INTERNATIONAL CRIMINAL JUSTICE AT THE INTERFACE: THE RELATIONSHIP BETWEEN INTERNATIONAL CRIMINAL COURTS AND NATIONAL LEGAL ORDERS

by
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THESIS CONTAINS

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Abstract

International criminal courts do not operate to the exclusion of national legal orders, but co-exist with them. The present thesis provides an in-depth analysis of the above relationship. By examining the concepts of primacy and complementarity on the basis of which the *ad hoc* international criminal Tribunals and the permanent International Criminal Court seize jurisdiction, the foundations of the interface are explored. As effectiveness is a key concept to international criminal justice, the relationship between international criminal courts and national legal systems is tested, by examining the co-operation regimes envisaged in the Statutes of both the Tribunals and the ICC, as well as the problems that arise in practice. Moreover, the way the UN Security Council affects State interplay with international criminal justice institutions is crucial for a holistic understanding of the limitations of the interaction. The final part of the thesis focuses on national incorporation efforts and provides a detailed analysis of implementing legislation of a number of key States with a view to discerning some common approaches and highlighting problem areas. The present thesis argues that despite the different constitutional bases of the Tribunals and the ICC, similar questions of interface with national courts arise and the challenges presented could be better tackled by aiming for a "functional or workable interaction".

Overall, the originality of this thesis lies in its analytical approach. By scrutinising a number of crucial aspects of the relationship between international criminal courts and national legal orders an overview of the research question posed is achieved. Moreover, the examination of the legal

principles and their practical application is complemented by a comprehensive discussion of national implementing legislation which has not previously been attempted in a similar manner.

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TABLE OF CONTENTS

LIST OF ABBREVIATIONS

1982 UN Convention on the Law of the Sea	UNCLOS
Accountability, The Newsletter of the ASIL International Criminal Law Interest Group	ACCOUNTABILITY
Acta Juridica Hungaria	AJH
Afrique contemporaine	AC
Air Force Law Review	AFLR
Albany Law Review	ALBLR
American Criminal Law Review	AMCRLR
American Journal of International Law	AJIL
American Society of International Law Proceedings	ASILPROC
American University International Law Review	AMUILR
American University Journal of International Law and Policy	AMUJILP
Annuaire Français de Droit International	AFDI
Archiv des Völkerrechts	AVR
Arizona Journal of International and Comparative Law	AZJICL
Army Lawyer	ARMLAW
Assembly of States Parties	ASP
Australian Yearbook of International Law	AYBIL
Berkeley Journal of International Law	BERKJIL
Boston College International and Comparative Law Review	BCICLR
Boston University International Law Journal	BUILJ
Boston University International Law Journal	BUILJ
British Yearbook of International Law	BYIL
Brooklyn Journal of International Law	BKNJIL
Brown Journal of World Affairs	BJWA
Buffalo Human Rights Law Review	BFHRLR
BYU Journal of Public Law	BYUJPL
Canadian Bar Review	CBR
Canadian Yearbook of International Law	CYIL
Case Western Reserve Journal of International Law	CWRJIL
Case Western Reserve Law Review	CWRLR
Catholic University Law Review	CATHULR
Champion	CHAMP
Chicago Journal of International Law	CHIJIL
Columbia Human Rights Law Review	CLMHRLR
Columbia Journal of Transnational Law	CLMJTL
Common Market Law Review	CMLR
Connecticut Journal of International Law	CTJIL
Cornell International Law Journal	CNLILJ
Criminal Law Forum	CRIMLF
Current Legal Problems	CLP
Denver Journal of International Law and Policy	DENJILP
DePaul International Law Journal	DPLILJ
Dickinson Journal of International Law	DICKJIL
Duke Journal of Comparative and International Law	DUKEJCIL

Duke Law Journal	DUKELJ
Emory International Law Review	EMORYILR
Europäische Grundrechte – Zeitschrift	EuGRZ
European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment	CPT
European Journal of Crime, Criminal Law and Criminal Justice	EJCCLCJ
European Journal of International Law	EJIL
European Law Review	ELR
European Union	EU
Federal Republic of Yugoslavia	FRY
Fletcher Forum of World Affairs	FLFWA
Florida Journal of International Law	FLJIL
Fordham International Law Journal	FDMILJ
Fordham Law Review	FDMLR
Foreign Affairs	FA
George Washington International Law Review	GWILR
Georgetown Law Journal	GEOLJ
Georgia Journal of International and Comparative Law	GAJICL
German Yearbook of International Law	GYIL
Golden Gate University Law Review	GGULR
Harvard Human Rights Journal	HVHRJ
Harvard International Law Journal	HVILJ
Hofstra Law and Policy Symposium	HOFLPS
Houston Journal of International Law	HOUJIL
Human Rights Law Journal	HRLJ
Human Rights Law Review	HRLR
Human Rights Quarterly	HRQ
Humanitäres Völkerrecht – Informationsschriften	HuV-I
ILSA Journal of International and Comparative Law	ILSAJICL
Indiana Journal of Global Legal Studies	INJGLS
Inter-American Court of Human Rights	IACHR
International and Comparative Law Quarterly	ICLQ
International Centre for Settlement of Investment Disputes	ICSID
International Court of Justice	ICJ
International Covenant on Civil and Political Rights	ICCPR
International Criminal Law Review	ICLR
International Enforcement Law Reporter	INTLELREP
International Journal of Legal Information	INTJLI
International Journal of Marine and Coastal Law	IJMCL
International Law Commission	ILC
International Law FORUM du Droit International	ILForumDI
International Law Practicum	INLPRAC
International Law Reports	ILR
International Law Update	INTLLUP
International Lawyer	INTLLAW
International Legal Materials	ILM
International Legal Perspectives	INTLP
International Military Tribunal	IMT

International Peacekeeping	INTPEACE
International Relations	IR
International Review of the Red Cross	ICRC Rev.
International Tribunal for the Law of the Sea	ITLOS
Israel Yearbook of Human Rights	IYHR
Jahrbuch Menschenrechte	JM
Japanese Annual of International Law	JAIL
Journal of Armed Conflict Law	JACL
Journal of International Criminal Justice	JICJ
Journal of International Law and Practice	JILP
Juristen Zeitung	JZ
King's College Law Journal	KCLJ
Kritische Viertljahresschrift für Gesetzgebung und Rechtswissenschaft	KritVGR
Law and Contemporary Problems	LCPR
Leiden Journal of International Law	LJIL
Loyola of Los Angeles International and Comparative Law Review	LYLAICLR
Maryland Journal of International Law and Trade	MDJILT
Max Planck Yearbook of United Nations Law	MPYUNL
Melbourne University Law Review	MELULR
Michigan Journal of International Law	MIJIL
Michigan Law Review	MILR
Militair Rechtelijk Tijdschrift	MRT
Military Law Review	MILLR
Modern Law Review	MLR
Netherlands International Law Review	NILR
Netherlands Quarterly Human Rights	NQHR
Neue Juristische Wochenschrift	NJW
Neue Justiz	NJ
Neue Zeitschrift für Strafrecht	NStZ
New England Law Review	NENGLR
New York University Journal of International Law and Politics	NYUJILP
Nordic Journal of International Law	NJIL
North Carolina Journal of International Law and Commercial Regulation	NCJILCR
Orange County Law	OCLAW
Organisation for Security and Co-operation in Europe	OSCE
Osgoode Hall Law Journal	OHLJ
Pace International Law Review	PACEILR
Pace Yearbook of International Law	PACEYBIL
Recht und Politik	RuP
Recueil Dalloz	RD
Recueil Dalloz Sirey	RDS
Recueil des Cours Académie de Droit International	RCADI
Resolution	Res.
Review of International Affairs	RIA
Revue de Droit Penal et de Criminologie	RDPC
Revue Générale de Droit International Public	RGDIP

Revue Hellénique de Droit International	RHDI
Revue Trimestrielle de Droit de l'Homme	RTDH
Rules of Procedure and Evidence	RPE
Saint John's Journal of Legal Commentary	STJJLC
Schweizerische Zeitschrift für Strafrecht	SchwZStR
Secretary General	SG
Security Council	SC
South African Journal of Criminal Justice	SACJ
South African Journal on Human Rights	SAJHR
St Louis-Warsaw Transatlantic Law Journal	STLWTLJ
Stanford Journal of International Law	SJIL
Syracuse Journal of International Law and Commerce	SYRJILC
Texas International Law Journal	TXILJ
The Law and Practice of International Courts and Tribunals	LPICT
Touro Journal of Transnational Law	TJTL
Transnational Law and Contemporary Problems	TRNATLCP
Tulane European and Civil Law Forum	TLNECLF
Tulane Journal of International and Comparative Law	TLNJICL
U.C. Davis Journal of International Law and Policy	UCDJILP
UCLA Journal of International Law and Foreign Affairs	UCLAJILFA
UN General Assembly	GA
United Nations	UN
United Nations Interim Administration Mission in Kosovo	UNMIK
United Nations Transitional Authority in Eastern Slavonia, Barajna and Western Sirmium	UNTAES
University of California Davis Law Review	UCDLR
University of Chicago Law Review	UCLR
University of Chicago Law School Roundtable	UCHILSRT
University of Colorado Law Review	UCOLR
University of Kansas Law Rewiew	UKSLR
University of Miami International and Comparative law Review	UMIAICLR
Vanderbilt Journal of Transnational Law	VNJTL
Vereinte Nationen	VN
Vienna Convention on the Law of Treaties	VCLT
Villanova Law Review	VLLR
Virginia Journal of International Law	VAJIL
Washington University Journal of Law and Policy	WAUJLP
Whittier Law Review	WTLR
Wisconsin International Law Journal	WIILJ
World Trade Organisation	WTO
Yale Journal of International Law	YJIL
Yale Law Journal	YLJ
Yearbook of International Humanitarian Law	YIHL
Zeitschrift für ausländisches and öffentliches Recht und Völkerrecht	ZaöRV
Zeitschrift für die gesamte Strafrechtswissenschaft	ZStW
Zeitschrift für Rechtspolitik	ZPR

TABLE OF CASES

Chapter One

The Inter-relationship between National and International Jurisdictions: Raising the Issues

In the evolving international criminal justice system, where national and international judicial orders co-exist, issues of interaction arise. The possibility of both national and international courts operating simultaneously might create tensions on various levels. The present thesis focuses mainly on this issue. This inter-relationship in the field of international criminal law is the main theme this dissertation explores.

The main research hypothesis involves the manner of interaction between the international criminal justice system and national legal orders. It is not a question of judicial taxonomy as no classification between the two is intended[1]. Rather, the main aim of this work is to observe the interplay between national and international criminal jurisdictions through the prism of international law. Guided by the principles enshrined in the Statutes of the *ad hoc* Tribunals and the International Criminal Court (ICC), the aim is to highlight some of the problems of this interaction, compare and contrast the solutions adopted for the *ad hoc* Tribunals from those for the permanent Court, and whilst providing some insight into the system, suggest possible solutions as to how it could be strengthened.

There are two equally valid approaches to the above research question: an international law approach, and a criminal law approach. This study adopts the former. The same study would have taken a totally different angle and

[1] For a piece of work which examines questions of competing jurisdictions at the international level, see Shany, (2003).

could have had different results had it been conducted by a domestic criminal lawyer, who is not as sympathetic to the idea of international crimes being tried at an international level, nor wishes to let go of what has traditionally been a domestic prerogative.

Whilst acknowledging that international criminal justice is a wider concept than the *ad hoc* Tribunals and the ICC, for the purposes of the present thesis, a very restrictive definition of international criminal justice is adopted. This piece of work focuses almost exclusively on the Tribunals and the ICC through an examination of the relevant principles and their practical application, by both States and institutions. Conceivably similar issues arise with regard to the Sierra Leone Special Court, and also, albeit to a lesser extent, the Nuremberg and Tokyo Military Tribunals. When referring to international crimes, again, the approach is a similar one: for, the term international crimes is here restricted to crimes falling within the jurisdiction of the above-mentioned Tribunals and Court only, and covers war crimes, crimes against humanity, genocide and with regard to the ICC, aggression. Mindful of the sensitivities of various States regarding the use of the term "national" courts, or even "domestic" and "municipal" courts, these terms are used interchangeably throughout the thesis, in order to describe the relationship between national and international legal orders[2].

These qualifications do not, hopefully, constitute restrictions on the validity of the thesis. The question of inter-relationship between national and international jurisdictions is not examined in the abstract, but the concepts

[2] See amendment of ICTY and ICTR RPE in January 1995 and June 1997 respectively of Rules 8, 9, 10, 12 and 13 to remove any reference to "national" courts and the discussions surrounding "municipal" or "domestic" courts, which led to the adoption of the rather incontrovertible "courts of any State".

chosen here are examined in detail from both conceptual and the practical angles, to better illustrate this interplay.

1. Models of Inter-relationship between Domestic and International Spheres

In general, the envisioned functioning of international judicial bodies evinces little concern on how the operation of international processes may interact with local processes. In the field of international criminal law, however, due to the wider intersection between the two levels, this is an issue which merits greater exploration. Several possibilities may be foreseen to deal with this interaction.

Undoubtedly, although both systems may be capable of having jurisdiction, they could be kept completely separate. In that sense, the national is completely "insulated" from the international, and *vice versa*, and no interaction whatsoever is achieved. Although this would guarantee that each system would maintain its integrity and distinct character, it would also mean that the limitations on it would be greater. This segregation would impede the transformation and adaptation of either or both systems with the view to creating a flexible unity, able to address common problems and to find widely acceptable solutions.

A second option would be to endow one system with primacy over the other. This does not necessarily mean that the international should be vested with primacy over the national. Conceivably, control could be left solely with the national jurisdiction. Primacy has the advantage that, although it permits interaction of the two systems, ultimately only one system prevails over the

other and uniformity is achieved. However, this is largely possible when the international system is bestowed with primacy, due to the fact that the mere existence of a number of national judicial systems with many disparities among them, would mean that in giving them primacy uniformity would be difficult to achieve.

Finally, another approach could be to encourage better interaction of both national and international systems with defined rules of competence over specific cases. This cross-fertilisation would lead to the improvement of both national and international systems through the exchange of ideas and working patterns. To what extent this is likely to be achieved in the field of international criminal law and the ICC in particular, is a question which will be addressed in the chapters that follow.

2. Treatment of the Issue in Other Systems

Interaction between national and international jurisdictions is not an issue which arises solely in the field of international criminal law. It occurs in almost all adjudicative bodies that deliver judgments at a level different from the national.

In order to put the inter-relationship between international criminal law and domestic jurisdictions in perspective, it is worth examining the various types of interaction in other systems so as to draw useful analogies, if any, before proceeding with an examination of the interface in international criminal law itself.

Some interaction between national and international legal orders is present in several systems regardless of the degree of integration. For instance, the issue arises equally in the case of the European Union which is considered to have achieved a high degree of integration, as well as systems such as the International Tribunal for the Law of the Sea, where integration is not really an issue.

Moreover, should a role for national jurisdictions be envisaged, this is made clear in the international instrument governing the operation of the adjudicative body. Although a minimum degree of interface for the enforcement of judgments is needed in any case, there is usually no mention of inter-relationship since the action of the international body is kept separate from the national. In international criminal law however, the interaction between national and international levels is sought for almost every step of the judicial process.

Before looking succinctly at some of these international adjudicative bodies and their relationship with national jurisdictions, it is important to stress that in international criminal law the individual plays an important part in the proceedings. This is the main achievement of Human Rights law. However, the differences between international criminal law and the Human Rights system are easily discernible[3]. The individual does not have *locus standi* before the international criminal Tribunals and the Court but appears primarily as defendant. Mention should be made also to the limited right of victims to appear before the ICC, which does not, however, change the status of

[3] See Mumford (1999), 170, who maintains that "[w]hile civil rights violations are deplorable, only the most egregious that are designated as such rise to the level of the "most serious crimes of international concern"", quoting also US Ambassador Scheffer noting that "This [the ICC] is not a human rights court; it is an international criminal court".

individuals. Victims may not directly bring a case in their individual capacity against the alleged perpetrator(s) but are enabled only to make representations in order for the Court to determine potential reparations to victims[4]. In addition, international criminal law would in any case be dissimilar to other systems, due to its "criminal" nature. And this issue alone has its own bearing on the inter-relationship with domestic jurisdictions. For, this criminal aspect dictates different approaches when compared to the civil cases, for instance, in the type of penalties to be imposed, or even in the way justice is administered so as to accommodate the particular needs of a case.

The examination of the issue of inter-relationship in other adjudicative bodies will be limited to the issues of access to those bodies and the question of enforcement of judgments[5]. These two areas are generally indicative of whether interaction between the national and the international levels is envisaged. Where appropriate, other aspects will also be examined briefly.

2.1 The International Court of Justice

Turning to specific institutions, it is only fair to begin with the International Court of Justice[6]. The differences from international criminal law are twofold. First, with respect to *ratione personae* it is important to mention that only States may appear before the World Court[7]. Second, in order to identify the interaction of the ICJ and UN Member States, the action requested

[4] For the role of victims in ICC proceedings see Article 75 ICC Statute. See also Jorda and Hemptinne, in Cassese, Gaeta, and Jones (2002), 1387.
[5] Although in certain cases this issue arises also with regard to applicable law.
[6] For the ICJ see *inter alia*, Bowett, (1997); Muller, Raič, and Thuránszky, (1997); Lowe and Fitzmaurice (1996); Rosenne, (1995); Singh, (1989); Damrosch, (1987); Fitzmaurice, (1986).
[7] See ICJ Statute, Article 34(1); See *Mavrommatis Palestine Concessions Case* PCIJ Rep. Ser. A No. 2 (1924).

by States following a finding of the Court should be examined. In general, the ICJ does not require active co-operation of States in terms of assistance provided by States in order for the World Court to be able to deliver a judgment. This is not the same in international criminal law, where State co-operation is needed in every stage of the proceedings. In most cases, the ICJ will make a finding on a particular case, which is of course final and binding and must be complied with by the States involved in the dispute[8]. In most cases, this finding, however, does not entail the taking of positive action on behalf of a State. Active co-operation in terms of positive action is more likely to be requested by States when the ICJ indicates provisional measures[9], in cases involving reparation/restitution and usually in cases of delimitation of maritime or land frontiers. The system though resembles the international criminal justice system with regard to the failure on behalf of a State to perform the obligations incumbent upon it under a judgment. The other party may then have recourse to the Security Council (SC) which may adopt recommendations or binding decisions pertaining to the enforcement of the judgment[10]. This is also the case in both the *ad hoc* Tribunals and only exceptionally in the ICC, where the SC is asked to monitor the enforcement of co-operation requests[11].

[8] Article 94(1) UN Charter.
[9] Article 41(1) *ibid.*
[10] Article 94(2) *ibid.* To date, the SC's judgment-enforcement powers have never been used.
[11] See *infra* chapter 3.

2.2 The International Tribunal for the Law of the Sea

Moving to the International Tribunal for the Law of the Sea[12], under the 1982 UN Convention on the Law of the Sea, it exercises compulsory jurisdiction over all States parties to UNCLOS in relation to certain types of disputes[13]. This function of ITLOS is not identical to the *ad hoc* Tribunals in the sense that although it enjoys some sort of primacy as the said Tribunals do[14], the ITLOS nevertheless enjoys exclusive jurisdiction with regard to a particular set of disputes. Moreover, the jurisdiction of ITLOS *ratione personae* potentially extends beyond States, to include private parties (at least in the context of disputes over the seabed)[15]. Coming to the inter-relationship between the ITLOS regime and national jurisdictions regarding the enforcement of its judgments, although they are binding upon the parties and must be complied with[16], the UNCLOS does not explicitly provide for an enforcement mechanism. However, the decisions of the Seabed Disputes Chamber of the Tribunal are enforceable in the territories of the States parties in the same manner as judgments or orders of the highest court of that State party[17]. This enforcement mechanism brings this aspect of the system closer to international criminal law.

[12] See generally, Eiriksson, (2000); Rosenne, (2000), 443; Noyes, (1998), 109; Mensah, (1998), 527; Rosenne, (1995), 806.
[13] Article 287(1),(4) ITLOS Statute
[14] See *infra* chapter 2.
[15] Article 20(1) *ibid.*
[16] Article 296(1) UNCLOS; Article 33(1) ITLOS Statute.
[17] Article 39 ITLOS Statute.

2.3 The World Trade Organisation

Another system worthy of examination is the dispute settlement system of the World Trade Organisation[18]. The WTO is characterised by the oxymoron that, although individuals are, in fact, the principal actors of the system, they are barred from the operation of the Organisation. In fact not only do they not have *locus standi* before the Panels and Appellate Body of the WTO, they are not even allowed to attend those proceedings since they are confidential and closed to the public. This is indicative of the fact that the administration of international economic law was perceived in a traditional public international law way involving only States. The Dispute Settlement Understanding (DSU) refers only to the members of the WTO whose members are only States. This does not mean that individuals are completely excluded from the disputes. They are involved in two main ways: first at the pre-litigation stage of the proceedings and second by means of direct applicability of WTO law[19] in the national legal orders.

At the pre-litigation stage WTO members have internal procedures for private legal persons, mainly companies, to invoke a means of diplomatic protection where a Member of the Organisation utilises the DSU against another member to protect the trade interests of its nationals[20]. The monitoring of implementation of those reports is discharged by the Dispute Settlement

[18] For the WTO see *inter alia*, Jackson, (1997); Qureshi, (1999); Hilf, and Petersmann (eds.), (1993); Jackson, and Sykes, (1997); Cottier, and Schefer, (1998), 83; Jackson, (1992), 310.
[19] Including the decisions by the panels and Appellate Body.
[20] Indicatively on the two main players of the system the relevant internal instruments are: for the EC: Council Regulation (EC) 3286/94 of 22 December 1994 laying down the Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization (the Trade Barriers Regulation) and for the United States: Section 301 of the Trade Act of 1974

Body (DSB), which supervises the compliance of the losing party with the recommendations of the report[21]. In case of failure to comply, negotiations can be initiated by the complaining party for payment of mutually acceptable compensation and if no agreement is reached, authorisation of the DSB for the imposition of temporary trade sanctions against the recalcitrant party may be sought[22]. The said formulation resembles the enforcement mechanism assigned by the ICC Statute to the Assembly of States Parties to the Statute[23].

This process takes place because the major participants to the system opted not to accord direct effect to the WTO Agreements[24]. Accordingly, a company that is, for example, the subject of a WTO-inconsistent trade barrier cannot argue before national courts that the barrier at stake violates any of the annexed WTO Agreements and cannot request review of the illegality of the measure[25]. The same thesis applies also in the presence of a Panel/Appellate Body ruling confirming the violation[26].

2.4 The International Centre for Settlement of Investment Disputes

Another institution, is the International Centre for Settlement of Investment Disputes (ICSID)[27]. Under the ICSID Convention[28] there is a facility, through the establishment of *ad hoc* conciliation commissions and

[21] Article 21 DSU.
[22] Article 22(2),(6) and (8) *ibid.*
[23] *Infra* chapter 3.
[24] For the EC: see Council Decision 94/800/EC. For the United States: see the Uruguay Round Agreements Act of 8 December 1994. See also Case C-149/96 *Portugal v. Council* [1999] ECR I-8395 para. 43.
[25] *Ibid.* at para. 47. Subject to the *Nakajima*'s exceptions. Case C-69/89 *Nakajima v. Council* [1999] ECR I-2069.
[26] Case C-104/97P, *Atlanta v. European Community* [1999], ECR I –6983, paras. 19-20.
[27] Hereinafter ICSID. For a comprehensive list of sources see http://www.worldbank.org/icsid/pubs/bibliogr/part2.htm

arbitral tribunals, for conciliation and arbitration of investment disputes between contracting States and individuals and companies that qualify as nationals of other contracting States[29]. It may be that ICSID has jurisdiction over natural persons, however, those have to fall under the conditions enshrined in its Convention. This could be taken as a significant difference between the right to standing of the individual in the ICSID mechanism and the emerging international criminal justice system. A further difference has to do with the enforcement of awards rendered pursuant to the ICSID Convention. Recourse to conciliation and arbitration under the said Convention is entirely voluntary; in fact, no contracting State or national of such State is obliged to resort to such conciliation or arbitration without having explicitly consented. Consequently, the parties are bound to abide by the award. Interestingly, all contracting States regardless of whether they are parties or not to the dispute are asked to recognise the awards rendered following the Convention as binding and to enforce the pecuniary obligations imposed thereby, as if it were the final judgment of a court in that State[30], which is akin to the ITLOS system.

2.5 The European Union

The question of inter-relationship arises also within the framework of the European Union law[31]. In the European Union the choice taken by the participants to the system, infused with a strong dose of judicial activism by the

[28] See Convention for the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 575 UNTS 159.
[29] See Article 25(1) *ibid.*
[30] See Article 54(1) *ibid.*
[31] See generally Craig, and de Búrca (2003); Arnull, Dashwood, Ross, and Wyatt, (2000); Weatherill, and Beaumont, (1999); Hartley, (1998).

European Court of Justice, is that national and Community law will interact. The first level of interaction is the enforcement of Community law in the national legal order, and the second, is the judicial protection afforded to individuals before the Community courts.

As to the former, individuals can achieve the enforcement of Community law before national courts as long as it is directly effective[32]. At the level of enforcement of Community law, if a national court of whichever rank[33] finds that Community law is in conflict with national law, even of constitutional nature[34], it should recognise the supremacy of Community law and set aside the conflicting national law[35]. In addition, if a Member State violates Community law and this causes individuals to suffer damages, the State is liable to pay compensation[36]. Generally, Member States are obliged to do their utmost to assist the effective implementation of Community law. This is an obligation stemming from Article 10 of the EC Treaty and applies across the range of the European Community competences. Accordingly, in enforcement proceedings against a Member State brought by the Commission under Article 226 EC Treaty not only will national authorities take all the necessary measures to comply with the decision of the Court of Justice,[37] but national courts are also entitled to draw all the appropriate inferences with

[32] Case 26/62 *NV Algemene Transporten Expeditie Onderneming Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1.
[33] Case 106/77 *Amminstrazione delle Finanze dello Stato v. Simmenthal* [1978] ECR 629.
[34] Case 11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratstelle für Getreide und Futtermittel* [1970] ECR 1125.
[35] Case 6/64 *Costa v. ENEL* [1964] ECR 585.
[36] For example, in case of non transposition of a directive, see Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci v. Italy* [1991] ECR I-5357.
[37] Article 228(1) EC Treaty.

regard to cases pending before them[38]. As to decisions by the European Court of Justice imposing a pecuniary obligation[39] those will be enforced in the national legal orders in accordance with national procedural rules[40].

As to the latter, individuals can have *locus standi* before the Community courts under the conditions set out in Articles 230(4) and 232(3). In addition, individuals can ask for compensation before the Community Courts for extra-contractual liability of the Community in accordance with Article 288(2) EC. Another instance of interaction is the possibility given to national courts, when a question of Community law arises in proceedings before them, to refer to the Court of Justice for a preliminary ruling in accordance with Article 234 of the EC Treaty. The ruling will form part of an interlocutory process in the national proceedings and, in order to achieve uniformity, the interpretation of Community law given by the Court of Justice will be binding on the national court.

2.6 Human Rights Courts

Having examined the position in European Law, it remains to see how the human rights system interacts with national jurisdictions. In that respect, the Human Rights Committee (HRC)[41] established to monitor compliance with the International Covenant on Civil and Political Rights (ICCPR) should be examined. *Ratione personae* the HRC may receive communications relating to

[38] Accord direct effect to the Community law provisions as in Joined Cases 314-316/81 and 83/82 *Procureur de la République v. Waterkeyn* [1982] ECR 4337 or grant compensation in accordance to the *Francovich* principle, *supra* n. 36.
[39] Case C-387/97 *Commission v. Greece*, [2000] ECR I-5047.
[40] Articles 244 and 256 EC Treaty.
[41] See generally, McGoldrick, (1994); Gandhi, (1998).

states parties that have accepted the jurisdiction of the Committee and under the Optional Protocol, individual communications are allowed[42]. However, the individual bringing a claim should be subject to the jurisdiction of the State complained against and should claim to be victim of a human rights violation under the ICCPR[43]. The views of the Committee are not binding and thus not enforceable against States[44].

Coming to the European Court of Human Rights, access to the Court is open to State parties to the Convention[45]. The Court is open to individuals, NGOs and groups of individuals who may bring a claim against a State provided that they claim to be victims of violations[46]. Regarding the enforcement of the judgments it should be noted that they are binding upon the States parties and their execution is subject to supervision by the Committee of Ministers of the Council of Europe[47].

Moving to the equivalent system of the Organisation of American States, it is to be noted that the Inter-American Court of Human Rights (IACHR)[48] and the Inter-American Human Rights Commission are entrusted with adjudicating human rights violations under the 1969 American Convention of Human Rights[49]. Individuals may bring claims before the Commission[50], but not before the Court[51]. The Commission issues a report and when there is a breach of the Declaration, the Convention or any other

[42] Article 41(1) ICCPR and Article 1 of the Optional Protocol.
[43] Articles 1, 2, Optional Protocol.
[44] Note however that according to Rule 95 of the Rules of Procedure, the HRC appoints a special rapporteur for follow-up to determine measures taken by states parties to give effect to the Committee's views.
[45] See Article 33, ECHR. See generally, Harris, O'Boyle, and Warbrick, (1995); Jacobs, and White, (1996); Van Dijk, and Van Hoof, (1998); Janis, and Kay, (1990).
[46] Article 34 *ibid.*
[47] Article 46(1), (2) *ibid.*
[48] See generally, Davidson, (1997).
[49] See 9 *ILM* (1970), p. 673.

instrument, it issues also a number of recommendations[52]. The reports are not formally binding and they cannot therefore be enforced. The IACHR has held, however, that States parties to the American Convention have the obligation to make every effort to apply the recommendations of a protection organ such as the Commission[53]. On the other hand, States parties must comply with the judgments of the IACHR[54]. In the case where the Court awards damages against a State party, this part is enforceable in accordance with the procedures governing the execution of judgments against the State in question[55]. A quite similar system is envisaged also for the African Court on Human and People's Rights[56].

3. Some Tentative Conclusions

Following a brief introduction on how national and international orders interact in other systems, it is important to note that few similarities exist between these systems and the emerging international criminal justice system. As a general point, it could be said that the degree and intensity in which this inter-relationship occurs is very much dependent on each particular system and there is no pattern to be followed, due to the differing characteristics of the systems in question.

[50] Article 44 *ibid.*
[51] Article 61 *ibid.*
[52] Articles 50(1) *ibid.*; Article 46(2) of the Commissions' Regulations.
[53] See *Loayza Tomayo Case,* Series C No. 33, 17 September 1997, para. 80.
[54] Article 68(1), *ibid. supra* n. 49.
[55] Article 68(2), *ibid.*
[56] The Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court of Human and People's Rights of June 1998 entered into force on 25 January 2004. http://www.unwire.org/UNWire/20040128/449_12499.asp

Accordingly, the role envisioned for the individual differs significantly among the adjudicative organs. From no *locus standi* before the ICJ and the WTO, to a limited role for private parties in the ITLOS and to strict preconditions for the appearance of individuals before the EU, ICSID and Human Rights Courts, international criminal law is different yet again. For, the individual is the centre of the focus although the main players are States and the Security Council. There is only one role envisaged for the individual in international criminal law and that is the role of the defendant. Arguably, this finds no equivalent in the systems examined above and dictates a different approach in international criminal law.

Turning to the enforcement of judgments and the assistance it provides to the better understanding of the inter-relationship between national and international systems, it should be noted that some similarities with international criminal law exist. None of those systems however can provide a formula for the operation of the international criminal justice. For instance, although the ICJ mechanism to tackle the failure to co-operate resembles the equivalent mechanism of the *ad hoc* Tribunals and, to an extent, the ICC, it has never been used in practice. Moreover, the sanctions likely to be imposed by the DSB although akin to those in the ICC regime, differ significantly in their application. For, the former deals with non-compliance in a civil context, whereas the latter involves criminal responsibility.

In sum, it is usually the case that the international body will make a finding, reach a judgment and the States will have to comply, or take steps in a civil context which may or may not be so problematic. However, in international criminal law, not only is it the criminal nature of the proceedings

which makes it different, but also, the fact that in the said field national contribution is a precondition to the successful operation of both the international criminal Tribunals and the ICC.

