

# **The Consequences of Non-Cooperation with the ICC**

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## **Abstract**

The International Criminal Court has been tasked with the prosecution of individuals who have committed the most serious of international crimes; namely War Crimes, Crimes Against Humanity, Genocide and Aggression. Unlike domestic legal systems, the Court does not have an established body that is responsible for arresting suspects and securing their presence at trial and is therefore reliant on the cooperation of States in performing these functions. This cooperation regime is largely successful, with only a few instances of States being unwilling to respond to and cooperate with the requests of the Court. Seeing that non-cooperation from States negatively affects the ICC's ability to function properly, it is crucial that there are appropriate legal consequences in place to address and punish non-cooperation.

The purpose of this dissertation is to investigate the consequences that States face for failing to cooperate with the ICC. Firstly, the importance of international cooperation between States and the ICC shall be highlighted, with a brief discussion of the provisions on cooperation contained within the Rome Statute. This shall be followed by a discussion on how matters of non-cooperation are handled by the ICC and its associated bodies, with reference to specific cases and decisions on non-cooperation, as well as an evaluation and criticism of the remedies that have been developed to address non-cooperation. This dissertation shall also investigate whether it is possible to further develop existing remedies to non-cooperation, or introduce additional remedies in order to strengthen cooperation and address and prevent non-cooperation.

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I declare that this min-dissertation is my own original work. Where other people's work has been this has been properly acknowledged and referenced in accordance with departmental requirements.

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## Glossary

Assembly of States Parties	ASP
African Union	AU
Democratic Republic of the Congo	DRC
International Criminal Court	ICC or The Court
Pre-Trial Chamber	PTC
Rome Statute of the International Criminal Court	Rome Statute or The Statute
United Nations	UN
United Nations Security Council	UNSC

# Table of Contents

## Chapter One

<b>Introduction</b>	<b>1</b>
<b>1. Problem Statement</b>	<b>1</b>
<b>2. Non-Cooperation</b>	<b>2</b>
<b>3. Research Questions</b>	<b>3</b>
<b>4. Research Methodology</b>	<b>3</b>
<b>5. Literature Review</b>	<b>3</b>
<b>5.1. Initial Thoughts on the ICC</b>	<b>3</b>
<b>5.2. Cooperation and the failure to Cooperate</b>	<b>4</b>
<b>5.3. Non-Cooperation: Consequences and Remedies</b>	<b>6</b>
<b>6. Delimitation</b>	<b>7</b>
<b>7. Chapter Outline</b>	<b>8</b>

## Chapter Two

<b>International Cooperation and Judicial Assistance</b>	<b>9</b>
<b>1. Introduction</b>	<b>9</b>
<b>2. The Cooperation of States with the Court</b>	<b>9</b>
<b>2.1. States Parties' Obligation to Cooperate</b>	<b>9</b>
<b>2.2. Requests to Non-States Parties for Cooperation</b>	<b>10</b>
<b>3. Domestic Legislation and Cooperation</b>	<b>11</b>
<b>4. The Types of Cooperation Requested by the Court</b>	<b>12</b>
<b>4.1. Arrest and Surrender</b>	<b>12</b>
<b>4.2. Other Forms of Cooperation</b>	<b>12</b>
<b>5. Issues Relating to Cooperation with the Court</b>	<b>13</b>
<b>5.1. Competing Requests</b>	<b>13</b>
<b>5.2. Consultations with the Court</b>	<b>14</b>
<b>5.3. Waiver of Immunity and Consent to Surrender</b>	<b>15</b>
<b>6. Failure to Cooperate</b>	<b>16</b>

## Chapter Three

<b>The Consequences of Non-Cooperation</b>	<b>17</b>
<b>1. Introduction</b> .....	<b>17</b>
<b>2. First Consequences for States Parties</b> .....	<b>17</b>
<b>2.1. Case Study: Exercising Discretion</b> .....	<b>17</b>
<b>2.2. Case Study: Failure to Arrest and Surrender Al-Bashir</b> .....	<b>18</b>
<b>3. First Consequences for Non-States Parties</b> .....	<b>24</b>
<b>3.1. Case Study: Sudan</b> .....	<b>24</b>
<b>3.2. Suspects in the Territory of a Non-State Party</b> .....	<b>26</b>
<b>4. Referral of Non-Cooperation</b> .....	<b>26</b>
<b>4.1. A Criticism of Referral Procedures</b> .....	<b>27</b>
<b>5. The Assembly of States Parties</b> .....	<b>27</b>
<b>5.1. Assembly Procedures Relating to Non-Cooperation</b> .....	<b>28</b>
<b>5.2. The Bureau</b> .....	<b>30</b>
<b>5.3. A Criticism of ASP Procedures and Remedies</b> .....	<b>31</b>
<b>6. The United Nations Security Council</b> .....	<b>33</b>
<b>6.1. Action taken by the UNSC in ICC Decisions</b> .....	<b>34</b>
<b>6.2. A Criticism of the UNSC</b> .....	<b>34</b>
<b>7. Developing the Consequences of Non-Cooperation with the ICC</b> .....	<b>35</b>
<b>7.1. Future Non-Cooperation Decisions and Referrals</b> .....	<b>35</b>
<b>7.2. Enhancing the Role of the UNSC</b> .....	<b>36</b>
<b>7.3. Additional Remedies</b> .....	<b>38</b>
<b>7.4. Strengthening the ASP</b> .....	<b>40</b>

## Chapter Four

<b>Conclusion</b>	<b>42</b>
<b>References</b>	<b>45</b>

# Chapter One

## Introduction

### 1. Problem Statement

In July 1998, the Rome Statute was adopted, with it coming into force in July 2002.<sup>1</sup> Its purpose was to create the International Criminal Court (hereinafter the ICC or the Court), a permanent international court to try individuals for war crimes, crimes against humanity, genocide and the crime of aggression.<sup>2</sup> As the Court does not have a police or peacekeeping force at its disposal to arrest suspects and secure their presence for trial, it has to rely on States to cooperate with it in the investigation of situations and in arresting and securing of suspects for trial.<sup>3</sup>

The Court has over the years observed varied levels of cooperation from States; ranging from full cooperation in some instances and selective cooperation in others, to instances where States have either full out rejected the authority of the Court or have created “pseudo-legal hurdles” to avoid cooperating with the requests of the Court.<sup>4</sup> Uganda, the Democratic Republic of the Congo and the Central African Republic were some of the first States to refer a situation in their territory;<sup>5</sup> and cooperate with the ICC in arresting and prosecuting persons responsible for committing atrocity crimes in their territory. The assistance of these States has resulted in the arrest and trials of various high-level individuals. While some cases have reached a guilty verdict,<sup>6</sup> others are ongoing,<sup>7</sup> or have been closed and the suspect acquitted.<sup>8</sup>

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<sup>1</sup> The Rome Statute of the International Criminal Court 1998.

<sup>2</sup> Article 5 of the Rome Statute (n above)

<sup>3</sup> Article 86 of the Rome Statute (n 1 above)

<sup>4</sup> Hillebrecht, C and Straus, S “Who Pursues the Perpetrators? State Cooperation with the ICC” (2017) 39(1) *Human Rights Quarterly* 162 163.

<sup>5</sup> Article 14 of the Rome Statute (n 1 above)

<sup>6</sup> *The Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06 [Convicted: Reparations/Compensation Phase] *The Prosecutor v. Jean-Pierre Bemba Gombo* ICC-01/05-01/08 [Convicted: Under Appeal]

<sup>7</sup> *The Prosecutor v Dominic Ongwen* ICC-02/04-01/15 [Trial Ongoing]

<sup>8</sup> *The Prosecutor v. Mathieu Ngudjolo Chui* ICC-01/04-02/12 [Acquitted]

## 2. Non-Cooperation

Although non-cooperation is rare among States,<sup>9</sup> its occurrence has a negative impact on the reputation of the Court among its members and non-members alike. This can be illustrated by the situation in Darfur, Sudan. In 2005, the UN Security Council drafted Resolution 1593,<sup>10</sup> which addressed the conflict in Sudan and referred the matter to the ICC.<sup>11</sup> The Court investigated the matter and identified several individuals deemed responsible for the crimes committed in the country, including Omar Al-Bashir the president of Sudan. Two arrest warrants were issued by the court in 2009 and 2010 and all States Parties were requested to cooperate with the Court in arresting and surrendering him to the Court.<sup>12</sup> As of 2018, Al-Bashir remains yet to be arrested as States have not complied with the requests of the Court. This has led to findings by the Court of non-cooperation against ICC Member States that Al-Bashir has visited over the years, including Chad, Malawi, the Democratic Republic of the Congo, Nigeria, Kenya, Uganda, Djibouti, South Africa and Jordan. In July 2017, Pre-Trial Chamber II of the ICC found that South Africa had failed to cooperate with the Court in arresting and surrendering Al-Bashir when he was in the territory in 2015.<sup>13</sup> In determining an appropriate penalty, it was held that a referral of South Africa's non-compliance would be of no consequence as a mechanism for the Court to obtain cooperation.<sup>14</sup> One of the reasons presented was that previous referrals of non-cooperation had not resulted in any consequences for the offending States.<sup>15</sup>

These events illustrate the importance of cooperation for international tribunals like the ICC and highlights some weaknesses in the armour of the Court. Firstly, the ICC cannot function effectively without the cooperation of States. Secondly, it is clear from the above that the ICC and its associated bodies do not have effective remedies in place to address the failure of States in complying with cooperation obligations.

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<sup>9</sup> Hillebrecht and Straus (n 4 above) 174.

<sup>10</sup> Security Council resolution 1593 (2005) [Sudan] 31 March 2005, S/RES/1593.

<sup>11</sup> Article 13(b) of the Rome Statute (n 1 above)

<sup>12</sup> International Criminal Court *Al Bashir Case* <https://www.icc-cpi.int/darfur/albashir#9> (accessed 26 March 2018)

<sup>13</sup> *Prosecutor v Omar Hassan Ahmad Al Bashir [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]* ICC-02/05-01/09 302 (6 July 2017) (hereinafter the "South Africa decision")

<sup>14</sup> *South Africa Decision* (n above) at 137.

<sup>15</sup> *South Africa Decision* (n 13 above) at 138.

### **3. Research Questions**

What consequences do States face for not cooperating with the ICC?

- a.) Do these consequences encourage States to cooperate with the ICC in existing and future situations being investigated by the Court?
- b.) Are these consequences appropriate for addressing and punishing non-cooperation by States?
- c.) Is it possible to develop and strengthen these existing remedies; as well as introduce other remedies through amendment of the Rome Statute to appropriately address and punish States for not cooperating with the requests of the ICC?
- d.) What other factors may influence a State's decision to cooperate with the ICC?

### **4. Research Methodology**

Academic desktop research will be conducted. The research will include an evaluation of international law relevant to international criminal tribunals; including treaties, resolutions and procedures adopted by the Assembly of States Parties (hereinafter the ASP,) resolutions adopted by the United Nations Security Council (hereinafter the UNSC,) case law in both international and local jurisdictions and public documents released by the ICC and the UNSC. I shall rely on secondary sources in the form of views expressed by authoritative writers on International Law as set out in journal articles and textbooks as well as in reliable news and public interest sites.

### **5. Literature Review**

#### **5.1. Initial Thoughts on the ICC**

The former president and judge of the International Criminal Tribunal for Yugoslavia, Antonio Cassese, wrote an analysis on a newly created International Criminal Court in 1999, in which various aspects of the Court and its Statute and their contribution to international criminal law are discussed.<sup>16</sup> With regards to the issue of State cooperation, the similarities and differences between the ICC the *ad-hoc* tribunals of

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<sup>16</sup> Cassese, A "The Statute of the International Criminal Court: Some Preliminary Reflections" (1999) 10(1) *European Journal of International Law* 144.

the 1990's are discussed, alongside various aspects relating to cooperation.<sup>17</sup> Noting the weakness in the Court's cooperation regime, he stated:

The provisions on State cooperation with the court should be clarified and strengthened so as to leave no loopholes available to those States which are unwilling to allow the court to exercise criminal jurisdiction over persons under their control.<sup>18</sup>

## **5.2. Cooperation and the failure to Cooperate**

As the Court started its investigations and opened cases, we were able to observe how it would handle situations brought before it and how it would interact with States. Various issues were soon identified which would affect the proper functioning of the court.

