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### Key Reforms for the Next Decade of the ICC—Towards a Stronger Judicial Role in the Investigations and a More Robust System of Enforcing State Cooperation

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Topic for June 2018 – May 2019

## Anniversary Question

In the *Rome Statute's* third decade, what key reforms could make the international criminal justice project stronger, more efficient, and more effective?

Twenty years ago, on July 17, 1998, the adoption in Rome of the ICC's founding statute was a significant milestone in the development of international criminal justice. To mark the twentieth anniversary of the *Rome Statute*, we look ahead to the next ten years and consider the future of international criminal justice.

Two decades on since the adoption of the *Rome Statute*, the Court has

## INVITED EXPERTS ON ANNIVERSARY QUESTION

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WHAT'S YOUR OPINION?



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## Key Reforms for the Next Decade of the ICC—Towards a Stronger Judicial Role in the Investigations and a More Robust System of Enforcing State Cooperation

### Summary

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The two biggest threats to the effective functioning of the ICC are (1) interference with witnesses and (2) states which refuse to cooperate with the Court. This comment argues for reforms that could assist

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in addressing these problems.

It is argued that interference with witnesses finds its root causes in lengthy investigations and a non-objective, partisan approach to

investigations. Giving the judge in the Pre-Trial

Chamber a stronger role in the pre-trial investigations may assist in reducing the instances of witness interference. [Article 57\(3\)\(c\)](#) of the *Statute* offers the necessary basis for the Pre-Trial Chamber to take on this role and is flexible enough to ensure that a more active judicial involvement in investigations is only done when the circumstances of a particular case so require.

In regards to non-cooperation, the conclusion is that, until now, the approach in the case law of the Court and in the Assembly of States Parties (ASP) has been quite disappointing. In the interest of taking cooperation seriously, it is advised that all findings of non-compliance under [Article 87\(7\)](#) of the *Statute* are automatically referred to the ASP. In addition, the ASP should develop more robust reactions against non-cooperative states. Sanctions, such as taking away the right to vote for some time, or an increase in the annual contribution, should be available and should be proportionate to the harm done to the effective functioning of the Court. Otherwise, for some states-parties, non-cooperation may become “business as usual.”

#### Argument

All supporters of the ICC are keen on working on a more effective and stronger international criminal justice system. I am therefore happy to contribute to this particular topic of UCLA’s highly valued Human Rights and International Criminal Law Online Forum.

In the limited space available to me, I will concentrate on what I consider to be the two biggest threats at present to the effective functioning of the ICC. These are:

1. [The quality of fact-finding](#), especially the problem of interference with witnesses;

states which refuse to cooperate with the Court. This comment argues for reforms that could assist in addressing these problems.

## 2. The non-cooperation by states.

COLLAPSE

### I. The Quality of Fact-finding

The cases that are brought before the ICC are still highly dependent on fact-finding and testimonial evidence. It follows from a number of cases that, unfortunately, witnesses are being subjected to various forms and degrees of interference. For example, as the ICC Prosecutor said in relation to the Kenya case:

There was a relentless campaign to identify individuals who could serve as Prosecution witnesses in this case and ensure that they would not testify. This project of intimidation preceded the start of our investigation in Kenya, intensified in the weeks leading up to the beginning of the trial, and continued throughout the life of the case.

As a result, potential witnesses told us they were too afraid to commit to testifying against the Accused. Others, who initially gave us accounts of what they saw during the post-election period, subsequently recanted their evidence, and declined to continue cooperating with the Court.

