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CHAPTER 10

State "Cooperation Issues" in Arresting Al Bashir

Göran Sluiter

Summary

The Al Bashir arrest warrant of the ICC raises a number of questions regarding cooperation obligations incumbent upon states. In light of the most recent arrest warrant, including charges of genocide, this opinion explores the questions whether States Parties to the Genocide Convention have a duty to cooperate with the ICC in the arrest of Al Bashir under that particular treaty, whether States Parties to the Rome Statute can effectively invoke head of state immunity of Al Bashir, as a ground to refuse cooperation, and whether states members of the African Union can invoke Article 98 of the Rome Statute, or any other ground, to justify refusal to arrest Al Bashir.

It is argued in respect of the first question that the ICC is undeniably the international penal tribunal envisioned in Article VI of the Genocide Convention. This triggers a duty to cooperate when an individual is charged by the ICC with genocide, as is the case with Al Bashir as of July 2010, and when the State Party to the Genocide Convention has accepted the jurisdiction of the ICC. I support the view that a member of the United Nations must be regarded as having accepted the jurisdiction of the ICC when that jurisdiction is the direct result of a binding Security Council resolution.

Regarding the second issue, immunities for Al Bashir as acting head of state cannot be considered as a bar to his arrest in other states. Although Resolution 1593 could have been better drafted, its gist—and object and purpose—must be the effective prosecution of the most responsible persons. I agree with the view that Resolution 1593 equates Sudan for cooperation purposes to a State Party to the ICC Statute. The result is that immunities do not apply, just as they do not apply between ICC States Parties. But even if the Pre-Trial Chamber which requested all States Parties to arrest Al Bashir had acted in violation of Article 98 it is uncertain whether this can be regarded as a ground justifying refusal to cooperate recognized under the statute. States cannot be allowed to decide unilaterally that the Court has acted *ultra vires* and to attach to such determination the consequences they deem fit.

Finally, the present opinion takes issue with the position of the African Union (AU) on cooperation with the ICC. Apart from head of state immunity—already discussed—it appears that the AU advances some sort of "essential State interests" as justification for refusal of its members to cooperate. Although this is not recognized as a ground to refuse cooperation, Part 9 of the statute does not necessarily exhaustively set out grounds for refusal. Article 97 could be the basis on which states submit to the Court

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impediments in the execution of requests for assistance. Clearly a high threshold should apply and it is questionable whether the concerns advanced by the AU would meet such threshold.

In an afterthought to this opinion it is submitted that until this day the Court has used the wrong procedures in dealing with instances of noncooperation. We could be much more advanced in this situation if the Court had followed, as a rule and directly, in all instances of noncooperation the procedure embodied in Article 87(7) and Regulation 109 of the Court.

Argument

This opinion focuses on three aspects of "cooperation issues" triggered by the Al Bashir arrest warrant. First, the question is answered whether the Genocide Convention can be used as a basis for cooperation obligations of States Parties to that treaty. Second, it will be examined whether Head of State immunities applicable to Al Bashir constitute an impediment to his arrest by ICC States Parties. Third, this opinion concentrates on certain issues related to noncooperation by the African Union (AU). Finally, I will offer a few concluding observations on procedures dealing with noncooperation.

Cooperation under the Genocide Convention

Article VI of the Genocide Convention says that persons charged with genocide shall be tried by a competent tribunal of the state in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction.

The question is whether this provision can be used as a basis for the duty to cooperate with the ICC in the arrest and surrender of Al Bashir, in the event that a state does not prosecute him nationally. Although other international criminal tribunals, notably the ICTR and the ICTY, have indicted persons for genocide before the ICC, these tribunals were never in much need of the Genocide Convention for obtaining cooperation. They could rely on the UN Charter and, as a result, the Genocide Convention as an additional source of cooperation duties was never seriously explored. This may be different for the ICC, which (a) has to live with the reality that a significant number of states are not parties to the statute and have no cooperation duties under that instrument, and (b) in the Darfur situation is facing challenges that a nonparty state, Sudan, is having imposed on it cooperation duties it has never consented to. Thus, the use of the Genocide Convention may have the twofold advantage

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that it broadens the group of subjects of cooperation duties, including important states such as the US and China, and that it confronts Sudan with its own consent in respect of its cooperation duties. The latter is not required legally, in light of the obligations set out in Resolution 1593, but the importance of consent cannot be underestimated in international relations.