### *Varied Cooperation*

A comprehensive study by Hillebrecht and Straus notes the variation in States' cooperation with the ICC. The article recognises that the Court has established itself as an essential part of modern international criminal law and notes the weakness in its dependence on cooperation of States to prosecute suspected perpetrators of atrocity crimes.<sup>19</sup> The reasons behind States' decisions to cooperate with the court are discussed. These include a State's domestic politics, the international ambitions of the State and the possible economic and reputational consequences of not cooperating with the Court.<sup>20</sup> In their research the authors also note that "cooperation with the ICC is a relatively nuanced phenomenon with States very rarely cooperating with all of the Court's requests."<sup>21</sup> Various situations under investigation by the court are discussed and their attitudes towards the ICC are evaluated and criticised.<sup>22</sup> As an example, the authors discuss how Uganda's willingness to co-operate with the ICC changed once the ruling government realised the growing possibility of its own members being targeted by the Court.<sup>23</sup> The authors identify three areas that require further research with regards to ICC/State cooperation. Firstly, the involvement of the ICC during

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<sup>17</sup> Cassese (n above) 164-167.

<sup>18</sup> Cassese (n 16 above) 171.

<sup>19</sup> Hillebrecht and Straus (n 4 above) 162-163.

<sup>20</sup> Hillebrecht and Straus (n 4 above) 167-168.

<sup>21</sup> Hillebrecht and Straus (n 4 above) 173.

<sup>22</sup> Hillebrecht and Straus (n 4 above) 173-185.

<sup>23</sup> Hillebrecht and Straus (n 4 above) 178.

conflicts can shape the incentive structures of those at war; in that successful cooperation from States is dependent on who is likely to be investigated and prosecuted by the court. Secondly, the deterrent power of the ICC is dependent on how politically neutral the court is when conducting investigations and prosecutions in a specific situation. Finally, the authors identify that better understanding is needed of the factors that further influence the cooperation regime of the Court; such as decisions of commanders and political leaders during conflicts, social pressure from international allies to cooperate with the Court, as well as the possibility of improving domestic efforts in the prosecution of atrocity crimes.<sup>24</sup>

### *The African Union and the ICC.*

The strained relationship between the ICC, the UNSC and the African Union regarding cooperation is discussed by Tladi.<sup>25</sup> The role of cooperation in the relationship between the ICC, the AU and the UNSC is assessed and it is argued that cooperation is used as a tool by these actors to achieve political objectives, while at the same time is being hampered by the power struggle between these bodies.<sup>26</sup> The article also discusses the cooperation regime of the court and the manner in which certain States Parties try to address non-cooperation.<sup>27</sup> The failure of these bodies to cooperate with each other is illustrated in the manner in which the situations in Libya and Sudan have been handled by all parties involved.<sup>28</sup> The article also discusses the limited scope of cooperation obligations in matters referred to the ICC by the UNSC which have led to some legal loopholes in the cooperation regime.<sup>29</sup> It is suggested that this limited scope is as a result of political considerations by these organizations and global State powers.<sup>30</sup> It is also suggested that the UNSC lacks the political will to ensure cooperation if one evaluates how it has dealt with the situations in Libya and Sudan.<sup>31</sup> It is also suggested that the ICC has also at times harmed the objective of cooperation due to its ongoing attempts at expanding the scope of cooperation beyond what is

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<sup>24</sup> Hillebrecht and Straus (n 4 above) 186-188.

<sup>25</sup> Tladi, DD "When Elephants Collide it is the Grass that Suffers: Cooperation and the Security Council in the Context of the AU/ICC Dynamic" (2014) 7 *African Journal of Legal Studies* 381.

<sup>26</sup> Tladi (n above) 385.

<sup>27</sup> Tladi (n 25 above) 387-390.

<sup>28</sup> Tladi (n 25 above) 391-393.

<sup>29</sup> Tladi (n 25 above) 393-394.

<sup>30</sup> Tladi (n 25 above) 394-395.

<sup>31</sup> Tladi (n 25 above) 395.

provided in the Rome Statute and its failure to address legal arguments presented in non-cooperation cases.<sup>32</sup>

### 5.3. Non-Cooperation: Consequences and Remedies

The Rome Statute provides that where a State Party fails to comply with a request to cooperate with the Court, a finding of non-cooperation may be made, and the matter may be referred to the ASP or the UNSC.<sup>33</sup> In a piece written for the Institute for Security Studies by Allan Ngari, the 2017 decision on South Africa's non-compliance with the ICC is discussed.<sup>34</sup> It is noted that there are no guidelines as to what these bodies should do when they receive referrals for non-cooperation.<sup>35</sup> He also highlights the vague provision that the ASP "shall consider questions relating to non-cooperation,<sup>36</sup>" and that UNSC Resolution 1593 does not provide any remedies against States who fail to comply with the request to cooperate.<sup>37</sup>

#### *Existing Remedies to Non-Cooperation*

The possible remedies that the ICC could depend on to combat non-cooperation is evaluated by Van Der Vyver.<sup>38</sup> He notes that the ICC can only make a finding of non-compliance and that the final decision as to what must be done with the culprit State is up to whichever body the Court referred the matter to.<sup>39</sup> The article discusses the possibility of the UNSC imposing punitive measures in terms of chapter VII of the UN Charter against States that fail to cooperate with the court and the fact that they have not been implemented in any situation of non-cooperation.<sup>40</sup> The role played by the ASP in dealing with non-cooperation is also discussed;<sup>41</sup> including an analysis of the procedures adopted by the ASP in cases of non-cooperation by States.<sup>42</sup> Tladi notes the unlikelihood of these procedures having any real effect on non-cooperation and

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<sup>32</sup> Tladi (n 25 above) 398.

<sup>33</sup> Article 87(7) of the Rome Statute (n 1 above)

<sup>34</sup> Ngari, A "The real problem behind South Africa's refusal to arrest al-Bashir" 10 July 2017 *ISS Today* available at <https://issafrica.org/iss-today/the-real-problem-behind-south-africas-refusal-to-arrest-al-bashir> (accessed 26 March 2018)

<sup>35</sup> Ngari (n above)

<sup>36</sup> Article 112 (f) of the Rome Statute (n 1 above)

<sup>37</sup> Ngari (n 34 above)

<sup>38</sup> Van der Vyver, JD "The Al Bashir Debacle" (2015) 15 *African Human Rights Law Journal* 559-574.

<sup>39</sup> Van der Vyver (n above) 576.

<sup>40</sup> Van der Vyver (n 38 above) 576-577.

<sup>41</sup> Van der Vyver (n 38 above) 577.

<sup>42</sup> *Assembly Procedures Relating to Non-Cooperation*, Resolution ICC-ASP/10/Res.5 Annex.

suggests that they appear to be more for publicity than for actually ensuring cooperation.<sup>43</sup>

### *Developing Non-Cooperation Remedies*

Ways to strengthen the Court's cooperation regime is further discussed in an article by Barnes.<sup>44</sup> It is suggested that the ICC must incentivise States to follow through with their obligations under the Statute.<sup>45</sup> The article proposes the introduction of new provisions in the Statute which provide for suspension or expulsion of States parties from the ICC. The possibility of imposing UNSC sanctions is also discussed.<sup>46</sup> It is noted that careful consideration is needed with regards to the introduction and development of new sanctions as the Statute would need to be amended as well as the fact that unwanted issues and consequences for the Court could develop.<sup>47</sup> The option on UNSC sanctions is appealing as it is already provided for in the Rome Statute to refer an instance of non-cooperation with the ICC to the Security Council.<sup>48</sup> However, as noted by Pre Trial Chamber II,<sup>49</sup> such measures have not as yet resulted in appropriate sanctions against non-cooperating States.<sup>50</sup>

## **6. Delimitation**

The aim of this dissertation is to discuss various aspects of the cooperation regime of the ICC, with special focus on the non-cooperation of States and the remedies that have been developed to address and remedy instances of non-cooperation. The dissertation shall also criticise existing remedies to non-cooperation and attempt to propose ways to improve non-cooperation procedures and remedies. Although the dissertation shall also refer to other aspects of the ICC regime, such as issues relating to immunity and the tension between the Court and the African Union, they shall not be discussed in detail.

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<sup>43</sup> Tladi (n 25 above) 390.

<sup>44</sup> Barnes, GP "The International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir" (2011) 34(6) *Fordham International Law Journal* 1584.

<sup>45</sup> Barnes (n above) 1616-1617.

<sup>46</sup> Barnes (n 44 above) 1617.

<sup>47</sup> Barnes (n 44 above) 1617-1618.

<sup>48</sup> Barnes (n 44 above) 1618; Art 87(7) of the Rome Statute

<sup>49</sup> See fn 13-15 above.

<sup>50</sup> See also Ngari (n 34 above)

## **7. Chapter Outline**

In the second chapter the provisions on cooperation with the ICC as provided in part 9 of the Rome Statute shall be discussed. The role and importance of state cooperation with the court shall also be highlighted.

Chapter three concerns the consequences and remedies that have been developed to address States' failure to cooperate with the Court. Reference shall be made to specific cases of non-cooperation and the arguments presented by the Court and the offending States that led to specific findings of non-cooperation. The role and effectiveness of the ASP and the UNSC in dealing with non-cooperation, as well as the remedies that these bodies have at their disposal, shall also be discussed. Other possible remedies and initiatives to strengthen cooperation and prevent non-cooperation shall also be proposed and evaluated.

## Chapter Two

### **International Cooperation and Judicial Assistance**

#### **1. Introduction**

Within the context of the ICC, international cooperation and judicial assistance can be defined as: “The provision of support by an international legal person (the requested State) for criminal proceedings in the forum of a distinct international legal person (the ICC).”<sup>1</sup> Part 9 of the Rome Statute addresses various aspects of cooperation with the Court; ranging from general provisions with regards to cooperation requests,<sup>2</sup> the different forms of cooperation,<sup>3</sup> to issues that may be identified with regards to the execution of the court’s requests.<sup>4</sup> Important aspects of these provisions as they relate to non-cooperation shall be discussed below.

#### **2. The Cooperation of States with the Court**

As the ICC does not have its own police or military force, cooperation from States is crucial for its effective functioning, especially in matters relating to the arrest and surrender of suspects. The way both States Parties and non-States Parties cooperate with the Court is regulated by the opening provisions of part 9 of the Statute, as well as through provisions contained in other sources of international law.

##### **2.1. States Parties’ Obligation to Cooperate**

The general obligation to cooperate with the Court reads:

States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court<sup>5</sup>.

This provision confirms that the obligation to cooperate with the court is confined to States who have signed and ratified the Statute<sup>6</sup>. Therefore, as per well-established

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<sup>1</sup> C Kress & K Prost ‘International Cooperation and Judicial Assistance’ in O Triffterer & K Ambos (eds) *Rome Statute of the International Criminal Court: A Commentary* (2016) 2005.

<sup>2</sup> Article 87 of the Rome Statute of the International Criminal Court 1998.

<sup>3</sup> Articles 89 & 93 of the Rome Statute (n above)

<sup>4</sup> Article 97 of the Rome Statute (n 2 above)

<sup>5</sup> Article 86 of the Rome Statute (n 2 above)

<sup>6</sup> C Kress & K Prost ‘International Cooperation and Judicial Assistance’ in Triffterer & Ambos (n 1 above) 2014.

rules of international law, the Statute does not create obligations or rights for States not party to it without their consent.<sup>7</sup> This obligation to cooperate is restricted to the State as a legal person and does not extend to State officials or private persons in their individual capacity.<sup>8</sup> This provision is of considerable importance for the remainder of part 9 and for the Statute as a whole, as it amounts to a major interpretive guideline that places obligations and responsibilities upon all parties involved to comply with the provisions contained within.<sup>9</sup>

### *Transmission of Requests to States Parties*

The Court is authorised by the Statute to submit requests to States Parties for all forms of cooperation through diplomatic or other appropriate communication channels as designated by each State Party upon ratification.<sup>10</sup> Provision was made during drafting negotiations to include these other channels of communication, such as those found in mutual assistance or extradition treaties, so that the Court would always have a channel available for the submission of requests, therefore providing for a more effective cooperation regime.<sup>11</sup> Provision was also made for the transmission of requests through the International Criminal Police Organization (Interpol) or any other appropriate international organization, without prejudice to the provisions of the article 87(1)(a).<sup>12</sup>

## **2.2. Requests to Non-States Parties for Cooperation**

The Statute empowers the Court to invite non-States Parties to cooperate based on an *ad-hoc* arrangement or agreement with that State.<sup>13</sup> This provision indicates that any cooperation agreement between the Court and States not party to the Statute is of a voluntary nature.<sup>14</sup> A cooperation obligation between the Court and States not party to the Statute can either take the form of a legally binding cooperation regime or

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<sup>7</sup> Article 34 of the Vienna Convention on the Law of Treaties 1969.