In addition, at public prayer rallies, local politicians and community leaders branded Prosecution witnesses as liars who had all given false evidence. On social media, anonymous bloggers engaged in a steady stream of speculation about the identity of protected witnesses. This speculation frequently devolved into vitriolic commentary about witnesses' motives for cooperating with the Court.<sup>1</sup>

It exceeds the scope of this comment to analyse in detail the exact causes and nature of interference in all ICC investigations. Suffice it to say that we have been fortunate enough that in some cases, such as the Lubanga trial—the first ICC case—several instances of influencing witnesses came to light, as these witnesses themselves admitted in court that their initial statements provided to the prosecution were false and the result of instruction by so-called intermediaries. We do not know how many other instances of witness interference may have taken place in the totality of ICC investigations which have not been discovered, and have thus resulted

in instances of false testimony—or no testimony at all. Also, looking at the statement of the Prosecutor in the Kenya case, and bearing in mind the problems with intermediaries instructing witnesses and the prosecution of bribing witnesses by defendant Bemba and his co-accused, I think it is safe to conclude that the problem of witness interference is at present the greatest threat to accurate fact-finding at the ICC.

With this cloud of possible interference of witnesses hanging over the functioning of the Court, the question arises of which steps and reforms could be taken to reduce this and to enhance the quality of fact-finding?

Some steps have already been taken. The use of intermediaries by the OTP and the ensuing interferences with witnesses in the ICC's first cases have led, in 2014, to the adoption of Guidelines Governing the Relations between the Court and Intermediaries.<sup>2</sup> When the interference of witnesses comes within the purview of [Article 70](#) of the *Rome Statute* (the *Statute*), amounting to an offense against the administration of justice, criminal prosecutions at the ICC can be initiated. This happened in respect of Mr. Bemba and four co-accused resulting in convictions and sentences. In the Kenya case, arrest warrants have been issued against suspects of witness interference, but nobody has been arrested and surrendered to the Court yet.

I am unpersuaded that the Guidelines on Intermediaries and the prosecution of criminal witness interference will suffice to address the problems.

It seems to me that, at the heart of the problem of witness interference, are the facts that:

- a. the investigations stretch out too long before the commencement of the trial, and
- b. the parties have a partisan, non-objective approach towards their collection of evidence, and engage in fact-finding without judicial supervision.

The key to reducing the instances and severity of witness interference thus lies in limiting the period of time that witnesses can, prior to trial, be the object of attempts of interference. A stronger role for the judge in the pre-trial investigations can serve to ensure that the period of time between first contacting the witness and taking testimony in

court is limited as much as possible and that the investigations of the parties are under “judicial supervision” in a broader sense.

The role of the judge in pre-trial investigations is a matter that divides criminal justice systems. In the continental European tradition—notably in a country like France—judge-led investigations excluding the parties is the norm, at least in more serious cases; in French, this investigating judge is called the *juge d’instruction*. This approach to investigations serves to ensure objective and comprehensive fact-finding without the risk of investigations being distorted by a partisan approach. Judge-led investigations have long been unknown in international criminal justice, until the establishment of the ECCC. Adhering to Cambodian procedural law, which is based on the French system, all investigations at the ECCC are exclusively conducted by an Office of two co-investigating judges.<sup>3</sup>

In adversarial criminal justice systems, such as in the US or the UK, the judge has only a small role in fact-finding, limited to issuing the warrants that may be necessary for certain investigative activities. The approach of using party-driven investigations, without significant judicial involvement and oversight, has also prevailed in international criminal justice.

Between the extremes of either exclusive judicial investigations, or investigations only by the parties, there are more flexible options. In the Netherlands, for example, the pre-trial judge has a supervisory function in pre-trial investigations, which—depending on the needs of the investigation—may result in a greater or more marginal role.

It seems to me that the system of the ICC, with the creation of the Pre-Trial Chamber and bearing in mind some of its powers, is flexible enough to give the judge a stronger role in the investigations. We have already witnessed some developments which point towards a more active Pre-Trial Chamber and a stronger judicial role in the investigations, especially with the aim of dealing with the problem of (potential) interference with witnesses.

[Article 56](#) of the *Statute*, entitled “Role of the Pre-Trial Chamber in relation to a unique investigative opportunity,” has been used to take testimony prior to trial. This provision was included in the *Statute*

to secure evidence prior to trial in case there is a strong risk it will not be available later on; the most mentioned example is that of a terminally-ill witness. The [Article 56](#) collection of evidence is, in principle, to be triggered by the Prosecutor, but it can also be initiated on the Pre-Trial Chamber's own initiative under [Article 56\(3\)](#) of the *Statute*, subject to appeal by the Prosecutor.