Article VI of the Genocide Convention raises a number of interpretative questions. We have the benefit that the International Court of Justice applied this provision, along with other provisions in the Convention, in the recent dispute between Bosnia and Yugoslavia. In that case Yugoslavia was held to have acted in violation of Article VI, because it was established to have failed to cooperate with the ICTY in the arrest of Mladić. It follows from this judgment that Article VI imposes a duty upon States Parties to the Genocide Convention to cooperate with international criminal tribunals with jurisdiction. The required cooperation first and foremost concerns the arrest and surrender of persons charged with genocide and certainly extends to the ICC. There can be no doubt that at present Al Bashir must be regarded as charged with genocide by a penal international tribunal, in the sense of Article VI of the Genocide Convention.

The central difficulty in the interpretation of Article VI is what is meant by the condition that states must have accepted the jurisdiction of the penal international tribunal. Although drafted somewhat unclearly, the cooperation duty in that provision is only meant to apply to contracting parties to the Genocide Convention which also have accepted the jurisdiction of a penal international tribunal. The ICJ on this vital aspect of Article VI resorted to a puzzling interpretation, in which a state is deemed to have accepted the jurisdiction of an international criminal tribunal when it has a cooperation duty under a source of international law. If we accept this interpretation, it implies that at least Sudan is included in this approach, and would be within the reach of Article VI, because it is already obliged to cooperate with the ICC under Resolution 1593. But states like the US and China would not be included.

The problem in the interpretation by the ICJ is that acceptance of jurisdiction and cooperation duties are two separate aspects of the relationship between a state and a tribunal. But the ICJ seems to conflate the two notions in a manner which by no means conforms to the rules of proper treaty interpretation. It is perfectly imaginable that a state accepts the jurisdiction of a tribunal but has no cooperation relations with that institution. In the context of UN Security Council Resolution 1593, referring the Darfur situation to the ICC, this is exactly what happened. I agree with Akande who wrote that Resolution 1593 embodies at the least a decision conferring jurisdiction on

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the ICC; pursuant to Article 25 of the Charter that decision must be accepted by the members.[1] The Resolution does not provide for conditions to the acceptance of jurisdiction, except for the clause in operative paragraph 6 (the "US immunity clause," if I may say so). I therefore conclude that acceptance of jurisdiction by all UN Members of the ICC's Darfur case has taken place. It is not necessary that this acceptance is followed by a duty to cooperate in the same Security Council Resolution; Article VI demands no such thing. One should also consider the possible implications if one were to say that UN members should be regarded as not having accepted the jurisdiction of the ICC over "Darfur." This would seriously challenge the authority of Resolution 1593 and the powers of the UN Security Council under Chapter 7 more generally.

The practical advantage of the above position may not seem directly evident, because what matters most now does not seem to be the existence of additional duties but effective compliance. Yet, the appeal of the Genocide Convention should not be underestimated; it is an instrument outside the ICC that enjoys widespread support, including from states that have not ratified the statute. Furthermore, it is the particular gravity of genocide that entails these cooperation obligations; it might very well be the starting point in (unexpected) cooperation relations between the ICC and contracting parties to the Genocide Convention. Ideally, it should be more and more embarrassing for states to receive Al Bashir on their territory.

Also in the area of enforcement, the Genocide Convention opens up possibilities. Just as was the case with Bosnia, contracting parties could initiate proceedings against Sudan for violation of Article VI of the Convention. Article IX of the Genocide Convention provides the basis for it and involves acceptance of the jurisdiction of the ICJ.