<sup>8</sup> C Kress & K Prost 'International Cooperation and Judicial Assistance' in Triffterer & Ambos (n 1 above) 2016.

<sup>9</sup> C Kress & K Prost 'International Cooperation and Judicial Assistance' in Triffterer & Ambos (n 1 above) 2016-2017.

<sup>10</sup> Article 87(1)(a) of the Rome Statute (n 2 above)

<sup>11</sup> C Kress & K Prost 'International Cooperation and Judicial Assistance' in Triffterer & Ambos (n 1 above) 2024.

<sup>12</sup> Article 87(1)(b) of the Rome Statute (n 2 above)

<sup>13</sup> Article 87(5)(a) of the Rome Statute (n 2 above)

<sup>14</sup> C Kress & K Prost 'International Cooperation and Judicial Assistance' in Triffterer & Ambos (n 1 above) 2028.

can be of an informal nature.<sup>15</sup> When a non-State Party has bound itself to a voluntary cooperation agreement with the Court as per this section, it has taken up an international responsibility to ensure that such a cooperation request is adhered to<sup>16</sup>. This obligation is to be differentiated from an obligation of States not party to the Statute to cooperate with the Court in terms of a request from the UNSC as in the case of the resolutions that referred the situations in Sudan and Libya to the ICC.<sup>17</sup> Such an obligation is compulsory and therefore binding in terms of the UN Charter.<sup>18</sup>

### 3. Domestic Legislation and Cooperation

States Parties must ensure that there are procedures available under national law for all forms of cooperation with the Court.<sup>19</sup> States Parties are therefore required to introduce domestic procedures to meet their cooperation obligations.<sup>20</sup> Where a State Party has not implemented any appropriate domestic procedures, it has been held that:

any purported deficiency in domestic legal procedures (or interpretation thereof), cannot be raised as a shield to protect a State Party from its obligation to cooperate with the Court, or to undermine any application for non-compliance under Article 87(7) of the Statute that may result.<sup>21</sup>

While many States Parties have adopted legislation that implements part 9 into their domestic law, there are many cases where this implementing legislation remains to be enacted.<sup>22</sup> In the ASP resolutions on cooperation, the importance of such domestic legislation is regularly emphasised, with States Parties being urged to adopt such

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<sup>15</sup> C Kress & K Prost 'International Cooperation and Judicial Assistance' in Triffterer & Ambos (n 1 above) 2029.

<sup>16</sup> As above.

<sup>17</sup> UNSC Resolution 1593 [*Sudan*] 31 March 2005, S/RES/1593; UNSC Resolution 1970 [*Peace and Security in Africa*] 26 February 2011 S/RES/1970.

<sup>18</sup> Article 103 of the Charter of the United Nations 1945.

<sup>19</sup> Article 88 of the Rome Statute (n 2 above)

<sup>20</sup> C Kress & K Prost 'International Cooperation and Judicial Assistance' in Triffterer & Ambos (n 1 above) 2044.

<sup>21</sup> *Prosecutor v Uhuru Muigai Kenyatta [Decision on Prosecution's applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date]* ICC-01/09-02/11-908 (31 March 2014) at 47.

<sup>22</sup> C Kress & K Prost 'International Cooperation and Judicial Assistance' in Triffterer & Ambos (n 1 above) 2045.

legislative and other measures so that their obligations under the Statute are fully realized.<sup>23</sup>

#### **4. The Types of Cooperation Requested by the Court**

States are required to cooperate with the Court in various ways to ensure its effective functioning in the prosecution of international crimes. The different types of cooperation are provided for in different sections of part 9.

##### **4.1. Arrest and Surrender**

Article 89 of the Statute deals with aspects relating to the arrest and surrender of persons to the Court. The first paragraph provides that where a person wanted by the Court is found to be in the territory of a certain State, the Court is to request the cooperation of that State in the arrest and surrender of that person<sup>24</sup>. This provision is to be read in conjunction with the provisions in article 58 dealing with the requirements for the issuing of arrest warrants.<sup>25</sup> Furthermore, the reference to ‘States’ in this provision recognises that the Court is empowered to transmit cooperation requests to both States Parties and non-States Parties.<sup>26</sup> Additionally, States Parties have an obligation to comply with these requests in accordance with Part 9, as well as in accordance with procedures adopted under national law.<sup>27</sup>

##### **4.2. Other Forms of Cooperation**

Apart from requests to States to arrest and surrender persons, other forms of cooperation are also required of States to ensure the effective functioning of the Court. The Statute provides that States Parties are required to comply with requests to provide for various forms of assistance in relation to investigations or prosecutions.<sup>28</sup> The forms of assistance required from States range from the identification and locating of persons, to the examination and exhumation of places or sites, to any other non-prohibited form of assistance undertaken with a view to helping out with the

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<sup>23</sup> ASP Sixteenth Session *Resolution on Cooperation* ICC-ASP/16/Res.2 14 December 2017 para 6.

<sup>24</sup> Article 89(1) of the Rome Statute (n 2 above).

<sup>25</sup> Article 58(1) of the Rome Statute (n 2 above).

<sup>26</sup> C Kress & K Prost ‘International Cooperation and Judicial Assistance’ in Triffterer & Ambos (n 1 above) 2048.

<sup>27</sup> Article 89(1) of the Rome Statute (n 2 above).

<sup>28</sup> Article 93(1) of the Rome Statute (n 2 above).

investigation and prosecution of crimes within the Court's jurisdiction.<sup>29</sup> Unlike requests to cooperate with the arrest and surrender of persons, this provision indicates that these forms of cooperation are limited to States Parties.<sup>30</sup> A State Party may deny such requests where it is either prohibited by that State's national law,<sup>31</sup> or where the production of documents or disclosure of evidence may compromise the national security of that State.<sup>32</sup> With regards to the former, the Statute limits this refusal to cooperate by providing that the State must consult with the Court to attempt to find another manner to ensure that assistance can be rendered.<sup>33</sup> Furthermore, assistance may not be refused on the grounds that it amounts to an offence of a political, military or financial nature, and neither is there a general provision that allows for refusal where execution of the request would be contrary to the public order, sovereignty or public interest of that State.<sup>34</sup>

## **5. Issues Relating to Cooperation with the Court**

When States are faced with an obligation to cooperate with the Court, there may be situations before such States that may make such cooperation impractical or impossible. The Statute takes such factors into account and contains procedures that are aimed at remedying such situations.

### **5.1. Competing Requests**

Unlike the previous International Criminal Tribunals that were set up in terms of a UN mandate, requests from the ICC do not take priority over other international obligations as provided for in article 103 of the UN Charter.<sup>35</sup> The Statute addresses the possibility of a State Party receiving a request from the ICC and from another State for the surrender of a person in relation to the same criminal conduct. The goal of this section

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<sup>29</sup> Articles 93(1)(a)-(l) of the Rome Statute (n 2 above).

<sup>30</sup> C Kress & K Prost 'International Cooperation and Judicial Assistance' in Triffterer & Ambos (n 1 above) 2081.

<sup>31</sup> Article 93(1)(l) of the Rome Statute (n 2 above).

<sup>32</sup> Article 93(4) of the Rome Statute (n 2 above).

<sup>33</sup> Article 93(3) of the Rome Statute (n 2 above).

<sup>34</sup> C Kress & K Prost 'International Cooperation and Judicial Assistance' in Triffterer & Ambos (n 1 above) 2083.

<sup>35</sup> Maogoto, JN "A Giant without Limbs: The International Criminal Court's State-Centric Cooperation Regime" (2004) 23 *The University of Queensland Law Journal* 102 124.

is to ensure that all individuals are tried before a competent court and are subject to protections and penalties that meet international standards.<sup>36</sup>

### *Notification*

It is provided that where a State Party receives requests from both the ICC and another state for the surrender of a person for the same conduct, the State shall notify both parties of this fact.<sup>37</sup> This section applies to all situations of competing requests, irrespective of whether the other request comes from a State Party or a non-State Party.<sup>38</sup>

### *Prioritising Requests*

In the instance where a competing request is from a State Party, the Statute identifies the circumstances where priority is given to the request of the Court.<sup>39</sup> The first circumstance is where the Court determines that the case is admissible under articles 18 and 19 of the Statute.<sup>40</sup> The second is where a determination of admissibility has been made by the court in terms of Article 90(1).<sup>41</sup> This would be in the instance where the Court has already made a positive ruling on the admissibility of the case without knowledge of the requesting States investigation and therefore reconsiders the issue in light of being made aware of this fact.<sup>42</sup> Where the competing request is from non-State Party, the requested State must prioritise the Court's request where it is not under an international obligation to the requesting State to extradite a suspect.<sup>43</sup>

## **5.2. Consultations with the Court**

The Statute recognises that States can face various issues that can have an effect on the execution of a cooperation request.<sup>44</sup> In order to remedy such issues, a State Party

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<sup>36</sup> As above.

<sup>37</sup> Article 90(1) of the Rome Statute (n 2 above)

<sup>38</sup> C Kress & K Prost 'International Cooperation and Judicial Assistance' in Triffterer & Ambos (n 1 above) 2061.

<sup>39</sup> Article 90(2) of the Rome Statute (n 2 above)

<sup>40</sup> Article 90(2)(a) of the Rome Statute (n 2 above)

<sup>41</sup> Article 90(2)(b) of the Rome Statute (n 2 above)

<sup>42</sup> C Kress & K Prost 'International Cooperation and Judicial Assistance' in Triffterer & Ambos (n 1 above) 2063.

<sup>43</sup> Article 90(4) of the Rome Statute (n 2 above).

<sup>44</sup> C Kress & K Prost 'International Cooperation and Judicial Assistance' in Triffterer & Ambos (n 1 above) 2115.

is required to consult with the Court in the instance where problems are identified with regards to the proper execution of a cooperation obligation.<sup>45</sup> Examples of such problems are highlighted by the Statute and include: where there is insufficient information available with regards to the request, where the person wanted by the Court cannot be located and where the execution of the request may result in a breach of pre-existing treaty obligations.<sup>46</sup>

### 5.3. Waiver of Immunity and Consent to Surrender

The Court is prohibited from proceeding with a request for surrender or assistance in certain circumstances. The first instance is where a request requires a State to act inconsistently with its obligations under international law with regards to the immunity of a person or property of a third State.<sup>47</sup> The second instance is where a State is required to act inconsistently with obligations arising from pre-existing agreements with third States.<sup>48</sup> In each of these instances, the Court is required to obtain consent of the third State to waive immunity or disregard the pre-existing agreement. In recent decisions on non-cooperation, the Court and States Parties have been unable to reach consensus regarding the proper interpretation of the rules presented in article 98. In the recent decisions on South Africa and Jordan's failure to cooperate with the Court's requests to arrest and surrender Al-Bashir,<sup>49</sup> the pre-trial chamber has held that a State Party may not rely on its own understanding of the article in deciding not to cooperate with the Court's requests.<sup>50</sup> The Chamber has also noted in its decisions that it is up to the Court, and not States Parties, to address matters with regards to article 98.<sup>51</sup>

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<sup>45</sup> Article 97 of the Rome Statute (n 2 above)

<sup>46</sup> Article 97(a)-(c) of the Rome Statute (n 2 above)

<sup>47</sup> Article 98(1) of the Rome Statute (n 2 above)

<sup>48</sup> Article 98(2) of the Rome Statute (n 2 above)

<sup>49</sup> *Prosecutor v Omar Hassan Ahmad Al Bashir [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]* ICC-02/05-01/09 302 (6 July 2017); *Prosecutor v Omar Hassan Ahmad Al Bashir [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]* ICC-02/05-01/09-309 11 December 2017.

<sup>50</sup> *South Africa Decision* (n above) para 99; *Jordan Decision* (n above) para 41.

<sup>51</sup> *South Africa Decision* (n 49 above) para 100; *Jordan Decision* (n 49 above) para 41.

## 6. Failure to Cooperate

Failure to cooperate with the Court has a negative impact on its proper functioning and constitutes a breach of an international obligation,<sup>52</sup> with that breach constituting an internationally unlawful act entailing the international responsibility of the State.<sup>53</sup> The Statute contains procedures to be followed by the Court to address non-cooperation by both States Parties and non-States Parties.<sup>54</sup> These procedures initiate further measures against uncooperative States, all of which shall be discussed in the chapter below.

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<sup>52</sup> C Kress & K Prost 'International Cooperation and Judicial Assistance' in Triffterer & Ambos (n 1 above) 2034.