4. Structure of the Thesis

Having established in this introductory chapter that the main issue to be addressed is the relationship between national and international jurisdictions in international criminal law in the context of the Tribunals and the ICC, the second chapter of this work contains, in Part One, an examination of the rise and fall of the Tribunals' primacy. Primacy's function, successes and challenges are within the scope of this chapter. Part Two examines the complementary nature of the permanent International Criminal Court. The second chapter therefore explores questions of jurisdiction. It is of fundamental significance to regulate which of the two systems, the national or the international, takes precedence in the adjudication of international crimes and how these systems interact with each other.

Co-operation with both the Tribunals and the ICC is discussed in chapter three. In order for any regime to work properly, co-operation among its main players is of particular significance. Co-operation is not so problematic when a State has sole jurisdiction to deal with a case. When, however, an international institution seizes jurisdiction *in lieu* of a State, issues of co-operation arise, mainly because enforcement without involvement of State agencies is difficult, if not unattainable.

The penultimate chapter looks into the role the SC plays in the interaction between States and international criminal justice institutions. This role differs according to the institutions and the stage of SC's intervention and affects State interaction with the Tribunals and the ICC.

The final chapter explores the contribution of States to the relationship between national and international legal orders through the enactment of national implementing legislation. It focuses on the implementation efforts of some key States and aims to highlight common approaches and problem areas.

The thesis argues that despite the difference in establishment, jurisdictional principles and co-operation regimes between the Tribunals and the ICC, the main problems for effectiveness are the same. States, in all cases, play an important role and it is up to them to strengthen their relationship with international criminal courts within the constraints of the regime provided in the relevant Statutes. Ultimately, a model of "functional or workable interaction" is put forward as a framework for the relationship between international criminal courts and national legal orders.

Chapter Two

Primacy's Odyssey: Is Complementarity an Ithaca for International Criminal Justice?

Concurrent jurisdiction involves two different levels which compete with each other. Asserting jurisdiction is an important aspect of this relationship and, as seen already, the principles to achieve this vary from system to system. International criminal law benefits from concurrent jurisdiction. The principle chosen for the *ad hoc* Tribunals for the former Yugoslavia and Rwanda differs, however, from the one adopted for the permanent International Criminal Court. The Tribunals have been premised on primacy over national courts, whereas the ICC operates on the basis of complementarity. These two concepts represent the two extremes. The first part of this chapter is devoted to primacy, and the second explores complementarity.

Part One: Primacy: Emphasis on the International Level

Primacy denotes prevalence. It is intended to resolve any conflicts arising as a result of concurrent jurisdiction in favour of one level, to the exclusion of the other. In international criminal law, primacy means that competing jurisdiction between international Tribunals and national courts is resolved in favour of the former. International Tribunals, therefore, have priority over domestic courts.

Primacy has transformed over the years. Its origins will be sought at the Nuremberg and Tokyo Military Tribunals but the real focus will be on the ICTY and the ICTR. Yet again, primacy has changed to respond to different

needs that arose during the operation of these two Tribunals. Post the establishment of the ICC, primacy has been used to regulate the relationship between Internationalised Courts and national courts. However, as it will be seen, this is a very different type of primacy when compared to the Hague and Rwanda Tribunals.

The aim of this part is to trace the evolution of primacy through the institutions it has been applied to and to analyse its function and utility. Also, with a view to the future, a critical evaluation of the concept and its possible application to future institutions will be attempted.

1. Concurrent Jurisdiction and Primacy

The creation of the Tribunals was by no means intended to deprive national courts of their obligation to prosecute alleged culprits. As the Secretary General emphasised in his Report, "[...] national courts should be encouraged to exercise their jurisdiction in accordance with their national laws and procedures"[1]. In fact, the Tribunal will only intervene and take over from national proceedings whenever this serves the interests of justice[2].

It is not feasible to try each and every offender before international tribunals. Among the cases that arise, a selection, therefore, would have to be made so as to choose the most important –in terms of substance, difficulty,

[1] See *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, UN Doc. S/25704, Corr.1 and Add. 1, para. 64. See also the then Lawyers Committee for Human Rights: *Prosecuting War Crimes in the Former Yugoslavia – The International Tribunal, National Courts and Concurrent Jurisdiction: A Guide to Applicable International Law, National Legislation and its Relation to International Human Rights Standards* iv (May 1995); Report of the Commission of the French Jurists who were entrusted to study the creation of a criminal Tribunal for the adjudication of the crimes committed in the territory of the Former Yugoslavia and was reproduced as a document of the Security Council, 10 February 1993, S/25266, paras 134-136, 33-34 cited in Pellet, (1994), 38.

legal issues. This jurisdictional hierarchy that the two international Tribunals enjoy should be viewed as a discretionary power to try cases at first instance rather than review cases tried before "lower" national courts. A State may investigate and prosecute an alleged criminal when there is no reason to question the thoroughness and promptness of the investigation as well as the competence, independence and impartiality of a national court established by law[3]. Whether the international Tribunal is going to exercise jurisdiction or not is for the Prosecutor to decide, based on the factual and legal issues raised by each particular case.

2. The Advantages of Primacy

Uniformity is undoubtedly the most important advantage of primacy. By submitting all States to the same process *i.e.* one adjudicative body at a single level, uniformity of the legal process is ensured. Since there is only one institution dealing with a particular case, the risk of conflicting decisions is minimised. Although the Tribunals are not bound to follow their own jurisprudence, it is more likely, however, that they will take similar approaches to similar cases, unlike national courts in different States. Convergence at the international level between the different families of laws with regard to a particular issue is also likely to occur when a single forum deals with similar cases.

[2] See ICTY's First Annual Report, 29 August 1994, A/49/342-S/1994/1007, paras. 20, 87-89.
[3] Note however in this respect the Tribunals' jurisdiction by virtue of Articles 10 and 9 of the ICTY and ICTR Statutes respectively, whereby they are empowered to "review" cases already tried in national courts, for reasons explicitly stated in the Statutes. See *infra*, part two.

This particular function of primacy is of great significance, since it subjects all States to the same treatment. It does not, on its face, discriminate against any State[4] and therefore the application of double standards is precluded[5].

One essential aspect of primacy is the concomitant obligation of States to co-operate with the international Tribunals in investigations, arrests and prosecutions. This obligation stems from the coercive nature of the Tribunals. Primacy is a principle conferring jurisdiction to these Tribunals. The effects of this conferment can only be appreciated through co-operation, which gives meaning to the principle. Co-operation is, in principle, better achieved through primacy[6].

In addition, primacy impacts upon various aspects of the criminal process. One of the main concerns in general, is the concept of fairness in the course of adjudication. It may well be that national courts observe issues of fairness, but one way of ensuring that the international interest in fair prosecution is materialised is by recognising the primacy of international Tribunals[7]. The minimum standards of justice and impartial adjudication will be met in cases with great international concern in the course of proceedings before international tribunals, rather than before national courts[8].

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[4] Brown, (1998), 408; Bassiouni, (1997), 60.

[5] This is not to say that a different principle, such as complementarity, will necessarily entail the application of different standards for differing cases but at least the way the principle is perceived and the criteria applied to give purpose to its meaning, indicate that such a concern can be plausibly raised.

[6] Whether this argument is verified in practice, is a question which merits greater attention. See *infra* chapter 3.

[7] Brown, *ibid. supra.* n. 4, 389.

[8] This was also the view taken by the Commission of Experts on Rwanda. In its preliminary report to the Security Council, they strongly recommended the creation of an international criminal tribunal for Rwanda based on its conclusion that prosecutions for serious crimes committed during the armed conflict would be better undertaken by an international tribunal rather than national court because an international tribunal would best meet the objectives of independence, objectivity and impartiality. See Preliminary Report of the Independent

Primacy has potentially an impact on domestic courts. By exemplifying how international crimes should be dealt with, States may well be influenced in the manner of adjudication of such crimes before their own courts. This may be primarily achieved through the enactment of implementing legislation. Concurrent jurisdiction based on primacy does not preclude States from taking an interest in a particular case as the Tribunals may only deal with a handful of cases.

3. The Transformation of Primacy

3.1. (1945): Pseudo-primacy

To trace the origins of primacy, a brief examination of the concept in the two international military tribunals of Nuremberg and Tokyo is a good starting point. Arguably, evidence of some form of adjudication of international crimes might be traced to earlier times[9], the origins of international criminal justice, as perceived today though, should be located at Nuremberg.

Both Nuremberg and Tokyo IMTs were created in the aftermath of the Second World War. The allies[10], in an attempt to deal with the atrocities that had occurred, established an entity that was capable of trying perpetrators of the most serious crimes[11]. However, this very creation of the two Tribunals and

Commission of Experts Established in Accordance with Security Council Resolution 935 (1994) at 28-29, UN Doc. S/1994/1125 (1994).

[9] See *inter alia* Bassiouni, *ibid. supra* n. 4.

[10] *i.e.* France, Soviet Union, the United Kingdom and the United States of America.

[11] Following the seizure of Germany on the 5th of June 1945, the four allies took over the administrative, judicial and legislative powers. Accordingly, apart from the London Charter of 8 August 1945, 82 *UNTS* 279, 284.

the fact that they were applying "victors' justice"[12], is crucial to the appraisal of their function.

The jurisdictional basis of the Nuremberg Tribunal can be found in the power possessed by the Allies as *de facto* territorial rulers of a defeated Germany[13]. This has been rationalised as a type of universal jurisdiction exercised by the international community[14]. There is also the view that the Nuremberg trial derived its legal sanction from the United Nations War Crimes Commission which represented the "*quasi*-totality of civilised states at the time"[15]. The fact that nineteen nations[16] subscribed to the London Agreement, is, according to the same view, adequate to confer an international character to the tribunal[17]. Similar arguments would apply to the Tokyo IMT as well.

However, according to the most convincing view, the Nuremberg and Tokyo Tribunals were not truly "international"[18]. Hans-Heinrich Jescheck maintained that the IMT was not international because the substantial and procedural preconditions needed for the establishment of such a court had not been met[19]. He further points to the fact that the administrative, legislative and judicial powers were conferred on the four allies, and due to the establishment

[12] The IMTs represented only a segment of the world community: the victors. This was accepted by the Nuremberg Tribunal itself when it was stated that the four signatory powers to its Charter "have done together what any one of them might have done singly", *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg 14 November 1945-1 October 1946,* Nuremberg 1947, vol. 1, 218.

[13] Clark, in McCormack, and Simpson, (1997), 172.

[14] Simons, in Ginsburgs, and Kudriavtsev, (1990), 41-45. Moreover, in its first interim report, the Commission of Experts Established pursuant to Security Council Resolution 780, SC Res. 780, UN SCOR, 47th Sess. 1992, UN Doc. S/INF/48 (1992) stated as follows: "States may choose to combine their jurisdictions under the universality principle and vest this combined jurisdiction in an international tribunal. The Nuremberg International Military Tribunal may be said to have derived its jurisdiction from such a combination of national jurisdiction of the States parties to the London Agreement setting up that Tribunal" UN Doc. S/25274 at 20.

[15] Woetzel, (1960), 55.

[16] These included all member-states of UNWCC with the exception of China and Canada.

[17] *Ibid.*, 56.

[18] Ostendorf, and ter Veen, (1985), 35.

of the IMT by the Control Council Law, this was certainly not a German national court. Therefore, according to Jescheck, the IMT could only be considered as an occupational adjudicative body[20].

Moreover, Georg Schwarzenberger, held that the international character of both IMTs was formal rather than substantive. The international element derived, according to his view, from the fact that they "rested on a consensual international basis"[21]. In substance though, they were "joint tribunals of the powers that created these *ad hoc* institutions"[22].

The determination of IMTs' nature[23] is important for the discussion of primacy. Should they have an international character, the principle according to which they exercised jurisdiction over domestic proceedings should be examined. It is not possible to establish a type of primacy because the situation in the defeated Germany and in Japan in the aftermath of World War II, meant that there was no forum for challenging the proceedings before the IMTs, and there was not even a domestic mechanism that would deal with the adjudication of cases concerning the atrocities committed in the war. This was the result of the exclusivity on which the IMTs were premised, which signified that no other court could claim jurisdiction[24]. Indeed, as soon as Germany and

[19] Jescheck, (1952), 289. It should be noted though that he does not mention which are these criteria that are lacking. It might therefore accepted that those criteria could be traced in general international law.
[20] "Juristisch betrachtet heißt das (...), daß [das Gesetz] als Besatzungsrecht gedacht war und als solches Geltung haben sollte". *Ibid.*, 293, 295.
[21] Schwarzenberger, (1968), 471.
[22] *Ibid.*; See also Röling, (1961), 356 where it is stated that the Nuremberg and Tokyo tribunals were "multi-national tribunals, but not international tribunals in the strict sense".
[23] For a thorough analysis of the IMT's nature see Ahlbrecht, in Hasse, Müller, and Schneider, (2001), 365.
[24] First ICTY Annual Report, *ibid. supra* n. 2, para. 20: "The Nürnberg Tribunal was set up to act *in lieu* of State courts to try those major war criminals whose offences had "no particular geographical location"; it left to State courts the task of following up its proceedings, in that these courts were to bring to justice minor criminals and members of the organisations found criminal by the Nürnberg Tribunal. Along similar lines, the Tokyo Tribunal was designed to substitute for any national criminal court".

also Japan were able to prosecute their own criminals they did so. After World War II, Germany tried and convicted a large number of criminals and has continued to do so in the 90's[25] and beyond.

However, the lessons learned from the Tokyo and Nuremberg Tribunals are of some merit. It became clear for the first time that the Military Tribunals, although with exclusivity, *i.e* no other court having jurisdiction, were capable of replacing national courts in adjudicating cases which traditionally fell within the jurisdiction of a State. This notion of exclusivity, although akin to primacy, cannot be considered as its exact counterpart. Any discussion of the IMTs' version of primacy over national proceedings has therefore limited significance for the modern notion of primacy.

3.2. (1993): Real Primacy

The first institution which enjoys full primacy over national courts is the ICTY, followed a year later by the ICTR. The Tribunals were created by SC Resolutions in 1993 and 1994 respectively, to deal with atrocities committed in the former Yugoslavia and Rwanda[26].

An examination of their Statutes shows that the Tribunals have concurrent jurisdiction with national courts[27]; however, the Tribunals enjoy primacy over them. Article 9(2) of the Statute of the ICTY clearly states that "The International Tribunal shall have *primacy* over national courts [...]"[28]. Similarly, the Statute of the ICTR in its Article 8(2) reiterates the principle by

[25] Marschlik, in McCormack, and Simpson, *ibid. supra* n. 13, 74.
[26] For their creation see *infra* chapter 4.
[27] Article 9[8](1): "The International Tribunal and national courts shall have concurrent jurisdiction [...]".

reproducing *mutatis mutandis* the corresponding provision contained in the ICTY Statute.

There is, however, a slight difference in wording in the two Statutes: The ICTR Statute recognises its "primacy over the national courts of *all States*"[29], whereas the ICTY provision is somewhat weaker and grants "primacy over national courts". This phrasal divergence should not be taken as indicative of a different and, in a sense, wider scope of primacy. The Tribunals' primacy is general, it involves each and every Member State and is binding due to their creation by Chapter VII Resolutions. Had the Security Council intended that primacy involved only the Yugoslav and Rwandan courts, it would have made it clear in the wording of the relevant Statute Articles. It has been suggested that the change of wording is indicative perhaps that in the year elapsed between the creation of the second of the two Tribunals, there was a wider consensus over primacy, which made it possible for a bolder assertion of what primacy really entails[30]. Given the identical legal basis of the Tribunals, it is possible that it simply represents better drafting. Nevertheless, apart from some statements by States on the issue, which have not been relied upon in the operation of the Tribunals' primacy, is rather doubtful that this slight difference in wording has led to differing approaches and results[31].

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[28] Emphasis added.
[29] Emphasis added.
[30] Brown, *ibid. supra* n. 4, 402. Cf. El Zeidy, (2002), 887 who maintains that the stronger language is the result of a particular crisis before the SC. However, this argument is not very convincing, as a crisis referred to would have led to a weaker as opposed to a stronger primacy.
[31] Uganda challenged the primacy of the ICTR over its domestic courts with regard to crimes committed in "neighbouring States" like Uganda, as follows: "While the Government of Uganda supports the establishment of a tribunal to prosecute persons responsible for serious violations of international humanitarian law committed in Rwanda, at the request of the Rwandese Government, the Ugandan Government considers that its judicial system has primary and supreme jurisdiction and competence over any crimes committed on Ugandan territory by its citizens or non-citizens, at any particular time". *Letter Dated 31 October 1994 From the Chargé d' Affaires a.i. of the Permanent Mission of Uganda to the United Nations*

3.2.1 Reasons behind the Adoption of Primacy

Three broad categories of reasons may have influenced the choice of primacy for the Tribunals. First, their creation by means of SC Resolutions and not by an international treaty. Second, the internal situation in the Balkans and Rwanda which involved distrust of the judicial system in the former Yugoslavia and amounted to severe disruption of the judicial system in Rwanda. And thirdly, it is the *ad hoc* nature of the Tribunals which perhaps encouraged the present choice.

Establishing a Tribunal by a binding SC Resolution, has an impact on the choice of its jurisdictional basis. The advantages of using Chapter VII for the Tribunals' creation are mainly that it is the quickest way of establishment and most importantly their decisions are binding on each and every State[32]. This makes it easier for the SC to choose principles such as the one of primacy.

On the international plane, the most common way of entering international obligations is by an international treaty. In fact, this was also the view held by the UN SG with regard to the creation of the Yugoslav Tribunal[33]. Indeed, the treaty option has significant advantages over any other option[34]. The text is carefully examined and detailed provisions are usually adopted. Nevertheless, when peace and security are at stake, there is virtually

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Addressed to the President of the Security Council, UN Doc. S/1994/1230 (1994). See also UK's statement, *infra* 3.2.2.

[32] Articles 2(6) and 25 of UN Charter. On the debate about whether Article 25 can bind non-Member States see Vitzthum, in Simma (2002), 140.

[33] SG Report, *ibid. supra* n. 1, at 6.

[34] In fact despite their positive vote for SC Res. 827, Brazil and China, in the process of explaining their votes, expressed a preference for the establishment of an international criminal tribunal by means of a treaty. See UN SCOR, 48th Sess., 3217 mtg., UN Doc. S/PV.3217 (1993).

no time for a treaty to be negotiated, its text to be adopted, ratified and enter into force. Moreover, there is no guarantee that the States directly concerned and whose participation is vital to the effectiveness of the Tribunal, will eventually become parties to the treaty[35]. Had the treaty approach had been taken, it is doubtful that primacy would have been chosen. The fact that the situation in the Balkans and Rwanda demanded immediate action by the international community might be considered crucial regarding the choice of primacy. As no negotiations took place, considerations of sovereignty were by-passed. The decision to confer jurisdictional primacy to the Tribunals was made by SC members and was in a way "imposed" on the rest of the international community. It was deemed that both the Yugoslav and Rwandan courts were not willing and able to deal with the alleged crimes. A mechanism had to be devised to transfer jurisdiction from the national level to the international. As a result, the Tribunals were vested with jurisdictional primacy.

Finally, it is also the *ad hoc* character of the Tribunals which facilitated the approach taken. The choice of primacy was perhaps encouraged by the limited territorial and temporal basis of the two Tribunals. Knowing that the Tribunals were not going to be permanent, States were prepared to accept their primacy. A cynic might say that SC members opted for primacy as they were certain that their jurisdictional reach would not involve themselves. Had a Tribunal been created now, it would almost certainly not have been premised on primacy. Evidence of that can be found in the establishment of the ICC and Internationalised Courts. The former adopts a different concept, whereas the latter are based on a limited notion of primacy.

[35] Morris, and Scharf, (1995), 40.

The choice of primacy was undoubtedly a product of its time. It represents a conscious choice of the SC to deal with the situation in the Balkans and Rwanda and was thought to be the only way the goals of international criminal justice could be attained at the time. Hence, the use of primacy as a principle for international adjudication was a unique phenomenon, inextricably linked with the two Tribunals.

3.2.2 Statements by Members of the Security Council Intended to Restrict Primacy

Immediately after the approval of the ICTY Statute by the SC, four out of the five Permanent Members of the Council made statements purporting to limit the Tribunal's primacy[36].

Identifying the legal significance of these statements is crucial because of their potential impact on primacy's application. These statements came from Permanent Members of the SC which also have the power to veto its Resolutions[37]. From a legal perspective, statements made by SC members, albeit its Permanent Members, are not legally binding. The way decisions are made at the SC is laid down in Article 27 of the UN Charter. These statements do not fall in this category. In addition, a SC Resolution is not an international treaty for the interpretation rules of the Vienna Convention on the Law of Treaties to apply[38]. The statements are not legally binding in that sense. The

[36] For a lengthy discussion of the statements, see Brown *ibid. supra* n. 4, 398-403; see also *id.*, in Bassiouni, (1999), *"International Criminal Law"*, 507-509.
[37] Article 27 UN Charter.
[38] See Article 31(1) VCLT , *8 ILM* (1969), 679; See generally Wood, (1998), 73 *et seq.*

most important effect these statements might have is to preclude primacy from becoming part of customary law[39].

The UN obliges its Members to accept and carry out decisions taken under Chapter VII of the Charter[40]. There is, however, no provision in the Charter that could give some evidence of how statements made by SC Members after the adoption of a Resolution should be treated. These Members could have, in case of disagreement, threatened to veto the Resolution establishing the Tribunal, attempted to modify the Tribunal's Statute before this was adopted, abstained, or in fact, vetoed its adoption. That they did not do so indicates either that they did not consider it important enough so as to attempt to amend the relative provision, or that they thought they would achieve the same goal by simply making these statements. How should Article 9 of the ICTY Statute be interpreted then? Do these statements provide an interpretation of the Statute, and if so, should it be accepted that they amount to an amendment of the Statute? The impact of the question is nevertheless limited by the fact that not all statements focus on the same issue and most importantly, those that do, differ in their content. Whereas both Mr. Merimée[41] and Mrs. Albright[42] held that ICTY's primacy is limited to the situations described by Article 10(2), the statement by Sir Hannay[43], distinguishes

[39] Lambert-Abdelgawad, (2004), 429.
[40] Article 25 UN Charter.
[41] The representative of France: "Thirdly, we believe that, pursuant to Article 9, paragraph 2, the tribunal may intervene at any stage of the procedure and assert its primacy, including from the stage of investigation where appropriate, in the situations covered under Article 10, paragraph 2". See provisional Verbatim Record of the Three Thousand Two Hundred and Seventeenth Meeting, UN Doc. S/PV.3217 (1993), at 11.
[42] Of the US stated: "Thirdly, it is understood that primacy of the International Tribunal referred to in paragraph 2 of Article 9 only refers to the situations described in Article 10". *Id.* at 16.
[43] Representing the UK: "Articles 9 and 10 of the Statute deal with the relationship between the International Tribunal and national courts. In our view, the primacy of the Tribunal, referred to in Article 9, paragraph 2, relates primarily to the courts in the territory of the former

between the courts in the territory of the former Yugoslavia and elsewhere. From a different perspective, Mr. Vorontsov[44] speaks of the duty a State has to consider the request for deferral by the Tribunal seriously, but he seems to suggest that there is a possibility to refuse the execution of a deferral request, if justified. It would have been more interesting to see what the approach would be, had the statements been focused on the very same issue and a common view had been taken to that end[45].

The Tribunal has not expressed its position on the matter. When these statements were put forward by the defendant in the *Tadić Case*, the ICTY simply refused to state its views: "The Trial Chamber takes no position on the interpretation of these statements nor upon their possible legal effect"[46]. Nonetheless, the Tribunal has maintained, albeit on a different occasion, that in appropriate cases it will consider such statements by SC members as "authoritative interpretations", if undisputed when made before the Council[47]. The statements referred to in this latter instance did not relate to primacy, but such an interpretation by analogy should not be precluded.

Yugoslavia: elsewhere it will only be in the kinds of exceptional circumstances outlined in Article 10, paragraph 2, that primacy should be applicable". *Id.* at 18-19.

[44] Finally, Mr. Vorontsov, representing the Russian Federation maintained that: "As we understand it, the provisions of Article 9, paragraph 2, denote the duty of a State to give very serious consideration to a request by the Tribunal to refer to it a case that is being considered in a national court. But this is not a duty automatically to refer the proceedings to the Tribunal on such a matter. A refusal to refer the case naturally has to be justified. We take it that this provision will be reflected in the rules of procedure and the rules of evidence of the Tribunal". *Id.* at 46.

[45] See for instance the position taken by IFOR (later SFOR) in Bosnia. Although it is arguable whether there was an obligation placed on IFOR to arrest suspected war criminals, NATO (whose member States participated) contested this obligation and for some time, did not in practice take active steps to those ends. See *infra* chapter 3.

[46] *Prosecutor v. Tadić Case,* Decision on Defence Motion on the Principle of non bis in idem, 14 November 1995, (IT-94-1-T), 33. The ICTY went on to state that "under no conceivable interpretation of these declarations is there even a hint that deferral of a case to this International Tribunal could violate the principle of *non bis in idem.* [...]", *id.*

[47] Both the Trial and the Appeals Chamber II in the *Tadić Case* have been dealt with the issue. See *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, (IT-94-1-AR72), para. 88; See also the *Tadić* final Judgment of 7 May 1997, (IT-94-1-T), para. 631.

The importance of these statements, is not so much their legal significance, but rather in their practical and political impact. Powerful States may influence the effectiveness of international instruments. Should the key powers not endorse "full" primacy, it is likely that they would reject a request for deferral which fell within the scope of their interpretation. Thus, unless the State in question has changed its position in the years elapsed between the making of the statement and the actual operation of the Tribunal, it is doubtful that a broad, unqualified primacy, such as the one intended in the Statute, would be accepted. Primacy has certainly changed over the years, but it is questionable that this change may be attributed to the impact of the above SC Statements. Rather, its transformation is a response to different needs.

3.2.3 The Three Phases of Primacy

Phase One: Doctrinal Primacy

The theoretical underpinnings of primacy can be found in the separate Opinion of Judge Sidhwa, in the *Tadić Case*[48]. In paragraph 83 of his opinion he justified the granting of primacy as follows:

> "At the root of primacy is a demand for justice at the international level by all States and constitutes the first step towards implementation of international judicial competence. The rule enhances the role of the Prosecutor in giving him a right to move for transfer of competence and to the International Tribunal the option whether to exercise its discretion to secure competence for itself. The rule obliges States to accede to and accept requests for deferral on the ground of suspension of their sovereign rights to

[48] *Prosecutor v. Tadić*, Separate Opinion of Judge Sidhwa on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, (IT-94-1-AR72).

> try the accused themselves and compels States to accept the fact that certain domestic crimes are really international in character and endanger international peace and that such international crimes should be tried by an international tribunal, that being an appropriate and competent legal body duly established for this purpose by law. The rule cuts national borders to bring to justice persons guilty of serious international crimes, as they concern all States and require to be dealt with for the benefit of all civilized nations. Last but not least, the rule recognizes the right to all nations to ensure the prevention of such violations by establishing international criminal tribunals appropriately empowered to deal with these matters, or else international crimes would be dealt with as ordinary crimes and the guilty would not be adequately punished".

This quotation contains an important definition of primacy. Judge Sidhwa's opinion, although not part of the actual judgment in *Tadić*, is indicative of the way the judges perceived, at least at the early stages of the Tribunals' function, the concept of primacy. The Judge's first point is that primacy is founded on the demand for justice at the international level. This is further explained, later in the quotation. He moves on to say that primacy "constitutes the first step towards implementation of international judicial competence". Presumably, it is only the first step because the notion of primacy contains a general obligation, the materialisation of which is left to States. Implicit in this statement is that implementation is better achieved through primacy.

Primacy has, according to Judge Sidhwa, a threefold effect: on the Prosecutor, the Tribunal itself, and finally on States. The language used to describe primacy's function is crucial and indicates its mandatory effect. Primacy "enhances" the role of the Prosecutor and "obliges" States. The Prosecutor has therefore a right to request transfer of competence to the

Tribunal, when this serves the interests of justice. The Tribunal on the other hand, is given the option to establish competence, and may or may not assert jurisdiction. The effect of primacy is most noticeable, however, on States, to whom the Judge dedicates most of this paragraph. Accordingly, a State must "accede to and accept requests for deferral". This is a reminder of the obligation to comply with Tribunal requests. Establishing the obligation is the first step towards acknowledging the importance of international crimes. And there are international crimes which, according to the view put forward here, endanger international peace. This statement may be interpreted as an attempt to justify the creation of the *ad hoc* Tribunals by the SC in response to a threat or breach of the peace. In a sense, this also reflects perhaps the recent trend in international law which favours the establishment of international criminal tribunals. And this is for the benefit of "civilised nations". Ironically, bringing people to justice is not beneficial to civilised nations only, but to all nations. Distinguishing between "civilised" and "uncivilised" nations is not perhaps agreeable anyway, and is certainly anachronistic. The preventive application of international criminal law, which this time belongs to "all" nations, is discussed in the penultimate point of Judge Sidhwa's quotation. This is coupled with a warning that unless tribunals are international, these international crimes will be treated as ordinary crimes and the accused will not be adequately punished[49]. The last part of his description of primacy implies that adjudication at the national level does not provide the same treatment for the culprits, in terms at least of punishment of the guilty. This, in turn, seems to involve considerations of fair trial but still the adjective "adequate" is, if not misused, at least problematic. What seems like an unqualified assertion, is formulated as

[49] See application of *ne bis in idem* principle *infra* part two.

a sweeping statement. Nevertheless, it disregards the possibility that some States are, in fact, able to try the accused of heinous crimes and they do so properly. In any case, even if seen in light of the situation in the former Yugoslavia at the time, it still goes against the principle of concurrent jurisdiction established firmly in the Statute[50].

From this definition of primacy it is clear that much is invested on this concept, as it is perceived in an unqualified way, and with no room for limitations by States[51].

On a different occasion, the Appeals Chamber in rejecting the arguments put forward by Tadić proclaimed the legitimacy of primacy in the ICTY and stated that:

> "Indeed, when an international tribunal such as the present one is created, it must be endowed with primacy over national courts. Otherwise, human nature being what it is, there would be a perennial danger of international crimes being characterised as 'ordinary crimes'[...] or proceedings being 'designed to shield the accused', or cases not being diligently prosecuted[...]. If not effectively countered by the principle of primacy, any of those stratagems might be used to defeat the very purpose of the creation of an international criminal jurisdiction, to the benefit of the very people whom it has been designed to prosecute.
> The principle of primacy of this International Tribunal over national courts must be affirmed; the more so since it is confined within the strict limits of Articles 9 and 10 of the Statute and Rules of Procedure of the International Tribunal"[52].

[50] Article 9(1).

[51] In the same direction see *Prosecutor v. Tadić*, Decision on the Defence Motion on Jurisdiction, 10 August 1995, (IT-94-1-T), where in para. 41 it was observed that concurrent jurisdiction without the granting of primacy to the Tribunal would, in effect, allow the accused "to select the forum of his choice, contrary to the principles relating to coercive criminal jurisdiction". Cf. statements made by four permanent members before the SC immediately after the adoption of the SC Res. which created the ICTY, *supra* 3.2.2.

The above statement although not so detailed as the one by Judge Sidhwa, constitutes a valuable contribution to the comprehension of the concept. It is stressed that an international Tribunal "must" be endowed with primacy over national courts. And this view is supported fervently, as evidenced from the choice of language. The ICTY judges acknowledge that primacy helps fulfil the purposes of international justice. Along the same lines as Judge Sidhwa, they point to the fact that should an international Tribunal not be premised on jurisdictional primacy there is a permanent danger that international crimes are dealt with as ordinary crimes and the requirements of fairness and impartiality of the trial are not met[53]. They further claim that the entire purpose of the creation of the Tribunal might be vanquished otherwise. Portrayed in a rather philosophical manner, this danger is attributed by the Appeals Chamber to "human nature being what it is".

In affirming ICTY's primacy, emphasis is placed on its limitations by the Statute and the relevant Rules of Procedure and Evidence (RPE). This statement almost appeals for a wider, unlimited primacy, whereas in essence, the one found in the Statute and the RPE is already unrestricted. The language in the Statute is broad and attaches no conditions to primacy. Moreover, the RPE are drafted by the judges themselves, who would be reluctant to unnecessarily limit the ambit of their operation.