Surprisingly, the Genocide Convention does not yet seem to have been "discovered" by the Judges of the ICC. They have now engaged repeatedly in reminding states of their duties to cooperate in the arrest and surrender of Al Bashir and have even informed the Security Council of the lack of cooperation from certain states. However, in none of these decisions is reference made to a state's obligations under Article VI of the Genocide Convention. The Prosecutor, however, has referred to obligations under the Genocide Convention in a letter reminding States Parties of their duty to arrest and surrender Al Bashir.

1 Dapo Akande, "The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities," 7 *Journal of International Criminal Justice* (2009) 341.

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Immunities

A seemingly complex obstacle in securing the arrest and surrender of Al Bashir is the issue of immunities. The African Union—or its members—has on several occasions invoked the immunities of Al Bashir, as acting head of state, as a ground for refusing cooperation. To the extent that this would be a valid ground under Article 98 of the statute, to which reference is often made, one important thing is often overlooked. Immunities as a ground for refusal can never be invoked by the AU as a whole, because one of its members, Sudan, cannot benefit from Article 98. Immunities, under public international law, concern foreign head of states and not a state's own leader; simply, Al Bashir enjoys no immunities under international law when in Sudan.

Leaving this aside, the substantive discussion on the applicability of immunities has been conducted in the literature and—unfortunately—not yet at the ICC. Surprisingly, when sending out arrest warrants to states other than Sudan the ICC Chamber did not address the question whether this would be in compliance with Article 98. Article 98 is drafted in such a manner that the Court should itself examine whether a request for cooperation would require a state to act inconsistently with its obligations under international law and not leave it for states to raise as an impediment to the execution of requests. Rule 195(1) of the Court's Rules of Procedure and Evidence (RPE) seems to mitigate somewhat the duty on the part of the Court under Article 98, by providing for a procedure in which a state has to notify the Court of a "98-problem." This may very well be, but Rule 195 does not relieve the Court from its duty *proprio motu* to deal with Article 98 issues which can be reasonably anticipated. In its Decision of March 2009, the Pre-Trial Chamber discussed immunities of Al Bashir, but only in relation to the Court's jurisdiction. In the disposition, the Pre-Trial Chamber decided that a request for cooperation in the arrest and surrender of Al Bashir was sent to all States Parties to the ICC, thereby creating duties for these states under Articles 86 and 89, without paying any attention to Article 98. By having failed to deal with this issue *proprio motu*, the ICC Judges committed a serious error, which they repeated in the arrest warrant decision of July 2010. The matter was so obviously raising a potential Article 98 issue that lack of information to that effect from a State Party, as envisioned by Rule 195(1), does not relieve the judges from their duty to deal with this *proprio motu* before sending out the request for cooperation to States Parties. In the literature there is at least one seriously argued position that Article 98 is applicable and that the Al Bashir arrest warrant is inconsistent with States Parties' obligations under international law.[2]

2 Paola Gaeta, "Does President Al Bashir Enjoy Immunity from Arrest?" 7 *Journal of International Criminal Justice* (2009) 315.

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Coming to the heart of the matter, there are two good articles on immunities of Al Bashir, one by Gaeta and one by Akande, which deal in detail with this issue.[3] The authors come to opposing views. To put it very simply—and this is my interpretation of the respective positions—Akande underlines the object and purpose of Resolution 1593. This implies that Sudan must, in the interests of effective investigation and prosecution of Darfur, be equated with a State Party. The result is that the mechanism of Article 98, which does not apply between ICC States Parties, also does not apply in relation to Sudan. Gaeta, on the other hand, proceeds to a more strict interpretation of both the Rome Statute and SC Resolution 1593; she concludes that Sudan is still a state nonparty and that no special regime is in place to treat it differently for the purposes of immunity.