<sup>53</sup> Article 1 of the International Law Commission's Articles on State Responsibility 2001.

<sup>54</sup> Articles 87(5) & 87(7) of the Rome Statute (n 2 above)

## Chapter Three

### The Consequences of Non-Cooperation

#### 1. Introduction

In this chapter, the remedies and procedures that have been developed by the ICC and its related bodies to address and prevent non-cooperation shall be discussed. In addition, the possible development of further remedies to strengthen the cooperation regime of the Court shall also be suggested.

#### 2. First Consequences for States Parties

In the event that a State Party does not comply with a request by the Court to cooperate, the Court may make a finding of non-cooperation and the matter may be referred to the Assembly of States Parties or the UN Security Council.<sup>1</sup> The procedure to be followed in terms of this provision is to be found in the Court's Regulations,<sup>2</sup> which state that when a Chamber has made a cooperation request, proceedings as per article 87(7) may be initiated by that Chamber.<sup>3</sup> Before such a finding can be made, the requested State is to be given an opportunity to be heard by the Chamber as to why cooperation did not take place.<sup>4</sup> Following a finding of non-cooperation, the President of the Court has the discretion to refer the matter to the appropriate body that will be tasked with further addressing the State's failure to cooperate.<sup>5</sup>

##### 2.1. Case Study: Exercising Discretion

Within the context of the *Kenyatta* case,<sup>6</sup> the Pre-Trial chamber placed a large amount of emphasis on the discretionary nature of a finding of non-cooperation and further referral during its decision on Kenya's non-cooperation with the arrest and surrender of the current president of Kenya, heard in December 2014.<sup>7</sup> It was held that even where it has been determined that a State has failed to comply with a cooperation

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<sup>1</sup> Article 87(7) of the Rome Statute of the International Criminal Court 1998.

<sup>2</sup> Regulations of the International Criminal Court 2004 ICC-BD/01-01-04.

<sup>3</sup> Regulation 109(2) of the ICC Regulations (n above)

<sup>4</sup> Regulation 109(3) of the ICC Regulations (n 2 above)

<sup>5</sup> Regulation 109(4) of the ICC Regulations (n 2 above).

<sup>6</sup> *The Prosecutor v. Uhuru Muigai Kenyatta* ICC-01/09-02/11.

<sup>7</sup> *The 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.

request, the Chamber has to consider whether making a finding of non-cooperation would be appropriate in the circumstances.<sup>8</sup> The PTC read in a requirement that the non-cooperation in question should not be of a trivial or technical nature when making a decision in terms of article 87(7).<sup>9</sup> It was also held that where non-compliance has arisen from a genuine and confirmed lack of capacity or ability, such inaction will be condoned by the Court as a valid justification.<sup>10</sup> It was also noted that the main reason for making a finding of non-cooperation was to further the proceedings in the main case.<sup>11</sup> As a result of the Kenyan Government's continued non-cooperation with the Court, the PTC also found it appropriate to make a decision on non-compliance as further delays would be contrary to the interests of justice.<sup>12</sup> In this decision it was found that it was not appropriate to make a referral of the matter to the ASP and rejected the article 87(7) application.<sup>13</sup>

## 2.2. Case Study: Failure to Arrest and Surrender Al-Bashir

Many cases of non-cooperation heard by the Court have been from visits to the territory of States Parties by President Al-Bashir of Sudan.<sup>14</sup> In most of these cases, non-cooperation arose from the adoption of a decision by the African Union which called on its members to not cooperate with the Court in the arrest and surrender of Al-Bashir, citing article 98 of the Statute to justify its decision.<sup>15</sup> The decisions on Malawi, the Democratic Republic of the Congo, South Africa and Jordan shall be discussed below.

### *Malawi*

In December 2011, PTC I decided upon the failure of Malawi to arrest Al-Bashir when he was in the territory in October 2011 to attend a Summit of the Common Market for Eastern and Southern Africa (COMESA.)<sup>16</sup> Malawi argued that Al-Bashir was

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<sup>8</sup> *Kenya Non-Cooperation* (n above) para 39.

<sup>9</sup> *Kenya Non-Cooperation* (n 7 above) para 40.

<sup>10</sup> *Kenya Non-Cooperation* (n 7 above) para 41.

<sup>11</sup> *Kenya Non-Cooperation* (n 7 above) para 82.

<sup>12</sup> *Kenya Non-Cooperation* (n 7 above) para 89.

<sup>13</sup> *Kenya Non-Cooperation* (n 7 above) para 90.

<sup>14</sup> *Prosecutor v Omar Hasan Ahmad Al-Bashir* ICC-02/05-01/09.

<sup>15</sup> Assembly of the African Union 13<sup>th</sup> Session [Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)] Doc.Assembly/AU/13(XIII) 3 July 2009 para 10.

<sup>16</sup> *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

guaranteed the immunities and privileges afforded to a visiting head of State by virtue of the rules of public international law and by its domestic immunities laws.<sup>17</sup> It was further argued that as Al-Bashir was the head of a non-State Party, waiver of immunity in terms of article 27 of the Statute was not possible. Malawi also argued that it aligned itself with the position adopted by the AU regarding the indictments of sitting heads of States that are not parties to the Statute.<sup>18</sup> The PTC reminded Malawi that it had rejected such an argument in a previous decision when it had issued its first warrant of arrest for Al-Bashir.<sup>19</sup> The Chamber identified article 98(1) of the Statute as the basis of Malawi's arguments, even though it was not expressly referred to in Malawi's observations.<sup>20</sup>

It was held that Malawi was not entitled to rely on article 98(1) to justify its refusal to cooperate and that interpreting article 98 in this manner would disable the Court and international criminal justice contrary to the purposes of the Statute.<sup>21</sup> It was also noted that customary international law created an exception to Head of State immunity when international courts require a Head of State's arrest for committing international crimes and that there were therefore no conflicts between Malawi's obligations towards the Court and obligations under customary international law..<sup>22</sup> It was found that Malawi had failed to comply with the request to cooperate with the Court in surrendering and arresting Al-Bashir, and decided to refer the matter to the UNSC and the ASP .<sup>23</sup>

Following this decision, the ASP Bureau's first report on non-cooperation revealed that dialogue held between the ASP President and Malawian authorities in the beginning of 2012 indicated that Malawi had reaffirmed its intention to meet its obligations under the Rome Statute.<sup>24</sup> It was also reported that in June 2012, Malawi declined to host

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*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 (13 December 2011) (Hereinafter the *Malawi decision*) para 5(i).

<sup>17</sup> *Malawi Decision* (n above) para 8.

<sup>18</sup> As above.

<sup>19</sup> *Malawi Decision* (n 16 above) para 14.

<sup>20</sup> *Malawi Decision* (n 16 above) paras 15 & 17.

<sup>21</sup> *Malawi Decision* (n 16 above) para 41.

<sup>22</sup> *Malawi Decision* (n 16 above) para 43.

<sup>23</sup> *Malawi Decision* (n 16 above) para 47.

<sup>24</sup> ASP Eleventh Session *Report of the Bureau on non-cooperation* ICC-ASP/11/29 (1 November 2012) para 5.

Al-Bashir at an AU Summit that was planned to be held in the Country. Said summit ended up being held in Ethiopia, which is not a State Party to the Rome Statute.<sup>25</sup>

*Democratic Republic of the Congo*

In April 2014, PTC II decided upon the failure of the DRC in arresting and surrendering Al-Bashir to the Court when he was in the Country in February 2014 to attend another COMESA Summit.<sup>26</sup> In this decision, the DRC argued that it was unable to cooperate with the Court due to time constraints.<sup>27</sup> This was rejected by the PTC, as the obligation to arrest Al-Bashir had existed since the warrants for his arrest were issued.<sup>28</sup> The DRC also argued that although it acknowledged that it was under an international obligation to arrest Al-Bashir, such an obligation was subject to the application of article 98(1) of the Statute.<sup>29</sup> Also citing recent decisions of the AU, the DRC claimed that Al-Bashir enjoyed immunities as a result of his position as the Head of an AU Member State and that arresting him would be inconsistent with these decisions and with the obligation to respect his immunities.<sup>30</sup> In contrast to the *Malawi decision*, the PTC did not refer to customary international law when discussing immunities, but instead based its decision on the fact that immunity was implicitly waived because of Resolution 1593 which referred the situation in Sudan to the ICC.<sup>31</sup> It was also confirmed that obligations under the UN Charter took preference over any other international agreement. Therefore, the DRC would not be able to rely on any other decision, including that of the AU, to avoid its obligations to the ICC and the UNSC.<sup>32</sup> The PTC concluded by deciding that the DRC had failed to comply with the Court's request to cooperate, and that the matter would be referred to the ASP and the UNSC.<sup>33</sup>

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<sup>25</sup> *Report of the Bureau* 2012 (n above) para 10.

<sup>26</sup> *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) (Hereinafter the *DRC Decision*)

<sup>27</sup> *DRC Decision* (n above) para 12.

<sup>28</sup> *DRC Decision* (n 26 above) para 15.

<sup>29</sup> *DRC Decision* (n 26 above) para 18

<sup>30</sup> *DRC Decision* (n 26 above) para 19.

<sup>31</sup> *DRC Decision* (n 26 above) para 29.

<sup>32</sup> *DRC Decision* (n 26 above) para 31.

<sup>33</sup> *DRC Decision* (n 26 above) para 34.

## *South Africa*

In July 2017, PTC II decided on South Africa's failure to arrest Al-Bashir when he was in the Country in June 2015 to attend an AU Summit.<sup>34</sup> In May 2015, the ICC was made aware of the fact that Al-Bashir was intending to travel to South Africa to attend this summit.<sup>35</sup> South African authorities were requested to arrest Al-Bashir should he enter the territory and consult with the Court in the event that there were any problems with the execution of this request.<sup>36</sup> Prior to and during Al-Bashir's arrival in South Africa, various meetings were held between representatives of the South African Embassy in the Netherlands and the Court registry in terms of article 97 of the Statute to clarify South Africa's obligations to the Court. A separate meeting between the ICC representatives and the Chief State Law Adviser also took place.<sup>37</sup> In the meantime Al-Bashir entered and left the Country without any resistance from law enforcement.<sup>38</sup>

The main argument presented by South Africa was that Al-Bashir enjoyed immunity under customary international law and that that immunity had not been waived. Therefore, the Court was precluded by article 98(1) of the Statute from requesting the arrest and surrender of Al-Bashir.<sup>39</sup> South Africa also submitted that it was under an obligation under the host agreement concluded between them and the AU to respect Al-Bashir's immunities.<sup>40</sup> South Africa rejected the argument presented in previous decisions that claim that UNSC Resolution 1593 had implicitly waived Al-Bashir's immunities, and submitted that the resolution should be interpreted in a way that is consistent with existing international law.<sup>41</sup> South Africa also submitted that if the PTC found that it was non-compliant, referral would be unnecessary as its purpose would be to cast South Africa in a negative light which would not be an incentive for cooperation.<sup>42</sup>

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<sup>34</sup> *Prosecutor v Omar Hassan Ahmad Al Bashir [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]* ICC-02/05-01/09 302 6 July 2017 (hereinafter the *South Africa Decision*)

<sup>35</sup> *South Africa Decision* (n above) para 5.

<sup>36</sup> *South Africa Decision* (n 34 above) para 6.

<sup>37</sup> *South Africa Decision* (n 34 above) paras 7-14.

<sup>38</sup> *South Africa Decision* (n 34 above) para 15.

<sup>39</sup> *South Africa Decision* (n 34 above) para 32.

<sup>40</sup> *South Africa Decision* (n 34 above) para 33.

<sup>41</sup> *South Africa Decision* (n 34 above) paras 34-38.

<sup>42</sup> *South Africa Decision* (n 34 above) para 39.