This approach is one more example of the way primacy was conceived. And this is linked to the advantages primacy has in practice. Whether the doctrinal approach presented here is in line with the application of the principle

[52] *Prosecutor v. Tadić,* Appeal, *ibid. supra* n. 47, paras. 58-59.
[53] The language used here is reminiscent of jurisdiction based on complementarity.

in practice should be examined through the operation of the two *ad hoc* International Criminal Tribunals for the Former Yugoslavia and Rwanda.

Phase Two: Operational Primacy – Deferral

The most visible result of granting primacy to the Tribunals can be found in deferral. At any stage of the proceedings the international Tribunal may order national courts to defer to its competence and release a suspect to its custody for trial. A State, even though it has both custody and concurrent jurisdiction to try the perpetrator of an international crime, is required to yield its jurisdiction to the Tribunal upon a formal request to that effect[54].

Undoubtedly, deferral is loaded with great political charge[55] as it impinges upon State sovereignty and removes from domestic jurisdiction crimes that have traditionally been dealt with exclusively before national courts. It has been suggested that the use of the term "request" in Article 9(2) of the Statute, implies that deferral is not legally obligatory, and that Article 29 of the Statute which stipulates the obligation of States to co-operate with the Tribunal, does not apply to that respect[56]. Such an approach should not be accepted since it would undermine the very notion of primacy[57].

[54] This means that the prosecutor may formally request a Trial Chamber to order a State to defer to the jurisdiction of the Tribunal and forward the results of its inquiries. Moreover, the investigations in such a case are transferred to the Tribunal and the alleged criminals are prosecuted solely before it.

[55] Bassiouni, and Manikas, (1995), 319, observed that: "Of all the provisions of the Statute, those concerning deferral are likely to have the most political significance. They also have the greatest potential for protracted legal and political manoeuvres".

[56] See Weckel, (1993), 258-259; note also the statement by the representative of the Russian Federation, *supra* 3.2.2.

[57] Indeed the Tribunal has endorsed a strong view in relation to deferral. See *Tadić Case, ibid. supra* n. 52.

In order to understand deferral, an examination of the framework for its application is essential. The process of deferral is elaborated in the RPE which provide, in essence, for the way primacy works in practice[58]. Rule 9 RPE sets the requirements for making a deferral request for both the ICTY and the ICTR. Although most of the provisions of the RPE for both the Tribunals are identical, this is not the case with Rule 9[59]. The ICTY Rule will therefore be examined first.

Rule 9(i) and (ii)[60] draws from the principle of *non bis in idem*[61] and more specifically, the exception to it, which allows the Tribunal to try an accused already tried before domestic courts. The function of deferral however, is not simply to reiterate Article 10. Rather, this seeming duplication may be explained by the fact that the interests of the ICTY are to avoid a crime being characterised as an ordinary crime[62], and to prevent sham trials. Rule 9 applies to a different stage of proceedings than Article 10. The former aims to prevent a sham trial from taking place, whereas the latter, in essence, reverses one that has already occurred.

Rule 9 does not simply reiterate the wording of Article 10, and is significantly broader that that. Under Rule 9(iii) deferral may also be requested

[58] As the SG stated in his Report "the details of how the primacy will be asserted shall be set out in the rules of procedure and evidence of the Tribunal". See *ibid. supra* n. 33.

[59] Rule 9 ICTY RPE reads: "Where it appears to the Prosecutor that in any such investigations or criminal proceedings instituted in the courts of any State:

(i) the act being investigated or which is the subject of those proceedings is characterized as an ordinary crime;

(ii) there is a lack of impartiality or independence, or the investigations or proceedings are designed to shield the accused from international criminal responsibility, or the case is not diligently prosecuted; or

(iii) what is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal,

the Prosecutor may propose to the Trial Chamber designated by the President that a formal request be made that such court defer to the competence of the Tribunal".

[60] *Ibid.*

[61] See *infra* section 1.10.

when "what is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal". According to one view, Rule 9(iii) is *ultra vires* because it was inserted by the judges to reflect the statements made by the Permanent Members mentioned above[63]. Provided that the statements are not binding, it is hard to see the validity of this argument. Arguably, there is scope for a rather expansive interpretation of the above provision. The first deferral request, for instance, in *Tadić* did not involve Rule 9(i) and (ii) since the proceedings underway in Germany could not possibly be taken to fall under either of the above[64], it can only be considered that the deferral request was as a matter of fact, made under (iii). Tadić was clearly not the type of criminal these Tribunals were meant to try, but was unfortunate enough to be the first accused the ICTY got hold of.

Although prosecutorial discretion is an important aspect of every court[65], deferrals requested with regard to cases arising in FYROM[66] took prosecutorial discretion to its limits. The Prosecutor requested deferral of five investigations and initially also of "all current and future investigations and prosecutions." She later modified her application and asked the Chamber to insert a "clause" in its decision, by virtue of which the authorities in FYROM would be obliged to inform the Prosecutor about findings in their future investigations. In particular, she requested that this clause oblige FYROM "to comply with any declaration of primacy by the Prosecutor in the absence of a

[62] See also doctrinal primacy *supra*.
[63] Jones, and Powles, (2003), 368.
[64] On the German proceedings re Tadić see, Griesbaum in Fischer, and Lüder, (1999), 130-132; Roggemann, (2002), 50 *et. seq.*
[65] The closest the ICTY came into asserting it is in *Prosecutor v. Delalić, Mucić, Delić and Landžo case*, 20 February 2001, (IT-96-21-A), para. 611.

formal request for deferral to the jurisdiction of the Tribunal by the Chamber"[67]. The RPE stipulate that it is for the Trial Chamber to be seized of a proposal for deferral[68]. Should it appear to the Trial Chamber, seized of a proposal for deferral, that the requirements of the previous Rule are satisfied, the results of the investigation and a copy of the court's record and the judgment if delivered are forwarded to the Tribunal[69]. In the *Re Macedonia Cases*, the Trial Chamber declined the Prosecutor's request noting that it would appear "inappropriate [...] to request the deferral of *all current and future* investigations and prosecutions, notwithstanding their potential seriousness [...] or the status of the alleged perpetrators, to the competence of the Tribunal"[70]. The ICTY in other words rejected the prosecutorial attempt to secure a greater degree of control over deferrals. The case reiterated the authority of the Trial Chamber "to decide and finally issue a formal request [for deferral] to the State concerned"[71]. It also highlighted the significance that the most important cases only be tried before the Tribunal as, arguably, a *carte blanche* on deferrals might lead to cases that are not suitable being tried in the Hague.

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[66] *Decision on the Prosecutor's Request for Deferral and Motion for Order to the Former Yugoslav Republic of Macedonia*, 4 October 2002, (IT-02-55-MISC.6).
[67] Judicial Supplement 37, 3.
[68] See Rule 10(A). In practice, the issue arose with regard to the need for the Chamber to be "seised of a proposal of deferral". See *Delalić et al.*, Decision Regarding Preliminary Motion to the Prosecutor by the Accused Zdravko Mucić Requesting Deferral, 30 September 1996, (IT-96-21-T), where it was held that the Trial Chamber had to be seized by the Prosecutor before it could issue a request for deferral. It further maintained that it is not within the authority of the Trial Chamber to order the Prosecutor to submit to it a proposal for deferral. (para. 2 of the decision). This is in line with the Decision in the *Dukić Case*, Decision on Preliminary Motions of the Accused, 26 April 1996, (IT-96-20-T), paras. 6-8.
[69] Rule 10(B). According to Rule 10(C), in order to ensure the impartiality of the deferral procedure, subsequent proceedings are held before another Trial Chamber and not before the one that has requested the deferral.
[70] *Decision on the Prosecutor's Request for Deferral and Motion for Order to the Former Yugoslav Republic of Macedonia*, *ibid. supra* n. 66, para. 51.
[71] *Ibid.* para. 53.

The preconditions for deferrals, in Article 8(2) of the ICTR Statute, may be found in Rule 9, which differs from its ICTY counterpart. Rule 9 is broader for the ICTR. For deferral to be requested, it suffices that the crimes are the subject of a prosecutorial investigation, or should be the subject of such an investigation, or are the subject of a Tribunal's indictment[72]. In the ICTY, the preconditions for deferral are more closely defined. Although the criteria of the exception to the *non bis in idem* are not reiterated in the ICTR RPE, 9(ii)(a) should not preclude similar application, particularly if, despite the seriousness of offences, the courts of States do not recognise this in their proceedings. No reference is made though to characterisation of a crime as ordinary before national courts, but (a), (b) and (c) are only indicative, as evidenced from the wording of 9(ii)[73]. Another difference with Rule 9(i) ICTY, which refers explicitly to investigations and court proceedings, is that 9(ii)(a) ICTR, does not mention both explicitly. Does that mean that its application is limited to court proceedings only? Although such an interpretation may not be precluded, reference to the chapeau of Rule 9 suggests that both investigations and court proceedings would probably be accepted. Moreover, in 9(ii)(b), the importance placed on prosecuting those mostly responsible for the genocide in Rwanda is evident. Although implicit in 9(iii) of the ICTY RPE, all aspects of ICTR Rule 9 are focused towards this approach.

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[72] Rule 9(i), (ii) and (iii) ICTR RPE respectively.

[73] Rule 9 ICTR RPE reads: "Where it appears to the Prosecutor that crimes which are subject of investigations or criminal proceedings instituted in the courts of any State:
(i) Are subject of an investigation by the Prosecutor;
(ii) Should be the subject of an investigation by the Prosecutor considering, *inter alia*:
(a) The seriousness of the offences;
(b) The status of the accused at the time of the alleged offences;
(c) The general importance of the legal questions involved in the case;
(iii) Are the subject of an indictment in the Tribunal,
the Prosecutor may apply to the Trial Chamber designated by the President to issue a formal request that such court defer to the competence of the Tribunal".

Once the conditions set out in Rule 9 are satisfied, a formal request for deferral is issued by the Trial Chamber pursuant to Rule 10. Accordingly, all relevant information is forwarded to the Tribunal. Moreover, section (c) of Rule 10 enshrines the obligation of the State to which the formal request for deferral is addressed to comply without undue delay in accordance with Article 28 of the Statute.

Furthermore, issues of compliance for both Tribunals are dealt with in the identical Rule 11 which provides for a very reasonable sixty-day time limit for a State to comply with a deferral request, and referral to the SC in case of non-compliance is explicitly provided for.

The process of deferral is formulated in an authoritative manner. No input is envisaged from the State to which deferral is addressed. This might be explained by the fact that deferral is the principal means of establishing the Tribunals' primacy. This was very important for the Tribunals' operation, at least in the beginning. However, the passivity imposed on States does not assist the wider process of interaction between the national and international orders. In deferral, and in primacy generally, the main actor is the Tribunal, whereas the State does not possess any powers of influencing the process. However, as seen in the recent *Macedonia cases*, the right to request deferral is not unlimited; primacy is therefore submitted to certain checks and balances, which should involve an examination of the appropriateness of the forum. In that sense, a realisation of the desirability of restricting deferral requests to those instances that would be beneficial for the process is a step in the right direction.

Phase Three: Pragmatic Primacy

In the recent phase of the Tribunals' operation, which, according to their completion strategy[74] should reach the end of their lives within the next few years, primacy is changing yet again. There is a shift from deferral to the Tribunals' jurisdiction to referral[75] of cases to national courts. The procedure for this is enshrined in Rule 11*bis* of the RPE which regulates the issue of suspension of indictment in case of proceedings before national courts[76]. The rationale for domestic referrals should not be traced in the empowerment of national proceedings, but rather in the pressing need for completion of the Tribunals' work, which are rather costly for the entire UN system[77].

Strengthening national jurisdictions should have been at the forefront of the Tribunals' work[78]. This did not happen in a systematic way[79]. Ten years after the atrocities ended in much of Yugoslavia and Rwanda, however, the process of "relocating cases"[80] is underway. There have been two main stages before the application of Rule 11*bis*. First, the "Outreach Programme"[81], established by Judge McDonald in 1997 and then, the "Rules of the Road"[82],

[74] See SC Presidential Statement S/PRST/2002/21; SC Res. 1503, 28 August 2003, S/RES/1503 (2003); SC Res. 1534, 26 March 2004, S/RES/1534 (2004).
[75] Note the use of the term "referral" when compared with SC referral with regard to the ICC. See *infra* chapter 4.
[76] Rule 11*bis* was introduced for the first time in the 12th RPE Revision of 20 October and 12 November 1997 and was subsequently amended to include the criteria for a domestic referral.
[77] Zacklin, (2004), 543, reporting that the Tribunals take up approximately 10% of the overall UN budget. The ICTY's budget for 2004-5 is $271,854,600 (source: www.un.org/icty), whereas the ICTR budge amounts to $177, 739,400 (source: www.ictr.org).
[78] SC Res. 955 for instance, stresses in its preamble that there is a need "to strengthen the courts and judicial system of Rwanda, having regard in particular to the necessity for those courts to deal with large numbers of suspects".
[79] Tolbert, (2002), 8,12.
[80] See speech by Judge Jorda, 27 November 2001, JD/P.I.S./641-e where he outlines the advantages of this process.
[81] For an analysis see Vohrah, and Cina, in May *et al.* (2001), 547.
[82] The parties to the Dayton Agreement agreed in Rome on 18 February 1996 that "persons other than those already indicted by the Tribunal may be arrested and detained for serious violations of international humanitarian law only pursuant to a previously issued order, warrant

which although arguably not hugely successful[83], paved the way for the adoption of Article 11*bis*. According to this Rule, cases pertaining to low-mid-level indictees may be referred back to the national courts of the State in whose territory the crime was committed, or where the accused was arrested or, following a very recent amendment of the RPE, a State which has jurisdiction and is willing and adequately prepared to accept such a case[84]. The exact application and effectiveness of the Rule remains to be seen. Some problems are already discernible however[85]. At the time of writing, a request by the Prosecutor under Rule 11*bis* is before a Trial Chamber of the ICTY to decide the first ever referral[86], and it is clear that the ICTR will follow[87].

Decoupling Rule 11*bis* from the particular realities of its application, it represents another change in primacy's role. Judge Jorda maintains that "the ICTY has exercised both primary and complementary jurisdiction"[88]. In this final stage of the Tribunals' operation, the Tribunal's primacy has certainly

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of indictment that had been reviewed and deemed consistent with international legal standards by the Tribunal", Sixth Annual ICTY Report, A/54/187-S/1999/846, para.135.

[83] Tolbert, *ibid. supra* n. 79, 14-15.

[84] Rule 11*bis*(A). Sending a person back to the country where he/she was arrested which might differ from the territory of where the crime was committed might be criticised as giving the wrong message. If one of primacy's purposes is to empower national jurisdictions, particularly where the *locus commissi delicti*, then this is not necessarily clear from this provision. Instead, it is evidence of a decentralised enforcement of international jurisdiction, which is still agreeable. The amendment of the RPE on the 28th of July 2004 added the final possibility of deferring to any State, which significantly broadens its application.

[85] Del Ponte, (2004), 519 where she mentions problems with domestic legislation, in terms of admissibility of evidence and protection of witnesses, for instance. Also, with regard to transfers to Rwanda, the possibility that the person might face the death penalty, is of concern. See para. 38 of Letter by ICTR President, *ibid. infra* n. 87.

[86] *Prosecutor v. Rahim Ademi and Mirko Norać*, Request by the Prosecutor under Rule 11*bis*, 2 September 2004, (IT-04078-PT). President Meron appointed three judges "to constitute a Trial Chamber for the purpose of determining whether this case shall be referred to the authorities of Croatia", Press Release CC/P.I.S./891-e, 8 September 2004.

[87] Letter dated 30 April 2004 from the President of the ICTR to the SC, S/2004/341, 3 May 2004, outlining the Tribunal's completion strategy, paras. 36-39. Note, however, that in *Prosecutor v. Bernard Ntuahaga*, Decision on the Prosecutor's Motion to Withdraw the Indictment in Ntuahaga, 18 March 1999, (98-40-T), the ICTR effectively referred the case to national courts, by withdrawing the indictment with the view to encouraging Belgium to try the accused, which due to a technicality was not able to be transferred there and faced extradition to Rwanda.

[88] Jorda, (2004), 582. He recognises however that the discretion lies with the Tribunal.

taken a different angle owing to 11*bis*. An expression of this is deferring back to national courts. When these courts are able to deal with the cases effectively, then it is only to the benefit of the process to have the cases before them. This shift from the Tribunals' hegemony to national proceedings is complemented also by other domestic initiatives such as War Crimes Chamber within the State Court of BiH[89], and to an extent, even the community-based Gacaca proceedings in Rwanda[90].

Referring cases to national courts should have been the emphasis from the beginning and should not be celebrated as a success at this stage, simply because of a realisation of the limited success the Tribunals have had in shifting a large number of cases. The use of this other primacy now, the primacy that involves national courts more, proves that the concept is flexible and has adapted yet again to the changing needs of a "mature" Tribunal. Primacy has proven to be a dynamic concept.

4. Primacy's Demise

Primacy has dominated the scene in the Tribunals, and has changed over the years. Ironically, primacy's evolution has grown to resemble the restrictions envisaged by the SC Permanent Members when they made their statements at its original inception. Although these statements do not seem to have influenced the operation of the Tribunals' primacy, they have had an

[89] See SC Res. 1503 (2003), para. 5; SC Res. 1534 (2004), para. 10. See Mundis, Gaynor (2004), 696; For a comprehensive analysis of the exit strategy, see Bohlander, (2003), 59 *et seq.*

[90] Scherrer, (1997), 4; Burke-White, (2002), 54-60; Daly (2002), 355.

impact on primacy's use for institutions that followed the establishment of the *ad hoc* Tribunals. The ICC has adopted complementarity which will be the focus of the second part of this chapter, whereas the Sierra Leone Special Court (SLSC) which will not be examined in this study[91], although premised on primacy, differs greatly from the Tribunals. According to Article 8 of its Statute, the SLSC "shall have primacy over the national courts of Sierra Leone".

So what has Judge Sidhwa's legacy been? Instead of a full-strength primacy needed to build the first truly international criminal justice institution, primacy has been replaced by a conditional primacy of the ICC, and a more targeted primacy of the SLSC. Perhaps the greatest achievement of the Tribunal's primacy is the realisation that serious crimes such as these falling under the jurisdiction of the Tribunals and the Court may be tried by an international forum when certain conditions are met. In that sense, primacy has played a very important role, which led to a more refined principle, that of complementarity.

[91] See generally, Cryer, (2001), 435; Frulli, (2000), 857; McDonald, (2002), 121; Schocken (2002), 436.

Part Two: Complementarity

The Meaning of Complementarity

Complementarity constitutes a key concept in the ICC regime[92]. It is vital for the function of the Court and was one of many thorny problems facing those designing this permanent institution.

Complementarity defines the relationship between the ICC and national courts and determines the forum that should have jurisdiction in a particular case. It is generally accepted that it is the product of a compromise which emerged in the negotiations for the ICC. This compromise serves a delicate balance between the competing interests of State sovereignty and judicial independence[93]. Finding a widely acceptable solution on the problematic issue of jurisdiction was a problem in the negotiations[94]. Complementarity therefore is among those concepts without which the ICC would not have materialised.

In the very essence of complementarity lies the fact that the ICC is not intended to replace or displace national courts when these are functioning properly[95]. Some States have well-functioning judiciaries; some however do not[96]. The ICC is meant to act as an effective complement and will not replace

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[92] The ICC was the result of the 1998 Rome Statute of the International Criminal Court, A/Conf.138/9, 1998, 37 *ILM* (1998), 999. The Court was formally established on the 1st of July 2002.

[93] See Bachrach, (1999), 40; See also Pejic, (1998), 311. Arguably, the protection the ICC will provide will compensate for the relinquishment of whatever sovereign rights. On this particular issue see Bhattacharyya, (1996), 75; See also Brand (1995), 1696, 1697.

[94] Ferencz, (1998), 227.

[95] Crawford, (1995), 410; Bleich, (1997), 1; See also the then LCHR, Establishing an International Criminal Court; Major Unresolved Issues in the Draft Statute, *International Criminal Court Briefing Series Vol.1, No.1 (1998),* 10, available at gopher://igc.apc.org/00/orgs/icc/ngodocs/rome/lchr_issues.598; As Bassiouni puts it, "complementarity requires deferral to capable national systems", Bassiouni, Brower, Grossman, Orentlicher, Rosenberg, Scheffer, and Williams, (1998), 1396.

[96] Dunoff, and Trachtman, (1999), 405.

effective national courts. The Statute's goal is to establish a judicial "safety net" in place for those cases where, due to a national court system that is unwilling or unable, the investigation of serious international crimes is not possible[97]. In other words, the ICC will provide, in those cases, an alternative forum for the termination of impunity[98] and will, in fact, supplement[99] the domestic proceedings.

Complementarity introduces a new regime on the international scene, by ensuring that both national and international proceedings co-exist and that adjudication takes place at the level most competent to deal with a case.

Concurrent Jurisdiction and Complementarity

Concurrent jurisdiction entails two different forms when it comes to the Court. First, the ICC's relationship with national jurisdictions and second, with the *ad hoc* Tribunals. Of the two, concurrent jurisdiction between the ICC and national courts is more problematic.

It has been suggested that complementarity is contrary to the concept of concurrent jurisdiction and arguably this is in opposition to the original ILC conception[100].

In the process of the Rome Statute negotiations, it was agreed that "parallel" procedures between national courts and the ICC should be avoided

[97] Brown, (1999), 878.
[98] Fowler, 1.
[99] For the supplemental role of the ICC see Crawford, *ibid. supra* n. 95 , 415.
[100] Wexler, in Bassiouni, (1999), 659.

to the maximum extent possible[101]; in that sense, complementarity is closer to the concept of concurrent jurisdiction[102].

This is true, as complementarity guarantees that both jurisdictions may be involved. In contrast to primacy, where the ICTY and the ICTR establish their jurisdictional superiority, when necessary, the ICC leaves the adjudication of a case to the national courts and will intervene only in exceptional cases.

Concurrent jurisdiction, raises similar problems for both the *ad hoc* Tribunals and the ICC, and it could be therefore argued that, at first, the solutions chosen appear to be similar[103].

Indeed, both regimes involve the national and the international levels. However, the interaction between the national and the international levels in the case of the *ad hoc* Tribunals is not as noticeable as it is expected to be with the ICC. The *ad hoc* Tribunals have primacy which is manifested through the process of deferral. Deferral might or might not involve national court input, depending on the reason for which deferral is sought. The level of interaction between national and international proceedings therefore varies.

Nevertheless, in order for the ICC to be seised of jurisdiction, the case must necessarily pass through the domestic forum[104]. Thus, there is a more "direct" concurrent jurisdiction in the latter case, which is mainly due to complementarity.

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[101] See Report of the 1996 Preparatory Committee on the Establishment of an International Criminal Court, Volume I, GA, 51st Sess. Supp. No. 22, A/51/22, 1996, at 38-39.
[102] *Ibid.* at 37.
[103] Amnesty International, The International Criminal Court: Making the Right Choices – Part I; Defining the Crimes and Permissible Defences and Initiating a Prosecution, 11-12.
[104] Except of course in those instances where the State fails to act, where the ICC will be seised of jurisdiction by virtue of the "inaction scenario". See *infra* section 5.3, fn. 173 in particular.

Contrary to a widely accepted view[105], complementarity does not in fact signify complete primacy of national courts. It is a *sui generis* principle, which allows national courts to deal with a case first[106]. If they fail in this role, the ICC may step in and be seised of jurisdiction. The ICC, being the final arbiter of its own jurisdiction[107], will decide on whether a case is admissible before it, provided that the domestic courts of a State are shown to be genuinely unwilling or unable to deal with a case. National courts are not granted primacy as the ICC is given the power to determine when national courts are unwilling or unable to fulfil their role.

Regarding the second form of concurrent jurisdiction, namely between the ICC and the *ad hoc* Tribunals, problems may occur only in respect of the ICTY whose jurisdiction is not limited *ratione temporis*[108], and includes crimes committed in the territory of the Former Yugoslavia after the 1st of January 1991[109]. This means that the ICTY can deal with crimes falling under its jurisdiction beyond the time-span of the Bosnian war[110]. In the hypothetical case that crimes falling under the jurisdiction of both the ICTY and the ICC are committed in the territory of the former Yugoslavia, and the successor States have become parties to the Rome Statute, a potential "conflict" might then arise. On the one hand, the ICTY will have primacy to investigate and prosecute the said crimes whereas on the other, for the ICC to be seised of

[105] Paper on some policy issues before the Office of the Prosecutor, September 2003, 4 available at: http://www.icc-cpi.int/otp/policy.php; See Bachrach, (1998), 158; See also *id.*, (1999), 40; Kritz, (1996), 145; Arsanjani, (1999), 26; Bleich, (1997), "Cooperation with National Systems" 3; Brown, (1998), 424, especially fn 203, 204.
[106] Morris, in Shelton (2000), 195, calls the Court's conditional primacy, a "vestigial form of primacy".
[107] See *infra.* 5.4.
[108] This is not the case for the ICTR though whose jurisdiction is limited according to Article 7 of its Statute to the crimes committed during the "period beginning on 1 January 1994 and ending on 31 December 1994".
[109] Article 8 of the ICTY's Statute.

jurisdiction the complementarity test must be met. The same issue could also arise with regard to any other *ad hoc* criminal Tribunal or Special Court that may exist at one time, with comparable jurisdiction. The question then posed is which of the two institutions would have jurisdiction in the first place, so as to subsequently determine the position of national courts.

There is no provision in the ICC Statute regarding the resolution of such a conflict. It has been argued by analogy to the rule that speciality prevails over generality, that the specialised Tribunal derogates from the competence of a broader international jurisdiction[111]. However, this solution is not necessarily accurate. Prosecutorial discretion might provide a better solution to the conflict, in terms of not asserting jurisdiction even though the preconditions for jurisdiction are met, when the case is dealt with appropriately by either the State party or the *ad hoc* Tribunal[112].

Identifying Complementarity's Content through Analogous Concepts

Unless a certain expertise in physics is possessed, where it is a prevalent concept, complementarity did not mean much to lawyers before the ICC negotiations. However, despite its importance, complementarity remains undefined[113]. In fact, no mention of the term "complementarity" can be found in the Statute, which stipulates that the prospective ICC is meant to be

[110] See for instance the Kosovo crisis and ICTY's investigations of criminal responsibility for crimes committed in the context of ethnic cleansing.
[111] Trifterer in Triffterer (1999), 64.
[112] See also Bohlander in Cassese, Gaeta, and Jones (2002), 689, who maintains however that "the ICTY could demand the ICC or its Prosecutor not to entertain the case any further, and take charge of the case under its own jurisdiction". This argument, based on the coercive powers the SC exercises over UN members fails to address the question whether the ICC is bound as an institution by Article 103 of the Charter.

"complementary" to national criminal jurisdictions[114]. The term has its origins in the French term "complementarité". However, this is not indicative of its content[115]. In order to understand its meaning, it would be helpful to examine analogous concepts in regional and other systems such as the principle of subsidiarity in European Law and the European Convention of Human Rights, the operation of the federal States and the human rights system in general.

In the field of European Law, subsidiarity is the closest concept, even though this principle does not refer to jurisdiction and it recognises moreover, a hierarchy, of which European Law is superior[116]. One of the functions of the principle of subsidiarity in EC Law is that the Community takes action only if the objectives of the action cannot be sufficiently achieved by the Member States and can be better achieved by the Community[117]. Subsidiarity emerged as a political concept to satisfy concerns raised by certain Member States. In the process of European integration, it has taken up much significance. In this respect, the analogy to the concept of complementarity in international criminal law is of some merit since, as in European Law, the ICC will take action if the national jurisdictions are not sufficient to try an accused, presuming then that the ICC is the better forum. It is difficult to see how complementarity differs from subsidiarity. Unlike subsidiarity though, complementarity applies to all cases falling under the jurisdiction of the Court when certain preconditions are met and is not limited in terms of specific competence allotted to it.

[113] See Association of American Law Schools Panel on the International Criminal Court, (1999), 248; Bachrach, (1999), 158.
[114] See the Preamble and Article 1 of the Rome Statute.
[115] Bassiouni, (1997), 397.
[116] Article 5 EC Treaty.
[117] For the principle of subsidiarity in European Law see generally Craig, and De Búrca, (2003), 132-138; See also Toth, (1992), 1079.

In the European Human Rights System, the principle of subsidiarity laid down therein could be another possible source in order to understand the principle of complementarity[118]. Although no reference to subsidiarity is made in the European Convention on Human Rights[119] this does not mean that it has no application in its framework. The Convention is "in no way intended to take the place of national human-rights provisions and machinery", but the fundamental freedoms enshrined therein were "clearly designed to add a supplementary and ultimate remedy to those safeguards which the internal law of the Convention States afford to the individual"[120]. This is in a way akin to complementarity since the ICC will not replace the national courts of a State but will be an effective complement without constituting the ultimate remedy available to the individual.

Another possible source of comparison may come from an examination of federal-type States[121]. The interplay between the constituent states and the central federal state in this type of constitutional structure may be helpful for approaching complementarity in international criminal law. In order for a valid analogy to take place, the discussion should be focused on the federal judicial system. And more specifically, on the inter-relationship between the courts of each state and the federal court[122]. It may be argued that there is no common ground on jurisdiction since there is generally a separation and division of

[118] For the European System see generally Harris, O'Boyle, and Warbrick, (1995); For the principle of subsidiarity see, *ibid.*, 9-11.
[119] The European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, ETS 5 as amended by Protocol No 11 (ETS No 155).
[120] Petzold, in MacDonald, Matscher, and Petzold, (1993), 43.
[121] The federal form is used by many nations in the world, including USA, Canada, Australia, India, Germany, Switzerland, Belgium, Nigeria, Venezuela, for example. For the similarities and differences among the federal systems see generally Jackson, and Tushnet, (1999), chapter VIII.

powers[123]. The federal court may, should certain conditions be met, be seised of jurisdiction when it is deemed necessary and is specifically provided for in the constitution itself or in a law[124]. However, although this might suggest that the approach taken is akin to the principle of complementarity, it should be noted though that the relationship between the national courts of a State and the ICC differs substantially from the analogous relationship in federal States. And this has to do with the fact that in the latter case, the formulation entails only one level *i.e.* jurisdiction within the same State, whereas in the former it involves two different levels, the national and the international. More importantly, the federal court has supremacy over the courts of the constituent states. This is not the case with the ICC. The intention is that the ICC is truly complementary and would normally not review decisions delivered at the national level[125]. Hence, the operation of the federal system can only provide limited assistance towards the comprehension of the principle of complementarity. This could derive from the fact that jurisdiction on the federal court is conferred only if certain conditions, provided by law, are met and not arbitrarily, which is also the case for the ICC.

An analogy to complementarity may also be found in the international human rights system and the different options provided to victims of human rights violations. Protection can be sought in different frameworks[126].

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[122] In the American system this would be the federal jurisdiction of the Supreme Court and the Courts of the individual states. In the German system reference should be made to the inter-relationship between the Bundesverfassungsgericht and the courts of the Länder.

[123] See, for instance, on American Law, Tribe, (1998), 18.

[124] Nowak, and Rotunda, (1995), chapter 2, 21 *et. seq.*; Isensee, and Kirchhof, (1987), part four, chapter V., 665 *et seq.*

[125] With the exception of course of the strictly defined cases in which exception to the principle of *ne bis in idem* may occur.

[126] For example in the Human Rights Commission, the European Court of Human Rights, the Inter-American Court of Human Rights, the different Committees established by the various international Conventions etc.

However, it should be noted that the different possibilities for protection available, are not complementary either to each other or to national courts and thus no analogy may be drawn between the human rights system and international criminal justice. Nevertheless, an examination of the preconditions that need to be met might be of assistance. For the purpose of this study, only one, the requirement for the exhaustion of local remedies, will be briefly examined[127]. As this constitutes a necessary precondition for the admissibility of a case, it is in a sense comparable to complementarity. The same rule underlies international criminal law as well, and is manifested in complementarity. The exhaustion of local remedies rule can be comparable to the "unavailable" and "ineffective"[128] criteria needed by the complementarity principle since conferral of jurisdiction to the international court is made conditional on those two criteria.

There is no exact equivalent in other regional or international systems that would assist in the comprehension of the meaning of complementarity. The analogies are helpful in understanding how similar concepts operate in other systems, and may be of assistance in the practical application of the complementarity principle.

[127] Article 26 of the ECHR *ibid. supra* n. 119 reads: "The Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law..."; see also Article 46(1)(a) of the IACHR 9 *ILM* (1970), 673, which for the admissibility of the petition or communication requires "that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law"; also in the African Charter on Human and Peoples' Rights, 21 *ILM* (1982), 59, by virtue of Article 56 communications received by the Commission shall be considered if they "are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged".

