a lot can also be done without such amendments. This is important, as we all know how hard it will be to amend the Statute.

As far as the role of the Court is concerned in non-cooperation matters, it has already been mentioned that Part 9 could have been better organized by pulling together Article 97 on consultations and the procedures on judicial findings of non-compliance presently in Article 87(7). Logically, in case of no- or unsuccessful consultations, Article 87(7) proceedings should be initiated, and therefore a connection between the two stages in non-cooperation would seem obvious; preferably, all of this should have been made explicit in the Statute.

With the present setup of Part 9, it has taken quite some time for a practice under Article 87(7) to develop.<sup>55</sup> I have already dealt with a number of problematic aspects in the available case law under Article 87(7). The biggest problem at present, as evidenced in the recent South Africa and Jordan rulings of the Pre-Trial Chamber, is the encroachment by the Court on the role and prerogatives of the ASP. It was in my view a mistake of the Appeals Chamber in the Kenya case to grant discretion to the Chambers whether or not to refer judicial findings of non-compliance to the ASP. This has led to unfortunate evaluation by a Chamber of the likely effectiveness of what should be the task of the ASP, which results in a situation contrary to the distinction between the judicial and political roles in this field, a distinction helpfully and convincingly defined by the ICTY Appeals Chamber in *Blaškić*. The situation has also led to puzzling, even arbitrary, distinctions among instances of non-cooperation, with a few states (Nigeria and South Africa) having the benefit of having their non-cooperation not referred to the ASP, even in cases that are factually not very dissimilar to cases which were instead referred (Jordan). I would strongly encourage a reversal of the current jurisprudence and assurance that referrals of judicial findings of non-cooperation to the ASP, are automatic upon a finding of non-cooperation deemed important enough to trigger Article 87(7) proceedings.

This brings us to the role of the ASP in dealing with matters of non-cooperation.

In a situation where the ASP would automatically receive — through referrals — *all* instances of non-cooperation deemed important enough to trigger Article 87(7) proceedings, this should become the ASP's primary focus of attention. I am of the opinion that a significant degree of caution should be exercised in relation to 'non-cooperation issues' *that have not been* referred to the ASP by the Court. Without a judicial finding of non-compliance pursuant to

55 See for an analysis of problems in timing of Art. 87(7)-proceedings, Sluiter and Talontsi, *supra* note 8, at 86–89.

Article 87(7), it cannot be convincingly claimed that a state has violated its cooperation obligations under the ICC Statute. It may be that the non-cooperating state has some valid reasons to refuse cooperation. True, in relation to the failure to arrest Al Bashir, which covers almost all instances of non-cooperation, one can hardly imagine at present any possibly valid grounds justifying non-compliance, as all of the objections appear to have been — definitively — litigated.

The Statute, notably Article 112, leaves much to be desired in terms of the mandate that it bestows upon the ASP in terms of non-cooperation. In defence of the ASP's relatively poor performance in the area of non-cooperation until now, it has to be acknowledged that 'considering any question relating to non-cooperation', as reads Article 112(2)(f), is not an unambiguous and powerful mandate. If we can agree that non-cooperation is seriously undermining the authority and effective functioning of the Court and that a more robust mandate and role for the ASP is in order, amendment of Article 112(2)(f) would be wise. Either in Article 112 or in a new provision to be added to the Statute, the mandate and powers of the ASP in respect of non-cooperation could be regulated and strengthened.

The essential question to be asked would then be what type of mandate and powers should the ASP be given in non-cooperation matters, and how should this be organized? One should not in this regard be blind to the political reality and problems surrounding the ICC. Every observer following the ICC would raise the issue that a strong mandate and strong powers for the ASP in non-cooperation matters could lead to a further breakdown in the relationship between the states of the African Union, on the one side, and other states within the ASP, on the other. With one AU state, Burundi, already having left the Court, it makes sense for the ASP to do whatever it takes to discourage other dissatisfied states from leaving the institution. That said, the present situation (in which non-cooperation appears to have become business as usual) is in my view far more a threat to the Court than dissatisfaction within the ASP, or the occasional state leaving the Court.

It is beyond the scope of this paper to present a full analysis and overview of possible powers the ASP should be able to exercise against non-cooperating states, but I will briefly offer a few thoughts.