With specific reference to risks of witness interference, the Pre-Trial Chamber justified the use of [Article 56](#) in the Ongwen case as follows:

The PTC Single Judge specified the Article 56(2) measures enabling him to take the Witnesses' testimony. Pursuant to Article 56(1) (a) of the *Statute*, he found a unique investigative opportunity to take the Witnesses' testimony in light of a risk that it may not be available subsequently for the purposes of a trial. In so finding, he considered specific meetings, publications and other events with the potential to taint the Witnesses' evidence, in conjunction with the risks inherent in the passage of time, in particular, the possible recurrence of events with the potential to taint the Witnesses' evidence.<sup>4</sup>

This use of [Article 56](#) is not without criticism. The question arises whether hearing witnesses prior to trial out of fear of interference later on amounts to "unique investigative opportunities" as intended by the drafters and whether the defense is not significantly disadvantaged by having to cross-examine these witnesses without proper preparation and knowledge of the Prosecution's case.

The question may arise why another provision in the *Statute* has not been used to deal with the problems pertaining to witness interference. [Article 57\(3\)\(c\)](#) of the *Statute* empowers the Pre-Trial Chamber, without requiring an application from the parties, to protect witnesses and also to preserve evidence. Arguably, this *proprio motu* power in the preservation of evidence could open the door to a more active judicial involvement in the pre-trial collection of evidence, which might even go as far as conducting judicial investigations—if so required by the circumstances of a particular case. However, commentaries to this provision in the [Rome Statute](#)—and the very limited case law on this point—show that the views are divided whether or not the Pre-Trial Chamber could use this provision to take on a much stronger role in



the pre-trial investigations; furthermore, the Prosecutor has objected against encroachment on her investigative powers that could be the result of a stronger judicial role in the collection of evidence.<sup>5</sup>

Looking at the idea behind having a Pre-Trial Chamber at the ICC to start with, namely ensuring the preservation of evidence, there does not seem to be that much against having a stronger role of the Pre-Trial Chamber in the investigations.<sup>6</sup> And that was even without the drafters having anticipated rather widespread and structural problems regarding the interference with witnesses.

It is therefore my opinion that a flexible—and thus at times strong—role for the Pre-Trial Chamber in the collection of evidence can improve the quality of fact-finding and has the potential of reducing instances of witness interference. When the Pre-Trial Chamber considers it to be in the interests of justice—or necessary—[Article 57\(3\)\(c\)](#) of the *Statute* empowers the Chamber to take a variety of steps and measures to ensure the preservation of evidence. For example, on the basis of [Article 57\(3\)\(c\)](#) of the *Statute*, the Pre-Trial Chamber could require to be kept informed about the existence and nature of contacts with the parties' witnesses. It could also deal with all possible interference risks, including ordering additional protective measures, which is mentioned as a separate power in [Article 57\(3\)\(c\)](#) of the *Statute*.

The advantage of using [Article 57\(3\)\(c\)](#) in a more active—even pro-active—manner is that it enables the Court to enhance the quality of fact-finding without having to resort to amendments to the *Statute*, or even to the Rules of Procedure and Evidence. As has been done in other matters, the Pre-Trial Chamber, if there is a need to do so in a particular case, can develop a protocol aimed at being informed of and supervising the investigations of the parties, or even substitute these investigations in respect of certain witnesses whom the Chamber deems particularly vulnerable. When the circumstances so dictate, this could, in my view, go as far as prohibiting further contacts between a party and a witness and have a pre-trial statement taken directly by the Chamber.

Obviously, such a potentially far-reaching role for the Pre-Trial Chamber in certain investigations is not without problems. It raises the structural

question whether the emphasis may gradually shift from the trial to the pre-trial phase and thereby risks threatening the external publicity of international criminal proceedings. Especially in international criminal trials, justice must be seen to be done. It is not helpful in this regard if there is a development which contributes to evidence not always being presented at a public trial. But, that said, it does not have to be a consistent development in all cases; the law is flexible enough to adjust the role of the Pre-Trial Chamber to the needs and threats in a particular investigation.