I agree with Akande, but with some hesitation. I have already argued elsewhere that the law on cooperation in case of SC referrals in general, and in respect of SC Resolution 1593 in particular, is flawed in many ways.[4] As in many areas of international criminal justice, there seems no other way than to resort to a purposeful interpretation, to correct errors and to fill gaps. It is my concern that resorting to strict interpretation, as Gaeta did, will make the entire Darfur investigation impossible. Emphasizing the position of Sudan as a state nonparty brings "cooperation" into a complete legal vacuum. There are no detailed provisions on cooperation in the SC Resolution; the Statute would almost in its entirety be rendered inapplicable, because of all the references to States Parties in numerous relevant provisions. Therefore, the applicability of the Statute to Sudan, as if it were a State Party, must be presumed in the referring SC Resolution. Sudan should be considered a State Party for the purpose of giving content to the SC Resolution's element that Sudan must cooperate fully. It is not the most satisfactory solution to this issue—and there are certainly better ways of doing this in the future—but the alternative, as we see it in Gaeta's approach, is even less desirable.

There are two additional remarks to be made on the discussion on immunities.

First, even if one were to follow Gaeta in her approach, this still raises the question whether states such as Kenya or Chad can simply ignore the arrest warrant. Gaeta submits that the Pre-Trial Chamber has acted *ultra vires* in respect of Article 98(1) of the statute. Let us suppose it did—I think they acted *ultra vires* procedurally by not exploring this, but in the end not substantively.

3 Id., and Dapo Akande, "The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities," 7 *Journal of International Criminal Justice* (2009) 333.

4 Göran Sluiter, "Obtaining Cooperation from Sudan—Where Is the Law?" 6 *Journal of International Criminal Justice* (2008) 871.

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Gaeta then concludes that states can lawfully decide not to comply with *ultra vires* requests for assistance. This part bothers me very much. It introduces a dangerous element in the ICC's law on cooperation, namely that—perceived—*ultra vires* conduct on the part of the ICC would in and of itself justify refusal of cooperation. This is inconsistent with the vertical approach to cooperation, as embodied in Part 9 of the Statute. To start with, Article 98 does, in principle, not create a ground to refuse cooperation but a duty on the part of the Court. Clearly, errors by the Court in the application of Article 98 may put a state between a rock and a hard place. Even then, refusal is not an option. The mechanism of Article 97 has in particular been designed for these types of problems, and Rule 195(1) even offers a special provision in respect of Article 98 problems. States should consult with the Court with a view to discussing impediments in executing requests for assistance. To my knowledge none of the states which could have made use of Article 98 have done so and have already on that basis violated their cooperation obligations, irrespective of the question whether or not Article 98(1) is substantively applicable. While this is a legitimate reproach to these states, the Court is, of course, to blame for the fact that this issue, along with many other cooperation problems in the Darfur situation, has still not been settled in case law. There have been, and still are, many opportunities where the Court could have resolved this, thereby ending the discussion, not the academic debate of course, but the practical question whether this is a legitimate ground not to arrest Al Bashir.

The second point I wish to make in respect of the immunities discussion relates—again—to the Genocide Convention. In my view the question of state immunities for Al Bashir is no longer relevant when the arrest is also grounded in treaty relations between the arresting state and Sudan, namely Article VI of the Genocide Convention. As we saw above, that particular provision obliges a State Party to that Convention to ensure a trial at the ICC of a person charged with genocide. There is no exception of immunity set out in the Genocide Convention; Article VI, it can be said, applies to all persons charged with genocide. This interpretation also logically follows from Article IV of the Genocide Convention:

> Persons committing genocide or any of the other acts described in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

Similar language can also be found in Article 27 of the Statute, but Article IV offers the benefit of Sudan's—and other contracting parties to the Genocide Convention' explicit—consent to be bound by that provision.