There are many other international organizations which are, as the ICC, fully dependent on the cooperation, in various ways, of its members, and which have developed mechanisms to sanction members which do not live up to their obligations towards the organization. A well-known example is Article 19 of the UN Charter according to which a UN member in arrears in the payment of its contribution can lose its right to vote in the UN General Assembly. This approach is echoed in Article 112(8) of the ICC Statute. I do not see why similar measures and sanctions could not be developed and used in case of non-cooperation; the serious nature and consequences of non-cooperation could certainly make imposition of such measures necessary and proportionate.

A possible framework for enforcing non-cooperation within the ASP could consist of a number of measures, or administrative sanctions, that can be imposed against the non-cooperating State. If and what administrative sanction would be necessary and proportionate under the circumstances should depend on a number of factors, including the degree to which the non-cooperation has undermined the functioning of the Court and whether the cooperation could be and has been provided at a later stage. Clearly, failure to execute an arrest warrant, while knowing that there is no likely later possibility to provide the requested assistance, should rank as a serious kind of non-cooperation which substantially undermines the functioning of the Court and which would justify a more severe reaction compared to other forms of non-cooperation. Another relevant factor could be whether the non-cooperating state is a 'first offender' or has failed to cooperate with the Court in the past.

Applying the aforementioned factors the ASP, or rather a specialized Committee within the ASP, could then impose a range of measures and administrative sanctions, which in order of severity and bearing in mind the particular context of the Court could consist of the following: (i) a formal warning; (ii) losing the right to present nationals as candidates for ICC (elected) positions; (iii) losing the right to vote within the ASP for a specified period of time; (iv) an administrative fine, for example in the form of increase in the annual contribution to the Court.

## 6. Concluding Observations

This article is about a matter of growing concern to the functioning of the ICC, the enormous difficulty in enforcing the obligation under the Rome Statute of States Parties to cooperate with the Court. It is a matter that has always been of keen interest to Håkan Friman, both when he was working himself on the Rome Statute and later when he was following closely the functioning of the Court.

In this paper I raised the question whether the drafters at Rome had organized the enforcement of cooperation the right way and whether the current approach by the Court and ASP towards non-cooperation is sufficient. To this end, I analysed the drafters' overall intentions with Part 9, which was based, by and large, on a 'harmony approach' towards cooperation. This is evidenced by the provision on consultations, Article 97, and rather scarce attention to the issue of enforcement of cooperation, both at the level of the Court and at the level of the ASP. It follows from the increasing instances of non-cooperation, that the harmony approach envisaged by the drafters is based on an incorrect presumption of good faith cooperation between the States Parties and the Court.

The third section of the article was about the — recent — case law of the Court under Article 87(7). One notices that the Court is distancing itself to some degree from the intentions of the drafters when it comes to the harmony approach to cooperation. For example, the provision on consultations,

Article 97, is being interpreted teleologically, favouring a stronger vertical cooperation regime. However, understandable this trend may be, the reality is that the drafters did not intend a strong, vertical cooperation relationship between the Court and States Parties. The Court can furthermore be criticized for not automatically referring instances of non-cooperation to the ASP and for encroaching upon the role of the ASP by pronouncing itself on the feasibility and usefulness of further action by the ASP.

In the fourth section, I have examined the activities of the ASP in terms of dealing with non-cooperation. It can be concluded that the actions the ASP has taken in this connection have been rather disappointing. There is today a myriad of initiatives, reports and documents, but when the dust settles, the simple fact is that the non-cooperating state has nothing to fear in terms of effective action that could come from the ASP.

That the ASP could do better than this — and that this is necessary to uphold the authority of the Court — has been the object of Section 5. I have proposed a framework for non-cooperation in the ASP, which should provide for effective administrative sanctions in case of non-cooperation. The sanctions should increase in severity when the non-cooperation is seen to be seriously undermining the effective functioning of the Court and when the non-cooperating state is ‘re-offending’.

I realize that a proposal along these lines would amount to new and unprecedented steps, a drastic departure from both the intentions of the drafters when designing the cooperation law, including its enforcement, and the practice of the Court under Article 87(7), as well as (present) approach towards non-cooperation within the ASP. However, much is at stake, namely the authority and effective functioning of the Court. We simply cannot allow non-cooperation to become ‘business as usual’. I would like to think Håkan would agree with this.