In cases where the Pre-Trial Chamber exercises a firmer grip on pre-trial investigations, another issue relating to the organizational structure of the Court needs to be addressed. The Pre-Trial Chamber will have to be up to the task and be able to deliver on the promises it may make in both policies and practices as it undertakes more involvement in the investigations. This means more staff, especially more staff specialized in investigations and their challenges. Also, with the election of judges and the allocation of them among the Chambers, care should be taken that there is sufficient experience and expertise in criminal investigations.

To conclude on this point, reform of the Pre-Trial Chamber in the direction of a stronger role in the investigations will not be without controversy, problems, and costs. However, I am convinced that the problems in investigations, especially interference with witnesses, are significant and we should not be burying our heads in the sand. The Judges themselves appear to have acknowledged the seriousness of the problems with witness interference and have already started to take a stronger role in investigations by making use of [Article 56](#). I believe, however, that [Article 56](#) is not the best basis to continue on this path of a stronger judicial role in the investigations. [Article 57\(3\)\(c\)](#) of the *Statute* offers a more solid and also flexible legal basis to take a variety of measures to protect the quality and integrity of the investigations, if the circumstances of a particular investigation so require.

## II. Non-cooperation by States

One of the greatest frustrations of every supporter of an effective ICC is undeniably the current non-cooperation by states. This does not

really concern states which are not a party to the *Statute*, as they have no obligation to cooperate unless such cooperation is required by another source of law than the *Statute*, such as a Security Council Resolution or [Article VI](#) of the *Genocide Convention*. But states which have voluntarily joined the ICC, and have accepted all the obligations in the *Statute*, have refused to cooperate with the Court, and appear to get away with it. With South Africa's non-cooperation having been recently addressed by the Court and with Jordan's non-cooperation still pending at the level of the Appeals Chamber, we have arrived at a critical phase in the Court's life when it comes to dealing with non-cooperation. The worst thing that could happen to the effective functioning and authority of the Court is that non-cooperation is increasingly considered "business as usual."

I recently published an article in which I tried to address many of the problems resulting from non-cooperation and how the Court, especially the ASP, should respond to this.<sup>7</sup> It exceeds the scope of this comment to deal with all those issues here as well. I will focus on some major points.

Before I do, I'd like to emphasize that there may not always be much difference that the law alone can make in ensuring cooperation with the Court. The recent history of international criminal justice has demonstrated how important unwavering political pressure on non-cooperating States is to have legal obligations—finally—enforced. The reality, simply, is that the ICC does not presently benefit from the same degree of political pressure that was available, for example, to the ICTY when the European Union insisted on the arrests of Karadzic and Mladic. Rather, the Security Council, which referred the situations of Libya and Sudan to the Court, has let down the Court in a painful manner when it comes to having these mandates effectively fulfilled.

With the limitations of the law in mind, a solid legal framework regarding non-cooperation is nevertheless an important pre-requisite for subsequent effective enforcement measures. A number of problems have arisen in the Court's practice until now.

First of all, the fact remains that the ICC's law on cooperation has been the result of a compromise and is not necessarily always geared towards effective cooperation. Simply, the drafters did not

always make the interests of the Court prevail. An interesting example in this regard is [Article 97](#) of the *Statute*, dealing with consultations between the Court and the requested State, which allows a State to raise potentially every problem it may encounter in executing a request for cooperation. These consultations should result in a resolution of the cooperation dispute, but, also looking at the drafting history, it is not said that this resolution should be in favor of an effectively functioning Court. In its case law, the Chambers, dealing with [Article 87\(7\)](#) litigation, have tried to interpret and apply [Article 97](#) in a manner that would favor effective cooperation, but this approach may not be in keeping with the drafting history.<sup>8</sup> The bottom-line is that the entire law on cooperation, together with the law and procedures on the enforcement of cooperation obligations, would have benefited from substantive obligations which would unequivocally be in favor of an effective Court.

