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

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1 Introduction

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

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

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

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

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

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

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

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4 See in contrast, the ICTY suggested definition of the judicial finding of non-compliance in ICTY, Prosecutor v Tihomir Blaškić, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, IT-95-14 (29 October 1997) at para 35.
5 This includes instances of non-compliance in arrest of Al Bashir by Nigeria and the DRC that will be analysed in detail in subsequent sections of this chapter.