It was held that the rights and obligations provided for in the Statute apply to the situation in Sudan because of UNSC Resolution 1593, and that there were no immunities preventing States Parties from executing the requests of the Court for the arrest and surrender of Al-Bashir. It was also held that article 98 of the Statute cannot be relied upon to refuse compliance with a request for arrest and surrender.<sup>43</sup> Regarding the consultations held between South Africa and the Court prior to its failure to arrest Al-Bashir, the Chamber held that such interactions did not have an effect on South Africa's duty to arrest Al-Bashir.<sup>44</sup> The PTC found that South Africa had failed to comply with the request of the Court to arrest Al-Bashir.<sup>45</sup> Interestingly, the PTC found it unnecessary to refer the matter to the ASP and UNSC due to the fact that domestic courts had already ruled that the South African Government had acted in a manner that was inconsistent with the State's obligations in terms of the Statute and its domestic equivalent.<sup>46</sup> It was also observed that no measures had been taken against States Parties in previous non-cooperation decisions.<sup>47</sup> The PTC also took into account that South Africa was the first State to trigger consultation procedures in terms of article 97 of the Statute in order to resolve conflicting obligations under international law and to resolve various legal questions.<sup>48</sup>

### *Jordan*

In December 2017, PTC II decided on the Kingdom of Jordan's failure to arrest Al-Bashir when he was in the country to attend an Arab League summit in March 2017.<sup>49</sup> In February 2017, the Court was made aware of the fact that Al-Bashir was expected to be in Jordan to attend this summit. Jordan was invited to provide the Court with more information and was reminded of the obligation to arrest Al-Bashir in the event that he enters Jordanian territory.<sup>50</sup> It was confirmed that he was invited to attend the

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<sup>43</sup> *South Africa Decision* (n 34 above) paras 107-108.

<sup>44</sup> *South Africa Decision* (n 34 above) para 122.

<sup>45</sup> *South Africa Decision* (n 34 above) para 123.

<sup>46</sup> *South Africa Decision* (n 34 above) para 136; see also *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17.

<sup>47</sup> *South Africa Decision* (n 34 above) para 138.

<sup>48</sup> *South Africa Decision* (n 34 above) para 139.

<sup>49</sup> *Prosecutor v Omar Hassan Ahmad Al Bashir [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 ICC-02/05-01/09-309 11 December 2017* (Hereinafter the *Jordan Decision*)

<sup>50</sup> *Jordan Decision* (n above) para 5.

summit and that he would be attending.<sup>51</sup> It was reported that Al-Bashir eventually travelled to Jordan and left without any interference from law enforcement.<sup>52</sup>

Jordan argued that Bashir enjoyed immunity due to his status as a Head of State and under a pre-existing Arab League Convention.<sup>53</sup> It was also argued that immunity was not waived through Resolution 1593 and that implementing the arrest warrants would violate Jordan's obligations under the 1953 Arab League Convention.<sup>54</sup> It was further submitted that Jordan had requested article 97 consultations with the Court. This request was not granted.<sup>55</sup> The Conclusion of the PTC mirrors that of the South Africa decision with regard to the application of the provisions relating to immunity.<sup>56</sup> It was also held that any consultations, either requested or ongoing, between a State and the Court do not suspend or otherwise affect the validity of a cooperation request.<sup>57</sup> The PTC concluded that Jordan had failed to comply with the Court's request to arrest and surrender Al-Bashir.<sup>58</sup> It was also found necessary to refer the decision to the ASP and the UNSC.<sup>59</sup>

Jordan has since taken this decision on Appeal,<sup>60</sup> submitting that the 2017 Decision had several errors: That the PTC made incorrect conclusions with regards to the effects of the Statute upon Al-Bashir's immunity; that the conclusion that UNSC Resolution 1593 had an effect on Jordan's obligations under international law to grant immunity to Al-Bashir was incorrect; and that even if the Decision was correct, the PTC had abused its discretion in deciding to refer the matter further.<sup>61</sup>

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<sup>51</sup> *Jordan Decision* (n 49 above) paras 6-7.

<sup>52</sup> *Jordan Decision* (n 49 above) para 8.

<sup>53</sup> *Jordan Decision* (n 49 above) para 14.

<sup>54</sup> *Jordan Decision* (n 49 above) paras 15-17.

<sup>55</sup> *Jordan Decision* (n 49 above) para 18.

<sup>56</sup> *Jordan Decision* (n 49 above) paras 44-45.

<sup>57</sup> *Jordan Decision* (n 49 above) para 48.

<sup>58</sup> *Jordan Decision* (n 49 above) para 50.

<sup>59</sup> *Jordan Decision* (n 49 above) para 55.

<sup>60</sup> *Prosecutor v Omar Hassan Ahmad Al Bashir [The Hashemite Kingdom of Jordan's appeal against the "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]* ICC-02/05-01/09-326 12 March 2018 (hereinafter *Jordan Appeal*).

<sup>61</sup> *Jordan Appeal* (n above) para 3.

### 3. First Consequences for Non-States Parties

The Statute provides that where a non-State Party fails to cooperate with the Court's requests as per an agreement or arrangement envisaged in article 87(5)(a), the Court may inform the ASP or the UNSC of such a failure to cooperate.<sup>62</sup> Although there are slight changes in the wording of the Statute regarding the non-cooperation of non-State Parties, the difference in language is significant as it reflects how the Court deals with the failure of non-State Parties to cooperate with requests.<sup>63</sup> It is also possible to read article 87(5) to include obligations to cooperate arising from UNSC resolutions.<sup>64</sup>

#### 3.1. Case Study: Sudan

Since referral, Sudan has maintained a hostile policy towards the ICC,<sup>65</sup> making it clear that it will not surrender its nationals to the Court.<sup>66</sup> International-relations theory suggests that States are less likely to cooperate with the Court when those indicted are members of or allied with the ruling party of the State in question.<sup>67</sup> Applying this to Sudan, authorities have very little incentive to cooperate with the ICC as those indicted are associated with the ruling party.<sup>68</sup> Another factor affecting Sudan's willingness to cooperate is that it was subjected to ICC jurisdiction against its will.<sup>69</sup>

##### *The Harun and Al-Rahman case*

In May of 2010, PTC I issued a decision on the failure of Sudan in cooperating with the ICC in the arrest and surrender of Ahmad Harun and Ali Al-Raman.<sup>70</sup> The decision

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<sup>62</sup> Article 87(5)(b) of the Rome Statute (n 1 above)

<sup>63</sup> Wenqi, Z "On co-operation by States not Party to the International Criminal Court" (2006) 88(861) *International Review of the Red Cross* 87 107.

<sup>64</sup> C Kress & K Prost 'International Cooperation and Judicial Assistance' in O Triffterer & K Ambos (eds) *Rome Statute of the International Criminal Court: A Commentary* (2016) 2030.

<sup>65</sup> *Twenty Seventh Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to UNSCR 1593 (2005)* (20 June 2018) available at <https://www.icc-cpi.int/itemsDocuments/20180620-27-rep-UNSCR-1593-ENG.pdf> (accessed 23 October 2018) para 35.

<sup>66</sup> *Prosecutor v Abdel Raheem Muhammad Hussein [Decision on the Prosecutor's Request for a finding of non-compliance against the Republic of Sudan]* ICC-02/05-01/12-33 (26 June 2015) para 9.

<sup>67</sup> Hillebrecht, C & Straus, S "Who Pursues the Perpetrators? State Cooperation with the ICC" (2017) 39(1) *Human Rights Quarterly* 162 169.

<sup>68</sup> Hillebrecht & Straus (n above) 177.

<sup>69</sup> Nouwen SMH & Werner WG "Doing Justice to the Political: The International Criminal Court in Uganda and Sudan" (2011) 21(4) *European Journal of International Law* 941 954.

<sup>70</sup> *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 Sudan]* ICC-02/05-02/07-57 (25 May 2010) (Hereinafter *Sudan I*)

dealt with the unwillingness of Sudanese authorities to accept any documents relating to arrest and surrender served to it by the Court.<sup>71</sup> The Chamber highlighted that the obligation of Sudan to cooperate with the Court arose directly from the UN Charter and Security Council Resolution 1593, as well as the fact that the UNSC had entrusted the Court with investigating and prosecuting crimes within its jurisdiction in Sudan.<sup>72</sup> Also highlighted was that the Court had the inherent power to inform the UNSC of the failure to cooperate by virtue of Resolution 1593.<sup>73</sup> The Chamber concluded that as the Court had taken all possible measures to ensure cooperation, Sudan was failing to comply with its obligations to cooperate in relation to the enforcement of arrest warrants.<sup>74</sup> The Chamber then ordered the Registrar of the Court to transmit the decision to the UNSC for it to take any appropriate action.<sup>75</sup>

### *Al-Bashir*

In March 2015, PTC II decided on Sudan's failure to cooperate with the Court in arrest and surrender of Al-Bashir.<sup>76</sup> Here the Chamber recalled that Sudan had refused receive the warrants for the arrest of Al-Bashir and refused to recognise the jurisdiction of the Court.<sup>77</sup> The Chamber also recalled the many instances where representatives of the Sudanese government had indicated the State's unwillingness to cooperate with the Court.<sup>78</sup> It was also held that Sudan had failed to consult or notify the Court of any problems with the execution of the cooperation requests.<sup>79</sup> Taking these factors into consideration, the Chamber held that Sudan had failed to cooperate with the Court and that this decision should be referred to the UNSC for it to take appropriate measures against the State.<sup>80</sup>

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<sup>71</sup> *Sudan I* (n above) paras 5, 9 & 10.

<sup>72</sup> *Sudan I* (n 70 above) paras 15-16.

<sup>73</sup> *Sudan I* (n 70 above) para 18.

<sup>74</sup> *Sudan I* (n 70 above) para 22.

<sup>75</sup> *Sudan I* (n 70 above) para 25.

<sup>76</sup> *Prosecutor v Omar Hassan Ahmad Al-Bashir [Decision on the Prosecutor's Request for a Finding of Non-Compliance Against the Republic of Sudan]* ICC-02/05-01/09-227 (9 March 2015) (Hereinafter *Sudan II*)

<sup>77</sup> *Sudan II* (n above) para 9.

<sup>78</sup> *Sudan II* (n 76 above) paras 10-12.

<sup>79</sup> *Sudan II* (n 76 above) paras 15-16.

<sup>80</sup> *Sudan II* (n 76 above) para 19.

### 3.2. Suspects in the Territory of a Non-State Party

There have been several cases before the Court that have dealt with the presence or potential presence of Al-Bashir in the territory of a non-State Party.<sup>81</sup> In these decisions, it was highlighted that although the States in question had no obligations to the Court arising from the Statute, resolution 1593 which referred the situation in Sudan to the Court, urged all States to cooperate with the Court.<sup>82</sup> These decisions conclude by reminding the States of the arrest warrants against Al-Bashir and inviting them to arrest and surrender him to the Court in the event he enters their territory.<sup>83</sup> Although not decisions in terms of article 87(5)(b), they are important as they show how the Court interacts with non-States Parties when a suspect has travelled or is reported to be travelling to the territory of those States.

### 4. Referral of Non-Cooperation

The next part of this chapter shall discuss the bodies that are authorised to further address non-cooperation decisions following a referral by the Court, namely the Assembly of States Parties and the United Nations Security Council. It is important to determine whether such referral is always required after a decision on non-cooperation, as the *ICC Regulations* state that the President of the Court has the discretion to refer a decision of non-cooperation to these bodies.<sup>84</sup> The Appeals Chamber has held that since the object and purpose of article 87(7) is to foster cooperation, a referral to these bodies was not intended to be the standard response to non-compliance, but only one that may be sought when it is concluded that it is the most effective way in which cooperation can be obtained.<sup>85</sup> It was also held that a decision not to refer a matter to the ASP or the UNSC does not imply acceptance of non-cooperation, but may be based on a conclusion that such a referral may not be an effective means to address the lack of cooperation in the context of the case.<sup>86</sup> In

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<sup>81</sup> E.g. *The Prosecutor v Omar Hassan Ahmad Al Bashir [Decision Regarding Omar Al-Bashir's Potential Travel to the United States of America]* ICC-02/05-01/09-162 18 September 2013.

The Court has also had to make similar decisions with regards to Saudi Arabia, Kuwait, Egypt, Ethiopia, Equatorial Guinea, Morocco and the United Arab Emirates

<sup>82</sup> *USA Decision* (n above) para 11.

<sup>83</sup> *USA Decision* (n 81 above) paras 12(a)-(b).

<sup>84</sup> Regulation 109(4) of the ICC Regulations (n 2 above)

<sup>85</sup> *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) para 51.