The second problem relates to the Court's case law under [Article 87\(7\)](#) of the *Statute*. The procedure under this provision is aimed at establishing a judicial finding of non-compliance, which is the condition for subsequent measures by the Assembly of States Parties or the Security Council. The litigation under [Article 87\(7\)](#) has (i) not always been of sufficient quality, and (ii) also has come to mix too much law with politics.

The lack of quality in [Article 87\(7\)](#) case law can be illustrated by the fact that, after years of litigation and many decisions, there is still no persuasive substantive analysis by the Court on the issue of state immunity as an obstacle to the arrest and surrender of Sudanese sitting president Al Bashir. It is only very recently that the Appeals Chamber has chosen to address this matter thoroughly; in the appeals procedure in [Article 87\(7\)](#) litigation involving Jordan's failure to arrest Al Bashir, the Appeals Chamber has called for *amicus curiae* briefs, with a view to be thoroughly informed on all international law issues surrounding the arrest of Al Bashir by States Parties.<sup>9</sup> It begs the question why this had not been done already a long time ago.

Another shortcoming of the case law under [Article 87\(7\)](#) is the discretion that has been granted to the competent Chamber, following a decision by the Appeals Chamber, to decline to refer non-compliance to the ASP.<sup>10</sup> This raises the question

about what criteria should guide the Chamber in referring non-compliance to the ASP. Rather, one would expect that when the non-compliance is considered serious enough to trigger [Article 87\(7\)](#) proceedings, referral to the ASP should be automatic. It would then be up to the ASP to take appropriate action. The exercise of non-referral discretion by Chambers has resulted in a number of unsatisfactory decisions. A few States, such as Nigeria and South Africa, have been spared the referral of their non-compliance to the ASP, whereas other States in identical situations have been referred for their non-compliance to the ASP. Moreover, the reason why some non-cooperation has not been referred to the ASP has led to some remarkable observations, amounting to an encroachment upon the powers of the ASP. For example, the non-referral of South Africa was based, in part, on the view that subsequent action by the ASP was unlikely to be effective in obtaining the requested cooperation.<sup>11</sup> I don't think this is the message that should be sent to non-cooperative States.

Finally, we should look at the role of the ASP in enforcing cooperation. One must admit that the mandate of the ASP in terms of dealing with non-cooperation is not particularly persuasive. Pursuant to [Article 112\(f\)](#), the ASP is empowered to consider any question relating to non-cooperation. "To consider" does not endow the ASP directly with specific powers, but is broad enough to develop a robust and active approach by the ASP towards non-cooperation. What we see in practice is, however, quite disappointing. Over the years, the ASP has taken a great variety of initiatives in organizing its dealings with non-cooperation. On the basis of the ASP's internal documents on procedures on non-cooperation, the following measures appear at present available to react against non-cooperation:

- Emergency Bureau meeting, at which it can be decided what further action can be taken;
- Open letter from the President of the ASP, on behalf of the Bureau, to the state concerned, reminding that state of the obligation to cooperate and requesting its view on the matter;
- A meeting of the Bureau, at which a representative of the state concerned would be invited to present its views on how it would cooperate with the Court in the future;

- Holding a public meeting on the matter to allow for an open dialogue with the requested state;
- Submission of a Bureau report on the outcome of the aforementioned dialogue to the plenary session of the ASP, including a recommendation as to whether the matters require action by the Assembly;
- Appointment in the plenary session of the ASP of a dedicated facilitator to consult on a draft resolution containing concrete recommendations on the matter.<sup>12</sup>

None of the measures can be considered to be effective or seriously sanction non-cooperation. When non-cooperation seriously hampers the effective functioning of the Court, one would expect the development and use of more robust enforcement measures. Those could include a financial sanction or taking away, for some period of time, the right to vote in the ASP. I realize that a more robust approach towards enforcement within the ASP may create tensions and problems, but one should also not underestimate the consequences of continuing on the present path. Regrettably, non-cooperating States see that there is nothing to fear in case of non-cooperation and, as a consequence, non-cooperation has appeared to have become business as usual.