It is worth mentioning that in its recent interpretation of Article VI, the ICJ never addressed any issue of immunity as being relevant in parties' reciprocal

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obligations under Article VI. The problem of third-party effect does not arise in the application of Article VI to the Al Bashir case, because Sudan is a party to the Genocide Convention as well. Bearing in mind that the Genocide Convention intends punishment of all perpetrators of genocide, no individual is exempt from the scope of application of Article VI. As a result, a State Party to the Genocide Convention arresting Al Bashir and surrendering him to the ICC, in compliance with Article VI, violates no rule of international law in relation to Sudan. On the contrary, that state complies with its obligations under the Genocide Convention.

"Other Essential Interests": Peace and Security

The relationship between peace and justice is a recurring theme in international criminal law. In respect of the arrest and surrender of Al Bashir the African Union has claimed his arrest would jeopardize peace and stability and the region. It has, among other things, been said that efforts to arrest Al Bashir could destabilize certain African countries and frustrate diplomatic efforts to bring about peace. Leaving aside the merits of such claims, it will be examined whether (a) risks of destabilization, jeopardizing peace or other perceived essential interests could justify refusal to arrest Al Bashir, and (b) a decision by the AU obliging its members not to arrest Al Bashir could be a lawful ground to refuse compliance with the arrest warrant.

As to the first matter, the starting point must be that the Rome Statute does not explicitly recognize the risk of destabilization, or any other essential state interest, as a ground of refusal. Of course, if this were part of the statute one can easily imagine the enormous potential for abuse. National security is part of the statute, Article 93(3), but only as a ground of refusal in respect of forms of assistance other than arrest and surrender. In this respect, it must be mentioned that Article 72 only protects national security information. Mention must be made of the possibility for the Security Council to make use of Article 16 of the Statute when destabilization threatens international peace and security. This provision allows the Council to prevent the ICC proceeding with the Al Bashir case—for a period of 12 months, renewable—with a resolution adopted under Chapter 7 of the UN Charter. In the case at hand, the use of Article 16 may not even be necessary, because jurisdiction in the Darfur situation is the result of a Security Council referral, which the Council can end or modify whenever the interests of international peace and security require it to do so.

Leaving aside the unique framework of Article 16, the starting point is that the concerns of the African Union are not explicitly recognized in the Statute as reasons justifying refusal—or rather postponement of arrest and surrender of Al Bashir. Still, I would be in favor of embracing the ICTY's Blaskic legacy.

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In the Blaskic decision, of 1997, the ICTY Appeals Chamber developed the essential features of the vertical cooperation regime, an effective system of cooperation as it should apply to international criminal tribunals.[5] But the ICTY Appeals Chamber also explicitly said that it should not be unmindful to legitimate state interests. I think that has been wise; a system of cooperation, be it applicable to the ICTY or ICC, can only survive in the long run when the concerns of subjects concerned, states, are treated seriously and fairly. The practical consequence of this idea is that the grounds of refusal set out in Part 9 need not be necessarily exhaustive. A state may face problems in the execution of requests for assistance that have not been anticipated by the drafters and which may nevertheless be legitimate. Article 97 appears to embody the impossibility of regulating all scenarios of legitimate noncooperation. As a result, that provision refers to problems impeding or preventing the execution of requests for assistance in general, and then sets out three examples, clearly allowing for the possibility that states advance problems other than these examples. The purpose of Article 97 is "to resolve the matter"; ideally, such resolution would still bring about execution of the request, but it cannot be excluded that the Court will adjust or even withdraw the request for assistance. In case there is no resolution—in other words, the Court maintains its request and a state persists in its refusal to comply—the state will be in breach of its obligations to cooperate.