[128] For the analysis of the criteria see *infra*.

Reasons behind the Adoption of Complementarity and the Abandonment of Primacy

The choice of complementarity should not be seen as an evaluation of the merits of national proceedings and certainly not because the drafters realised primacy's problems[129]. Complementarity is perceived as the maximum that could be achieved in the negotiations[130]. Moreover, the choice of complementarity might be rationalised on the different constitutional basis for the ICC. The fact that the permanent Court was created by a treaty and not by means of a Chapter VII Resolution is crucial for the choice of the principle on which its jurisdiction is based. Creating a new Court by a treaty signifies that the consent of the States participating in the negotiations must be achieved. In the absence of a SC prerogative to "impose" its choices through binding Resolutions, a commonly acceptable solution is often very difficult to reach. Accordingly, complementarity replaced primacy[131].

When dealing with questions of the establishment of a new institution, considerations of sovereignty come into play[132]. The pertinent question of State sovereignty and its relationship to the jurisdiction of the permanent

[129] Morris, (1997), 362-365.

[130] Commenting on the merit of complementarity, the delegate of Austria at an oral interview made on August 6, 1997, pointed out that "complementarity constitutes a guiding spirit" and the delegate of Ireland concluded "complementarity might not be the strongest grounds for the Court to rest on, but it might be the best", cited in Bachrach, *ibid. supra* n. 105, 169, fn. 102-103.

[131] This however contradicts the view held by the ICTY in the course of the *Tadić* case which maintained that "[...]when international tribunal is created it must be endowed with primacy over national courts". See *ibid. supra* n. 52.

[132] McKeon, (1997), 535; See also generally, Cassese, in Cassese, and Delmas-Marty, "Crimes internationaux", (2002), 13 and Kirsch, *ibid.*, 31.

international criminal court was one of the main obstacles to its establishment[133].

State sovereignty is one of the most fundamental attributes of the law of nations in a community whose primary actors are States[134]. However, in the recent years, the concept of sovereignty has changed. Economic development, technological evolution, new international concerns such as those relevant to the environment, the increased international concern for human rights, and most recently terrorism, signify the continuing development of the once rigidly defined concept of sovereignty[135]. States have accepted cessions of sovereignty[136], the most prominent example being membership of international organisations[137]. Sovereignty is no longer absolute[138]-if it ever was, but it remains strong[139].

Although States continue to play the leading role in the international arena, it is no longer the case that they are "the only true actors"[140] in international law. The individual has acquired some *locus standi* on the international scene[141], a prominent example being in the field of international criminal law, albeit only as defendant. Traditionally, criminal jurisdiction has been a

[133] Pejic, (1997), 860; Rebane, (1996), 1664; Pickard, (1995), 439; Cavicchia, (1992), 223; Simpson, (1999), 134. See also the relevant discussions in the course of the Preparatory Committee. Namely, see the Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, GA 50th Sess., Supp. No. 22, A/50/22 (1995), paras. 29-51; Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I (Proceedings of the Preparatory Committee during March-April and august 1996) and Volume II (Compilation of Proposals), GA 51st Sess. Supp. No. 22 A/51/22 (1996), paras. 153-178.

[134] Brownlie, (2003), 287.

[135] Grossman, and Bradlow, (1993), 11, 14, 16-18; and Jamison, (1995), 431.

[136] There is the view (Bassiouni) whereby "by limiting its sovereignty, a State proves that it is sovereign". See Bassiouni, and Nanda, (1973), 17.

[137] See generally, Sands, and Klein (2001), 533.

[138] Nagan, (1995), 142; see also Juss, (1994), 225.

[139] Brierly, (1963), 46-49; See also Brand, (1995), 1695.

[140] This position can be found in the first edition of Oppenheim, (1905-1906).

[141] As Sir Hersch Lauterpacht has observed, (1950), 463, international law has displaced the States as the sole subjects of international law and has moved towards the individual human

reserved domain (*domaine reservée*) for the national sphere and no international organisation could supersede this notion. The exercise of criminal jurisdiction within the limits of public international law fell within the unfettered prerogatives of the sovereign State[142].

States are generally reluctant to give up their sovereignty in favour of an international tribunal although arguably the sovereign rights forfeited are regained by the protection the international instruments provide[143]. In the field of international criminal law, the creation of the Nuremberg and Tokyo Tribunals was the first step towards a penetration of the veil of sovereignty[144]. However, unlike the Yugoslav and Rwanda Tribunals, where the limits of their mandate made it possible for them to rely on jurisdictional primacy, the community of sovereign States did not display a similar willingness to accept such a restriction of national competence with regard to the ICC.

The permanent nature of the new court meant that States wished to maintain the sovereign prerogative of bringing perpetrators of the alleged crimes to trial according to the legal basis of criminal jurisdiction[145], and submit them to the jurisdiction of the ICC only in exceptional case[146]s.

Linked to this is the importance attributed to State consent. Many States, with the US being the most fervent supporter of this view[147], were deeply

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rights by bringing the "individual human being in the very center of the constitution of the world".

[142] See *Lotus Case, France v. Turkey (1927)*, PCIJ Rep., Series A, No. 10, 18.

[143] Ferencz, (1992), 391-392; See also Saxer, (1992), 601-602; Wright, (1994), 42-43.

[144] King, (1996), 136-137; Brand, *supra* n. 93, 1690.

[145] *i.e.* the nationality, the territoriality and the passive personality principles. See generally, Brownlie, (2003), 299-305.

[146] Whilst it is true that only situations can be referred to the ICC, the Court ultimately deals with individual cases and it is precisely this point that States had trouble with and would rather have control over the proceedings.

[147] On 26 March 1998, US Senator Jesse Helms, Chairman of the Senate Committee on Foreign Relations, sent a letter to US Secretary of State Madeleine Albright objecting on political grounds to the Court. He wrote: "I am unalterably opposed to the creation of a permanent UN criminal court because any permanent judiciary within the United Nations

concerned by the possibility that their own citizens could be brought before an international tribunal without state consent. Thus, the fear that the ICC would become a supranational entity led the ILC to seek ways to assuage their concerns[148]. It was then that complementarity was born as the result of a compromise achieved in the negotiations for the ICC.

At this point, it should be noted that the complementarity provisions as they presently stand, require monitoring from the ICC to ensure the satisfactory operation of the principle. Ironically, one of the main reasons for the adoption of complementarity was the fear that the ICC would otherwise pass judgments on national authorities[149]. International supervision is indeed necessary for the full implementation of complementary jurisdiction, for State attempts at escaping jurisdiction will be inevitable[150]. It would be interesting to see whether this formulation in the long run compromises the sovereignty of the States concerned more than an ICC based on primacy.

Another factor which might have also led to the adoption of complementarity for the ICC may be the fact that the scope of its jurisdiction extends only to future crimes. Both Nuremberg and Tokyo IMTs as well as the ICTY and the ICTR, were established after most of the crimes they related to had been committed. The ICC however, not having retrospective

system would be totally inappropriate... it would grant the UN a principal trapping of sovereignty. The UN is not now – nor will it ever be so log as I have breath in me – a sovereign entity... Under this scenario, an American citizen could very well come under the jurisdiction of a UN criminal court, even over the express objection of the United States Government... [I]f they manage to conclude a treaty establishing such a court without a clear U.S. veto, it will be dead-on-arrival at the Senate Foreign Relations Committee".

[148] Wexler, (1997), 221.

[149] Human Rights Watch: Recommendations for an Independent and Effective International Criminal Court, New York, London, 1998 available at http://www.hrw.org/reports98/icc/jitbwb-07.htm

[150] Brown, *ibid. supra* n. 4, 431; Cassese, (1999), 159.

jurisdiction[151], deals with situations as they arise. States fearing that they would no longer have control and that they would be involved in situations they could not handle, were reluctant to set up a Court without ensuring that their interests would be preserved. The only way to safeguard these interests was by denying primacy to the new Court. By accepting complementarity there is a "barrier" before the ICC may be seised of jurisdiction; that of domestic courts which can only be crossed if those courts are found to be insufficient. This way, control remains with able and willing States.

Complementarity in the ICC Statute

Complementarity can be found in the Preamble of the Rome Statute, as well as in Articles 1, 17 and 18, whereas its implications permeate the entire Statute. Some of these aspects will be examined in the chapters that follow. In examining jurisdiction, the *ne bis in idem* principle, found in Article 20 ICC Statute, will be discussed later in this chapter together with Article 10[9] of the *ad hoc* Tribunals.

5.1 The Preamble to the Statute

As with every international treaty, the Preamble to the Rome Statute indicates its aspirations. Although none of the drafts prior to the 1994 ILC Draft contained a Preamble, it has since been developed steadily, primarily in the negotiations at Rome, to acquire its present form.

[151] Article 11 ICC Statute.

Complementarity is first found in the tenth Preambular paragraph where it is stated: "Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions"[152].

Originally, the Preamble was meant to contain the main reference to complementarity which was first introduced by the 1994 Draft[153]. However, in the process of negotiations the possibility of it being moved to an Article in the main text of the treaty was explored[154]. It was feared that the inclusion of complementarity in the Preamble would make it weak, and in order to strengthen it, it should find its place in the Statute.

Had complementarity been found solely in the Preamble, it would, arguably, not have been as strong as it could be, had it been mentioned in a separate Article in the body of the international instrument. In general treaty law, Article 31 VCLT provides for the interpretation of international treaties. According to its paragraph 2: "the context for the purpose of the interpretation of a treaty shall comprise in addition to the text, including its preamble and annexes...". The Preamble itself may thus not have normative language but reference to concepts found in Preambles have long been in the scope of international adjudication and can be found in jurisprudence[155].

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[152] In order to stress the complementary position of the new institution, reference should also be made to the 6th preambular paragraph which stipulates that "...it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes". See on that Lattanzi, (1999), 426.

[153] The preamble provided: "...Emphasizing further that such a court is intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective". See Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court, 2 May – 22 July 1994 (GA, 49th Sess., Supp. No. 10, A/49/10, 1994) at 43.

[154] 1995 Report of the *Ad Hoc* Committee on the Establishment of an ICC G.A., 50th Sess., Supp. No. 22, A/50/22, 1995 at p. 7

[155] See *Reparations for Injuries Suffered in the Service of the United Nations Case,* ICJ Rep. 1949, 174; See also *Certain Expenses of the United Nations Case,* ICJ Rep. 1962, 151; As to the legal function of the Preambles see *Asylum Case*, ICJ Rep. 1950, 282; *Rights of Nationals of the United States of America in Morocco*, ICJ Rep. 1952, 196. There have also been some arbitral awards on the issue. See *Arbitral Decision Rendered in Conformity with the Special*

In the drafts that followed the ILC Draft, complementarity was further elaborated so as to provide a greater understanding of its meaning[156]. The Preamble of the ICC Statute as it stands, adopted the alternative reading of the final draft which was presented at the Rome conference[157]. This refers to complementarity without adding any characteristics, leaving those to the Articles that follow in the main part of the treaty.

5.2 Article 1 of the Statute

It was considerations of the legal implications of the placement of such an important concept in the Preamble of the Rome treaty that led its drafters to include complementarity in the main text. Hence, its inclusion in Article 1 of the final Rome text[158].

The historical development of this Article cannot be precisely reconstructed. It should be accepted though that in the process of negotiations several concepts began to take shape and found their way into the Statute. It is

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Agreement Concluded on December 17, 1930, between the Kingdom of Sweden and the United States of America Relating to the Arbitration of a Difference Concerning the Swedish Motor Ships Kronprins Gustaf Adolf and Pacific, Washington D.C., July 18, 1932, reproduced in 26 *AJIL* (1932), 834, at 846; See also *Arbitration between Great Britain and Costa Rica. Opinion and Award of William H. Taft, Sole Arbitrator. Washington D.C.*, October 18, 1923, reproduced in 18 *AJIL* (1924), 147 at 148; *In the Matter of the Arbitration of the Boundary Dispute between the Republics of Costa Rica and Panama Provided for by the Convention between Costa Rica and Panama of March 17, 1910. Opinion and Decision of Edward Douglass White, Chief Justice of the United States, Acting in the Capacity of Arbitrator as Provided in the Treaty aforesaid, Washington D.C.*, September 12, 1914, reprinted in 8 *AJIL* (1914), 913 at 924. On the character and effect of the preamble to a treaty see generally Fitzmaurice, (1957), 227-228.

[156] The Final Draft reads in the Preamble: "Emphasizing further that such a court is intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective" See Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute and Draft Final Act (A/Conf. 183/2/Add. 1, 1998) at 10. Delegations have expressed their opposition to the wording of the third preambular paragraph and suggested the following instead: "Emphasizing further that such a court shall be complementary to national criminal jurisdictions".

[157] *Ibid.* at 10.

common in international treaties to stipulate in their first Article the generally agreed position. In the ICC treaty it is established that the ICC has jurisdiction over the most serious crimes and that it is complementary to national fora and this is certainly of primary importance. This explains the inclusion of complementarity in Article 1 of the Statute.

The said Article does not add much to the substance of the principle, as it simply repeats *verbatim* the Preamble. Its specifics are left to the Articles which follow later in the Statute.

5.3 Article 17 of the Statute

The Court's complementary character is most clearly manifested in the provisions dealing with admissibility, namely, Articles 17 and 18. Article 17 does something rather unusual in treaty practice, as it does not mention by name the concept it refers to. Article 17 does not contain the term complementarity. By referring to the Preamble and to Article 1, it stipulates the conditions upon which jurisdiction is conferred to the ICC *in lieu* of national courts. It constitutes therefore the most important provision on complementarity and its drafting history is fascinating[159]. Article 17 contains

[158] "An International Criminal Court ("the Court") is hereby established. [...] and shall be complementary to national criminal jurisdictions. [...]".

[159] Space does not permit a full exploration of the negotiations surrounding this provision. The Article on the admissibility has been considered as one of those provisions which should give clear expression to the principle of complementarity. See the 1995 Report of the *Ad Hoc* Committee on the Establishment of an ICC, GA, 50th Sess., Supp. No. 22, A/50/22, 1995, at 33. But see also relevant discussion at p. 8 of the report. Article 35, which eventually became Article 17 underwent a great deal of negotiations and political bargaining. The 1994 Draft contained the ILC's understanding of complementarity as to when a case should be considered inadmissible. (See Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court, 2 May – 22 July 1994 (GA, 49th Sess., Supp. No. 10, A/49/10, 1994) at 105). In the 1996 Preparatory Committee it was stated with regard to Article 35 that it was too narrow and perhaps it should be drafted differently so as to include other grounds of inadmissibility contained in other Articles and thus to become the main Article on

four grounds of inadmissibility: a) the case is being investigated or prosecuted at national level[160], b) the case has been investigated and the decision was made not to prosecute[161], c) *ne bis in idem*[162] and, d) the case is not of sufficient gravity[163]. If one of those grounds is engaged, the Court is precluded from stepping in. However, the Court will be seised of jurisdiction if in a) and b) the State is unwilling or unable genuinely to investigate or prosecute, and in c), when the conditions for the exception to *ne bis in idem* apply[164]. For the first three grounds of inadmissibility certain State action is required, whereas whether a case is of sufficient gravity so as to justify further action by the Court is not dependent on a particular State behaviour and goes to the heart of prosecutorial discretion[165]. For the rest, their constituting elements will be examined in turn. Although some indication is given in the Statute as to their meaning, Article 17 largely remains a highly complicated provision with many of its elements remaining far from clear, which prompted Shabtai Rosenne to advocate an Advisory Opinion from the ICJ for clarification[166].

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complementarity. (See Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume II, (Compilation of Proposals), GA, 51st Sess., Supp. No. 22, A/51/22, 1996, at 38). It serves better the aims of the Court to have the relevant provision in one, maybe two Articles, rather than scattered throughout the Statute, as this may lead to different approaches regarding the interpretation of the relevant provisions. However, the greatest development of the concept was achieved in 1997, when a Working Group on Complementarity and Trigger Mechanisms was created and the principle was discussed in length. Accordingly, the concepts of "inability" and "ineffectiveness", introduced in the 1994 Draft, found their way into the 1997 Draft.

[160] Article 17(1)(a) ICC Statute.

[161] Article 17(1)(b) *ibid.*

[162] Article 17(1)(c) *ibid.*

[163] Article 17(1)(d) *ibid.*

[164] Article 20(3) *ibid.*

[165] See in particular Article 53(1)(c) ICC Statute. This is consistent also with Articles 1, 5 whereby the Court exercises jurisdiction over the most serious crimes.

"The State"

In both 17(1)(a) and (b), reference is made to *the State* which either investigates or prosecutes or has investigated and decided not to prosecute. It is not clear from the Statute at this point whether the State refers to States parties, to States parties that have jurisdiction, to States parties that exercise a particular type of jurisdiction[167] (on the basis of territoriality or nationality for instance), or to all States, even third parties[168]. Which of the above will have to be unwilling or unable for the Court to be seised of jurisdiction?

Clearly, the State referred to here is one which has jurisdiction[169]. Moreover, it should be accepted that since Article 18, which deals with preliminary rulings, stipulates that all States, regardless of whether they are parties to the Statute or not, have to be notified of the beginning of an investigation[170], the same approach should be accepted here. Moreover, a possible conflict between two or more States exercising jurisdiction might arise. Articles 17 and 18 do not provide any rules as to how to resolve this "positive conflict of jurisdiction or competence"[171]. This is certainly a very interesting question and the ICC Prosecutor will, in practice, have to wait and see which State(s) assumes jurisdiction before he or she examines whether admissibility even arises. In that sense, States have a principal role to play.

[166] Rosenne, (1999), 130.
[167] By virtue of territoriality or nationality for instance, in accordance with Article 12 ICC Statute.
[168] For and excellent analysis of issues involving third-parties, see Akande, (2003).
[169] Article 17(1)(a) and (b) ICC Statute.
[170] Article 18(1) *ibid.*
[171] See Cassese's contribution in the Public hearing of the OTP, 17-18 June 2003, the Hague, transcript available at www.icc-cpi.int/otp/otp_public_hearing.html, who suggests resorting to Article 119(2) of the Statute and advises the Prosecutor to issue general guidelines on the issue.

"Investigated"

Whenever a State carries out its investigations, even if it decides not to prosecute, the case will be inadmissible before the ICC "unless it could be shown that the national proceedings were a deliberate attempt to forestall international justice"[172].

Quite clearly, if no State acts at all, then, the ICC would have jurisdiction to try a particular case, without having to prove unwillingness or inability. It is important to emphasise the "inaction scenario"[173] in that respect, as this would render the case admissible.

When a State investigates, however, then complementarity will come into play. The problem of course is what happens when a States says it investigates and in fact it does not[174]. It is important then to determine when a State fulfils its obligation to investigate. No indication is given in the Statute. Regarding the standards to be adopted, of particular relevance and indicative of what is generally accepted in international practice, are some of the Turkish cases before the European Court of Human Rights. In the *Çakici v. Turkey Case*[175] both the Commission and the Court emphasised the importance of accurate custody records and they went on to describe the range of records that

[172] See Lawyers Committee for Human Rights, Establishing an International Criminal Court; Major Unresolved Issues in the Draft Statute, International Criminal Court Briefing Series, Volume 1, No. 1, 1998, <gopher: //igc.apc.org/00/orgs/icc/ngodocs/rome/lchr_issues.598> .

[173] Informal expert paper: The principle of complementarity in practice, available at: www.icc-cpi.int/otp/expconsult_html .

[174] Cf. the argument put forward by Libya in the oral pleadings before the ICJ in the case *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom) 1998*, where it maintained that it has taken all the necessary steps towards the investigation and prosecution of the alleged crimes. Pleadings available at http://www.icj-cij.org/icjwww/idocket/iluk/iluk2frame.htm.

[175] Judgment of 8 July 1999, Application no 23657/94.

need to be kept. In the *Ihlan v. Turkey Case*[176] the Commission identified fourteen types of problems it had encountered in the conduct of domestic investigations.

Along the same lines, in the Inter-American system, the Inter-American Commission of Human Rights has on several occasions observed that investigations have not been conducted properly, considering undue delay as the principal reason for its findings[177].

However, the use of human rights case-law cannot but be indicative of a possible interpretation of the above provisions and should not be relied upon exclusively, as the HR courts referred to have a totally different ambit and jurisdiction. Their case-law, however, remains of interest[178].

The beginning of an investigation might suffice for the ICC not to intervene. It would certainly be adequate for a "mini trial" under Article 18. The Prosecutor then has, once an investigation has been initiated, to examine whether he could justify an intervention based on "unwillingness" or "inability" under the Statute.

"Decided not to Prosecute"

It is clear from Article 17(1)(b) that if a State has investigated and decided not to prosecute, then the ICC has no jurisdiction. As Klip rightly points out, this provision presumes that there will be a *decision*[179] not to

[176] Report (31) 23 April 1999, Application No 22277/93.
[177] See for instance Res. No. 14/89 Case 9641 (Ecuador), 12 Apr. 1989, Annual Report, 1988-9 at 104-115; Res. No 1/88, Case 9755 (Chile), 12 Sept. 1988, Annual Report 1987-8 at 132-9.
[178] As both the contributions of Cassese, 19 and Møse, 179, in Bergsmo, (2003) demonstrate, both the *ad hoc* Tribunals have had recourse to HR instruments in their operation.
[179] Emphasis in the original.

prosecute and that this entails a risk of constituting a ground for inadmissibility in any case, even when the decision not to prosecute is due to lack of sufficient evidence, for instance[180]. This situation has to be distinguished however, from the above "inaction scenario", but it is not clear whether it would give jurisdiction to the Court, and if so, under which ground.

"Unwilling"

The main purpose for including a provision on unwillingness is to preclude the possibility of a State shielding the culprits of crimes falling under the Court's jurisdiction. Article 17(2) provides some indication on the criteria to be used in order to determine unwillingness[181]. There are three indications of unwillingness in the Statute. The wording of this provision excludes the application of additional criteria to prove unwillingness, but it also makes clear that their application is not cumulative and it is sufficient if only one is engaged[182]. There are various constituting elements therein which will be examined in turn.

Accordingly, unwillingness may be found if "the proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility"[183].

[180] Klip, in Association Internationale de Droit Penal (2004), 185. Klip categorises this scenario under "inability", whereas it could be examined under "unwillingness".
[181] Rule 51 RPE, however, allows the State in question to bring to the Court's attention information showing compliance with international standards of independence and impartiality when dealing with *similar conduct* (emphasis added), or confirm in writing that a case is being investigated or prosecuted. For an analysis of this Rule, see Lindenmann, in Fischer, Kreß, and Lüder (2001), 185.
[182] Article 17(2): "shall consider", "whether one, or more of the following exist".
[183] Article 17(2)(a) ICC Statute.

No indication is given as to the character of action which would be considered as giving the right to the Court to determine that the is aiming at shielding the accused from criminal responsibility. It might be that this concept was included to ensure that the State engaging in investigation or prosecution may still be found to be unwilling in accordance with the Statute, if the intention is to undertake sham proceedings[184].

Proving this will be a real challenge for the Prosecutor[185]. It is not clear what evidence could be used in this respect. In addition, a very real scenario might be the following: Assuming that a case is being investigated or prosecuted as an ordinary crime before domestic courts which, however, entails a more severe penalty than the one envisaged in the ICC Statute[186], would the State in question be unwilling in this particular case? Since no guidance is given in the Statute in that respect, and this scenario does not trigger the exception in Article 20, each case has to be examined *in concreto*.

Holmes, in defending the seemingly high standards for the application of this provision, maintains that complementarity intended that the Court would not interfere "except in the most obvious cases"[187]. However, it is the less obvious cases that will be more problematic and will make it more difficult for the ICC to step in. And this is where applying this criterion will be a real challenge. However, a clearer indication of specific requirements would be damaging in terms of unnecessarily restricting the application of this provision.

[184] Arbour, and Bergsmo, in von Hebel, Lammers, and Schukking, (1999), 131 where it is stated that "the Prosecutor must prove a devious intent on the part of a State, contrary to its apparent actions".
[185] Cf. Young (2000), 318, who maintains that the burden rests with the States which would have the necessary evidence to prove the willingness of their domestic proceedings. This is certainly true, but unless the Prosecutor questions a State's intentions, complementarity is a mute point.
[186] Article 77 ICC Statute.
[187] Holmes, in Cassese, Gaeta, and Jones (2002), 675.

It remains to be seen how complementarity will be exercised in practice in that respect.

Moreover, another basis for allowing the ICC to establish its jurisdiction on the basis of unwillingness is "unjustified delay" shown by a particular State which is "inconsistent with an intent to bring the person concerned to justice"[188]. Initially, the concept of delay was unqualified but in the 1997 Working Group on Complementarity an additional criterion relating to delay was introduced and the concept of "undue delay" was selected. In Rome, the concept of "undue delay" was criticised as too low a threshold and was resolved by substituting the adverb "undue" with "unjustified". This change was broadly supported[189].

Nevertheless, it is still not clear what should be considered as justified delay. An examination of the State's normal procedures would be important in that respect. However, given the chapeau and reference to due process therein[190], and since no indication of what constitutes such a delay is provided for in the Statute itself, or in the *travaux préparatoires*, it is helpful to examine the existence of the concept in other human rights instruments; namely, the European Convention of Human Rights, the ICCPR and the Inter-American Convention on Human Rights[191], again taking into account the possible limitations of such an exercise. It is one of the fundamental principles of criminal justice that the accused is entitled to trial within a reasonable time. From the jurisprudence of those instruments it can be concluded that "rendering justice without delay is important in order not to jeopardise its

[188] Article 17(2)(b) ICC Statute.
[189] Holmes, in Lee (1999), 54.
[190] See *infra* analysis of this issue.

effectiveness and credibility"[192]. The delay in question must be attributable to the State[193]. Regarding the time beyond which the delay in the proceedings is considered to be unjustifiable it is to be noted that there is no absolute time limit as such[194]. Each case should be judged *in concreto*; this means that the reasonableness of the length of the proceedings in criminal cases depends on the particular circumstances of the case[195]. The same approach should be taken for the concept of "unjustified delay" in the ICC. It would have been unrealistic to determine a specific time span beyond which the delay would be unjustified. Considering also that most cases will arise in the aftermath of great instability in the States in question, the reasonabless has to be assessed in the view of the particular circumstances of the State concerned.

Ultimately, delay was linked with a State's intent which has to be "inconsistent with an intent to bring the person concerned to justice". It is not clear whether the latter requirement assists in determining that the national courts are unwilling, due to unjustified delay. Should the delay be unjustified, then the intent not to bring the person to justice is almost certainly fulfilled, as provided that such intent is present, then delays should not exist, and if they do, there has to be a good justification[196].

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[191] See also Article 6(1) ECHR *ibid. supra* n. 119; See also Article 14(3)(c) ICCPR, 999 *UNTS* 171.

[192] See ECHR case, *Stögmüller v. Austria* A 9 (1969), 40.

[193] For the ECHR see for instance judgment of 20 February 1991, *Vernillo*, A 198, 13; Judgment of 27 February 1992, *Pierazzini*, A 231-C, 30.

[194] For the ICCPR, see *inter alia Drescher Caldas* case, No. 43/1979 paras. 12.2, 13.4, 14; *Pinkey v. Canada*, No. 27/1978 paras. 10, 22, 25; *Pratt, Morgan and Kelly v Jamaica*, Nos. 210/1986, 225/1987 paras. 13.4, 13.5; No. 253/1987 paras. 5.12, 6; and *Mukong v. Cameroon*, para. 6. For the IACHR see Case *11.245 (Argentina)*, 54, para. 112.

[195] See for the ECHR among many examples, *König v. FRG*, A 27 (1978), para. 99; *Kemmache* A 218, (1991), para. 60; *Santilli*, A 194-D, 61; *Maj*, A 196-D, 43.

[196] Klip, *ibid. supra* n. 180, 182, convincingly asks the question: "Does this suppose that the relevant state will oppose the admissibility and will this justify unsuccessfully the delay in the proceedings?". He refrains however from giving an answer.

Finally, considerations of independence and impartiality come into play[197]. Lack of independence or impartiality enables the ICC to be seised of jurisdiction since the national authorities are presumed to be acting inconsistently with an intent to bring the alleged perpetrators to justice. This provision was included by the 1997 Report where it was mentioned that although the protection of the accused permeates throughout the various provisions found elsewhere in the Statute, the question of independence and impartiality of the proceedings was raised and was included in the Article[198].

Again what constitutes lack of independence and impartiality was not further clarified in the negotiations. It is necessary to discern the meaning of those two concepts from their occurrence elsewhere in international law.

In general, "independent" is construed as "independent of the executive and also of the parties"[199]. In order to establish whether a body can be considered 'independent' "regard must be had, *inter alia* to the manner of appointment of its members and their term of office, to the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence"[200]. The same standards for the independence of the proceedings should be upheld for the determination of the concept provided for in Article 17 of the Rome Statute.

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[197] Originally, reference to the independence and impartiality of the proceedings was made in the provision for the inability but in the work of the 1997 Working Group on Complementarity it was suggested that it would be better linked to the unwillingness and should therefore be moved to the paragraph addressing this question.

[198] For an insight into the 1997 Working Group on Complementarity see Holmes, who served as the co-ordinator for the informal consultations, in Lee (1999), 45-51.

[199] See for the ECHR *Ringeisen v. Austria* A 13 para 95 (1971). Independence should also include the independence in relation to the legislative power (see *Crociani v. Italy* No 8603/79, 22 DR 147 at 221 (1980)) as well as in relation to political, economical and social pressure groups.

[200] See *inter alia*, *Langborger v. Sweden* A 155 (1989) para. 32; *Campbell and Fell v. UK* A 80, (1984) para. 78. See also in the Inter-American system the *Case 11.006 (Peru)* IACHR Annual Report 1994, 71 where the Commission upheld the *Campbell and Fell* findings.

Regarding the 'impartiality' of the proceedings, this entails the lack of "prejudice or bias"[201]. Proceedings are impartial if both a subjective and an objective test are satisfied. That is endeavouring to ascertain "the personal conviction of a particular judge in a given case"; and "determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect", for the subjective and the objective tests respectively[202]. As with independence, in order to give meaning to the concept of impartiality enshrined in the ICC Statute, and taking into account that no indication of what its contemporary meaning in the field of international criminal law might be, application of the principle in other human rights instruments is of particular significance.

Moreover, Article 17(2)(c) introduces another element to be examined in conjunction with independence and impartiality: namely that "the proceedings were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice". And, "bringing the person to justice" might be held to mean a conviction in this particular case. The wording of this provision makes it somewhat difficult to see how acquittals might fit within this formulation.

[201] See *Piersack v. Belgium* A 53 (1982). This however was the main criticism regarding the trial of Adolf Eichmann, 36 *ILR* 5 (1961), 5. See Papadatos, (1964), 40-42. Cf. Harris, (1998), 292 who maintains that: "it is clear that Eichmann was given a scrupulously fair hearing".

[202] *Piersack v. Belgium* A 53 (1982), para. 30; *De Cubber v. Belgium* A 86 (1984), para. 24; *Hauschildt v. Denmark* A 154 (1989), para. 46; *Demicoli v. Malta* A 210 (1991), para. 40. Note also in this respect the English maxim "justice must not only be done: it must also be seen to be done".

"Having Regard to the Principles of Due Process Recognised by International Law"

The chapeau of Article 17(2), contains a reference to international law principles of due process. In Rome, problems arose with the Article on admissibility. There was the view that the Court would have broad discretion in determining unwillingness. In that respect, a proposal for adding the phrase "having regard to the principles of due process recognised by international law" was broadly accepted and was included in the final Draft[203]. This was meant to inject some objectivity into the criteria of unwillingness[204]. No specific examples were given however of which principles would be considered to fall in this category[205]. Reference to such principles however, represents an understanding of due process in international law, shared by States which is bound to be more objective than a domestic interpretation of due process. As such, this addition is welcome.