<sup>86</sup> *Kenyatta Prosecutors Appeal* (n above) para 52.

the *South Africa* decision, the PTC considered these arguments when determining whether or not engaging with the ASP or UNSC would be an effective way to obtain future cooperation.<sup>87</sup> In its decision, the Chamber was not convinced that referral would be warranted in order to achieve cooperation from South Africa.<sup>88</sup>

#### 4.1. A Criticism of Referral Procedures

It is uncertain as to what guides the PTC's in their discretion to refer matters to the ASP or the UNSC. Exercising of discretion in referral decisions could mean that the Court expects these organs to take specific steps upon referral, which may affect the judicial and political independence of the Court, the ASP and the UNSC.<sup>89</sup> Also problematic is the negative attitude of the Court in its decision not to refer South Africa's non-cooperation to the ASP and the UNSC. The conclusion drawn by the PTC in this decision is that it appears to give up on its referral and enforcement mechanisms in anticipation of them being ineffective in obtaining cooperation.<sup>90</sup> One would therefore expect the Court to apply such an argument consistently in future decisions if it was considered a substantial factor in deciding not to refer a matter further.<sup>91</sup> The attitude towards the Court in deciding upon matters with similar facts and circumstances, as was the case with the *South Africa* and *Jordan* decisions, highlights that the ruling of the Appeals Chamber in *Kenyatta* is also problematic for the efficient functioning of the Court's non-cooperation procedures.<sup>92</sup>

### 5. The Assembly of States Parties

The ASP is the Court's management oversight and legislative body and is composed of representatives of States Parties.<sup>93</sup> The ASP is tasked with various duties, including the consideration of any issues or questions relating to non-cooperation arising from decisions in terms of article 87(5) and 87(7) of the Statute.<sup>94</sup> Seeing that the Statute and the drafters offered no guidance as to what steps or measures the ASP could take

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<sup>87</sup> *South Africa Decision* (n 34 above) para 135.

<sup>88</sup> *South Africa Decision* (n 34 above) para 139.

<sup>89</sup> Sluiter G "Enforcing Cooperation" (2018) 16 *Journal of International Criminal Justice* 383 391.

<sup>90</sup> Sluiter (n above) 392.

<sup>91</sup> As above.

<sup>92</sup> Sluiter (n 89 above) 393.

<sup>93</sup> International Criminal Court *Assembly of States Parties* available at <https://www.icc-cpi.int/asp> (accessed 26 March 2018)

<sup>94</sup> Article 112(2)(f) of the Rome Statute (n 1 above)

in response to non-cooperation, the development of further regulations and practices relating to non-cooperation was left to the ASP.<sup>95</sup> As a result, it took a bit of time before a more structured approach to non-cooperation was developed. At the ASP's 10<sup>th</sup> Session held in December 2011,<sup>96</sup> the negative impact that non-cooperation had on the ability of the Court to execute its mandate was reaffirmed by the assembly, resulting in the adoption of procedures aimed at addressing instances of non-cooperation.<sup>97</sup>

### 5.1. Assembly Procedures Relating to Non-Cooperation

The Procedures define non-cooperation as: a failure by a State Party, or a State that has entered into an *ad-hoc* arrangement or agreement with the Court to comply with a specific request of the Court for cooperation.<sup>98</sup> The *Procedures* highlight that any response to non-cooperation by the Assembly would be non-judicial in nature and based on its capabilities under the Statute. It is confirmed that the ASP may support the effectiveness of the Statute through the deployment of political and diplomatic efforts to promote cooperation and respond to non-cooperation. Such efforts may not replace judicial determinations that would be taken by the court in ongoing proceedings.<sup>99</sup>

#### *Scenarios of Non-Cooperation and Responses to Them*

The *Assembly Procedures* recognise two scenarios of non-cooperation that may require action. The first scenario is where the Court has referred a State's non-cooperation to the ASP, which in the circumstances, may or may not require urgent action by the Assembly.<sup>100</sup> The second scenario is where the Court has not yet referred a State's non-cooperation to the assembly, but there is reason to believe that a specific and serious incident of non-cooperation regarding the arrest and surrender of a person is about to occur or is currently ongoing and requires urgent action by the ASP.<sup>101</sup>

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<sup>95</sup> Sluiter (n 89 above) 393.

<sup>96</sup> Assembly of States Parties Tenth Session *Strengthening the International Criminal Court and the Assembly of States Parties* ICC-ASP/10/Res.5 21 December 2011.

<sup>97</sup> ASP 10<sup>th</sup> Session (n above) para 9; Assembly of States Parties (2011) *Assembly Procedures Relating to Non-Cooperation* ICC-ASP/10/Res.5 Annex 21 December 2011.

<sup>98</sup> Assembly Procedures (n above) para 4.

<sup>99</sup> Assembly Procedures (n 97 above) para 6.

<sup>100</sup> Assembly Procedures (n 97 above) para 7(a).

<sup>101</sup> Assembly Procedures (n 97 above) para 7(b)

These scenarios require some form of response, either a formal one with some form of public participation in the case of a referral; or one which is informal and urgent in the case where non-cooperation may occur or there is still the possibility of cooperation taking place.<sup>102</sup> The procedures outlined are aimed at enhancing the implementation of the Court's decisions and should not lead to discussions on the merits of the request of the Court or otherwise undermine its findings.<sup>103</sup>

### *The Formal Response Procedure*

This procedure should be triggered by a decision of the Court that is addressed to the ASP. Such decision should be forwarded to all States Parties and the public should be informed of this decision through an official press release.<sup>104</sup> The possible steps following a referral of non-cooperation are described as follows: The Convening of an emergency Bureau meeting to decide what further action can be taken; the transmission of an open letter to the State concerned, reminding it of its obligation to cooperate and requesting it to present its views on the matter; the holding of a Bureau meeting where a representative of the State is to present its views on how it would cooperate with the Court in the future; public meetings to allow for open dialogue with the State followed by the submission of a report by the Bureau on the outcomes and recommendations of such dialogue and; the appointment of a facilitator to consult on a draft resolution that contains definite recommendations on the situation.<sup>105</sup>

### *The Informal Response Procedure*

In the event where there is an impending or ongoing situation of non-cooperation, it was recognised that a flexible mechanism needed to be in place for the Assembly to urgently respond to such situations and possibly ensure that cooperation could still take place.<sup>106</sup> One suggestion was to build on and institutionalize the good offices that the President of the Assembly had previously undertaken on an *ad-hoc* basis in relation to requested States.<sup>107</sup> In order to assist the President, four or five regional focal points for cooperation should be appointed on the basis of equitable geographical

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<sup>102</sup> Assembly Procedures (n 97 above) paras 10-11.

<sup>103</sup> Assembly Procedures (n 97 above) para 12.

<sup>104</sup> Assembly Procedures (n 97 above) para 13.

<sup>105</sup> Assembly Procedures (n 97 above) para 14.

<sup>106</sup> Assembly Procedures (n 97 above) para 15.

<sup>107</sup> As above.

representation.<sup>108</sup> Such procedure would be triggered on the initiative of the President either where non-cooperation is ongoing or expected or where non-cooperation has been referred to the ASP and the opportunity to fulfil a request for arrest and surrender may no longer exist by the time an emergency meeting is convened.<sup>109</sup> Upon triggering of the procedures, the President would raise the issue informally with officials from the requested State and other relevant persons with a view to the promotion of full cooperation. The purpose of these interactions would be to raise awareness of the issue and promote cooperation, and not to make judicial findings.<sup>110</sup> Following such interactions, the President is to present an oral report to the Bureau, who will decide how the President shall further engage in the matter.<sup>111</sup>

## 5.2. The Bureau

The Bureau is tasked with the duty to assist the ASP in the discharge of its responsibilities.<sup>112</sup> As per the *Assembly Procedures*, the Bureau is required to compile a report on the outcome of responses by the ASP to non-cooperation which is then to be submitted and discussed at an ASP Session.<sup>113</sup>

### *Dialogue between the ASP and Non-Cooperating States*

In its first report under the procedures, the Bureau discussed the decisions on the failure of Malawi and Chad in cooperating with the Court in arresting and surrendering Al-Bashir and the action taken by the ASP in these matters.<sup>114</sup> Also reported by the Bureau were the outcomes of the interactions between the States and the ASP. It was held while Malawi reaffirmed its intention to meet with its obligations under the Statute,<sup>115</sup> the dialogue held with Chad was less than favourable, as the State refused to change its stance on the matter.<sup>116</sup> Reports in following years follow a similar pattern where interactions with non-cooperating States are described, as well as mention of

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<sup>108</sup> *Assembly Procedures* (n 97 above) para 16.

<sup>109</sup> *Assembly Procedures* (n 97 above) para 17.

<sup>110</sup> *Assembly Procedures* (n 97 above) para 19.

<sup>111</sup> *Assembly Procedures* (n 97 above) para 20.

<sup>112</sup> Article 112(3)(c) of the Rome Statute (n 3 above)

<sup>113</sup> *Assembly Procedures* (n 97 above) paras 14(e)-(f).

<sup>114</sup> *Report of the Bureau 2012* (n 24 above) paras 2-11.

<sup>115</sup> *Report of the Bureau 2012* (n 24 above) para 5.

<sup>116</sup> *Report of the Bureau 2012* (n 24 above) para 6.

steps that have been taken to ensure cooperation in cases of impending visits of suspects in the territory of States Parties.

### *Adoption of the Toolkit*

At the Fourteenth Session of the ASP, the Bureau recommended in its report on non-cooperation that the focal points on non-cooperation should collaborate with any interested States, as well as consult with the Court and other relevant bodies, to finalise a toolkit that would improve the implementation of the informal non-cooperation procedures before the fifteenth ASP session.<sup>117</sup> A year later, this newly developed Toolkit was attached to the Bureau Report.<sup>118</sup> This toolkit was especially intended to encourage more uniform responses to potential instances of non-cooperation, and to depoliticise action taken to encourage States to meet their obligations.<sup>119</sup> These responses relate to specific aspects of non-cooperation such as the monitoring of the travel of ICC suspects, preventing instances of non-cooperation and sensitizing interlocutors to non-cooperation issues.<sup>120</sup> The *Toolkit* also proposes that future UNSC referrals include language that imposes a stronger and more binding obligation to cooperate upon UN Member States that are not States Parties to the Statute.<sup>121</sup>

### **5.3. A Criticism of ASP Procedures and Remedies**

As they currently stand, the procedures that have been developed to address and remedy non-cooperation are insufficient, with the ASP appearing incapable of handling instances of non-cooperation in a convincing and effective manner.<sup>122</sup> This has been recognised by the ASP itself at its 14<sup>th</sup> Session in the *Report of the Bureau on Non-Cooperation*.<sup>123</sup> It was reiterated that instances of non-cooperation should not be normalised, and that “business should not remain as usual” in the instance that there is a failure to cooperate.<sup>124</sup> The manner in which the ASP handles non-cooperation

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<sup>117</sup> ASP Fourteenth Session *Report of the Bureau on non-cooperation* ICC-ASP/14/38 18 November 2015 para 8.

<sup>118</sup> ASP Fifteenth Session *Report of the Bureau on non-cooperation [Addendum: Toolkit for the Implementation of the Informal dimension of the Assembly procedures relating to non-cooperation]* ICC-ASP/15/31/Add.1 9 November 2016.

<sup>119</sup> *Bureau Toolkit* (n above) para 10.

<sup>120</sup> *Bureau Toolkit* (n 118 above) paras 11-45.

<sup>121</sup> *Bureau Toolkit* (n 118 above) para 52.

<sup>122</sup> Sluiter (n 89 above) 398.

<sup>123</sup> n 117 above.

<sup>124</sup> *Report of the Bureau* 2015 (n 117 above) para 45.

can be criticised for a number of reasons, referring specifically to the *Assembly Procedures on non-cooperation* and the various responses and remedies to non-cooperation adopted by the Bureau.

### *The Assembly Procedures*

Regarding the formal responses and the steps contained in paragraph 14 of the *Procedures*,<sup>125</sup> it is observed that there is a tension between the consequences of some of these steps and the purposes of the procedures.<sup>126</sup> For instance, holding dialogue with non-cooperating State and allowing it to present its views on how to cooperate in future situations are considered steps that could potentially cause that State to discuss, challenge and undermine the Court's judicial finding of non-compliance.<sup>127</sup> Such an issue raises a crucial question as to purpose behind holding such discussions when a non-cooperating State is already expected to submit all of its observations and views during non-cooperation proceedings before the Court.<sup>128</sup> Another aspect of these steps that is identified as problematic is the repeated reference to follow up measures through phrases such as "what further action would be required,<sup>129</sup>" and "a recommendation as to whether the matter requires action by the Assembly."<sup>130</sup> It is held that these references are unlikely to have an effect on the actions of any present or future non-cooperating State and raise questions as to what these measures may be.<sup>131</sup> It is also held that the enforcement measures in the *Procedures* appear to have no deterrent effect on States that have failed to cooperate with the Court or that may fail to cooperate in future situations.<sup>132</sup> With regards to the informal procedures, even though they have been used on every occasion of potential non-cooperation, they have not been able to prevent the anticipated non-cooperation.<sup>133</sup>

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<sup>125</sup> n 105 above.