I acknowledge that there is a risk that states would regard Article 97 as a residual clause which allows them to raise all types of grounds of refusal. To accommodate that concern, I propose that the use of Article 97 is subject to two conditions. First, the State Party concerned must act in good faith; this means that in order to stand the chance to be accepted as legitimate grounds, a state must consult with the Court without delay in respect of all instances of non-cooperation, as is already foreseen in Article 97. As far as I can see, although I must admit I am unaware of the communications between AU members and the ICC, it seems there is no compliance with this obligation. However, as will be further explored below, the present use of Article 97 by the Pre-Trial Chamber in recent communications with Kenya and Chad may also create the impression that the initiative for invoking Article 97 lies with the Court, which will—when no cooperation is forthcoming—ask for explanations, using Article 97. Second, only legitimate state concerns can be raised in the context of Article 97. "Legitimate" means that there must be important

5 Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Prosecutor v. Blaškić, Case No. IT-95-14-AR108bis, A. Ch., October 29, 1997.

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interests at stake. It also implies in my view that grounds of refusal that have been clearly rejected in the course of negotiating Part 9, such as the double criminality requirement or the political offence exception, are ab initio excluded from the category of legitimate state concerns. One might go so far as to say that a state withholding cooperation on such grounds would make improper use of Article 97 and apply it in bad faith. As far as the Al Bashir arrest warrant is concerned, I cannot exclude that legitimate state concerns are at stake. A real and foreseeable risk of destabilization is a matter worthy of consultation and consideration by the Court, and—on the basis of the views submitted by relevant states—a decision can be taken (or rather "the matter shall be resolved"). The problem is that all AU Members which are parties to the ICC must have been aware of these risks and concerns the moment they received the Al Bashir arrest warrant, and Article 97 requires them to consult with the Court where they receive a request for cooperation and when they identify problems in respect of execution of that request. Again, this is not indicative of loyal and good faith fulfillment of a State Party's obligations under the Statute.

The question also arises whether AU decisions not to arrest Al Bashir binding on AU members could be a legitimate ground of refusal under the ICC Statute. The Statute takes into account competing obligations under international law in three different ways. First, as was already explored, there is the obligation on the Court not to proceed with a request for arrest and surrender when it would require a state to act in violation of its "immunity obligations" (Article 98). An AU decision prohibiting the arrest of Al Bashir would not fall within the scope of Article 98, because it does not represent one of the types of (immunity) obligations in the sense of that provision. Second, under Article 90 a State Party may, subject to a number of procedural conditions, give priority to a competing extradition obligation. Again, this is of no relevance to the AU situation. Third and finally, Article 97 makes explicit mention of breach of a preexisting treaty obligation in the case of execution of a request for assistance, as a problem impeding compliance with the request. Although Article 97 does not contain grounds for refusal—it is a consultation mechanism—the explicit mention of this particular problem of conflicting obligations gives it a certain status. Arguably, like the other two examples that were mentioned, it was something the drafters considered a possibly valid problem in executing requests for assistance. It thus might be a semi- or pseudo-ground of refusal, which would also be in line with the object and purpose of, for example, Article 98. In case AU members got stuck between the obligations under the Rome Statute to arrest Al Bashir and obligations towards the AU not to arrest Al Bashir, they can in consultations with the Court refer to the example of Article

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97(c). The problem of competing obligations under international law brings a fundamental issue to the mechanism of Article 97, that this provision does much more than deal with "practical problems," as is suggested in certain commentaries.