[203] See Draft Statute for the International Criminal Court, Committee of the Whole, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, A/Conf. 183/C.1/L/76 and Add. 1 through Add. 14 (16 July 1998).
[204] Holmes, *ibid. supra* n. 189, 54.
[205] See Broomhall, in Association Internationale de Droit Penal, (1999), 145. He maintains that such principles will include particularly those which are regarded as part of customary law and refers to the Universal Declaration of Human Rights (Articles 9, 10, 11), the ICCPR (Articles 4, 6, 9, 14, 15), the African Charter on Human and Peoples' Rights (Article 7), the ECHR (Articles 2, 5, 6, 7, 15; Protocol 6; Protocol 7, arts 2, 4), the Geneva Conventions 1949 (common Article 3), the third Geneva Convention 1949 (Articles 84-88, 99, 100-107), the fourth GC 1949 (Articles 33, 64-77), the 1997 Additional Protocol I (Article 75), the 1977 AP II (Article 6) and finally the standards found in the Statute (in particular in parts 5 and 6). The informal expert paper on complementarity, however, *ibid. supra* n.173, Annex 6, adopts a more restrictive approach and refers to sources relating specifically to due process and impunity. Either way, it is up to the Prosecutor to clarify which of the sources he utilises in a particular case.

As a general point, it is important to emphasise that unwillingness should be decided, on the basis of the process employed, and not on the outcome of a particular case[206].

"Unable"

Quite apart from unwillingness, the ICC may be seised of jurisdiction if the courts of a State are "unable". Some indication of what inability means can be found in Article 17(3). This was included to cover those cases where political upheaval, armed conflict or other circumstances result in total or substantial collapse of the judicial system, and was inserted to take account of situations which arose in various parts of the world. Such was the situation faced for example by Cambodia in the 70's, and Afghanistan, Liberia, Rwanda, Somalia or El Salvador more recently.

Not surprisingly, there was wide acceptance regarding inability during the negotiations. To some States, the issue of a State being unable to prosecute the alleged criminals was largely self-evident. This could be the result of various reasons (with the most prominent being the collapse of the national judicial system) and should therefore give jurisdiction to the Court. However, the fear that the Court would have, under such an unqualified formulation, too wide a discretion led the drafters to insist on the definition of inability in the 1997 Draft.

Whilst total collapse was met with no objection, determining what then was termed "partial" collapse was more controversial. This discussion occurred

[206] This point is also emphasised by the expert group *ibid.*, 14. They also contain in Annex 4, a list of indicia that might assist the Prosecutor in finding unwillingness.

mainly in the 1997 Working Group on Complementarity, where it was eventually decided that no further definition of these two concepts was needed provided that an additional criterion be present – namely, the inability on the part of the State to obtain an accused or key evidence and testimony[207]. This had to be related to the total or partial collapse of its judicial system. The strict application of these two criteria was somewhat smoothed by the inclusion of the phrase "or otherwise unable to carry out its proceedings". Nevertheless, in Rome, the issue was re-opened and it was argued that it was possible to have a partial collapse of the judicial system and the country could still undertake a *bona fide* prosecution. This is a reasonable argument but no change was decided[208]. The word "partial" though was changed to "substantial" which raises the threshold somewhat.

It remains to be seen in practice though what criteria will be applied to identify substantial or total collapse of a State[209]. And it is the concept of substantial collapse that is expected to create more problems, as it may lead to debates on whether the situation in a given State reaches the threshold which would give rise to the Court's jurisdiction, or it is of a lesser standard, which would then preclude the ICC from acting. It is beyond doubt though that the so-called "failed state" phenomenon falls in the category of the quintessentially "unable" state. Certainly, though this is too high a threshold and therefore something less than the situation faced by, for example Somalia, should be considered appropriate for the ICC to determine the inability of the domestic proceedings. This would be desirable in order to give the ICC the possibility of

[207] Holmes, *ibid. supra* n. 189, 49.
[208] Holmes, *ibid.* 55.
[209] The criteria put forward by the informal expert paper on complementarity, *ibid. supra* n.173, 15 and Annex 4, seem very reasonable.

adjudicating a greater number of cases where this is needed most. Arguably, the final part of 17(3)[210] gives the ICC greater discretion to intervene on the basis of inability and would cover almost anything that falls beyond inability to obtain the accused and the necessary evidence or testimony that would still affect the ability of State[211]. However, the criteria to be used in such a case have not been identified and any attempt to determine those cases might be considered somewhat arbitrary.

"Genuinely"

Defining unwillingness and inability was very controversial. Although some States were arguing against the possibility of the Court operating as an appellate body, they were at the same time arguing for the application of subjective criteria. The word "genuinely" was put forward as the best choice in order to allow the Court certain leeway to make its decision, and at the same time to make the determination of whether a State carries out the investigation or prosecution[212], objective[213]. A *bona fide* investigation would be akin to the effect the adverb "genuinely" seeks to achieve, but it was thought that it was narrower[214]. Be that as it may, it entails a certain value judgment on behalf of

[210] "or otherwise unable to carry out its proceedings".
[211] Holmes, *ibid. supra* n. 187, 678. McCormack, and Robertson, (1999), 645 have identified the following scenario: A State, which would in a hypothetical case otherwise have competence, has not introduced penal legislation covering one or more of the crimes falling under the subject-matter jurisdiction of the ICC. McCormack and Robertson maintain that the State would be typically genuinely "unable" to handle such a case. This might be the case, but this situation might also be evidence of "unwillingness", depending on whether the absence of legislation is the result of an effort to shield the accused or not.
[212] That the term "genuinely" refers to the investigation and prosecution is clear from the drafting history of the provision. See informal expert paper, *ibid. supra* n.173, 8, fn. 8 in particular.
[213] Holmes, *ibid. supra* n. 189, 50.
[214] Holmes, *ibid. supra* n. 187, 674.

the Prosecutor on the motives behind the investigations or prosecutions[215]. The lack of a comma following "unable" indicates that the adverb refers both to "unwilling" as well as to "unable", which are linked with the disjunctive "or". Interestingly, consensus on the adverb was reached before the criteria for determining unwillingness or inability had been determined.

From the above analysis it is clear that an extremely complicated system has been put in place before the ICC may be seised of jurisdiction. Despite the fact that some indication of what "unwilling" and "unable" mean is provided for in the second and third paragraphs of Article 17, their content is rather vague and is expected to create problems in their application. Moreover, no indication is given as to the methods to be used in order to prove unwillingness and inability. The Statute provides the guiding principles, the application of which is left to the Court's practice. This does not mean, however, that it is free from doubt and that the solution adopted is the optimal one. In essence, the text adopted represents a compromise crafted to accommodate individual concerns. In any case, it seems very difficult for the ICC to gain access to information regarding the "willingness" and "ability" of State authorities which will inevitably lead to subjective assessments by the new Court. This in turn entails the danger of creating double standards for the States concerned. The Article on admissibility is the cornerstone provision for complementarity on which the entire edifice of the ICC is based. A cautious approach by the Prosecutor and

[215] The use of the adjective "genuinely" has been criticised heavily as permitting the state to "stop a case from proceeding before the court by merely opening an investigation" and secondly as "creating ambiguities". It was suggested that the terms "unwilling" and "unable" "would perhaps have been clearer if the qualification of "genuineness" had been deleted". See Wexler, in Bassiouni, *ibid. supra* n. 100, 676-677; Sadat, and Carden (2000), 418.

whole-hearted assistance by States involved would help to guarantee that complementarity is applied properly.

5.4 Who Is to Decide on the Exercise of Jurisdiction by the Court

Determining the adequacy of State fora is an issue which needs closer examination. Where the authority lies was discussed in the negotiating process and the views expressed there were contradictory[216]. There was a view which maintained that States themselves should have the power to determine whether their domestic procedures are to be found adequate and thus competent to proceed with the adjudication of a particular case. This would, however, undermine the entire principle of complementarity and would in fact jeopardise the very justification for its existence in the Rome Statute.

Having regard to Articles 19(1) and 17(1), by virtue of which the ICC decides on its jurisdiction and on whether a case is admissible, it is clear it would be the Court's prerogative to decide on whether national courts are unwilling or unable. This is necessary in order to guarantee that the institution will function properly[217]. In doing so, the complementarity regime on which the ICC is based is ultimately shifted closer to primacy since the national courts will not decide themselves on the conferral of jurisdiction to the Court. But it is the ICC itself which will be able to decide its own jurisdiction in a given case, in accordance with the Statute. This formulation does not

[216] See for instance the proceedings of the 1996 Preparatory Committee, *ibid. supra* n. 159, 38. The views there varied form a proposed optional clause regime, to the Court being able to determine its own jurisdiction with or without any discretion from the part of the State.

[217] See on that the position of Lawyers Committee for Human Rights, Establishing an International Criminal Court: Major Unresolved Issues in the Draft Statute, International Criminal Law Briefing Series, Volume 1, No. 1, 1996 found in http://www.lchr.org/icc/pap1sec3.htm.

undermine the principle of complementarity but on the contrary it will give meaning to its context. Had a different approach been taken, the already limited jurisdiction of the ICC would have been further restricted with the very concept of "international" adjudication at stake.

5.5 Article 18 of the Statute: A Mini Trial?

Article 18 of the Statute is another provision which is relevant to complementarity. It embodies a compromise which was included in the Rome Statute in order to accommodate US concerns[218]. Under this Article the Prosecutor is required to notify all States parties to the Statute, as well as those which are not parties but would normally exercise jurisdiction, of his determination of a reasonable basis for the commencement of an investigation[219]. Within a month of receipt of notification, a State may inform the Court that it is investigating or has investigated the individuals concerned over crimes falling under the jurisdiction of the Court and related to the information provided in the Prosecutor's notification. At this stage, the prosecutor will have to defer to the State's investigation, unless the Pre-Trial Chamber decides differently[220]. Should a case be deferred to a State, its investigation may be reviewed by the Prosecutor within six months after the date of deferral, on the basis of significant change of circumstances due to the State's unwillingness or inability to carry out the investigation[221]. The ruling of

[218] See generally Arsanjani, in von Hebel, Lammers, and Schukking, (1999), 70-71.
[219] Article 18(1); Should the case involve a situation described in the second part of Article 18(1), the notification may occur on a confidential basis.
[220] Article 18(2); See also Article 18(5) according to which the Prosecutor may request from the State to provide periodical reports for the progress of its investigations.
[221] Article 18(3).

the Pre-Trial chamber may be subject to appeal in the Appeals Chamber by either the Prosecutor or the State against which the ruling is made. The appeal may be heard on an expedited basis in accordance with Article 82 of the Statute[222]. Moreover, the challenge to the ruling of the Pre-Trial Chamber does not preclude a challenge of admissibility of a case under Article 19 and on the basis of additional significant facts or significant change of circumstances. Finally, in case of deferral to a national court, the Prosecutor may –on an exceptional basis- seek authority from the Pre-Trial Chamber to take the necessary investigative steps for the preservation of evidence, where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available[223].

Article 18, procedural as it may sound, is a very significant provision. It constitutes, in essence, a mini trial on complementarity. Arguably, all a State has to do in order to gain some time is to initiate an investigation. The effect of Article 18 had not been wholly foreseen in the negotiations. It is a more powerful provision than anticipated and is likely to delay the Court's dealing with a case.

5.6 Complementarity and National Reconciliation Initiatives

In its initial inception, complementarity was thought to encourage national responses tailor-made to a particular culture, needs and history of a State, to deal with the most serious of crimes falling within the Court's

[222] Article 18(4).
[223] Article 18(6).

jurisdiction[224]. In dealing with such crimes, several approaches may be taken, varying from granting amnesties to the perpetrators, to establishing Truth and Reconciliation Commissions (TRCs)[225], and obviously holding trials[226]. Space does not permit an examination of the function and merits of each of the above in detail[227], so inevitably the focus of this section will be the compatibility of such initiatives with the ICC's complementary nature.

The Rome Statute does not contain a provision on amnesty, neither does it refer to TRCs. The possibility of taking into account national reconciliation initiatives, which entail legitimate offers of amnesty or internationally structured peace processes, had also been proposed within the realm of the principle of complementarity[228]. However, this point was not further developed in the negotiations.

It may be that the ICC statute does not provide explicitly that amnesty laws should not be taken into account. However, other international instruments do so explicitly[229].

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[224] Dembowski, in Stromseth (2003), 135.
[225] Hayner, (1994), 597;
[226] Orentlicher, (1991), 2537; Scharf, (1996), 41.
[227] For a "checklist" on what trials and TRCs can do, see Shriver, in Villa-Vincencio, and Doxtader (2003), 61; For amnesties see Scharf, (1999), 507; For a middle way, see Dugard, (1999), 1001. See also Sadat, in Zimmermann (2003), 161; Bassiouni, (2002).
[228] See 1996 Report of the Preparatory Committee, *ibid. supra* n. 159, 40. See also Arsanjani, in von Hebel, Lammers, and Schukking (1999), 75 who attributes the lack of reference to amnesties partly to pressure from HR groups.
[229] In Article 1 of the Genocide Convention, this duty is explicit. Article 18 of the Declaration on the Protection of All Persons from Enforced Disappearance stipulates that persons responsible for acts of enforced disappearance "shall not benefit from any special amnesty law or similar measure that might have the effect of exempting them from any criminal proceedings or sanction", GA Res. 47/133 of December 18, 1992. See also the UN Human Rights Committee Commentary on the Report of Argentina, April 5, 1995, UN Doc. CCPR/C/79/Add 46, where it was held by the Committee that the Argentine amnesty law was incompatible with the requirements of the Covenant since the law promoted an atmosphere of impunity for the authors of human rights violations which were consequently undermined. Moreover the Inter-American Commission on Human Rights has reported on the illegality of amnesty laws in Uruguay and Argentina. See Reports 28/92 and 29/92 respectively. Furthermore, a special rapporteur of the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities also opposed the application of amnesties to serious violations of human rights. See Report of June 21, 1985, UN Doc. E/CN.4/Sub.2/1985/16/Rev.1.

National reconciliation initiatives should not be dismissed outright[230]. The answer may be found in Prosecutorial discretion or in the application of *ne bis in idem*, depending on the stage of the proceedings[231]. The absence of an explicit provision in the Statute dealing with national reconciliation initiatives does not preclude the Prosecutor for exercising his discretion on the issue[232]. It would be very interesting to see how the Court would react where it was faced with a situation where a person charged with crimes falling under its jurisdiction has been granted amnesty by its own State[233]. The dilemma that the Court would have to face is whether to consider the granting of amnesty as evidence of the State's unwillingness to prosecute. Consequently the ICC would have to decide whether it could be seised of jurisdiction or not. A blanket amnesty would be more difficult to accept[234], but amnesty as part of a wider process, such as the South African TRC[235] for instance, would be most probably adequate and would not trigger the Court's jurisdiction. Moreover, in case that amnesty is pronounced post conviction, Article 20 of the Statute dealing with *ne bis in idem* may come into play. Despite the absence of an explicit provision therein, a purposive interpretation of "proceedings" in 20(3) might be necessary in order to allow action by the Court[236].

Moreover, practical problems that might arise should not be disregarded. For instance, if a person has testified before a TRC and was not

[230] Informal expert consultation paper, *ibid. supra* n. 173, 23-24, where some critical factors for the evaluation of such proceedings are suggested.
[231] Dugard, in Cassese, Gaeta, and Jones (2002), 701, also refers also to action by the SC under Article 16, but dismisses it for obvious reasons.
[232] Article 53(1)(c) and (2)(c) ICC Statute. See also Cameron in McGoldrick, Rowe, Donnelly, (2004), 91.
[233] Such would be the case of General Pinochet for instance. See generally, White, (1999), 127.
[234] See in that respect, *Barrios Altos case* (Chumbipuma Aguirre *et al.* v. Peru), 14 March 2001, para. 43-44, which found that self-amnesties are incompatible with the Inter-American Convention of Human Rights.
[235] Sarkin, (1996), 617

found to be telling the truth, and was later to be prosecuted by the ICC there could be problems concerning admissibility of evidence or generally access to additional evidence based on his or her original testimony[237]. This creates a serious danger to the rights of the accused and should not be overlooked.

In sum, amnesties and national reconciliation initiatives are relevant to complementarity and a great deal of caution is required in dealing with them. The Court's Prosecutor will have a very difficult task in assessing the situation at hand and deciding whether to initiate an investigation or not in a given situation.

The Impunity Gap

Reference should be made, at this point, to the possibility of a so-called "impunity gap". When the ICC asserts jurisdiction with regard to a particular situation, it will only try a handful of cases, particularly those that are thought to be representative of the situation at hand. The vast majority of cases arising out of the situation should be dealt with domestically. But this will not happen, as the national courts of the State in question will, by definition, be unwilling or unable to exercise jurisdiction, leading to an "impunity gap". This is yet another reason why the jurisdictional principles of the Court need to be applied in an effective way, and why the effort should be to strengthen domestic jurisdictions to an adequate standard, so that as many cases as possible can be

[236] See examination of Article 20, *infra*. See also Van den Wyngaert, and Ongena, in Cassese, Gaeta, and Jones (2002), 727.
[237] This is the case of Adrian Niewoudt for instance, currently on trial in South Africa, for crimes committed during the reign of the South African regime.

dealt with nationally. The impunity gap is an issue which will be central to the Prosecutor's approach to complementarity[238].

The "Complementarity Paradox"

The complementarity paradox cannot go unnoticed. As mentioned already, the ICC, under the principle of complementarity, will be seised of jurisdiction on the basis that national jurisdictions are proven to be genuinely unwilling or unable, but on the other hand, these unwilling and unable fora will have to co-operate with the ICC in order to achieve an effective prosecution and trial[239]. This is one of the great paradoxes on which the entire edifice of international criminal law is based. What is even more important is that the system provided for in the Statute does not seem to acknowledge this discrepancy, let alone address it. Similarly, the Policy Paper only acknowledges this issue but does not provide a satisfactory answer grounded in the Rome Statute regime. Instead, emphasis is placed on the need for intervention of the international community to assist the Prosecutor in the exercise of its powers[240].

Ne bis in idem and International Criminal Justice

As a direct result of concurrent jurisdiction between national courts and international criminal courts there is a danger that the accused may be tried

[238] Paper on some policy issues before the Office of the Prosecutor, September 2003, available at: http://www.icc-cpi.int/otp/policy.php, 7.
[239] Benvenuti, in Lattanzi, and Schabas (1999), 50.
[240] *Ibid. supra* n. 238, 6.

twice. The principle of *non bis in idem*[241] aims at eliminating this risk. At a national level, this principle is fundamental –in some way or another- to all criminal law systems[242] and provides that a person cannot be tried and punished twice for the same crime. It can be rationalised under the Latin maxim *nemo debet bis vexari pro una et eadem causa*[243]. Moreover, expression of the principle can be found in the German concept of *Erledigungsprinzip* meaning that a criminal claim can be used only once –with the exception of particular circumstances that may request different treatment- and is then extinguished[244]. Finally, the *non bis in idem* principle personifies the respect for the value of a decision reached in the past; the final judgment of an adjudicating body should be accepted by other courts.

The said principle was originally conceived to prohibit *de novo* adjudication of cases which have been dealt with in the same national jurisdiction. However, the complexity of international crime along with the current organisation of the international community, dictate that *ne bis in idem* protection is provided at the international level as well. Because the domestic legislation of most countries does not always guarantee that the *res judicata* effect of foreign criminal judgments will be respected, efforts have been undertaken to create such an international system. Several attempts though in the past have not been particularly successful[245], with the exception of the

[241] The principle is referred to as *non bis in idem* in the Tribunals and as *ne bis in idem* in the ICC, without any difference in its actual meaning.
[242] Slight differences may well apply. The principle is referred to as double jeopardy, autrefois acquit autrefois convict, or *res judicata*. See also Bassiouni, (1993), 288-289.
[243] No one should have to face more than one prosecution for the same offence.
[244] See Oehler, (1983), 573.
[245] See Articles 53-55 of the 1970 European Convention on the International Validity of Criminal Judgments; see also Articles 35-37 of the 1972 European Convention on the Transfer of Proceedings in Criminal Matters. In 1987 the EC member States acting within the framework of European political co-operation concluded a convention specifically addressing the *non bis in idem* principle.

Schengen treaty[246] which seems to create a new regime. However, the application of the *ne bis in idem* principle in the Schengen Convention differs substantially from the concept enshrined in the Tribunals or the ICC. The main difference lies with the fact that the former presupposes the existence of two or more States and the seizing of the same case in both States, whereas the latter attempts to regulate the relationship between a State and an international institution. At the international level, adequate justification for the application of the *non bis in idem* principle may be equally found, since the protection of the individual is sought not only at the domestic but also at the international level[247]. The principle can be found also in the ICCPR[248], the ACHR[249] and in Article 4(1) of Protocol No. 7 to the ECHR[250]. The protection offered to the individual therein is also limited to cases where the same jurisdiction is involved[251]. With the establishment of the two *ad hoc* Tribunals and the ICC, the principle of *ne bis in idem* is introduced in the international sphere in order to fulfil the need to protect the individual from being tried by both the national

[246] Convention of 19 June 1990, applying the Schengen Agreement of 14 June 1985 between the Governments of the States of Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders, 30 *ILM* (1991), 84. Article 54 of the Schengen Convention stipulates: "A person who has been finally judged by a Contracting Party may not be prosecuted by another Contracting Party for the same offences provided that, where he is sentenced, the sentence has been served or is currently being served or can no longer be carried out under the sentencing laws of the Contracting Party".

[247] See Van Den Wyngaert, and Stessens, (1999), 781.

[248] Article 14(7). See also Article 86 of Geneva Convention III Relative to the Treatment of Prisoners of War of August 12, 1949, 75 UNTS, 135 which states that: "No prisoner of war may be punished more than once for the same act or on the same charge".

[249] Article 8(4)

[250] ETS 117, Strasbourg 22.XI.1984

[251] Whereas Article 4 of the 7th Protocol explicitly stipulates that it entails trials within the same State, Article 14(7) of the ICCPR has been interpreted accordingly by the Human Rights Committee. See in that respect the decision of 16 July 1986 in the case of *A. P. v. Italy* where it was held that the "provision prohibits double jeopardy only with regard to an offence adjudicated in a given state" (Communication No. 204/1986, CCPR/C/31/D/204/1986, para. 7.3). The ICTY in *Prosecutor v. Tadić*, Decision on Defence Motion on the Principle of *non-bis-in-idem*, 14 November 1995, (IT-94-1/AR72), para. 8 upheld same view. See in general also the opinion of Advocate General Mayras before the ECJ in *Boehringer v. Commission* (1972) ECR 1297-1298.

and the international levels. There has therefore been a shift in the application of the principle.

Be that as it may, it matters little whether or not the second prosecution or judgment takes place in the same jurisdiction as the first. Hence the application of the principle at the international level is a positive development since it guarantees greater protection for the individual.

Both the Tribunals' Statutes have a provision which enshrines the above-mentioned principle[252]. Accordingly, the *non bis in idem* principle is binding upon them to the form and extent found in their Statutes. Moreover, the RPE provide for its application in practice[253].

According to both the ICTY and ICTR Statutes, should a person be tried by the Tribunals, subsequent action by national courts is precluded. However, a prior decision in national courts cannot preclude subsequent action by the Tribunals in exceptional cases. Those are the situations laid down in the second paragraph of Article 10 and 9 of the ICTY and ICTR Statutes respectively and involve the cases of "ordinary crimes" under national law, which can also constitute crimes in the Statutes. Moreover, in an attempt to tackle "sham proceedings" the Tribunals may try again persons who have not been diligently prosecuted, or where the trials are intended to shield the person from prosecution and/or punishment[254]. It is in the interests of justice that a

[252] Article 10 and 9 for the ICTY and ICTR respectively. This Article was drafted in the light of a *Letter Dated 12 April 1993 from the Permanent Representative of the United States of America to the United Nations Addressed to the Secretary-General,* at 7, UN Doc. S/25575 (1993).
[253] Rule 13 RPE.
[254] At this point reference should also be made to Rule 9 ICTY RPE. The scope underlying the aforesaid Rule and Article 10 is the same. Note also the correspondence of the wording in the two provisions.

second trial of the same person for the same conduct[255] must be allowed. However, in terms of the penalty to be imposed, the Tribunal has to take into account the sentence imposed by the national court.

In the practice of the international criminal Tribunals, Tadić invoked the principle of *non bis in idem* in an attempt to challenge the ICTY's ability to prosecute him. The Trial Chamber after elaborating on the principle as this appears in the ICTY Statute[256], rejected the defendant's contention, essentially because he had not been tried in Germany prior to his transfer to The Hague[257]. It went further to hold that once the ICTY completed its proceedings, he could not be tried in Germany for the same alleged crimes since this is made clear by Article 10(1) of the Statute[258].

Finally, Rule 12 stipulates that determinations of national courts are not binding on the Tribunal. However, the *non bis in idem* principle applies unless the conditions of Article 10(2) are met.

Turning to the ICC, Article 20 of the ICC Statute provides that the Court shall not try a person who has been convicted or acquitted by the Court itself[259]. It is unlikely that the ICC would try a person again if it has already tried him/her for that crime. An explicit reference to this, however, helps clarify things[260]. Similarly, no other Court may try a person under the Statute for conduct for which he/she has already been convicted or acquitted[261]. It is not clear whether reference to "other courts" is limited to the obvious case of

[255] Note the importance of defining the *idem* and the difference between conduct and crime. See Van den Wyngaert, and Ongena, in Cassese, Gaeta, and Jones (2002), 714-5.
[256] See *Tadić Case, ibid. supra* n. 251, para 9.
[257] *Ibid.*, para 10.
[258] *Ibid.*, para 13.
[259] Article 20(1) ICC Statute.
[260] Note that there is no equivalent provision in the *ad hoc* Tribunals.
[261] Article 20(2) ICC Statute.

national courts of States parties, or whether it would also include the *ad hoc* Tribunals for instance or hybrid courts.

The exception to the rule that no person can be tried twice can be found in Article 20(3). A comparison of this provision and Article 10[9](2) of the Tribunals reveals a significant difference. Although both provisions include problems of independence and impartiality as reasons for intervention, Article 20(3) does not contain an exception based on "ordinary crimes". This is unfortunate, but not insurmountable. A link with the complementarity criteria would assist in this instance. If the characterisation of the crime as ordinary at the national level was made to shield the accused from criminal responsibility, then, Article 20(3)(a) would apply. Another difference, is that there is no provision in Article 20 for taking into account the penalty already served, in the case of conviction based on the exercise of the exception to the *ne bis in idem*[262]. However, despite this a reduction may not be precluded, based on Article 78(2) ICC Statute which provides for a deduction from the overall sentence of time previously spent in detention in relation to the same conduct.

In sum, the protection of a person from being tried *de novo*, as laid down in the ICC Statute, is adequate. Perhaps an explicit reference to issues such as parole, pardon, amnesty and the Court's relationship to national reconciliation initiatives examined in a previous section, would have been welcome. This would have clarified the relationship between national proceedings and the international criminal justice institutions further. However, as with the Tribunals, it is important to stress that the incorporation of the principle of *ne bis in idem* in the Tribunals' and Court's Statutes is necessary in order to protect the individual from the risk of being tried twice, albeit at different

levels. This is a great achievement of international criminal law, and constitutes evidence of the close relationship between the national and international legal orders.

Conclusion

The interaction between the courts of a State and institutions of international criminal justice is premised on a number of relationships, the most important of which involves the principles conferring jurisdiction to a competent forum. This is in the interest of both the Tribunals and the Court. The ICC, however, goes in a different direction from the ICTY and the ICTR. Instead of primacy, its relationship with domestic courts is based on complementarity. Primacy was chosen to deal with the situation in the former Yugoslavia, essentially an "unwilling" State, and Rwanda, an "unable" State. This is akin to complementarity, whose operation is based on these very concepts. The difference lies in the degree of State involvement in the process. Primacy, initially quite rigid and absolute, excluded States from action completely. Over the years however, primacy has transformed, and has softened to involve States more. The culmination of this is the very recent application of the use of Rule 11*bis*, which brings international criminal justice back to the courts of the State concerned. Throughout the operation of primacy, one disadvantage stands out: primacy does not guarantee that the most suitable forum will actually try a particular case.

After the creation of the ICC and the SLSC, primacy in its pure form has been abandoned and replaced with complementarity for the former, and

[262] This can be found in Article 10[9](3) of the Tribunals.

with a more restricted, targeted primacy for the latter. Complementarity too, intends to regulate the relationship between domestic courts and an international institution. However, the main difference with primacy is the *ab initio* involvement of national jurisdictions. The ICC will only intervene if national fora are unwilling or unable genuinely to carry out investigations or prosecutions. In other words, complementarity ensures that the case remains with the most appropriate forum, which, by contrast to primacy, is not presumed to be the international one. This does not mean, however, that complementarity is a panacea for international criminal justice. The exact parameters of the criteria for its application have still to crystallise. It will take a certain number of cases before the precise meaning of these criteria is clearly identified. Certainly, inability will be easier to establish than unwillingness. It is fortunate, in a way, that the self-referrals of Uganda and the DRC have taken place recently, which will allow the ICC Prosecutor to apply complementarity for the first time to situations where inability is more likely to be an issue. Moreover, the impunity gap and most importantly, the complementarity paradox, examined above, will hamper complementarity's application.

To conclude, complementarity's best achievement is pre-emptive. States wishing to avoid the Court's involvement should strengthen their domestic processes. This is certainly the greatest merit complementarity has to offer, which was not the case with primacy. Primacy's odyssey is not yet over, and with complementarity, which is bound to go through an odyssey of its own, there is still a long way to go before reaching the much desired Ithaca of an effective international criminal justice regime.

Chapter Three

Unravelling Ariadne's Thread: Is There an Effective Co-operation Regime at the End of the Labyrinth?

Regardless of the principles of interaction between national and international jurisdictions, international criminal justice institutions with no suspects in custody and no evidence at their disposal could hardly claim to be effective. Primacy and complementarity are put to the test through co-operation. For the international criminal justice system to function properly, co-operation is of great significance. This chapter focuses on the co-operation regimes of both the *ad hoc* Tribunals and the ICC.

1. The Lack of an Enforcement System in International Law

Historically, crimes were committed within the territory of a single State and there was normally no need to request assistance from abroad. Enforcement of criminal law was traditionally accomplished without assistance from other States. The industrial revolution, advances in technology and transportation, meant that there has been a constant increase in requests for international assistance. Perpetrators frequently act in the territory of more than one States and/or find refuge in the territory of a State other than that of their nationality or where the criminal conduct occurred[1].

But this is again different from the co-operation required in respect of the international criminal justice institutions. When a crime occurs at the national level, regardless of the number of different jurisdictions involved, a

police force of some competence, would normally arrive at the scene to collect evidence, interview witnesses and secure the crime scene, whilst searching for the suspect. None of this is true for crimes falling within the jurisdiction of the international Tribunals and the ICC. Most of these crimes occur during armed conflicts or situations of grave tension. Due to their nature, magnitude and political repercussions, it might take years before such crimes are investigated and the alleged culprits are brought to justice[2].

In addition, unlike national jurisdictions, within the UN system, with the exception of the Security Council in the realm of its mandate for the maintenance of the international peace and security, there is no centralised agency responsible for the enforcement of UN decisions[3]. The lack of an enforcement system in international law is a crucial issue for the effectiveness of international criminal law.

In the eloquent words of the ICTY's first president, "the ICTY is very much like a giant without arms and legs – it needs artificial limbs to walk and work. And these artificial limbs are state authorities. If the co-operation of states is not forthcoming, they cannot fulfil their functions"[4]. It is not too much of a cliché to subscribe to this statement. Antonio Cassese said these words in relation to the Tribunals, but this statement is true also for the ICC. State co-operation is crucial to the effectiveness of international criminal law and cannot be underestimated.

Co-operation was not really a problem for the Nuremberg and Tokyo IMTs. The alleged criminals were largely in the territory then in the control of

[1] Guffey-Landers, (1996), 201-202.
[2] Harmon, and Gaynor, (2004), 405-408.
[3] For the enforcement powers of the SC, see *inter alia* Delbróck, and Heinz, (1995).
[4] Cassese, (1998), "Current Trends", 13.

the Allied powers (due to the military occupation) and the accused were in custody, and therefore present to stand trial[5]. This is not the case with the modern Tribunals and the ICC. From Nuremberg to Rwanda, there has been no international enforcement of international criminal law and this task has been left to the national sphere[6]. But unlike national courts, there is no law enforcement agency akin to a police force, and co-operation among States is the only way for these Tribunals and Court to achieve their goals[7].

2. International Criminal Co-operation and Judicial Assistance: Horizontal v. Vertical Co-operation

Co-operation with the *ad hoc* Tribunals and the ICC entails a variety of specific measures. States are expected to provide assistance in a number of areas, including but not limited to, identification and location of persons, taking of testimony, production of evidence, service of documents, arrest/detention of persons, surrender/transfer of the accused to the Tribunals and the ICC. Moreover, States should facilitate the appearance of witnesses/experts, help in the examination of sites and execution of searches/seizures, as well as the protection of victims and witnesses and finally in the preservation of evidence.