<sup>126</sup> Sluiter (n 89 above) 395.

<sup>127</sup> As above.

<sup>128</sup> Sluiter (n 89 above) 395-396.

<sup>129</sup> *Assembly Procedures* (n 97 above) para 14(a)

<sup>130</sup> *Assembly Procedures* (n 97 above) para 14(e)

<sup>131</sup> Sluiter (n 89 above) 396.

<sup>132</sup> As above.

<sup>133</sup> Tladi D "When Elephants Collide it is the Grass that Suffers: Cooperation and the Security Council in the Context of the AU/ICC Dynamic" (2014) 7 *African Journal of Legal Studies* 381 388.

## *Bureau Reports and the Toolkit*

Even though the Bureau has been in contact and conducted dialogue with non-cooperating States as required by the *Assembly Procedures*,<sup>134</sup> the outcomes of such dialogues have been less than favourable. It is noted that States Parties who acknowledge their non-cooperation and promise to cooperate in the future no longer form part of the attention of the ASP, while those who are not responsive to requests by the ASP for contact and dialogue remain on the agenda for further consideration.<sup>135</sup> Also problematic in the context of the Bureau is the structure of the *non-cooperation Toolkit*. One criticism against the *Toolkit* is that it places a lot of focus on reminding and emphasizing the obligations of States to cooperate, which is unnecessary as this is already done within the text of the Rome Statute. Furthermore, the *Toolkit* can also be criticised for its lack of sanctions or other punitive responses to non-cooperation.<sup>136</sup>

### **6. The United Nations Security Council**

With its main responsibility being the maintenance of international peace and security,<sup>137</sup> the UN Security Council has a special role to play in helping the Court function effectively. In 2004, the ICC and the UN signed an agreement that set out the terms upon which the two bodies would interact with each other.<sup>138</sup> Among other subjects, the *Agreement* contains provisions that regulate cooperation between the UNSC and the Court.<sup>139</sup> With regards to non-cooperation, the *Agreement* provides:

Where a matter has been referred to the Court by the Security Council and the Court makes a finding ... of a failure by a State to cooperate with the Court, the Court shall inform the Security Council or refer the matter to it ... and the Registrar shall convey to the Security Council through the Secretary-General the decision of the Court, together with relevant information in the case. The Security Council, through the Secretary-General, shall inform the Court through the Registrar of action, if any, taken by it under the circumstances.<sup>140</sup>

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<sup>134</sup> Assembly Procedures (n 97 above) para 14(e).

<sup>135</sup> Sluiter (n 89 above) 397.

<sup>136</sup> Sluiter (n 89 above) 398.

<sup>137</sup> Article 24(1) of the Charter of the United Nations 1945.

<sup>138</sup> Article 1(1) of the Relationship Agreement between the International Criminal Court and the United Nations Resolution ICC-ASP/3/Res.1 2004.

<sup>139</sup> Article 17 of the Relationship Agreement (n above)

<sup>140</sup> Article 17(3) of the Relationship Agreement (n 138 above)

## 6.1. Action taken by the UNSC in ICC Decisions

Any action taken by the UNSC will be in accordance with chapter VII of the UN Charter. The Charter empowers the UNSC to recommend or decide upon measures that should be taken to maintain international peace and security with regards to a situation of a threat or breach of peace or an act of aggression.<sup>141</sup> Such measures may involve actions which do not require the use of force, such as the interruption of economic activities or the severance of diplomatic relations;<sup>142</sup> or action that requires the use of force by Members of the UN, including demonstrations and blockades.<sup>143</sup> The UNSC has yet to impose any form of sanctions upon States who have not cooperated with the ICC. This has been noted by the PTC as one of the reasons why it chose not to refer South Africa's non-cooperation to the UNSC.<sup>144</sup> In the ICC Prosecutor's most recent report to the UNSC on resolution 1593, the lack of responses to non-cooperation referrals was considered a factor that has influenced States Parties to repeatedly disregard the requests of the Court and continuing to host Al-Bashir.<sup>145</sup> According to the 2018 *Report of the Court on cooperation*,<sup>146</sup> the ICC has transmitted a total of 16 communications on non-cooperation to the UNSC regarding the situations in Sudan and Libya and has received no response to any of them.<sup>147</sup>

## 6.2. A Criticism of the UNSC

The role that the UNSC plays in ensuring cooperation with the ICC can be criticised for its seemingly uninterested attitude towards cooperation. As per the Statute, the Court can exercise jurisdiction over a situation that has been referred to it by the UNSC acting under Chapter VII of the UN Charter.<sup>148</sup> The resolutions passed by the UNSC with regards to Sudan and Libya provide one with an understanding of the way in which the UNSC approaches the obligation to cooperate. While these resolutions create an obligation on the situation State to cooperate with the Court,<sup>149</sup> such an

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<sup>141</sup> Article 39 of the UN Charter (n 137 above)

<sup>142</sup> Article 41 of the UN Charter (n 137 above)

<sup>143</sup> Article 42 of the UN Charter (n 137 above)

<sup>144</sup> *South Africa decision* (n 34 above) para 138.

<sup>145</sup> *27<sup>th</sup> Report of the Prosecutor* (n 65 above) para 17.

<sup>146</sup> ASP Seventeenth Session *Report of the Court on cooperation* ICC-ASP/17/16 (29 October 2018)

<sup>147</sup> *Report of the Court on cooperation 2018* (n above) para 36.

<sup>148</sup> Article 13(b) of the Rome Statute (n 2 above)

<sup>149</sup> UNSC Resolution 1593 [*Sudan*] 31 March 2005, S/RES/1593 para 2; UNSC Resolution 1970 [*Peace and Security in Africa*] 26 February 2011 S/RES/1970 para 4.

obligation does not exist with regards to other UN Member States. This has created a significant gap in cooperation which is harmful to the ICC.<sup>150</sup> It is held that these resolutions were adopted in this manner so that some permanent members of the UNSC that are not States Parties would not be subjected to an obligation to cooperate with the ICC.<sup>151</sup> This leaves the impression that ICC referrals are used by the UNSC as a political tool, created in such a way to exert pressure on the situation State.<sup>152</sup> The unwillingness to properly address non-cooperation also suggests that the UNSC lacks the political will to ensure cooperation.<sup>153</sup> This failure on the part of the UNSC has the real effect of causing great harm to the ICC's legitimacy and reputation.<sup>154</sup>

## 7. Developing the Consequences of Non-Cooperation with the ICC

It is clear from the above discussion that the procedures and remedies currently in place do not sufficiently address and combat the non-cooperation of States. It is therefore necessary to discuss the possibility of enhancing the cooperation regime of the Court through the improvement of existing cooperation and non-cooperation procedures, as well as the possible introduction of additional remedies to address non-cooperation.

### 7.1. Future Non-Cooperation Decisions and Referrals

It has been previously noted that the Appeal Chamber's decision in the *Kenyatta* case regarding the discretionary nature of non-cooperation referrals is problematic for the efficient functioning of the Court's non-cooperation procedures.<sup>155</sup> It is held that this decision has led to the evaluation of the effectiveness of non-cooperation procedures as well as blurring the lines that distinguish between the judicial role of the Court and the political role of the ASP.<sup>156</sup> This decision has also led to puzzling distinctions among instances of non-cooperation, with some States escaping referral even though they share similar facts with other States that have been referred to the ASP.<sup>157</sup> It is

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<sup>150</sup> Tladi D "ICC and UNSC: point scoring and the cemetery of good intentions" (10 October 2014) *ISS Today* available at <https://issafrica.org/iss-today/icc-and-unsc-point-scoring-and-the-cemetery-of-good-intentions> (accessed 23 October 2018)

<sup>151</sup> China, Russia and the United States of America.

<sup>152</sup> Tladi (n 133 above) 394; see also Tladi *ISS Today* (n 150 above)

<sup>153</sup> Tladi (n 133 above) 395.

<sup>154</sup> Tladi *ISS Today* (n 150 above)

<sup>155</sup> Sluiter (n 89 above) 393.

<sup>156</sup> Sluiter (n 89 above) 391.

<sup>157</sup> Sluiter (n 89 above) 399.

proposed that the existing jurisprudence is reversed and that future referrals to the ASP are automatic upon a finding of non-cooperation considered important enough for article 87(7) proceedings to be triggered.<sup>158</sup>

## 7.2. Enhancing the Role of the UNSC

Considering that the UNSC has failed to appropriately address and sanction non-cooperation in situations that it has referred to the ICC, it has been recognised that the UNSC must change its approach to cooperation with the ICC.<sup>159</sup> Various factors have been identified that could strengthen the role of the UNSC in its interactions with the ICC.

### *Future UNSC Referrals*

Because of the growing number of conflicts throughout the world, and the fact that international crimes are being committed in territories that are beyond the jurisdiction of the ICC, there have been increased calls for UNSC referrals of these situations to the ICC, especially with regards to the ongoing conflict in Syria.<sup>160</sup> However, as decisions of the UNSC are politically motivated,<sup>161</sup> adoption of such resolutions is difficult considering the fact that permanent members of the UNSC have the power to veto decisions before them. This was the case in 2014 where a resolution, aimed at referring the situation in Syria to the ICC,<sup>162</sup> was vetoed by two permanent members. While referrals to the ICC may seem necessary in order to address international crimes, caution must be made with regards to proposing such resolutions, taking into account the fact that previous referrals in Sudan and Libya have failed to stop the atrocities being committed there.<sup>163</sup> However, in the case that the UNSC does successfully pass another referral resolution, it is proposed that such a resolution should not only impose a cooperation obligation on States Parties and the situation

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<sup>158</sup> As above.

<sup>159</sup> Jones A “Non-cooperation and the efficiency of the International Criminal Court” in Bekou O & Birkett D (eds) *Cooperation and the International Criminal Court: Perspectives from Theory and Practice* (2016) 199.

<sup>160</sup> Tladi *ISS Today* (n 150 above)

<sup>161</sup> See 6.2 above.

<sup>162</sup> UNSC Draft Resolution [*Syria*] S/2014/348 (22 May 2014)

<sup>163</sup> Tladi *ISS Today* (n 150 above)

State, but also on all UN Member States not party to the Statute.<sup>164</sup> As seen above, such a view is also supported in the ASP Bureau's non-cooperation *Toolkit*, which proposes a template to be included in future UNSC Referrals.<sup>165</sup>

### *UNSC Responses to non-cooperation*

It has also been recognised that the UNSC should use its powers under Chapter VII of the UN Charter to respond to findings of non-cooperation in cases arising from situations it has referred to the ICC.<sup>166</sup> The failure of the UNSC in responding to referrals of non-cooperation has been criticised on a number of levels, especially by the ICC Prosecutor, who said the following to the UNSC in her June 2018 statement on UNSC resolution 1593:

It is over thirteen years since the Council referred the situation in Darfur to the International Criminal Court and directed me to report to it every six months on actions taken and progress made pursuant to the Resolution. After thirteen years and twenty-seven reports, the victims of grave crimes which prompted this Council to refer the Darfur situation to the ICC are yet to see those alleged to be most responsible for such crimes face justice.<sup>167</sup>

She also urged the UNSC to take concrete action against States that are referred to it by the Court following failures by them to arrest and surrender suspects.<sup>168</sup> This was also addressed in the 2017 *Report of the Bureau on non-cooperation*, where it called upon States Parties to continue in their efforts in ensuring that the UNSC addresses communications from the Court on non-cooperation.<sup>169</sup> The 2018 *Report of the Court on cooperation* also highlights that the capacity of the UNSC in referring a situation to the Court is a crucial tool for promoting accountability and that active follow up measures to referrals by the UNSC for ensuring cooperation are still necessary to

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<sup>164</sup> Ngari A "The ICC is as strong as the support it gets from States" (17 July 2018) *ISS Today* available at <https://issafrica.org/iss-today/the-icc-is-as-strong-as-the-support-it-gets-from-States> (accessed 23 October 2018)

<sup>165</sup> *Bureau Toolkit* (n 118 above) para 52.

<sup>166</sup> Ngari *ISS Today 2018* (n 164 above)

<sup>167</sup> ICC Prosecutor *Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005)* 20 June 2018 available at <https://www.icc-cpi.int/Pages/item.aspx?name=180620-otp-stat> (accessed 23 October 2018) para 2

<sup>168</sup> ICC Prosecutor *Statement to the UNSC* (n above) para 13.