From the above it follows that a competing obligation, as mentioned in Article 97(c), could be a good starting point in consulting with the Court to a favorable resolution—for the requested state this would be that it would not have to violate any obligation under international law. In relation to the arrest of Al Bashir, however, I believe there is little reason for the Court to adjust or withdraw its arrest warrant in respect of AU members. It is true that AU obligations can be traced back to the AU Charter, which is a pre-existing treaty, and thus could fall within the reach of Article 97(c). However, the obligation not to arrest Al Bashir is the result of decisions that have been taken long after entry into force of the ICC Statute with the deliberate aim of making the functioning of the Court impossible. As such, this is not an obligation pre-existing to the ICC. The decisions are the result of a voting process in which also States Parties to the ICC have participated. States Parties that have voted in favor of such AU decisions can never in good faith advance this as a legitimate problem in their execution of the arrest warrant. The conflicting obligation is only there as a result of their own actions. The matter is clearly more complex where an ICC party has voted against the AU resolution, but is nevertheless bound by it on account of majority decision-making. In such a situation a bona fide ICC party may indeed face a very difficult situation when Al Bashir visited that state. It requires immediate consultation with the Court, and it cannot be excluded that in respect of that particular bona fide state the resolution would be that obligations towards the AU might be respected. But such determination will depend on many factors, including the answer to the question, exceeding by far the scope of this opinion, whether AU resolutions prohibiting the arrest of Al Bashir are consistent with obligations of UN Members not to frustrate the effects of Resolution 1593 and whether obligations towards the AU are not for all AU members set aside by the mechanism of Article 103 of the UN Charter. It is one thing that Resolution 1593 does not oblige, with the exception of Sudan, states nonparties to the ICC to cooperate with the Court, but it is something else when individual UN Members start—acting through the AU—creating obligations for ICC parties not to cooperate, thereby preventing the ICC exercising its jurisdiction in the Darfur situation.

Defective Procedures

Although slightly exceeding the scope of this opinion—which is to focus on the substance of cooperation duties—I feel nevertheless compelled to offer a few remarks on the procedural side of cooperation in the Al Bashir case. Probably as important as determining the content of cooperation obligations is the use of proper procedures in case of noncompliance. Until this day, the practice of the ICC has been utterly disappointing in this respect. The following problems are worth mentioning.

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First, the Court, meaning all relevant organs, the prosecutor, and chambers, has reacted too late in respect of instances of noncompliance. It is worth rememebering that Sudan is not only failing to cooperate in the arrest and surrender of Al Bashir, but also in the arrest and surrender of Harun and Al Kushayb, as well as many other forms of cooperation (collection of evidence). Simply, since the adoption of Resolution 1593 in 2005 Sudan has never effectively cooperated with the Court. However, it took the judges until May 2010, so five years, formally to conclude that Sudan had violated its obligations towards the ICC and to inform the Security Council thereof. This is rather late and raises serious enforcement issues. What is the message here? That states have about five years of violating obligations before the judges finally wake up and get into action?

Second, it is not only that it takes the Court too long to react to instances of noncooperation, it has not applied the proper procedures. As a result, it has only aggravated the cooperation problems, instead of clarifying certain issues. In its decision of May 25, 2010, informing the Security Council of lack of cooperation by Sudan, the Pre-Trial Chamber used inherent powers to conclude that Sudan had violated its obligations under international law and to inform the Security Council thereof. It did not use the procedures provided for in Article 87(7) of the Statute and Regulation 109 of the Court. This is unfortunate, because these procedures serve important purposes. It would be wrong to ignore them for the reason that Sudan is not a State Party; as was already mentioned above, effective cooperation would be in big trouble if Sudan could not be equated with a State Party, in order to give full effect to SC Resolution 1593.

Third, of the vital aspects of the procedure of Regulation 109, the most important is that the requested state, Sudan, shall be heard. Even if Regulation 109 were not applicable it is an essential element of a procedure determining whether a state has violated its cooperation obligations to hear that particular state. I find it hard to believe that the Pre-Trial Chamber made no effort whatsoever to hear Sudan. This is not only inconsistent with basic procedural fairness—*audi alteram partem*—but also strengthens Sudan—and supportive states—in their position that their views and opinions are not taken seriously. Moreover, requesting Sudan to submit its views would have the advantage that Sudan can no longer hide, but must speak out, and that it offers the opportunity to resolve a number of legal questions. It is true that organizing such a

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procedure would take more time, but that is a price worth paying. At present, we are faced with a determination from the Chamber that Sudan has violated its obligations, without involving Sudan in that procedure. It is an unforgiveable error. The Prosecutor has tried to obtain application of Regulation 109 in certain submissions, but as yet to no avail. It is to be hoped that in the future a Chamber is wise enough to involve Sudan in cooperation proceedings.