Although "international" co-operation may take place whenever there is a foreign element involved, co-operation with the Tribunals and the Courts differs greatly from co-operation between States. In the seminal *Blaškić* case the Appeals Chamber of the ICTY characterised as "horizontal" the co-

[5] First ICTY Annual Report, 29 August 1994, A/49/342-S/1994/1007, para. 84. See also *inter alia* Arbour, (1999), 43; Cassese, *ibid.*; Harris and Kushen, (1997), 562; Jorda, (1999), 174.
[6] Crawford, (1997), 256.
[7] See for instance Cassese *ibid. supra* n. 4, 10, 12; *Idem.* (1999), 164; Karnavas, (1996), 23.

operation between States in criminal matters, as opposed to the "vertical" co-operation between States and the ICTY[8]. This distinction, otherwise known as inter-state or supra-national co-operation[9], has dominated discussions on the issue. Assistance to the International Tribunals and the ICC should be provided invariably, and as part of their obligations, by Members States of the UN and by States parties to the ICC, respectively[10]. The relationship of States with the *ad hoc* Tribunals is purely vertical, whereas their relationship with the ICC has traces of both vertical and horizontal elements. In the case of the ICC, despite its treaty basis, the co-operation regime is still not entirely horizontal, in the sense that this concept is used to describe relations among States, but rather an amalgam of principles found in a vertical relationship, infused with procedures borrowed from a horizontal system. Swart and Sluiter have correctly identified and categorised the various Articles of Part 9 depending on whether they fit the inter-state or the supranational models of co-operation[11]. This distinction will become apparent in the course of the present discussion of the co-operation regime.

Whether a vertical or horizontal system of co-operation exists is particularly relevant when it comes to transferring persons sought to international institutions[12]. Although surrender of persons to the Tribunals and the Court will be examined later in this chapter, it is important, in this section, to draw a distinction between transfer of an accused to international criminal courts and extradition to other States. It is clear that transfer is not extradition.

[8] *Prosecutor v. Tihomir Blaskić*, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, (IT-95-14-AR108*bis*), paras. 47, 54.
[9] Cassese, (1999), 164-165.
[10] On the obligation to co-operate, see *infra* next section.
[11] Swart, and Sluiter, in von Hebel, Lammers, and Schukking, (1999), 99-100.
[12] The terms "transfer" and "surrender" in this section, are used interchangeably.

To equate this concept with extradition would have been inappropriate[13], if not unfortunate. For the Tribunals, this is clarified in Rule 58 of their respective RPE. For the ICC, Article 102 of the Statute provides a clear distinction by defining surrender and extradition in light of the purposes they serve. It was not the intention of the drafters of either Tribunal or the ICC, to craft the process of transfer of an accused to these institutions in terms of standard extradition processes known to States through various bilateral treaties. However, when international criminal justice institutions think that this would benefit effectiveness, recourse is made to extradition processes, albeit with certain qualifications[14].

Extradition concerns relations between sovereign States and is a reflection of the principle of equality of States[15]. This gives rise to a horizontal relationship between a State that has the accused in its custody and one that seeks his/her extradition. Surrender on the other hand, involves a relationship between a State and an international judicial body endowed with binding authority, and is therefore an expression of a vertical relationship.

Extradition is based on reciprocity, whereas surrender involves State assistance to an international court, without such a formal requirement. Moreover, extradition is subject to the discretionary consent of the State from which extradition is sought. This is envisaged in bilateral extradition treaties. States opt for extradition treaties with other States in order to facilitate international co-operation in criminal matters. Even after the conclusion of

[13] Cassese, *ibid. supra* n. 4.
[14] See Article 91(2)(c) ICC Statute.
[15] Lauterpacht, (1958), 297-400.

such treaties, they are not under an obligation to extradite the person sought[16]. They could instead prosecute themselves if they so wished[17]. This is not the case with the international criminal justice institutions, which once they have established jurisdiction based on primacy and complementarity respectively[18], are the sole forum empowered to try the accused.

In addition, traditional exceptions applying to extradition are of no relevance in the process of transfer to either of the Tribunals or the Court. Denying a request by invoking one of the many exceptions that are part of traditional bilateral extradition law and practice would not be consistent with a State's obligations[19]. Moreover, the exception in the extradition process relating to political or military character of the crimes, which constitutes another basis for refusing extradition, is not applicable when co-operating with the Tribunals or the Court. Arguably, all of the offences within the jurisdiction of the Tribunals and the ICC could be considered as either having a political or a military character, were these terms to be interpreted expansively. Yet it was precisely such offences that the Tribunals were created to prosecute, and the obligation to surrender extends to them[20]. Similarly, the timing and the double criminality requirements are also non-applicable[21], whereas *ne bis in idem* has

[16] In fact, a State is free to extradite as a matter of comity. See *United States v. Alvarez-Machain*, 504 U.S. (1992) 655 at 666 where it was held that: "nations are authorised, notwithstanding the terms of an extradition treaty, to voluntarily render an individual to the other country on terms completely outside of those provided in the Treaty".
[17] This is the so-called *aut dedere aut judicare* principle. The said principle was invoked for instance by Libya in the Lockerbie Case before the ICJ. For a detailed analysis of the principle see Bassiouni, and Wise, (1995).
[18] See *supra* chapter 2.
[19] Harris and Kushen, *ibid. supra* n. 5, 570. See also *infra* obligation to co-operate.
[20] *Ibid.*, 572.
[21] *Ibid.*, 573.

a distinct meaning in international criminal law and its application is governed by the relevant Statute Articles[22].

To summarise, none of the traditional grounds for refusal to provide mutual legal assistance in criminal matters apply[23]. The limited right to refuse execution of a co-operation request in the ICC does not extend to traditional extradition grounds of refusal, nor does it apply with regard to surrendering the requested persons to the Court. It is instead limited in scope and comes into play in strictly defined situations. The existence of grounds of refusal constitutes evidence of some horizontal elements which found their way into the Statute in the course of the negotiations[24].

Perhaps the most striking remnant of extradition is Article 101 of the ICC Statute which provides for the Rule of Speciality, which is common in extradition treaties. According to this rule, the person concerned cannot be tried for crimes other than the ones for which extradition has been granted[25]. Article 101(1) stipulates that a person surrendered to the ICC shall only be subject to prosecution, punishment or detention for that conduct for which he/she has been surrendered. However, the inclusion of such a provision in the ICC Statute is somewhat unfortunate and should not be necessary since States have already accepted the Court's jurisdiction. An attempt to rectify this unfortunate provision is made in 101(2), whereby a waiver may be requested by State allowing the ICC to forego Article 101(1). Its effect though is limited by the fact that there is no obligation on States parties to provide this waiver[26].

[22] See *supra* chapter 2.
[23] Kim, (1997), 165.
[24] See *infra*.
[25] Swart, in Cassese, Gaeta, and Jones (2002), 1698.
[26] See *infra* chapter 5 on the incorporation of this provision.

If this provision represents perhaps the most clear evidence that the ICC operates in a horizontal relationship, its most prominent example of verticality is Article 99(4) of the Statute which allows direct taking of evidence by the Prosecutor in the territory of a State party to the Statute[27].

The ICC therefore is a mixture of vertical and horizontal elements, in an attempt to create a functioning co-operation regime.

It is beyond doubt that all the issues mentioned above are worthy of a detailed analysis. However, although the relevant Statute provisions will be mentioned in this chapter, a complete Article by Article analysis is not in the scope of this work and emphasis will be placed on specific areas only.

3. An Obligation to Co-operate?

The starting point in examining any co-operation regime is whether there is or indeed should be an obligation to co-operate. The importance of co-operation for the emerging international criminal justice system may not be disregarded. However, the nature and extent of co-operation depends on the relevant players. The sections that follow address the various situations relevant to the obligation to co-operate with the Tribunals and the ICC.

3.1 Co-operation of States

Both the *ad hoc* Tribunals and the ICC rely heavily on State co-operation for the performance of their functions. And this fundamental obligation may be

[27] Note however the limits of this provision, which only allows execution of a request only when it is "necessary for the successful execution" of the request and the request "can be

found in their respective Statutes. Moreover, it is of interest to explore the potential co-operation of States that are not parties to the UN or to the ICC treaty. These issues will be examined in turn.

Quite apart from the SG's report on the establishment of the ICTY[28], some relevant SC Resolutions[29,30], GA Resolutions[31], as well as a reference in the Dayton Peace Agreement[32], the main reference to the obligation to co-operate with the Tribunals can be found in their Statutes. Article 29 of the ICTY Statute and Article 28 of its Rwandan counterpart, are the relevant provisions, supplemented also by the RPE[33]. Article 29[28](1) contains the general obligation to co-operate, whereas in the second paragraph of the above Article, a non-exhaustive list of potential assistance requests can be found. This Article is the sole provision referring to co-operation in the Tribunals' Statutes. The

executed without any compulsory measures". Article 99(4) ICC Statute.

[28] See *Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993)*, UN Doc. S/25704 of 3 May 1993, para. 125.

[29] SC Res. 827, UN Doc. S/RES/827 (1993), para. 4. Similarly, SC Res. 955 S/RES/955 (1994), para. 2. Moreover, in the same paragraph, the SC added a provision which did not appear in the corresponding Yugoslav Tribunal Resolution, according to which States were requested to keep the Secretary General informed of measures taken under their domestic law to implement the provisions of the resolution and Statutes, including the obligations under Article 28. This is indicative of a closer monitoring procedure introduced for the ICTR in order to ensure perhaps better compliance by States. There is no real evidence to suggest that this addition has made any difference in practice.

[30] Moreover, in February 1995, the SG reiterated the obligation by urging all States to arrest and detain persons found within their territory against whom there is sufficient evidence that they were responsible for acts within the jurisdiction of the ICTR and to inform the SG and the Prosecutor of the details of such cases and to co-operate with the investigators for the Tribunal. See paragraphs 1-3 of SC Res. 978 of 27 February 1995 UN SCOR, 3504th mtg. S/RES/978 (1995).

[31] See with regard to the ICTR, GA Res. 206 of 23 December 1994, (UN GAOR, 49th Sess. Supp. No. 49, vol. I, at 227, UN Doc. A/49/49 (1995) and GA Res. 200 of 22 December 1995, (UN GAOR, 50th Sess., Supp. No. 49, vol. I at 266, UN Doc. A/50/49 (1996). See also GA Res 114 of 12 December 1996, (UN GAOR, 51st Sess., Supp. No. 49, vol I, at 263, UN Doc. A/51/49 (1997).

[32] General Framework Agreement for Peace in Bosnia and Herzegovina, reprinted in 35 *ILM* (1996), 75. The agreement was signed in Paris on 14th December 1995. Article X of Annex 1-A of the said agreement provides that: "The Parties shall cooperate fully with all entities involved in implementation of this peace settlement, as described in the General Framework Agreement, or which are otherwise authorized by the United Nations Security Council, including the International Tribunal for the Former Yugoslavia". See also *id.* Article IX, which refers to the general "obligation of all Parties to cooperate in the investigation and prosecution of war crimes and other violations of international humanitarian law". Another example although of lesser importance is Article IV of Annex 9. See generally Jones, (1996), 226-244.

obligation to co-operate is expressed in broad, unconditional and absolute terms[34]. This is explained by the fact that both Statutes were adopted under Chapter VII of the UN Charter and, therefore, the obligation to co-operate is a binding obligation[35]. Failure to do so may entail severe consequences for the recalcitrant State[36].

The language of Article 29[28] suggests that it has been carefully chosen to demonstrate its mandatory nature. The use of the command verb "shall" in both paragraphs denotes an imperative act which leaves no room for subsequent interpretation by States. Non-compliance is not an option for the States concerned which are not allowed any discretion whatsoever by the Statute[37].

Furthermore, a time element is inserted in the second paragraph of Article 29[28]; assistance must come "without undue delay"[38]. As no indication of what constitutes undue delay is given in the Article, action within a reasonable time is required. Each case will be examined *in concreto*.

The equivalent provision for the ICC is Article 86 of the Rome Statute, which is the general provision on the obligation to co-operate. This provision is supplemented by a reminder of this obligation in Articles 89(1) and 93(1), which deal with arrest and surrender and other forms of co-operation respectively.

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[33] Rule 56.

[34] See 1996 ICTY Yearbook, 225: "The establishment of the Tribunal as an enforcement measure of the Security Council, pursuant to Chapter VII of the Charter of the United Nations, imposes upon States various unprecedented binding international obligations. At the core of these obligations lies the duty of States to co-operate unconditionally and to comply with requests for assistance and orders of the Tribunal".

[35] By virtue of Article 25 of the UN Charter.

[36] Although no indication is given in the Statutes of the *ad hoc* Tribunals with regard to the measures to be taken in case of failure on behalf of a State to co-operate it should be noted that the creation of the Tribunals by SC Resolutions is crucial to that end since it enables the SC to take action. See *infra* section 8.1.

[37] The term 'request' in Article 29(2) might be taken to denote, according to one view, some discretion, which is misleading. See Henquet, (1999), 979, fn. 51 in particular.

A comparison of the wording of Article 86 with the equivalent provision in the ICTY/ICTR Statutes is revealing. The former is not as imperative. Despite the use of the command verb "shall" in this provision as well, the time requirement, found in Article 29[28], is avoided. Instead, the adverb "fully"[39] is preferred, which assists in highlighting further the obligation to co-operate. This seemingly absolute obligation is qualified, however, by the phrase "in accordance with the provisions of this Statute" which precedes the general obligation to co-operate. As with every treaty, State parties are required to observe its terms and to act within its limitations. In that sense, co-operation should be provided to the Court in accordance with the Statute and in the manner prescribed therein.

Article 86 differs from the relevant provision of the *ad hoc* Tribunals in another respect as well. Whereas Article 29[28] is an all-encompassing provision, and in fact, as mentioned already, the sole provision on co-operation, Article 86 is simply the first of a total of seventeen provisions contained in Part 9 of the Statute. The general obligation to co-operate is further explained and elaborated upon in a number of provisions that follow, which cover different aspects of co-operation.

State co-operation in the International Tribunals is judge–made. Their Statutes state the general obligation but the exact form the request will take is a matter left to the Tribunal to decide. For the ICC, however, a *State-oriented*[40] approach has been adopted. Its treaty origins demand strict definition of the

[38] Note the slightly different wording in Rule 56 where States are required to act "promptly" to execute a co-operation request.
[39] There is the view which holds that the word "fully" refers to the principle of good faith. See Kreß, in Triffterer, (1999), 1053. He further maintains that States parties "must act promptly and with all due diligence to ensure proper and effective execution of the Court's requests to comply with their obligations under Part 9".
[40] Cassese, (2003), 358.

relevant obligations and more guidance on what States may and may not do in the course of co-operation with the Court. Still, the exact manner in which co-operation is to be effected between local authorities and the Tribunal remains, as with the Tribunals, unclear[41].

Another relevant issue is whom the obligation to co-operate refers to. For the Tribunals, it is an obligation *erga omnes*[42] and is not limited in its application to the former belligerents, *i.e.* States or entities of the former Yugoslavia[43], and the States where the genocide had spread to, as well as Rwanda. It may be that co-operation is more significant for the States and entities of the former Yugoslavia and Rwanda since these were the *locus delicti* of the crimes[44], but it is equally strong for the rest of the States. For the ICC, however, co-operation is limited and opposable only to State parties to the Statute[45] and to those States that have expressly accepted the Court's jurisdiction with regard to a particular case, or have signed a declaration to co-operate[46].

[41] See Dolenc, (1994), 464. There is a variety of specific measures which could be taken by States. See Grossman, McDonald, Specter and Weinstein, (1998), 1426. As will be seen in the final chapter, States in complying with a request to co-operate take different approaches in implementing the various Statute Articles.

[42] *Prosecutor v. Tihomir Blaškić, ibid. supra* n. 8, para. 26.

[43] Indeed this was the argument made by one of the *amici curiae*, Professor Wedgwood in the *Blaškić case. See amicus curiae* brief submitted by R. Wedgwood, *Prosecutor v. Tihomir Blaškić*, 15 September 1997, (IT-95-14-AR108*bis*), 3 *et seq.*. The Appeals Chamber of ICTY though dismissed the argument by making it clear in para. 29 of its judgment, *ibid. supra* n. 8, that the legal obligation stemming from Article 29 applies to all UN Member states, regardless of whether or not they are states of the ex- Yugoslavia.

[44] See the Appeals Decision in the *Blaškić* Case and particularly, paragraph 53 of the Judgment of 29 October 1997 *Prosecutor v. Tihomir Blaškić*, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, (IT-95-14-AR108*bis*). See also, Sixth ICTY Annual Report, 25 August 1999, A/54/187-S/1999/846, para. 90.

[45] Articles 34-8 VCLT, 8 *ILM* (1969), 679.

3.2 Co-operation of Non Member / Non Party States and Other Entities

As mentioned already, the obligation to co-operate with the Tribunals is incumbent upon all UN members *vis-à-vis* their responsibilities arising from the UN Charter. That aside, it is important to examine the obligation to co-operate for States which are not members of the UN. The issue is not very important in practice since the number of non-member States today is very small. However, the issue is of legal significance. There are several pertinent views on Article 2(6) UN Charter which is the relevant provision. The UN Charter, is, according to one view, nothing more than an international treaty and pursuant to the rule *pacta tertiis nec nocent nec prosunt*, Article 2(6) of the Charter cannot impose obligations to third parties without their consent. According to another view however, an international treaty such as the UN Charter indirectly obliges non-member States to obey the principles of Article 2[47]. It follows that sanctions on the basis of a SC decision can be applied to members and non-members alike. Another opinion holds that Article 2(6) has nothing but political charge and should not create legal obligations for States which are not members to the Organisation[48]. Yet a different view maintains that "*la Charte va dans le sens autoritaire d'un gouvernement international*"[49]. The idea of the Charter being a constitution for the international community and as such binding the non-member States is not unknown to international

[46] See *infra*, Articles 12(3), 87(5).
[47] Kelsen, (1951), 109.
[48] De Visscher, (1970), 287. Following this view, Combacau (1974), 625, talks about "excès de pouvoir" on behalf of the Organisation should the States non-parties are considered as mere executives and not as "partners".
[49] Scelle, (1950-1951), 625.

law[50]. Even though the majority of legal scholarship denies the possibility of a binding effect of Article 2(6) due to it being part of a treaty, it is accepted that insofar as the principles enshrined in it form part of customary law, they are binding on non-members[51].

In examining the relevance of this issue with regard to the *ad hoc* Tribunals, reference should be made Switzerland before it became a member of the UN in 2002. Was Switzerland bound to co-operate with the Tribunals? It is important to note that Switzerland had nonetheless enacted implementing legislation to facilitate its co-operation with the Tribunals[52] indicating its commitment to international criminal law. It would have been interesting to see the reaction of the international community had Switzerland refused to co-operate[53]. The ICTY in the *Blaškić case* has held that the enactment of legislation in the said case constitutes an express written acceptance of the obligations under the UN Charter with regard to the two *ad hoc* Tribunals[54], in accordance with Article 35 VCLT. It seems therefore that the Tribunal accepts that the Charter is an international treaty which imposes no obligations on non-member States. Be that as it may, the enactment of implementing legislation by Switzerland was very significant in practical terms, for the investigators did not need visas to enter the country which would otherwise be the case, except for States participating in the Schengen treaty.

[50] Fassbender, "*UN Security Council Reform*"(1998). See also *idem.*, "United Nations Charter as Constitution", (1998), 529-619; McDonald, in Schmitt (2000), 263.
[51] Cahier, in Cassese, (1975).
[52] See Federal Order on Cooperation with the International Tribunals for the Prosecution of Serious Violations of International Humanitarian Law of 21 December 1995. See generally Ziegler (1997), 382-408.
[53] Although not a member to the UN then, Switzerland decided autonomously to participate in the economic sanctions imposed on Iraq by virtue of SC Res. 661(1990). This followed a similar approach in the case of Southern Rhodesia, SC Res. 409 (1977).
[54] See Appeals Chamber Subpoena Decision, *ibid. supra* n. 8, para. 26.

Another aspect which should be considered is whether there is an obligation to co-operate for entities that are not States. Neither the ICTY nor the ICTR Statutes mention co-operation with non-State entities. The same holds true for the relevant SC Resolutions which created the Tribunals. Notably, however, the RPE define the term "State" in a different way so as to comprise States which are not Members of the United Nations as well as *de facto* entities[55]. This is particularly relevant to the Republika Srpska since its status is ambiguous. It has to be noted though that pursuant to the Dayton Agreement and its Annexes, the *de facto* States such as the Republica Srpska and the Federation of Bosnia Herzegovina are obliged to co-operate[56]. This has been upheld by the ICTY[57]. In reality, co-operation of the Republica Srpska has been generally poor[58], with the exception of some limited assistance regarding the exhumation of graves and investigations against non-Serbs. Although much better than 1996, there are still some problems in relation to co-operation which are also linked to the refusal to arrest Republica Srpska's own nationals, many of whom surrender voluntarily[59].

Turning now to the ICC, and emphasising that Article 86 is only binding on those States that have signed and ratified or acceded to the Rome Treaty, it remains to examine the possibility envisaged for non-parties to co-operate with the Court. Two possibilities are enshrined in the Statute. First, by means of a

[55] Cf. RPE and especially, Rule 2 which provides the definitions of the concepts found in the RPE. Accordingly, a State means: "A State Member of non-Member of the United Nations or a self-proclaimed entity de facto exercising governmental functions, whether recognised as a State or not". However, no such distinction is made in the Statute.
[56] Article X, Annex 1-A, *ibid. supra* n. 32.
[57] *Prosecutor v. Karadžić & Mladić*, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, (IT-95-5-R61), paras. 98-101. With regard to the Federation of Bosnia and Herzegovina, see *Prosecutor v. Rajić*, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 3 September 1996, (IT-95-12-R61), paras. 62-70.

declaration accepting the Court's jurisdiction pursuant to Article 12(3) or second, by virtue of a special agreement to provide assistance to the Court under Article 87(5) of the Statute. In the unlikely event that a State non-ICC party accepts the jurisdiction of the Court with regard to a particular crime[60], it also agrees to co-operate in accordance with Part 9 of the Statute. This State would have the same rights and obligations with the rest of the States parties in that respect. In the case of Article 87(5), however, a State may voluntarily[61] enter into an *ad hoc* agreement with the Court in order to provide assistance. Given the optional basis of this agreement, it will essentially be up to this State to formulate the content of such an agreement. The State concerned possesses a degree of flexibility to decide the type, field and length of co-operation to be provided to the Court. This might be a problematic for the Court which is bound by its Statute and it will not be inclined to go beyond it to accommodate a third party's wishes. As Sluiter rightly observes, the ICC in such a case would face a difficult dilemma. It would either have to refuse assistance by a State or accept their conditions[62].

A third possibility, although not explicitly enshrined in the Statute, would be for the Council to request third party co-operation as a Chapter VII measure[63]. However unlikely this is to happen in practice, given the current US stance on the ICC, it would be interesting to see whether or not the Council would formulate its request in accordance with the Statute's co-operation

[58] See for instance, Ninth ICTY Annual Report, 4 September 2002, A/57/379-S/2002/985, para. 228.
[59] E.g. Zoran Žigić (Omarska camp).
[60] See also Rule 44 RPE.
[61] Indicative of this is the wording used: "The Court may invite...".
[62] Sluiter, (2003), 610.
[63] Although SC referral is provided for in Article 13(b), no mention is made of co-operation in this Article. The only reference to co-operation in cases of referral is Article 87(7) which deals with failure to co-operate following a SC referral.

regime[64]. Nothing precludes the SC from disregarding the Statute provisions, wholly or partly, as it is not bound by them. In such a case, the obligation for UN Members, regardless of their being parties to the ICC Statute, would stem directly from the Charter, and as such[65] it would prevail over the Rome Statute[66]. Whether the ICC, as an institution, would be bound by this is a different matter altogether[67].

Moreover, there is no provision in the Rome Statute regarding the co-operation of entities which are not States, such as the Republika Srpska. However, as this is also the case with the *ad hoc* Tribunals, this issue could be addressed by other international instruments akin to the Dayton Peace Agreement that were relevant to a particular case.

Given that the accused, or evidence regarding a crime within the Court's jurisdiction, may be located in the territory of a State(s) which are not Party(ies) to the ICC Statute, and would not conveniently be present on the territory of a State party able and willing to assist the Court in its functions, co-operation of non-parties to the Court is indispensable.

3.3 Co-operation of Intergovernmental Organisations

That co-operation of intergovernmental organisations is important cannot be disregarded. As the Tribunals and the ICC operate in post-conflict

[64] The various possibilities are discussed in more detail by Sluiter, (2002), 71-72.
[65] Article 103 UN Charter.
[66] See *Order With Regard To Request For the Indication of Provisional Measure In The Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising From The Aerial Incident at Lockerbie (Libya v. United States)*, 14 April 1992, *31 ILM*, 662 at 671 where the ICJ found that: that, "in accordance with Article 103 of the Charter, the obligations of the parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention ...".
[67] See *infra* chapter 4.

situations, where the presence of multinational forces is likely, ensuring their co-operation on the ground would be beneficial.

The nature of the obligation for such organisations to co-operate with the Tribunals remains controversial and will be discussed further when dealing with arrest. Despite the absence of an explicit provision in their Statutes, nothing precludes the Tribunals from soliciting the assistance of such international organisations and they have done so in practice[68].

Multinational forces have assisted the ICTY in a number of its functions. They have assisted for instance with ensuring the security of investigation teams working on the field, in exhumations projects, as well as with the execution of search warrants[69]. Finding and securing mass graves, and providing logistical support during exhumations was very important to the Tribunal's investigations in Kosovo[70]. The UN Mission in Bosnia and Herzegovina, the Office of the UN High Representative, UNMIK, the OSCE and the EU mission in FYROM also provided assistance to the ICTY[71].

The most important issue however is whether an international authority should be empowered to arrest those indicted by the International Tribunals. The issue arose in particular with respect to ICTY and involved the ability of

[68] *Prosecutor v. Cément Kayishema and Obed Ruzindana*, Decision on the Motion for the Protection of Defence Witnesses, 6 October 1997, (ICTR-95-1-T). See also *Prosecutor v. Simić et. al.*, Decision on Motion for Judicial Assistance to be Provided by SFOR and Others, (IT-95-9-PT), 18 October 2000, where the ICTY requested that SFOR disclose to the defendant a series of documents. The ICTY in para. 48 held: "A purposive construction of the Statute yields the conclusion that such an order should be applicable to collective enterprise of States as it is to individual States". For a comprehensive analysis which reaches the opposite conclusion, see Henquet in Boas and Schabas, (2003), 138-141.

[69] Third ICTY Annual Report, 16 August 1996, A/51/292-S/1996/665, para.75; Fourth ICTY Annual Report, 18 September 1997, A/52/375-S/1997/729, para. 69; Sixth ICTY Annual Report, *ibid. supra* n. 44, para. 134; Eighth ICTY Annual Report, 17 September 2001; Ninth ICTY Annual Report, *ibid. supra* n. 58, para. 230.

[70] Seventh ICTY Annual Report, 7 August 2000, A/55/273-S/2000/777, para. 184; Eighth ICTY Annual Report, *ibid.*; Ninth ICTY Annual Report, *ibid.*.

[71] Tenth ICTY Annual Report, 20 August 2003, A/58/297-S/2003/829, para. 249.

NATO-led forces of SFOR (formerly IFOR)[72] to effectuate arrest of indictees and to transfer them to The Hague. More specifically, there is an issue whether SFOR has the authority[73] and, indeed, the duty to arrest an accused indicted by the ICTY and to transfer him to the Tribunal. Regarding the authority to arrest, although the General Framework Agreement does not provide explicitly for this right, it is accepted that a right to arrest emerges from various Articles in the Agreement. One argument for the acceptance of such a right is that IFOR, and now SFOR, have the power to use force to ensure compliance with the Agreement[74]. And since the Agreement provides for co-operation with the ICTY[75], and the arrest of the accused is one of the most important aspects of co-operation, such an authorisation is inherent in the powers conferred upon

[72] The NATO-led multinational force, called the Implementation Force (IFOR) was created pursuant the SC Res. 1031 of 13 December 1995, UN SCOR, 3607th mtg., UN Doc. S/PV.3607 (1995) by virtue of which NATO was given the mandate to implement the military aspects of the Dayton Peace Agreement. Its mandate lasted one year and after that, it was agreed that NATO should organise a Stabilisation Force (SFOR), which was activated on 20 December 1996, the date on which the mandate given to IFOR expired. Under SC Res. 1088 of 12 December 1996, SFOR was authorised to implement the military aspects of the Peace Agreement. For a brief description of SFOR mandate, see NATO Basic Fact Sheet No. 11, The NATO-led Stabilisation Force (SFOR) in Bosnia and Herzegovina, April 1997, available at http://www.nato.int/docu/facts/sfor.htm

[73] The day of the signing of the General Framework Agreement, a joint statement by the President of the Tribunal, Judge A. Cassese, and the Prosecutor, Justice R. Goldstone was issued which emphasised "The authority of the NATO Implementation Force to arrest any indicted war criminals it encounters or who interfere with its mission". See ICTY Press Release, "The Tribunal welcomes the parties' commitment to justice. Joint statement by the President and the Prosecutor", UN Doc. CC/PIO/027-E, The Hague, 24 November 1995.

[74] See Article I, para. 2(b), of Annex 1-A which states that the parties "...authorise the IFOR to take such actions as required, including the use of necessary force, to ensure compliance with this Annex...".

[75] See Article X of Annex 1-A of the Agreement. See also the statements made by the representatives of United States, the United Kingdom and France at the time of the adoption of SC Res. 1031. Mrs Albright of the United States stated: "Let me emphasize that Annex 1-A of the Dayton Agreement obligates the parties to cooperate fully with the International Tribunal. The North Atlantic Council can now underscore this obligation by explicitly authorizing IFOR to transfer indicted persons it comes across to the Tribunal and to detain such persons for that purpose. See SC Res. at 20. The UK representative mentioned: "Should it be decided that, in the execution of its assigned tasks, the Implementation Force should detain and transfer to the appropriate authorities any persons indicted by the Tribunal who come into contact with it in Bosnia, then the authority to do so is provided by the draft resolution before us, read together with the provisions of the Peace Agreement. See *ibid.* at 18. The French representative held that paragraph 5 "recognizes the role that IFOR may play to ensure proper cooperation" with the Tribunal. *Ibid.* at 21.

the Force and is, in any case, compatible with the obligation to ensure compliance with Article X of the Annex[76]. However, this argument is not convincing in its entirety. The duty to co-operate with the Tribunal is a duty imposed on States, which suggests that there is no basis for the multinational force to replace them if they do not exercise their duty[77]. A more specific basis for such an authorisation to arrest can be found in Article VI, para. 4 of Annex 1-A of the Agreement, which gives a right to the North Atlantic Council to "establish additional duties and responsibilities for the IFOR in implementing this Annex [Annex 1-A]"[78]. If this formulation is accepted, then the multinational force has indeed the authority to arrest the indictees and to transfer them to the Tribunal[79]. However, the "additional duties and responsibilities" that the North Atlantic Council may grant to the multinational force on the basis of Article VI, paragraph 4 are not unlimited. They are significantly limited by virtue of the obligations undertaken by the parties in Annex 1-A[80].

[76] See on this view, Jones, (1996), 238. According to this commentator, if the states do not make the arrests themselves, they are regarded to have conferred the authority to IFOR which is then authorised to do so on their behalf. See also Ambos, (1997), 887-888.
[77] See Gaeta, (1998), 177. Although there may be a separate duty for the multinational force to act where it is comprised of States who collectively owe such a duty.
[78] This seems to be the justification which is also accepted by NATO itself. See Basic Fact Sheet No. 11, available at: www.nato.int, where it is stated that: "The North Atlantic Council has authorised SFOR to detain and transfer to the ICTY persons indicted for war crimes...".
[79] But see Speech of the Representative of the Russian Federation to the Plenary Session of the United Nations Assembly on the Report of the International Tribunal for the Former Yugoslavia (Item 49 of the Agenda), 4 November 1997 (unofficial translation) who maintains that the "planned actions for the armed capture of suspects" cannot be described "as 'co-operation' with the Tribunal or as 'support' for the Tribunal's activities, particularly within the framework of the international peace-making operation which is being carried out in Bosnia and Herzegovina". He further maintained that "such deliberate actions are not in the mandate of the multinational stabilisation forces" as defined by the peace agreement and that "[e]ven during the talks on the conditions for Russia's participation, [Russia] objected to an interpretation of the mandate that would endow the multinational forces with police functions".
[80] Lamb, (1999), 192.