<sup>169</sup> *ASP Sixteenth Session Report of the Bureau on non-cooperation ICC-ASP/16/36 (4 December 2017)* para 3.

ensure that justice can be delivered effectively when the peace, security and well-being of the world is threatened.<sup>170</sup>

### 7.3. Additional Remedies

Except for the provisions contained in part 9, the Statute does not contain any other provisions that address the breach of obligations by States Parties. It may be therefore necessary for the Rome Statute to be amended to allow for the introduction of further repercussions for States that do not cooperate with the requests of the Court, therefore discouraging future instances of non-cooperation. For amendment of the Statute to take place, a proposal for such an amendment must be put forward by any State Party.<sup>171</sup> The ASP is then required to decide at its next meeting whether or not to take up such a proposal.<sup>172</sup> In order for an amendment to be adopted, it must be agreed upon by a two-third majority of States Parties.<sup>173</sup>

#### *Suspension of States Parties*

In the founding text of various international and regional organizations, mention is made to the suspension of member States from exercise of the rights and privileges associated with being a member State.<sup>174</sup> This consequence is an attractive measure to ensure cooperation with the Court as it is neither permanent nor too severe, especially for first offending States, but reminds them that there are repercussions for failing to cooperate.<sup>175</sup>

#### *Expulsion of States Parties*

The UN Charter provides for the expulsion of a member State that is in persistent violation of the principles contained in the Charter, upon recommendation of the UNSC.<sup>176</sup> Such a provision may be useful in the Rome Statute as it is likely to cause States Parties to reconsider breaching cooperation obligations. Seeing that the ICC

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<sup>170</sup> *Report of the Court on cooperation* (n 146 above) para 35.

<sup>171</sup> Article 121(1) of the Rome Statute (n 2 above)

<sup>172</sup> Article 121(2) of the Rome Statute (n 2 above)

<sup>173</sup> Article 121(3) of the Rome Statute (n 2 above)

<sup>174</sup> Article 5 of the UN Charter (n 91 above); Article 9 of the Charter of the Organization of American States 1948; Article 30 of the Constitutive Act of the African Union 2000.

<sup>175</sup> Barnes, GP "The International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir" (2011) 34(6) *Fordham International Law Journal* 1584 1617.

<sup>176</sup> Article 6 of the UN Charter (n 91 above)

cannot afford to lose member States, expulsion should only be considered in instances of a repeated breach of cooperation obligations<sup>177</sup>

### *Powers and Mandate of the ASP*

It has been recognised that the ASP needs a much stronger mandate to address the non-cooperation of States. Such a mandate could be added through amendment of article 112(2)(f) of the Statute or through the creation of a new provision which would regulate and strengthen the ASP's powers with regards to non-cooperation.<sup>178</sup> A crucial aspect to consider is the type of mandate that should be given to the Court, taking into account the effect on relationship between the Court and States Parties.<sup>179</sup> A proposed framework for enforcing non-cooperation could consist of various administrative sanctions that could be imposed against a non-cooperating State. These sanctions would be influenced by various factors, such as the degree to which non-cooperation has affected the functioning of the Court, the likeliness that cooperation could be achieved in the future and the frequency in which a State has failed to cooperate with the Court.<sup>180</sup> Taking such factors into consideration, the ASP or a specialised committee within the ASP could impose these measures, based in order of severity to the situation before it. Potential sanctions that could be introduced include: a formal warning, loss of the right to present nationals as candidates for elected positions in the ICC, the temporary removal of the right to vote within the ASP and the imposition of an administrative fine.<sup>181</sup>

### *Voting*

Considering the difficulty surrounding amendment of the Statute, it may be possible to rely on other measures within the ASP to address and punish the non-cooperation of States.<sup>182</sup> The Statute provides that each State Party has the right to vote on matters in the ASP and in the Bureau.<sup>183</sup> Therefore, if amendment of the Statute cannot be achieved, it may be possible for the ASP to hold a vote on appropriate sanctions for

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<sup>177</sup> Barnes (n 175 above) 1618.

<sup>178</sup> Sluiter (n 89 above) 400.

<sup>179</sup> As above.

<sup>180</sup> Sluiter (n 89 above) 401.

<sup>181</sup> As above.

<sup>182</sup> Sluiter (n 89 above) 399

<sup>183</sup> Article 112(7) of the Rome Statute (n 1 above)

States Parties who have been referred for non-cooperation, taking into account factors such as the degree to which non-cooperation has affected the court and the amount of times the State in question has breached its cooperation obligations. Therefore, such a decision to impose sanctions on the guilty State requires approval by a two thirds majority of States Parties present and voting.<sup>184</sup>

#### **7.4. Strengthening the ASP**

It has been held that the procedures adopted to address non-cooperation appear to be more for publicity than to ensure cooperation.<sup>185</sup> It has been therefore recognised that these procedures need to be developed further to properly address non-cooperation.<sup>186</sup> This section shall look specifically at the contents in the ASP's resolutions on cooperation and the further development of the *Assembly Procedures Relating to Non-Cooperation*.

##### *ASP Resolutions*

In its annual resolutions on cooperation, various proposals to ensure and strengthen cooperation are put forward by States Parties. They have especially proposed the inclusion of language that prohibits States from having “non-essential contacts” ICC suspects. This was addressed for the first time in at the ASP's eleventh Annual Session, where it was requested of the Bureau, through its Working Groups, that it consider the issue and report on it at the next ASP Session.<sup>187</sup> At the next session, the ASP Bureau in its report on cooperation observed that States Parties were divided in support for the inclusion of such a paragraph in cooperation resolutions, the main concern being that the inclusion of such language might be construed to entail new legal obligations for States Parties.<sup>188</sup> Such concern was well-founded as it was uncertain as to whether such an obligation created by a resolution would bear the same weight both legally and politically as an obligation created through amendment

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<sup>184</sup> Article 112(7)(a) of the Rome Statute (n 1 above)

<sup>185</sup> Tladi (n 133 above) 390.

<sup>186</sup> Sluiter (n 89 above) 400.

<sup>187</sup> *ASP Report on the Eleventh Annual Session ICC-ASP/11/20* (14-22 November 2012) para 50

<sup>188</sup> *ASP Twelfth Session Report of the Bureau of Cooperation ICC-ASP/12/36* (21 October 2013) para 14.

of the Rome Statute.<sup>189</sup> Regardless of these concerns, subsequent resolutions now give mention to “non-essential contacts” in its preamble and body.<sup>190</sup>

### *Improving the Procedures Relating to Non-Cooperation*

With regards to the *Assembly Procedures Relating to Non-Cooperation*, it is held that the enforcement measures presented in the document appear to be ineffective and therefore need to be strengthened.<sup>191</sup> In the most recent Bureau Report on non-cooperation,<sup>192</sup> it was reported that the non-cooperation focal points had engaged in consultations with stakeholders in order to issue recommendations on how to improve the implementation of the *Procedures Relating to Non-cooperation*.<sup>193</sup> In May 2017, the focal points went into consultations with States Parties where they asked for suggestions with regards to any necessary additions or amendments to the *Procedures*.<sup>194</sup> In November 2017, the focal points circulated a document that contained proposed updates to the *Procedures*, suggesting both technical updates as well as improvements to the procedures, reflecting established practice with the aim to enhance their effectiveness.<sup>195</sup> According to this report, the focal points have been working on the revisions to the ASP Procedures through the course of 2018.<sup>196</sup> In the 2018 *Report of the Court on cooperation*, the Court expresses the hope that further consultations will take place with the view to strengthening these procedures as well as to developing guidelines with regards to the formal response procedures.<sup>197</sup>

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<sup>189</sup> Tladi (n 133 above) 389.

<sup>190</sup> ASP Sixteenth Session *Resolution on Cooperation* ICC-ASP/16/Res.2 (14 December 2017) para 5 pre & para 5 op.

<sup>191</sup> Sluiter (n 89 above) 396.

<sup>192</sup> n 168 above.

<sup>193</sup> *Report of the Bureau 2017* (n 168 above) para 28.

<sup>194</sup> *Report of the Bureau 2017* (n 168 above) para 30.

<sup>195</sup> *Report of the Bureau 2017* (n 168 above) para 31.

<sup>196</sup> *Report of the Bureau 2017* (n 168 above) para 32.

<sup>197</sup> *Report of the Court on Cooperation 2018* (n 146 above) para 34.

## Chapter Four

### Conclusion

Various factors have been understood to influence the willingness of States to obey their international legal actions. Such factors include the threat of sanctions, the reputational cost of non-cooperation and the perceived legitimacy of the rules that the State in question must comply with.<sup>1</sup> One factor which is seen as particularly important is the reputational cost of non-compliance, which is connected to the international reputation of the ICC. According to this, the more efficient, fair and legitimate the ICC is perceived to be, the greater the cost to the reputation of States that fail to comply with its requests for cooperation.<sup>2</sup> Taking this into consideration, it is necessary to enhance the reputation of the ICC, as well as respond to instances of non-compliance in a timely and decisive manner.<sup>3</sup>

The purpose of this dissertation was to discuss the cooperation regime of the ICC, especially how non-cooperation is addressed by the Court, the ASP and the UNSC. Several conclusions can be made regarding the research presented above. With regards to the finding of non-cooperation and the referrals that follow, it can be confirmed that a large amount of jurisprudence has been developed to assist future findings of cooperation. However, several issues can be identified from these decisions resulting from the wide discretionary powers awarded to the PTC's in previous decisions of non-cooperation. Such issues include confusion surrounding what guides the PTCs' in exercising discretion, inconsistent and confusing decisions in cases with similar facts and the seemingly negative attitude of the PTC towards the procedures that follow a finding and referral of non-cooperation.

Regarding the ASP and the Bureau, these bodies can be applauded for the procedures and initiatives that have been developed to address and prevent non-cooperation in recent years, especially with regards to the *Assembly Procedures*

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<sup>1</sup> Jones A "Non-cooperation and the efficiency of the International Criminal Court" in Bekou O & Birkett D (eds) *Cooperation and the International Criminal Court: Perspectives from Theory and Practice* (2016) 194.

<sup>2</sup> As above.

<sup>3</sup> Jones A "Non-cooperation and the efficiency of the International Criminal Court" in Bekou & Birkett (n 159 above) 196.

*Relating to Non-Cooperation and the Bureau Toolkit*. However, these tools have not been effective in addressing non-cooperation due to confusing provisions, as well as a lack of actual sanctions for correcting and discouraging non-cooperation. It has been recognised from this that the ASP therefore needs to be strengthened, either through amendment of the *Assembly Procedures* or through granting the ASP with a stronger and more effective mandate in addressing and remedying non-cooperation. It has also been recognised that non-cooperation remedies may benefit from the introduction of additional provisions in the Statute to address the inaction of the offending State Party.

The research presented also suggests that the UNSC seems to show very little interest in ensuring cooperation from States in the situations it has referred to the Court. It is also evident that the UNSC has failed to respond to any decisions on non-cooperation that have been referred to it. It has been proposed in academic circles and by the ASP that future referral resolutions should place an obligation to cooperate with the ICC upon all UN Member States. It has also been realised that more pressure must be placed on the UNSC to respond to decisions of non-cooperation that have been referred to it, as well as use its powers under Chapter VII of the UN Charter to decide upon an appropriate remedy for a State's failure to cooperate.

Over its twenty years of existence, the ICC has established itself as a crucial mechanism for the adjudication of serious international crimes. To paraphrase the late Antonio Cassese, international criminal tribunals like the ICC are very much like giants without arms or legs which need artificial limbs, meaning States, to function properly. If these tribunals do not receive cooperation from States, they cannot fulfil their functions.<sup>4</sup> Notwithstanding a small number of exceptions, States have generally been willing to cooperate with the ICC in the investigation and prosecution of crimes in its jurisdiction. Even though non-cooperation has not become the norm, any instance of its occurrence has serious implications for the reputation of the Court and its ability to function properly. It is clear from the discussion above that the ICC and its associated bodies have developed a large variety of tools to address and remedy instances of non-cooperation. However, it can also be established that the results of these remedies have been less than favourable, with several States escaping accountability

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<sup>4</sup> Cassese, A "On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law" (1998) 9 *European Journal of International Law* 2 13.

for failing to cooperate with the Court. It has therefore been identified that existing responses and remedies to non-cooperation need to be enhanced and supplemented to better equip the ICC in its responses to non-cooperation and preventing its occurrence. It is also recognised that all parties involved must exhibit the utmost dedication in ensuring that States cooperate with requests that are communicated to them, as well as in ensuring that the failure to cooperate is addressed promptly and appropriately.

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