Fourth, I am worried about how the Pre-Trial Chamber is currently monitoring cooperation problems. It seems that it wants to be on top of things by issuing short orders/decisions providing information or asking for information. The Pre-Trial Chamber, for example, informed the Security Council of the fact that Al Bashir had visited Chad and Kenya and was not arrested there. I seriously do not know what purpose this "information" serves. It is probably not a new fact to the Security Council that this happened, and the Council is always in the position to take the necessary steps. If the Pre-Trial Chamber wished to really inform the Council, it should have made a judicial finding of noncompliance, pursuant to Article 87(7). But such finding is nowhere explicitly made in the "information" provided. This type of decisions is thus neither flesh nor fowl, is only confusing, is not based on any statutory provision and should be avoided. The same applies, in my view, to decisions in which the Pre-Trial Chamber requests information from states explaining why they have not arrested Al Bashir, or will not do so in the future. Kenya has received a decision in which it is reminded of its obligations to arrest Al Bashir and requested to provide information, pursuant to Article 97 of the Statute, why it could not do so. This approach turns the system of cooperation on its head and significantly weakens it. The moment the Al Bashir arrest warrant was issued there was a very simple obligation for States Parties: to arrest him when they were in a position to do so, or to immediately inform the Court of any problems, pursuant to Article 97. When the Court has information that either of these obligations has not been fulfilled it is not the task of the Court to ask for explanations, unless in the framework of the enforcement procedure of Article 87(7) and Regulation 109; the noncooperative state should have provided explanations on its own accord. That they have failed to do so can only result in one conclusion: that particular state has violated its obligations under the Statute. To have states take these obligations seriously requires moving immediately to the next step, namely the procedure set out in Article 87(7) and Regulation 109, a judicial finding of noncompliance. It is in the framework of this procedure that noncooperative states can defend their lack of cooperation on the basis of legal arguments. There is a significant risk in not moving automatically from instances of noncooperation, via Regulation 109, to judicial findings of noncompliance: it creates—even reinforces—the impression that states can get

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away with noncompliance. This is problematic from several perspectives. To start with, I wonder if the Court has any idea as to what would be the follow-up procedure in respect of information provided. Suppose it is claimed by Chad that Article 98 is applicable and justifies refusal to cooperate. What is the next step? Clearly, the Court cannot leave such view without a reaction, but on what basis to react and involve the views of parties to the proceedings? There is thus no proper procedural framework to govern this; such framework would have been provided by Article 87(7) and Regulation 109. Second, with a view to possible later enforcement actions by the Assembly of States Parties or the Security Council it is crucial to have as accurate and comprehensive a record as possible of instances of noncooperation. The Prosecutor can—and does—provide useful information in this respect. Yet, only findings by a chamber may carry the necessary authority to move states into enforcement action. As we never know how much it takes to trigger enforcement action, the Court must prepare for making repeated judicial findings of noncompliance. This thus requires a series of procedures which may produce a series of judicial findings of noncompliance. This may indeed burden the Court significantly, but the importance of the matter justifies it. Furthermore, procedures in case of noncooperation can be far better organized than is currently the case. To start with, such procedures would benefit from a specialized chamber that ideally deals with a number of instances of noncooperation simultaneously. For example, in respect of Sudan it is quite bizarre that a finding of noncompliance was made in the Al Kushayb and Harun cases and not (yet) in the Al Bashir case. Clearly, these—and other instances of noncooperation by Sudan—merit joint treatment.

I am aware that the immediate and frequent holding of States Parties as in violation of their obligations towards the Court may create certain discomfort within the ASP, but this should not matter. The Judges must record violation of cooperation duties and must do so equally and effectively for all states that have done so.

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