There is also the view that there is a duty to arrest indictees[81]. It has been argued that the obligation to arrest indictees is part of the obligation to search and prosecute contained in the 1949 Geneva Conventions. According to this view, such an obligation is also applicable to the multinational forces operating in the field[82]. However, it should be noted that even if the duty to respect and ensure respect for the Geneva Conventions is part of customary international law[83] this, in the opinion of this writer, does not extend to the power to arrest. And since there is no clear indication to those ends in the Agreement, it should be accepted that such a duty cannot be imposed on the Stabilisation Force[84].

Recognition of the significance of the role that international organisations may play for the ICC led to the inclusion of Article 87(6), which enables the Court to request assistance from intergovernmental organisations[85]. The emphasis on the provision of information or documents may be explained as this would be the most common form of assistance that these organisations would be able to provide to the Court. Other forms of co-operation, including, arguably, requests for arrest and surrender, are not precluded in Article 87(6) but should be seen in light of the organisation's constituent instrument and

[81] Jones *supra* n. 76, 239. See also Figà-Talamanca, (1996), 171-175; Ambos, *ibid. supra* n. 76, 888.
[82] See Sharp, (1997), 445-9.
[83] Such an argument could be based on the analysis provided from Condorelli, in Swinarski, (1984), 17-35.
[84] As Scharf, (1999), "Tools for Enforcing International Criminal Justice", rightly stipulates at 953: "Had the Council wished to explicitly give IFOR this responsibility, it could have used the phrase 'calls upon' rather than 'authorizes'". Along the same lines see also Gaeta, *ibid. supra* n. 77, 180. See also Akhavan, (1996), 278. In addition see the memoires of the chief American negotiator Richard Holbrooke, (1999), 222 who attributes to John Shalikashvili, Chairman of the Joint Chiefs of Staff, that a compromise was accepted with regard to IFOR under which the force would "have the authority, but not the obligation to undertake additional tasks" upon completion of its mission. According to Holbrooke he explained that "[f]or example, we [the military] do not wish to be obligated to arrest war criminals, but we will accept the authority to arrest them if we get the chance".

certainly "in accordance with its competence or mandate". This is evidence that international organisations can only exercise the powers vested upon them[86].

The obligation to co-operate found in both the Tribunals and the ICC, is general, so as to cover all the possible players in the system. And in this system, co-operation of States plays a central part. By contrast to the Tribunals, where the specifics of the obligation are not laid down in their Statutes, the ICC Statute contains detailed provisions on the obligation to co-operate by all the entities likely to do so.

4. Arrest and Surrender: The First Step towards Achieving Justice

International criminal courts cannot operate without having the accused present for trial. Arresting the indictees has been a major problem for the Tribunals whose history has proven how difficult this issue is in practice[87]. It is also expected to be problematic for the ICC.

Despite the significance of arrest, no indication of how this may be achieved is given either in the Statutes of the Tribunals or in the RPE. Rule 56 of the RPE is the relevant Rule, which does not contain, however, the procedure to be followed. Instead, it is stated in a vague manner that a government which receives an arrest warrant from an International Tribunal shall act "with all due diligence to ensure proper and effective execution thereof...". That government must act according to Joyner "with such

[85] The Prosecutor may also request assistance for the initiation of an investigation from such organisations in accordance with Article 15(2).
[86] This is also reiterated in Article 54(3)(c) of the Statute.

sufficient perseverance, industry and assiduity that it can execute the arrest warrant in a manner that is adequate, proper and fit to meet that stipulated obligation"[88]. But this does not clarify the exact content of the obligation. Failure to conform to this standard is a breach of Rule 56 which, in turn, triggers failure to co-operate.

The ICTY held in the *Dokmanović Case*[89] that the arrest is effected when, by physical restraint or conduct, or by words, an individual is made aware that he is not free to leave[90], and that a restraint upon a person's free movement is a necessary component of arrest, as vindicated both in international law[91] and in national legal systems[92].

As to the standards to be followed while effectuating arrest, it is generally accepted that an international court should observe the highest human rights standards. Despite the lack of reference in the Statutes or in the RPE to that effect, it should nevertheless be accepted that the internationally recognised standards laid down for instance by Article 9(1),(2) and 14(3)(a) of the ICCPR[93] and 5(2) of the ECHR[94] would be applicable here. Accordingly, in the case of the arrest of a person indicted by the International Tribunals the

[87] For an excellent analysis of the issue of the arrest within the scope of the international tribunals see generally, Lamb, *ibid. supra* n. 80, 165-244.
[88] Joyner (1995), 91.
[89] *Prosecutor v. Dokmanović*, Decision on the Motion for Release by the Accused Dokmanović, Trial Chamber II, 22 October 1997, (IT-95-13a-PT).
[90] *Ibid.*, para 51.
[91] *Ibid.*, para 28.
[92] *Ibid.*, para 29.
[93] Article 9(1) reads: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law". Moreover, 9(2) states: "Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him". Furthermore, article 14(3)(a) stipulates: "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees in full equality: (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him".
[94] Article 5(2) requires that everyone "who is arrested shall be informed promptly, in language which he understands, of the reasons for his arrest and of any charge against him". See in that respect, *Fox, Campbell and Hartley v. UK*, A 182, para. 40 (1990).

accused should be informed in a language he/she understands of the reasons of the arrest, and of his/her rights, and any relevant documents should be handed over to him/her when apprehended. In practice, the Tribunals' OTP have their own internal procedure regarding the arrest of the persons indicted and emphasis is placed on the handing over to the accused of the relevant documents, such as a summary of the indictment, when apprehended. The OTP generally gives the indictees the documents in person. It is foreseeable that similar procedures will be followed by the ICC Prosecutor as well.

Moreover, there is extensive dialogue between the Tribunals and the targeted State on all questions of co-operation and in particular on the issue of making requests. There is understanding and patience on behalf of the OTP to tailor requests in such a way so as to achieve the co-operation of the State in question. The Tribunals, when filing requests, aim at long-term co-operation with the authorities on the ground and therefore, although not denying the powers conferred to them by the SC Resolutions, have tended to avoid emphasising them, in order to secure the surrender of indictees.

For the ICC, arrest and surrender is equally important. However, no definition can be found in its Statute either. Article 58 of the ICC Statute contains the conditions for issuance of an arrest warrant, which will not be examined in this study. For our purposes, it is important to stress that for an arrest to take place, an arrest warrant issued by the Pre-Trial Chamber is necessary. The practice adopted by the ICTY/ICTR RPE whereby, in urgent cases, a State is able to arrest a suspect without an arrest warrant following a request by the Prosecutor[95], has not been taken up by the ICC and a warrant is

[95] Rule 40 RPE.

necessary at all times. However, provisional arrest is envisaged[96]. The conditions for issuance of an arrest warrant are strictly laid down in the Statute and arrest is requested with a view to ensuring the person's appearance at trial, preventing obstruction or endangering the investigation, or preventing continuing with the commission of a crime based on the same or related crime[97].

Article 89 is beyond doubt one of the fundamental provisions of the Statute as it deals with the surrender of the accused to the Court. In general, the Court will, according to Article 89(1), transmit a request for the arrest and surrender of a person to any State on the territory of which the accused may be found. At this stage, the Statute makes no distinction between States that are parties to the Rome Statute and States that are not, presumably because the Court has the power to transmit requests to all States. However, only State parties have the duty to comply with the Court's request as evidenced by the second sentence of paragraph 1. And this obligation is a very firm one, namely an obligation from which no derogation is allowed.

The content of the request for arrest and surrender is enshrined in Article 91 ICC Statute. The said Article is a technical provision which regulates the practical aspects of surrender. To begin with, the request shall be made in writing[98], whereas at the same time the possibility is given for the use of modern technology in urgent cases[99]. Furthermore, the different subparagraphs of paragraph 2, deal with the practical issues of identification of

[96] Article 92 ICC Statute.
[97] Article 58(1)(b) *ibid.*
[98] Article 91(1) *ibid.*
[99] *Ibid.*; However, there is a condition of confirming the arrest through the proscribed (in Article 87(1)(a)) channel. This seems to contradict the emerging practice that e.g. electronic signature is acceptable even for the conclusion of contracts.

the person in question, the adequacy of a copy (instead of the original) of the warrant, and the relevant documents to be requested by the State for the surrender process[100].

Upon receipt of the arrest, or provisional arrest and surrender, request a State "shall immediately take steps to arrest the person in question in accordance with its laws and the provisions of Part 9"[101]. This provision obliges the requested State to act promptly towards arresting the person sought by the ICC. At the same time, emphasis is placed on the use of domestic procedures when effecting the arrest. This is stressed each step of the way in Part 9. Uniformity would have been better achieved had the Statute specified its own arrest procedure. However, the use of domestic procedures for arrest puts less strain on domestic legal systems allowing States more control over the process. In theory, this should work better than having to follow a "foreign" procedure when arresting a person. Nevertheless, this choice reflects the creation of the Court by an international treaty and the extent to which States were prepared to let go of their own procedures in favour of subscribing to a supra-national model of co-operation with its own distinct processes. Moreover, it also formalises existing practices used with regard to arrests in the context of the Tribunals, where no specific guidance was provided. The Statute in a sense, tries to anticipate rather than deal with problems as they arise. This balances out the lack of coercive powers. A dialectic relationship between the States and the Court in a path already pre-defined is central to the Statute's co-operation regime. Despite some elements of supra-nationality, the Court's operation remains faithful to its treaty origins. State input is naturally

[100] Article 91(2)(a), (b) and (c) respectively. Moreover, surrender of a person already convicted is regulated in 91(3).

important. Traces of this can be found in various Articles in the Statute, but when dealing with arrest, Article 91(2)(c) springs immediately to mind.

States are given the opportunity to request further documents from the Court in order to execute an arrest and surrender request in accordance with their domestic procedure[102]. This leeway offers a possibility of greater co-operation and avoidance of conflicts. The apparent freedom allowed by the Statute is actually not as wide-ranging as it initially seems. The State can only require evidence which is necessary to meet the surrender process in that State, and cannot go beyond what is required for the execution of an extradition request[103]. In fact, paragraph 2(c) of Article 91 makes clear that account should be taken of the "distinct nature of the Court". The aim of this provision is to integrate national courts as much as possible in the actual execution of the arrest and surrender requests without upsetting the existing judicial structure of a State. Whilst recognising that this is an important aspect, allowing, therefore, a State to use its own procedures and impose its own requirements, the underlying notion here is one of avoiding abuse. This is why the apparent freedom is restricted, with an extradition request as a reference point. The use of extradition standards as a comparator is not as striking as it may initially

[101] Article 59(1).

[102] This was a difficult issue to overcome in the negotiations due to the different approach taken from civil and common law countries. The formula adopted however, which represents a compromise, limits the form of material to documents, statements or information.

[103] This view is reflected in a speech by the then US Ambassador for War Crimes, David Scheffer, "Deterrence", (1999), 7, who noted the US success in preserving "sovereign decision-making" by rejecting proposals requiring States parties to co-operate automatically with the Court. He maintained that "our negotiators struggled, successfully, to preserve appropriate sovereign decision-making in connection with obligations to cooperate with the court. Some delegates were tempted to require unqualified cooperation by states parties with all court orders, notwithstanding national judicial procedures that would be involved in any event. Such obligations of unqualified cooperation were unrealistic and would have raised serious constitutional issues not only in the US but in many other jurisdictions. Part 9 of the statute represents hard-fought battles in this respect. The requirement that the actions of states parties be taken "in accordance with national procedural law" or similar language is pragmatic and legally essential for the successful operation of the court".

appear. The Statute takes great pains to convince the reader that surrender is not extradition[104]. The comparison here is an understandable one and, in this instance, welcome. Extradition is the closest concept to what is being discussed in Article 91 of the Statute. Extradition is also a concept States have been comfortable with for many years and which has been accommodated within their domestic systems in the forms of standards and procedures in place. Arresting a person and transferring them to the Court is certainly a novel experience for many States. At most, they had to deal with similar requests made by the *ad hoc* Tribunals. The majority of States though would not have dealt with such a case previously[105]. To allow for comparable standards with extradition is therefore appropriate. Besides, States are reminded that, when possible, requirements should be less burdensome. The nature of the Court as a court States have signed up to, is very different to subjecting a person to a foreign jurisdiction, which might be totally different to their own. States parties to the ICC treaty have a vested interest to see the Court functioning properly, and should not be intimidated by its proceedings given the input they had in its creation. Quite rightly then the procedures followed should be less onerous.

Article 91(2)(c) is further complemented by Article 91(4). This provision is an interesting one as it introduces a consultation procedure between the requested State and the Court. At the heart of this provision lies the interest of the ICC to get the person sought before it. It is recognised in the Statute, as emphasised above, that some national law requirements might come into play. To avoid a stalemate in the proceedings, the ICC Statute introduces a

[104] Article 102 ICC Statute.
[105] In the ICTY/ICTR the choice was clear. Several obstacles were removed simply because the *ad hoc* Tribunals were created by a Chapter VII SC Resolution. For the ICC, State sovereignty

consultation process during which the State party advises the Court of its national law requirements. This is a two-way process, where the feedback given by the State in question is taken into account by the Court, so as to safeguard both the person sought to be transferred to the ICC and the national law.

The natural position of this provision should have been immediately after Article 91(2)(c), as 91(4) further clarifies the procedure to be used. It would have been more convincing had it been placed as (d) in Article 91, or, given the importance attributed to it, meriting a separate paragraph, had this paragraph followed 91(2)(c). Be that as it may, the important point here is that the consultation mechanism envisaged further strengthens the interaction between the national and the international levels.

Going back to Article 89, in an uncontroversial provision, Article 89(3) regulates the transit of the accused from the territory of third States to the Court. It seems that the Statute attempts to foresee the possible complications that may arise with regard to flying over uninvolved States and landing in case of emergency. This provision follows the practice of common extradition treaties so as to facilitate the physical surrender of the accused.

It may be that paragraph 3 did not create much controversy in the negotiating process. This is not so though for Article 89(4). The said paragraph was subject of considerable debate over its content in the negotiations. It deals with the case that the person for whom surrender is sought is being proceeded against or serves a sentence in the State in question. The issue is linked to the debate whether control is left with the State or with the Court. The question

and consequently the intention of States to maintain control is evident throughout the Statute. And the provisions discussed under this heading are a manifestation of this approach.

arises only in respect of prosecution or service of sentence for a crime different from the one for which extradition is sought, since in another case, Articles 89(2) and 17 *et seq.*[106] come into play. Moreover, the issue of consultation referred to in Article 89(4) should not be taken to imply that the State has in fact a discretion not to grant the request. Rather, it should be seen as a remnant from the negotiating process where the issue of refusal to comply had not yet been resolved[107].

It seems that the surrender regime of the ICC is crafted in considerable detail when contrasted with the equivalent transfer procedure of the *ad hoc* Tribunals. In the ICC there has been close scrutiny regarding the formulation of the Articles in order to avoid misunderstandings. This may be ascribed to the fact that the ICC is bereft of the primacy with which the Tribunals are endowed. The ICC approach should not be associated with realisation of the problems likely to arise due to the lack of a specific framework. Rather, it should be attributed to the enhanced role that States have. The relationship between the ICC and domestic authorities clearly shows that State party co-operation will be crucial to the Court's effective functioning in practice[108]. With that in mind, it seems that the drafters have attempted to create a system with the view that almost every detail is regulated by the Statute. Remarkably, consultation with States has a prominent role to play. However, the formulation sought for in those provisions may be proven to be totally unworkable in practice for a variety of reasons attributed to the States parties or to the complexity of the provisions themselves. Be that as it may, it seems that the system is going to be far from expeditious.

[106] See *supra* in this section; see also chapter 2.
[107] Kreß, and Prost, in Triffterer, (1999), 1079.

4.1 Apprehension by Intergovernmental Organisations: Blessing or Curse?

It has been established already that co-operation by international organisations is important. In a system where arrest by States is not always forthcoming, intergovernmental organisations are a valuable substitute. In essence, it is again State assistance under the guise of an international authority. Willing States undertake the role of those that are unwilling to perform their duties. A significant number of ICTY indictees have been arrested mainly by SFOR and some also by KFOR[109]. Their attitude towards arrests has been far from clear. Initially, NATO was reluctant to accept such an authority[110]. IFOR did not want to appear to be doing "police work", by actively searching for war criminals[111]. Moreover, fear of "mission creep" that would undermine NATO's military mission was in the minds of NATO's leadership[112]. Furthermore, memories of the death of eighteen American soldiers in Somalia while hunting a warlord were still fresh[113]. This led to a number of instances where the multilateral forces could have arrested major figures, even Karadžić and Mladić, but did not, and actively avoided them instead[114].

In order to facilitate arrests by international forces such as the SFOR, the Judges of the ICTY adopted, at the Ninth Plenary Session on 17-18 January

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[108] Pejic, (2000), 81.
[109] See Appendix.
[110] As evidenced from the Fourth ICTY Annual Report, *ibid. supra* n. 69, para. 190: "[...] until very recently IFOR/SFOR has refrained form apprehending, or indeed encountering, indictees, stating that it did not intend to send out "posses" to arrest indictees *but would only arrest them if they came across them.*" (emphasis added). See also Maogoto, (2004), 157.
[111] Ruxton, in van Dijk, and Hovens, (2001), 21.
[112] Leurdijk, *ibid.*, 63.
[113] Akhavan, *ibid. supra* n. 84, 276.

1996, Rule 59*bis* of the RPE which clearly allows the transmission of warrants and orders to international authorities. But the arrests did not come, until the arrest by the OTP with the co-operation of UNTAES of Slavko Dokmanović[115]. As the feared reprisals did not materialise, NATO subsequently changed its position. This is partly attributable also to the change in its hierarchy and also in the political scene[116]. On the 10th of July 1997, Milan Kovačević was the first person to be arrested by SFOR[117]. This led to the arrest of a number of low-ranking officials since indicted by the Tribunal[118]. In fact, at one time, accused were arriving in the Hague at the rate of one a month[119]. NATO arrests have since dropped significantly though[120].

In sum, assistance provided by Intergovernmental Organisations with regard to arresting indictees has been very significant for the functioning of the Tribunals. Several persons, who would otherwise be untouched either due to lack of political will of the State in which they reside, or simply due the inability to arrest them, have been transferred to the ICTY. However, the practice has so far showed that the arrested indictees are primarily low-level,

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[114] Bass, (2000), 252.

[115] See *infra*. In para. 37 of this case however, the ICTY held that: "once an arrest warrant has been transmitted to an international authority, an international body, or the Office of the Prosecutor, the accused person named therein may be taken into custody without the involvement of the State in which he/she was located". Moreover, pursuant to Rule 61 proceedings (see *infra*), Rule 61(D) has been interpreted to comprise transmission of the international arrest warrant to be issued to the international authorities.

[116] Wesley Clark took command of NATO, and Tony Blair was elected the UK's prime minister.

[117] Fourth ICTY Annual Report, *ibid. supra* n. 69, para. 133.

[118] See Appendix. Information is also available at http://www.nato.int/sfor/advisory/. It is to be noted that in many of those Press Releases it is emphasised that "As the Secretary General of NATO affirmed again in a recent statement, NATO is determined to play its role in helping to bring indicted war criminals to justice. Those indicted war criminals who remain at large have no permanent hiding place. NATO will continue to detain them, as well as those that the Chief Prosecutor at the ICTY may indict in the future, SFOR advises all indicted war criminals to surrender immediately to the Tribunal". This is evident of the change in NATO's attitude.

[119] Wald, (2001), 87.

[120] Eighth ICTY Annual Report, *ibid. supra* n. 69, para. 195. Kerr, (2004), 167 suggests that this can be attributed to the deaths of Drjlaća and Gagović and the injury of a number of SFOR

which is not what the Tribunals had hoped for. Arresting so many indictees has in the recent years been a cause for concern, since this impacts upon the already overloaded Court-time and renders the trials far from expeditious[121]. Other practical problems relate to the lack of facilities, in terms of infrastructure, in the ICTY, to accommodate those arrested. It would have been preferable had multinational forces focused their efforts in ensuring the presence of indictees accused of the most serious of crimes.

4.2 Arrest by International Authorities for the ICC

Arrests by international authorities will also be relevant to the functioning of the permanent Court. However, the different legal basis of its establishment is expected to influence the ability of peacekeeping operations and multi-national forces, similar to the NATO-led forces operating in the territory of the former Yugoslavia, to arrest indicted criminals. The same holds true for the proposed "European rapid reaction force"[122], should it be mandated to act in the direction of arresting war criminals.

It might be that recourse to international authorities in order to effect arrests will be greater a necessity for the ICC, particularly to tackle the "complementarity paradox" discussed in the previous chapter. However, it is difficult to perceive how this could materialise. Taking into consideration that not all States will automatically be parties to the ICC, such an attempt to engage international authorities in arresting indicted criminals may be ruled out

troops in the process of arrest. Another possible reason is the impact of the Todorović trial *infra*.

[121] Wald, *ibid. supra* n. 119, 87, 101.

[122] See www.europa.eu.int/pol/cfsp/index_en.htm;

for practical reasons. The following hypothetical example can be used to demonstrate the case at hand. Suppose that a situation which triggers the ICC's jurisdiction takes place in State X. Moreover, the assistance of NATO-led force Y is sought, in order to bring the indictees for trial before the ICC, provided that the complementarity obstacle is removed. Suppose also that the US, maintains its current position towards the Court. In such a case, it is unlikely that they would participate in activities leading to arrest of ICC indictees and their surrender to the Court. Moreover, it is possible, due to the structure of NATO and its constituent treaty, which requires unanimity for action, that all similar operations restrict their field of operation due to the possibility that at some point they might be engaged in arresting people indicted by the ICC. The same conclusion can be reached in case of peacekeeping operations in general which would otherwise be willing to participate in missions to arrest the accused before the ICC.

To summarise, it is evident by now, following the example of the *ad hoc* Tribunals and particularly that of the ICTY, that international authorities play an important role in relation to the issue of arrest of indictees. It is beyond doubt that the role of the international authorities in assisting the work of the ICC will be restricted considerably. The solution to the problem lies with the individual States and their willingness to assist. However, this is expected to be much more difficult in practice than it has been with *ad hoc* Tribunals, which in any case has not been easy.

see also www.fco.gov.uk/new/newstext.asp?1795.

4.3 Voluntary Surrender: An Unforeseeable Tool

In the inception of the *ad hoc* Tribunals, few people would have thought that voluntary surrender would be such an effective means of getting the alleged perpetrators to the Hague[123]. Although legally not very challenging, it seems that fear of being "detained" by SFOR led to a number of indictees surrendering voluntarily[124]. Ten individuals indicted in the *Kordić* and *Kupreškić cases* were the first people to do this[125]. Moreover, the change in the political scene on the ground[126], as well as political pressure exercised by certain governments[127], led to a number of voluntary surrenders.

Whether voluntary surrenders will be the case for the ICC as well, remains to be seen.

4.4 Irregularities of Arrest

Inevitably, not all arrests will be problem-free. What the Tribunals and the ICC should do in case of irregularities of arrest, is examined in this section. The issue is not new, certainly with respect to domestic law. The position of the international community on the issue is far from clear. It is a well established concept in a number of domestic legal systems, that although the means used to effectuate custody of a person may not be in themselves lawful, the fact that this person is indicted and a warrant for his/her arrest is issued, is

[123] Appendix.
[124] Fifth ICTY Annual Report, 10 August 1998, A/53/219-S/1998/737, para. 222; Hagan, (2003), 108, quoting an OTP legal advisor: "The accused got the message that there was an easy way and a hard way to come here". Particularly, after the death of Drjlaća's death and Kupreškić' injury during their arrest. See also, Kerr, (2004), 170.
[125] Fifth ICTY Annual Report, *ibid.*, para. 112.
[126] Kerr, *ibid. supra* n. 124.

enough for a *post facto* legitimisation of the conduct. Thus for those States, jurisdiction following an illegal abduction is not barred. The US[128], UK[129], Australia[130], France[131] and Israel[132] have on various occasions accepted this proposition. The most prominent example is the case of Adolf Eichmann who was abducted in Argentina and was subsequently tried in Israel[133]. Another very well-known case is the case of Alvarez Machain[134]. In those cases, the principle of *male captus bene detentus* comes into play[135]. However, several States have recently overruled the above-mentioned principle and denied jurisdiction over illegally obtained criminals. UK[136], US[137], South Africa[138],

[127] McDonald, (2004), 564, attests that voluntary surrenders were encouraged by the US.
[128] See *Ker v. Illinois*, 119 US 436, 444 (1886); *Frisbie v. Collins*, 342 US 519, 661-662 (1952).
[129] See *inter alia Ex parte Susannah* Scott (1829), 109 Eng Rep 166; R. *v. O/C Depot Battalion R.A.S.C. Colchester, Ex parte Eliot,* (1949) 1 All E.R. 373; *R. v. Plymouth Justices, Ex parte Driver* (1986) Q.B. 95; *Liangsiriprasert v. United States* (1991) 1 App. Cas. 225; *In re Scmidt* (1995) 1 App Cas. 339.
[130] *Levinge v. Direstor of Custodial Services* (1987), 9 NSWLR 546
[131] See *inter alia Re: Argoud,* Court of Cassation (Criminal Chamber), 4 June 1964 *45 ILR* 90; *Fédération Nationale des Déportés et Internes Résistants et Patriotes and Others v. Barbie,* Court of Cassation (Criminal Chamber), 20 December 1985, *78 ILR* 124.
[132] *Attorney General v. Eichmann*, 36 *ILR* 5 (1961); *Afouneh v. Attorney General*, Ann. Dig. 321 (No. 97). However, the *Eichmann case* should not be considered as a good example because of the crimes involved.
[133] Green, (1960), 514-5. The District Court of Jerusalem rejected the objection on jurisdiction raised by the counsel for Eichmann and held that "a person standing trial for an offence against the laws of a state may not oppose his being tried by reason of the illegality of his arrest, or of the mans whereby he was brought to the area of jurisdiction of the state". See Eichmann Case, 36 *ILR* (1961), para. 41.
[134] *United States v. Alvarez Machain*, 504 U.S. (1992), p. 655 at 669 which found that United States Courts had jurisdiction to try an individual forcibly abducted from Mexico without his consent.
[135] See *inter alia*, Scharf, (2000), 968-969; Choo (1994), 165; Warbrick, (2000), 489.
[136] *R. Horseferry Road Magistrates, Ex parte Bennett* 3 All E.R. 138 where by a vote four to one, the Law Lords found that English courts have the discretion to stay the trial of a criminal defendant where English police have disregarded the protections of formal extradition and have had a defendant seized abroad by illegal means (*id.* at 139c).
[137] *United States v Toscanino*, 500 F 2d 267, 275 (2d Cir. 1974), where the Court held: "[we] view due process as now requiring a court to divest itself of jurisdiction over the person of a defendant where ti has been acquired as the result of the Government's deliberate unnecessary and unreasonable invasion of the accused's constitutional rights". This approach was relied upon in *Prosecutor v. Dokmanović*, *ibid. supra* n. 89, paras. 70-75.
[138] Decision of 26 February 1991 in *State v. Ebrahim*, 31 *ILM* (1992), 888.

Zimbabwe[139], Switzerland[140] and Costa Rica[141] all have case-law which represents this view.

The issue of irregularities in the process of the arrest may also arise in the context of the International Tribunals. However, there is a significant difference here. The case involves a State and an international institution which is moreover endowed with primacy rather than two sovereign States. This might be enough to dictate dissimilar approaches to the issues at hand.

In international criminal law there have been a few cases where violations have been alleged. In the *Dokmanović*[142] and *Todorović*[143], the death of the former and the plea agreement of the latter did not allow for a full consideration of the issue before the ICTY. *Nikolić* was perhaps the clearest of all[144]. The lawfulness of arrest was raised in *Milošević*[145], whereas in *Brdanin*, his writ of *habeas corpus* was rejected as the Tribunal does not possess such

[139] *State v. Beahan* 1992 (1) SACR 307 (A).
[140] 66 Blatter fur Zurcherische Rspr (1967) 248.
[141] The Supreme Court of Costa Rica unanimously censured the *Alvarez-Machain* decision of the US Supreme Court in its plenary session of June 25 1992. See statement quoted in Wilske, and Schiller, (1998), 229.
[142] *Prosecutor v. Slavko Dokmanović, ibid. supra* n. 89. For a graphic description of Dokmanović' arrest, see Hagan, *ibid. supra* n. 124, 101-105.
[143] *Prosecutor v. Stevan Todorović*, Decision Stating Reasons for Trial Chamber's Order of 4 March 1999 on Defence Motion for Evidentiary Hearing on the Arrest of the Accused Todorović, 25 March 1999, (IT-95-9). Allegedly the accused had been removed from the FRY by the SAS or the American Delta Unit. See also a separate document filed in support of the accused's Notice of motion, where it was alleged the "in September 1998 four individuals, unknown to the accused, by use of physical force and threats of bodily harm by firearm (sic), forced the Accused into a vehicle while still on the territory of the FRY", that the Accused, while so kidnapped and abducted, was "physically delivered to United Nations agents, servants or employees, or individuals acting under the auspices of the United Nations" and thereafter "delivered to the jurisdiction of the ICTY". See "Memorandum of Law in Further Support for an Evidentiary Hearing as to Abduction and Detention of Accused Todorović", (D3163-D3155), filed 1 March 1999; See article by Jon Swain in the *Sunday Times* of 23 July 2000 entitled "Serb snatched by rogue Nato bounty hunter" where it is alleged that SFOR use bounty hunters to effectuate arrests, available at:
http://www.the-times.co.uk/news/pages/sti/2000/07/23/stifgneur03003.html
[144] *Prosecutor v. Dragan Nikolić*, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 9 October 2002, (IT-94-AR72). See also *Prosecutor v. Dragan Nikolić*, Decision on Interlocutory Appeal Concerning Legality of Arrest, 5 June 2003, (IT-94-2-AR73).
[145] *Prosecutor v. Slobodan Milošević*, Decision on Preliminary Motions, 8 November 2001, para. 38.

powers. The Tribunal asserted that it "has both the power and the procedure to resolve a challenge to the lawfulness of a detainee's detention"[146].

First of all, it is beyond doubt that institutions such as the Tribunals and the ICC are bound by a firm commitment to human rights. Obtaining the custody of an accused by an international tribunal should ideally not be based on otherwise illegal conduct. The interests of justice dictate that effectiveness in arresting the indictees should not be enhanced. The principle *ex injuria non oritur jus* should be borne in mind. In the view presented here, it is taken for granted that violations of international law during arrest/surrender or detention should be addressed.

There have been several attempts to rationalise the irregularities of the arrest in order to allow the case to be tried. According to one approach, which is the least appealing, the territorial integrity of a State in which the abduction or luring takes place, is not absolute and should the situation in that State amount to a threat to international peace, such action could be rationalised as exercise of the legitimate right to self-defence[147]. However, it is highly unlikely that the presence of an indictee, even one accused of the most heinous crimes in the territory of a State, constitutes in itself a threat to international peace and security. Accordingly, the exception of self-defence cannot be of use in that particular case[148].

There is also the view which links the entire issue with the legal basis of the establishment of the Tribunals. The Chapter VII basis of the Tribunals enables the argument to be made that the States concerned have *ab initio* given

[146] *Prosecutor v. Radislav Brdanin*, Decision on Petition for a Writ of Habeas Corpus on Behalf of Radislav Brdanin, 8 December 1999, paras. 4-6.
[147] Scharf, "Dokmanović", (1998), 377.

authorisation for action in their territory. And the arrest of the indictees falls within the realm of the action required by the Tribunals for the administration of justice in the light of its mandate. However, does this prevail over general international law which guarantees protection of a person's rights? This is a hard question to answer.

Finally, the most compelling view seems to be the one which seeks to establish a balance between the irregularities of the arrest and the interests of justice. The so-called "Eichmann exception" then comes into play. Even strong critics of jurisdiction over abducted persons will allow for an exception for defendants who have committed heinous crimes[149]. So long as the offences allegedly committed by the accused are of sufficient gravity to be considered "universally condemned offences"[150], the issue of the abduction should be "decoupled"[151] in his/her subsequent trial. It follows that an adequate justification can be provided for the trial to go on regardless of the violation of international law and the rights of the accused. Under this formulation, the International Tribunals would be able to play the role allocated to them on the international scene.