This trend needs to be reversed. I therefore propose the following reforms, which can all be put in place without amending the *Statute*:

- I would urge for a reversal of the current jurisprudence and ensure that referrals of judicial findings of non-cooperation to the ASP, which were considered to be important enough to initiate the proceedings under [Article 87\(7\)](#), to the ASP are automatic upon a finding of non-cooperation.
- A possible framework for enforcing non-cooperation within the ASP could consist of a number of measures, or administrative sanctions, that can be imposed against the non-cooperating State. If an administrative sanction is appropriate, which sanction would be necessary and proportionate under the circumstances should depend on a number of factors, including the degree to which the non-cooperation has undermined the functioning of the Court and whether the cooperation was provided at a later stage. Clearly, failure to execute an arrest warrant, knowing that there is probably no likely later opportunity to provide the requested assistance,






should rank as a serious instance of non-cooperation which substantially undermines the functioning of the Court; it justifies a more severe reaction compared to other forms of non-cooperation. Another relevant factor could be whether or not the non-cooperating State is a “first offender” or has failed to cooperate with the Court in the past.

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

Endnotes — (click the footnote reference number, or ↩ symbol, to return to location in text).

1. **Fatou Bensouda**, Prosecutor of the ICC, *Statement Regarding Trial Chamber’s Decision to Vacate Charges* (Apr. 6, 2016), available [online](#) (last visited Jun. 8, 2018).  
  
(This statement was made following the vacating of charges in the Kenya case against William Samoei Ruto and Joshua Arap Sang). ↩
2. **International Criminal Court**, *Guidelines Governing the Relations between the Court and Intermediaries* (Mar. 2014) available [online](#),  [archived](#).  ↩
3. See *Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea*, ECCC, NS/RKM/1004/006, AT ARTICLE 23 NEW (AMENDED Oct. 27, 2004), available [online](#);  **Extraordinary Chambers in the Courts of Cambodia**, *International Rules (Rev.9)*, AT RULES 55–69 (AMENDED Jan. 15, 2015), available [online](#).  ↩
4. *The Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-520, Decision on Request to Admit Evidence Preserved Under Article 56 of the Statute, ¶ 8 (TC IX, Aug. 10, 2016), available [online](#).  ↩



5. See **Fabricio Guariglia, Kenneth J. Harris & Gudrun Hochmayr**, *Article 57: Functions and Powers of the Pre-Trial Chamber*, in COMMENTARY ON THE *ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT*: OBSERVERS' NOTES, ARTICLE BY ARTICLE 1126 (OTTO TRIFFTERER ED., 2ND ED. 2008). ↩
6. See **William A. Schabas**, *THE INTERNATIONAL CRIMINAL COURT—A COMMENTARY ON THE ROME STATUTE* 697 (2010). ↩
7. **Göran Sluiter**, *Enforcing Cooperation: Did the Drafters Approach It the Wrong Way?*, *J. INT'L CRIM. JUST.* (FORTHCOMING 2018), [paywall](#), [doi](#). ↩
8. See *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, ICC-02/05-01/09, 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 (PTC II, Jul. 6, 2017) [hereinafter *South Africa Non-Compliance*], [available online](#);  *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-309, 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 (PTC II, Dec. 11, 2017), [available online](#).  ↩
9. *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, ICC-02/05-01/09 OA2, Order Inviting Expressions of Interest as *Amici Curiae* in Judicial Proceedings (Pursuant to Rule 103 of the Rules of Procedure and Evidence) (AC, Mar. 29, 2018), [available online](#).  ↩
10. *The Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11 OA 5, 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*," (AC, Aug. 19, 2015), [available online](#).  ↩
11. See *South Africa Non-Compliance*, *supra* note 8, at ¶ 135. ↩
12. **Assembly of States Parties**, *Strengthening the International Criminal Court and the Assembly of States Parties*, ICC-ASP/10/RES.5, AT ANNEX ¶ 14 (Dec. 21, 2011), [available online](#).  ↩

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COLLAPSE

YOUR COMMENT

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