The merits of the above arguments will not be examined at present. Nor will the case-law of the Tribunals, as this has been competently done by

[148] Besides which, according to Article 51 UN Charter self-defence can only be undertaken in response to an "armed attack".
[149] Lowenfeld (1990), 490; Mann (1989), 478-9; Higgins, (1994), 472; Shen, (1994), 52. The SC though affirmed in the Eichmann case that non-consensual kidnapping by agents of another State violates international law, even when the victim of the kidnapping committed offences subject to universal jurisdiction. Consequently, the SC ordered Israel to make reparations to Argentina. See SC Res. 138, UN SCOR, 15th Sess, 868th mtg at 4, UN Doc S/4349 (1960).
[150] See apparent approval of this approach in *Nikolić* Appeal, *ibid. supra* n. 144, paras. 25-26.
[151] See Higgins, *ibid. supra* n.149, 72.

others[152]. Instead of indulging on the arguments of the parties in each of the above cases, and the rulings of the Tribunals, a formula will be presented to address the issues involved.

A first distinction should be made between violations that happened after the transfer of the person to the Tribunal. In this case the Barayagwisa precedent is pretty clear and would mean that a remedy should be provided which might amount even to decline jurisdiction, depending on the seriousness of the violation[153]. Each case should be judged *in concreto*[154]. A greater responsibility for the Tribunal is explained by the fact that it has control over the accused with their presence in the Hague/Arusha.

For violations that occurred before the person was brought to the custody of the Tribunal, the agency test should apply. Although the agency test argued for in *Nikolić*[155] is very appealing, it has to be recognised that it might be difficult for the Tribunals to have control[156] over each and every arrest.

Arguably, SFOR is made up of States, which are obliged to co-operate with the ICTY due to their UN Membership, and the obligation imposed on them by the SC. By the same token, the ICTY was created by the SC, so SFOR is bound and acts as an agent. Even if this is the case, co-ordination is a problem. SFOR is too remote from the "chain of command" as it were. The important point is that a remedy should be envisaged. It does not matter if this remedy comes from the State or from an international court. For the Tribunals,

[152] Henquet, *ibid. supra* n. 68, 113; Ülgen, (2003), 441; Knoops, (2002), chapter VIII; van Sliedregt, in van Dijk, and Hovens, (2001), 73; Scharf, *ibid. supra* n. 147, 369; Sloan, "Todorović", (2003), 85; Sloan, "Nikolić", (2003), 541.

[153] *Prosecutor v. Barayagwiza*, Decision, 3 November 1999, (ICTR-97-19-3), paras. 91-99, 106.

[154] *Soering v. United Kingdom*, ECHR, Judgment of 26 June 1989, para. 100.

[155] *Ibid. supra* n. 144.

it has to come from them, as the States on the ground have hardly had involvement in cases in which arrests were undertaken by international forces. But the agency test put forward here is stricter than the one argued for in *Nikolić*[157]. Accordingly, if the Tribunal's officials have been involved directly in making an arrest where the violations took place, then the Tribunal bears greater responsibility than if the arrest was carried out by a "non-agent". However, even in the latter case, does that mean that the person whose rights have been violated is not entitled to a remedy? A remedy ought to be available, but arguably, this could be raised before a national court and not necessarily before the Tribunal. However, at this point an examination of the type and degree of violation would be relevant. For instance, luring is not the same as abduction[158]. An egregious violation could also lead to the court not asserting jurisdiction[159], or alternatively, granting compensation if the person is acquitted, or a reduction in the sentence if convicted[160].

In the ICC, however, this is a different matter altogether. For the ICC was created with direct input by States which will be the very same parties that will be called upon to carry out arrests. Going back to the agency test, it would be easily discernible in the ICC, as States parties to it will be the visible actors in arrests. If, however, the equivalent of SFOR were to assist, then the same solution as for the Tribunals would apply.

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[156] The *Nicaragua Case* revolved around the issue of control. *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. USA),* (Merits), [1986] ICJ Reps. 70, paras. 114-115.

[157] *Ibid. surpa* n.144.

[158] *Prosecutor v. Dokmanović, ibid. supra* n. 142, para. 56.

[159] *Prosecutor v. Barayagwiza, ibid. supra.* n. 153, para. 74. See also *Nikolić* Appeal, *ibid. supra*, 144, para. 29-30.

[160] *Prosecutor v. Barayagwiza,* Prosecutor's Request for Review or Reconsideration, 31 March 2000, (ICTR-97-19-AR72). See also Letters from the ICTY President to the SG, S/2000/904 and S/2002/304. See Johnson, (2004), 374; Beresford, (2002), 628.

The ICC Statute, reacting perhaps to the Tribunals' case-law, includes a provision that deals with irregularities of arrest in terms of providing compensation[161]. It should be examined whether the ICC should be the only forum where irregularities should be addressed or whether the individual concerned would be entitled to raise this issue before national courts as well. As will be seen in the final chapter, the approach of States in their implementing laws is far from clear. However, since irregularities of arrest do not constitute a reason for refusing surrender to the ICC, it should be accepted that surrender should take place anyway, and the ICC would be the exclusive forum to deal with such issues rather than States releasing the accused before surrender. However, apart from the ICC, would an accused, if his motion fails, be entitled to raise it before national courts? Arguably this is correct, depending on the domestic system.

To conclude, the arrest of the indictees is a fundamental issue for the functioning of the Tribunals. The problems which arise in the course of arrests are likely to be raised in the subsequent trials. However, it is a question of balance between the genuine interest of the international community to have the alleged criminals arrested notwithstanding the procedure to be followed, and the rights of the accused in question, which should not in any case be violated. Addressing such violations either nationally or internationally is therefore important.

[161] Article 85 ICC Statute.

5. Competing Requests

In recognition of States' other obligations, besides those arising from the ICC Statute, competing requests are dealt with therein. Prioritising between competing requests is a daunting task even within a single State. When it comes to the Tribunals and the ICC however, this task is not likely to be simple. Unlike the *ad hoc* Tribunals which, because they are based on the Charter can afford to extend their coercive powers above and beyond arrest and surrender to ensure primacy over any competing requests, the ICC is not "immune" from such issues.

Rule 58 of the ICTY and the ICTR RPE, assert, rather authoritatively, the prevalence of a Tribunal request over extradition, and could be used as a basis for dealing with competing extradition requests as well.

For the ICC, Article 90 covers a range of different situations. The relationship between the Court, the requested State and the requesting State is complex, depending on the nature of the conduct, membership of the Court and the existence of an international obligation covering the extradition request. Undoubtedly, the issue of conflicting requests raised much controversy in the negotiation of the Rome Statute since it is reflective of the role the drafters were willing to grant the Court, *i.e.* whether or not the obligations towards it prevail over those towards States. In fact, this is largely dependent on whether the States involved are parties to the Statute or not and whether surrender and extradition are sought for the same person and for the very same crime. Needless to say, the issue is inextricably linked to the question of

complementarity[162], and depends on the ruling of the Court on the admissibility of the case at hand.

A requested State, which is a party to the ICC Statute, has different duties from a State which is not, depending on whether surrender and extradition involves the same conduct or not. And again, when a competing request involves the same conduct, sought both by the ICC and the requesting State, whether the requesting State is a State party to the Rome Statute or not is crucial. These different situations will be taken in turn to examine what the requested State ought to do in each case. The Statute in Article 90 maps out the different situations quite clearly.

When competing requests involve the same conduct, the next step will be to examine whether the extradition request comes from a State party or not. In the former case, priority should be given to the ICC, if the case has been deemed to be admissible in accordance with Articles 18 and 19 of the Statute[163]. The solution reached in this instance is in line with the intention of the States that become parties to the Statute to subject themselves to the Court.

However, if the Court has not yet ruled on the admissibility of the case the requested State has the right to continue to deal with the extradition request, though without, extraditing the accused to the other State before the determination of the admissibility by the Court[164]. The adopted formula assuages both the concerns of States that are required under bilateral obligations or national law to proceed expeditiously with extradition requests, as well as those of States that did not want a State's request to supersede that of

[162] See *supra* chapter 2.
[163] Article 90(2)(a).
[164] Article 90(3).

the Court. It is evident that this provision applies only to the State Parties to the Statute.

In the case in which the requesting State is not a party to the ICC treaty, different approaches are adopted in Article 90, depending on the existence of an international obligation regarding extradition[165], or absence thereof[166]. In the latter case, and provided that the case is admissible, the Court's request should be given priority by the requested State, as there is no international obligation to be fulfilled towards the non-State party, allowing the Court's request to prevail. However, this priority granted to the Court is limited only to cases that are admissible before it so as to safeguard its complementary nature. Should the admissibility of the case be still pending, discretion is allowed to the requested State to deal with the extradition request[167]. The solution provided in Article 90(5) is akin to the one found in paragraph 3 of the same Article.

Provided that an international obligation exists between the requested and the requesting State, the decision to proceed with the execution of the Court's request or with the extradition lies with the requested State[168]. The decision shall be made taking into account a number of relevant factors such as the date of the requests, the territoriality and nationality of the claims and the possibility of a subsequent surrender to the Court[169]. This paragraph is indicative of a general approach followed in various extradition treaties in this respect[170]. Since this situation involves two competing international obligations the decision is left to the State. This provision, however, places co-operation

[165] Article 90(6).
[166] Article 90(4).
[167] Article 90(5).
[168] Article 90(6).
[169] *ibid.*

owed to the Court on an equal footing with an obligation towards a non - Party. Any different formulation would have been unfair for States that are not parties to the Statute[171]. The list of factors enshrined in Article 90(6) of the Statute is not exhaustive. The emphasis is on the fact that the requested State should consider all the relevant factors of the particular case before granting the request to either the Court or the third State.

Having examined conflicting requests regarding the same conduct, it remains to examine the possibility of competing requests relating to a conduct which does not fall within the jurisdiction of the Court. When the competing extradition request involves different conduct to the one for which surrender to the ICC is sought, Article 90(7) of the Statute does not distinguish between parties and non-parties to the Statute. Essentially, the provision adopts the same approach as when dealing with conflicting requests regarding the same conduct when the extradition request is made by a non-party to the ICC Statute. This is also evidenced by the language used, which is identical. Accordingly, in the absence of an extradition obligation, the Court's request shall prevail. In addition, Article 90(7)(b) repeats *mutatis mutandis* Article 90(6). However, the requested State has the discretion to decide in relation to a request from both a State Party and a non-State Party. The nature and gravity of the conduct should therefore be emphasised.

An obligation to notify the Court can be found in two instances in Article 90[172]. First, when the requested State receives any competing requests,

[170] See for instance Article 17 of the European Convention on Extradition, 359 UNTS 273 and Article 16 of the United Nations Model Treaty on Extradition, UN Doc. A/CONF.144/28/Rev.1

[171] Cf. Cassese (2003), 359 who advocates ICC primacy given it being a "*universal* criminal court", and due to the Statute's purpose to "administer international justice in the interest of peace" (emphasis in the original).

[172] See Article 90(1) and (8).

and second, at a much later stage of the proceedings, when the Court has determined the case is inadmissible and the extradition has been refused. In the case of 90(1) notification is necessary in order to alert the Court to the existence of competing requests, and to ensure that it deals with the admissibility question, where relevant, under its expedited procedure. Notification found in Article 90(8) may be explained since, even though the Court has declared the inadmissibility of the case, the request for extradition has failed. This might give another opportunity to the Court to perhaps reconsider the case and establish its admissibility, under Article 19(10).

The inclusion of competing requests helps to avoid conflicts and is part of the mechanism enshrined in the Statute attempting to strike a balance between States parties' obligations towards the Statute and third parties, and the quest for an effective co-operation regime. In other words, the Statute recognises that the Court operates in a multi-player, multilateral environment and that necessary concessions need to be made.

6. Postponement of Co-operation

Postponement of execution is another tool in the Court's armoury. Instead of an outright refusal, emphasis is placed on accommodating conflicting situations. Postponing the execution of a co-operation request is unique to the ICC Statute. Article 89(2), deals with the *ne bis in idem* principle[173]. Notwithstanding the Court's ability to decide its own jurisdiction, the Statute recognises the possibility that individuals may also file applications relating to admissibility before national courts. In such a case, consultation

between the two courts should not be precluded. From that it follows that once the request is made and the case is admissible[174], the national courts have to proceed with the execution of the request. This is not so, if the case is ruled by the Court as inadmissible and the Court has not subsequently withdrawn the request[175]. If, however, the issue of admissibility is not yet decided by the Court, the State is entitled to postpone the execution of the request until there is a decision[176].

An admissibility challenge before the ICC itself, also constitutes a reason for postponement[177]. It makes sense for the Court to establish its jurisdiction first, before a co-operation request is executed.

Finally, Article 94 constitutes another concession to State authority. This time, postponement is sought when the execution of the request would interfere with ongoing investigation of a different case to the one before the ICC. Although reasonable, the possibility of a minor offence triggering postponement to the detriment of the case before the ICC, should not be disregarded.

Postponement is unique to the ICC and has not been part of State co-operation with the Tribunals. The inclusion of this provision for the ICC is reasonable and part of a wider mechanism to ultimately ensure co-operation.

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[173] See *supra* chapter 2.

[174] Problems might arise if an initially admissible case is appealed in accordance with article 19(6) in conjunction with 82(1)(a).

[175] In exceptional cases though the Court will uphold its request. See for instance Article 81(3)(c)(i) of the Statute.

[176] However, according to one view this should not be applied to an affirmative ruling by the Court which has subsequently been the object of appeal. See Kreß, and Prost, *ibid. supra* n.107, 1076.

[177] Article 95 ICC Statute.

7. Grounds for Refusing Requests for Co-operation

It has been established already that the Statutes of both the Tribunals and the ICC envisage an obligation to co-operate by States which seems to be quite powerful. However, in the case of the Tribunals, reasons for refusal have been raised in a number of instances, whereas in the ICC, specific grounds for denying the execution of a co-operation request can be found in its Statute.

7.1 ICTY: *de facto* Refusal to Execute Co-operation Requests

In the Tribunals' practice, several grounds for denying co-operation have emerged. Invoked primarily by States in the former Yugoslavia, they have focused on the lack of domestic legislation to co-operate, the prohibition of extradition of nationals and national security.

Although no specific provision to enact implementing legislation can be found in the Tribunals' Statutes, the obligation to do so derives from their primacy. Moreover, this does not mean that States can invoke the lack of such legislation in order to avoid co-operation[178]. In fact, the obligation to co-operate with the Tribunals is so strong that any opposite conclusion would limit their primacy and overarching jurisdiction. Problems with implementing legislation arose also with regard to the US, in the case of surrender of

[178] See for instance position of FRY which refused co-operation on the grounds of failing to enact such legislation. Fourth ICTY Annual Report, *ibid. supra* n. 69, para. 150.

Elizaphan Ntakirutimana[179], where it became clear that what matters is co-operation[180] and that there are no grounds for refusal.

Moreover, domestic legal prohibitions against the extradition of a State's own nationals have been invoked as another reason to deny surrender of persons sought by the Tribunals. In civil law countries there is generally such a prohibition which is usually incorporated in the constitution[181]. This was also the case with Yugoslavia, which noted that the creation of the ICTY is contrary to the Constitution of FRY which prohibits extradition of nationals, and any decision of Security Council on this question would have to be approved by the Yugoslav Parliament[182]. Taking into consideration that most of the suspects of the crimes committed in the course of the Yugoslav conflict were nationals of the former Yugoslavia, should such a restriction be accepted, it would eviscerate any obligation on the states of the former Yugoslavia to surrender suspects[183]. This would thwart the purpose of international criminal justice

[179] For an analysis see *inter alia,* Coombs, (2000), 171; Murphy, (2000), 131; Alexandropoulos, (2000), 107; Schmertz, and Meier, (1999), 99; Wallach, (1998), 59; Sluiter (1998), 383; Sluiter (2000), 459.

[180] See also in the UK, domestic debate over the enactment of co-operation legislation by means of an Order in Council. See Warbrick, (1996), 947; Fox, (1997), 434.

[181] Dascalopoulou-Livada, in Koufa, (1997), 123. For an analysis of the issue with regard to German law see Oellers-Frahm, (1995), 307-308; for the Greek law see Vassilakakis (1995), 1271-1272. For constitutional law questions regarding the transfer of Milošević to the ICTY, see Magliveras, (2002), 661; *idem,* (2002), 198.

[182] See also the letter from the former UN Secretary – General Boutros Boutros – Ghali, to the Deputy Prime Minister and Federal Minister for Foreign Affairs of the Federal Republic of Yugoslavia (Serbia and Montenegro) dated 27 April 1994, in reply to a letter from the latter in which he declined all co-operation by the FRY with the Tribunal. The Secretary – General's letter concludes: "It is therefore the position of the Secretary – General that the International Tribunal was established in full compliance with the provisions of the United Nations Charter, and that the Federal Republic of Yugoslavia, like all other States members of the United Nations, is bound to give effect to Security Council resolutions adopted under Chapter VII of the Charter, and to comply to that end with any requests of the International Tribunal for assistance, including, in particular, a request for the transfer or surrender of an accused, regardless of his nationality. It is the hope of the Secretary – General and that of the Security Council that the Federal Republic of Yugoslavia will cooperate with the Tribunal in the spirit of Security Council Resolution 827 (1993) and the Statute of the International Tribunal" as cited by Jones, (1998), 205.

[183] Harris, Kushen, *ibid. supra* n. 5, 571. The issue of the constitutional prohibition of extradition or transfer of Yugoslav nationals was raised by Milošević himself. This was

since most of the accused would not have been brought before the international Tribunals. In any case this would not be considered as consistent with the SC's intention.

In order to strengthen this conclusion, the Judges have devoted a Rule in the RPE which deals with this question[184]. Rule 58 further elaborates the scope of obligations in Article 29 on the national government to co-operate. The said rule effectively codifies the principle of customary international law pursuant to which a State cannot adduce its constitution or its law as defence for failure to carry out its international obligations[185]. Hence, the obligation to surrender the accused prevails over any legal impediment which may exist under national law[186].

It should be noted that the "confusion" of transfer with extradition is not a genuine one. In the situation where States try to put forward arguments

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rejected by the Trial Chamber in *Prosecutor v. Slobodan Milošević*, *ibid. supra* n. 145, para. 47.

[184] Rule 58.

[185] This is generally recognised position in international law which can be also found in decisions of the World Court. See *inter alia, Polish Nationals in Danzig* Case, where the Permanent Court of International Justice held that: "It should [...] be observed that [...] according to generally accepted principles [...] a State cannot adduce as against another State its own constitution with a view to evading obligations incumbent upon it under international law or treaties in force" (PCIJ, Ser. A/B. no. 44, 1931, at p. 24). See also the *Lockerbie Case*, where the ICJ found in, 15 and 126 that in conformity with Article 103 of the UN Charter, the obligations of the parties deriving therefrom prevailed over their obligations deriving from any other international agreement. Moreover, in the *Exchange of Greek and Turkish Populations Advisory Opinion* of 21 February 1925, (Ser. B, No. 10) the PCIJ emphasised in, 20 the "self-evident principle according to which a State is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of a validly contracted international obligation". In the *Georges Pinson* case, brought before the France-Mexico Claims Commission, the umpire dismissed the view that in case of conflict between the Constitution of a State and international law, the former should prevail, by highlighting that this view was "absolutely contrary to the very axioms of international law (absolument contraire aux axiomes mêmes du droit international" (decision of 18 October 1928, in United Nations Reports of International Arbitral Awards, vol. V., 393-394. See also Article 27, first sentence of the VCLT where it is clearly stated that: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". And, Third Restatement of the Law, The Foreign Relations Law of the United States, vol. I, (1987), para. 115b.

[186] ICTY Press Release: CC/PIO/030-E, 6 February 1996. Judge Jorda also maintained that "one conceivably would construe that Article 29 practically acts with the force of jus cogens and operates as a peremptory norm to override national laws and extradition treaties that might conflict with it". *Ibid. supra* n. 5, 91, fn 44.

which would normally be sound and produce results in common extradition cases, this should be attributed to the mere fact that politically it is convenient for the recalcitrant States to present the request in those terms. There is no genuine misunderstanding of the obligation of States. In the view of this author, the States are conscious of their obligations under Article 29 and 28 of the Statutes. However, in practice they dislike the fact that this obligation is a strenuous one and that they do not have control over the situation.

Finally, another issue that has been raised in order to refuse co-operation relates to national security. The ICTY gave its unequivocal answer when it held in the *Blaškić case*[187]: "To admit that a State holding such documents may unilaterally assert national security claims and refuse to surrender those documents could lead to the stultification of international criminal proceedings: those documents might prove crucial for deciding whether the accused is innocent or guilty. The very *raison d'etre* of the International Tribunal would then be undermined".

From the above it is clear that although the Tribunals' Statutes are very clear regarding the obligation to co-operate, some States have often tried to avoid their jurisdiction.

7.2 ICC: *de jure* Refusal to Execute Co-operation Requests

In the ICC Statute, on the other hand, there are some provisions which allow a State party to refuse co-operation with the Court. The presence of these provisions is the outcome of a hard fought "battle" in the negotiation of the Statute. Since the regime the Statute represents is closer to a horizontal

approach, the existence of grounds for refusal to co-operate is to be expected. When control is left to States, such grounds are likely to be plentiful. The battle though in the Statute focuses at the same time on enabling an essentially horizontal system to become more vertical. A close look at the relevant provisions reveals that refusal is limited and the Statute seems to have addressed what was an issue in State co-operation with the Tribunals. The lack of national legislation is addressed in Article 88 ICC Statute. Refusal to surrender one's own nationals has been tackled by distinguishing surrender from extradition, in Article 102. Conversely, national security features prominently now as a reason for refusal and will be examined below. For the purposes of our analysis, the reasons for denial of co-operation will be categorised as "endogenous" or "exogenous". The former arise within the relationship of a State party and the ICC, whereas the latter constitute grounds for refusal to execute an ICC request, but stem from the impact of a State party's relationship with a third party.

7.2.1 Endogenous Grounds for Refusal

In the relationship between States parties and the ICC, refusal to co-operate with the Court is limited to strictly defined situations. It is important to emphasise that the foreseen endogenous grounds for refusal do not apply to the execution of an arrest and surrender request, but relate only to other requests for co-operation contained in Article 93, where the grounds for refusal are also found. Article 93 contains, particularly in its first paragraph, a number forms of assistance that may be requested by a State. These provisions are very

[187] *Ibid. supra* n. 8, para. 65.

reasonable and although they merit greater exploration they will not be examined here. Instead, emphasis will be placed on the grounds for refusal.

Article 93(1)(l), contains the first possibility for refusing such a request. Essentially, this provision was included to allow a potential request not included in 93(1) at the time of drafting. However, in line with using domestic procedures, and given the vagueness of this provision regarding its content, a State is given the possibility to deny execution of a request that is prohibited by its domestic law[188]. The practical applicability of this provision is questionable, since it is hard to imagine a co-operation request beyond what is already present in 93(1). In any case, this ground of refusal is understandable and least problematic.

Of more concern is Article 93(3) which represents a compromise solution and was inserted in the Statute instead of a broad category of grounds for refusal[189]. Pursuant to this provision, a State may refuse to execute a particular measure of assistance if execution of that measure is prohibited by the law of that State on the basis of "an existing fundamental legal principle of general application". Accordingly, the Article recognises that although the State must have incorporated the co-operation regime into the national sphere in accordance with Article 88 of the Statute, it may be that some particular measures requested by the Court are prohibited by national law[190]. It should be

[188] It should be noted however, that this should not happen outright, as following Article 93(5), the possibility of considering providing the assistance in an alternative manner should be exhausted first.

[189] Article 90(2) of the Draft Statute A/CONF.183/2/Add.1, 171 contained an option according to which a State would be in a position to deny co-operation with the Court if according to subparagraph (b) the authorities of the requested State would be prohibited by national law from carrying out the requested action in similar circumstances. Moreover, subparagraph (c) allowed refusal where *ordre public* or other essential interests would be prejudiced.

[190] For instance, denial of a form of co-operation, e.g. compelling witnesses is not allowed. Under this Article though, in the specific circumstances, the measure is prohibited; e.g.

noted however, that not every legal principle under national law triggers the application of Article 93(3). It has to be a fundamental principle *i.e.* a principle which cannot be easily amended and, in addition, a principle of general application in the national legislation of the State in question[191]. The inclusion of this provision serves the concerns of the States to preserve the fundamental aspects of their legal systems and, at the same time, helps the Court to fulfil its goals since the obstacles otherwise found in the States are significantly limited. However, the fact that no examples are provided in the Statute as to what would fall under this category of principles might prove to be problematic in practice since some States are likely to adopt a wide reading of this provision in order to avoid co-operation with the Court[192]. It would have been preferable to find some indication in the RPE or elsewhere in the Statute.

Should Article 93(3) be applied, the State is not entitled to deny co-operation with the Court *ab initio*. There is an obligation to enter into consultations with the Court. The aim is to try to find an acceptable way to overcome the problem. Again, it is evident from this provision that consultation has a very significant role to play. In fact, in a system where States have the leading role, it is essential to embrace methods which would tackle the (anticipated?) unwillingness to comply with the provisions of the Statute. Consultation then comes in as a substitute to fill in the gap which exists in the

compelling a solicitor to testify about matters covered by the solicitor-client privilege. See Prost, and Schlunck, in Triffterer, (1999), 1111-1112.

[191] Obviously, the principle in question has to be present at the time the Court makes its request, because any different interpretation would unnecessarily expand the State's discretion to comply.

[192] The concept is reminiscent of Article 46 VCLT which enables a State to argue that its consent to a treaty violates internal law only where "that violation was manifest and concerned a rule of its internal law of fundamental importance". However, this is not of much assistance for the application of the concept in international criminal law.

system[193]. Finally, Article 93(3) provides for the modification of the request by the Court in order to be in accordance with the requirements laid down in the domestic legal system. This is again evidence of the lenience the Statute shows towards the State concerned in an effort to make the request successful. However, whereas most of the time this will be the case, the Statute does not address the case in which the request cannot be modified. In such a case, it should be accepted that the Court will not be in the position to pursue its request in the form sought.

Another ground for denial, explicitly enshrined in the Statute, can be found in Article 93(4). Read together with Article 72, assistance may be denied on the basis of its impact on national security information[194]. What constitutes "national security" under Article 93(4) is essentially for the State concerned to decide. However, the three-step procedure described in Article 72 has to be followed before denying co-operation. Article 72, although influenced by the *Blaškić case*[195], reaches the opposite conclusion. Instead of obliging the State to co-operate, all the Court can do is to assess the denial of assistance and take the relevant measures in case of failure to co-operate[196].

7.2.2 Exogenous Grounds for Refusal

As the ICC operates in a multilateral system where not all States will be parties to it, it is important to allow for situations where a State party will have

[193] See also Article 97 ICC Statute.
[194] On Article 72, see Triffterer, in Roggemann, Šarčević, (2002), 53; Behrens, *ibid.*, 115.
[195] *Prosecutor v. Blaškić*, Appeals Chamber, 29 October 1997, (IT-99-14-AR108*bis*), paras. 67-69.
[196] Pursuant to Article 87(7) ICC Statute.

to deny the execution of a co-operation request, because of another conflicting obligation owed to a third State.

As seen already, this may arise for instance in case of a surrender request competing with an extradition request under certain circumstances[197]. A similar rationale applies to Article 93(9)(a) with regard to competing requests other than surrender[198]. A rather more interesting provision is Article 93(9)(b) which pertains to information, property or persons subject to the control of a third State or organisation. Essentially, the requested State shall deny execution of a request with regard to the above and shall inform the Court of this fact, which will then redirect its request to the third State or organisation[199]. Whether the "third State" is required to co-operate depends whether another State party would fall under the category of a third State with regard to this provision or not[200].

Of yet more interest is Article 98 of the Statute, not least because the US has concentrated its efforts to bypass the Statute mainly on paragraph 2 of this provision[201]. Article 98(1) refers to requests which are inconsistent with the obligations of the state in question under international law or international agreements with respect to State or diplomatic immunity[202]. Article 98(1)

[197] See analysis of Article 90, *supra* section 5.

[198] This is evident from Article 93(9)(a)(ii) which explicitly refers to the procedure enshrined in Article 90. However, as 93(9)(a)(i) refers only to situations where there is an international obligation, it should be inferred that in instances where there is no international obligation, priority should be given to the Court.

[199] As Ciampi, in Cassese, Gaeta, Jones (2002), 1735, observes, the procedure in this provision is similar to Article 98 ICC Statute.

[200] Ciampi, *ibid.*

[201] For a comprehensive chart on the current developments regarding BIAs, see: http://www.iccnow.org/documents/otherissues/impunityart98/BIADB_current.xls .

[202] Of relevance on the issue of immunities are the *Pinochet* and *Yerodia* Cases which discuss immunities with regard to international crimes. The latter in particular is of dubious value. See *R v Bow Stipendiary Magistrate Ex Parte Pinochet Ugarte* (Amnesty International Intervening) [No.3] [2000] 1 AC 147; *Case Concerning the Arrest Warrant of April 11th 2000*, (Democratic Republic of Congo v Belgium), 14 February 2002, 41 *ILM* (2002), 536. Cf. the SLSC

requires that the Court should not proceed with a request for surrender or assistance if it recognises that this request conflicts with the State or diplomatic immunity of a person or property of a third State, under international law. In essence whenever the ICC has a person before it, immunities cannot be invoked[203]. However, because of possible immunities attached by non-parties, Article 98 contains a provision to deal with this issue. The obligation not to place the State in a position of conflict rests with the Court[204]. In fact the Court may either decide not to pursue the request or to engage in negotiations with that third State so as to waive the immunity. In the latter case, the waiver of immunity is sought by the Court before pursuing the request. It is possible, by virtue of Article 98, to have a bar to jurisdiction should waiver not be obtained.

Moreover, Article 98(2)'s intention was to cover the specific relationship arising out of Status of Forces Agreements[205], by virtue of which foreign troops remain in the jurisdiction of the sending State. Article 98 was meant to facilitate this relationship[206]. In an attempt to undermine the ICC the US has concluded bilateral immunity agreements whereby States parties to them undertake not to surrender any US citizens to the ICC. A detailed investigation into the lawfulness of these agreements as well as their impact on

Decision in *Prosecutor v Charles Ghankay Taylor*, Decision on Immunity from Jurisdiction, 31 May 2004, SCSL-2003-01-I.

[203] Article 27 ICC Statute.

[204] Cf. initial proposal by Singapore under which the Court would have been obliged to seek the consent of the third State.

[205] Under such agreements the members of the armed forces of a third State may be present on the territory of the requested State.

[206] See also Rule 195 RPE which was adopted with a specific mention that the Rule does not change Article 98 ICC Statute. For an interesting discussion regarding the background to the adoption of this Rule, see Harhoff, and Mochochoko in Lee, (2001), 664-669; see also Gartner, in Fischer, Kreß, and Lüder (2001), 430-433.

the Court are a matter of interest, but go beyond the scope of the present section[207].

The inclusion of this provision in the Statute as an exogenous ground for refusal had, as its purpose, the co-ordination of the conflicting obligations of States parties to the Court with obligations arising out of relationship with third States. It is clear, however, that this discretion has been abused by certain States to the detriment of the effective operation of the Court.

From the above analysis it is clear that mostly the exogenous, but also some of the endogenous grounds for refusal to provide co-operation to the Court are premised on procedural rather than substantive issues. This in part is an achievement. However, the mere existence of such grounds, although inevitable due to the very nature of the new institution, is expected to be used widely by some States in order to escape compliance with the requests of the Court.

8. Failure to Co-operate

Co-operation with the Tribunals has not always been forthcoming. More often than not, States have failed to co-operate as evidenced by the number of accused still at large[208]. Non-co-operation has been a serious problem particularly for the ICTY. Some States of the former Yugoslavia have consistently refused to co-operate with the Tribunal. In Rwanda, co-operation

[207] For a very interesting discussion on this issue as well as the question of immunities and the relationship between Articles 27 and 98 ICC Statute see the excellent article by Akande, (2004), 407. See also, *idem.*, (2003), 618; Wirth (2001), 429; Meißner, (2003), 119-134.
[208] See Appendix.

has been less problematic[209]. Co-operation with the ICC is also expected to be a cause for concern. All institutions lack coercive powers to enforce orders and authority to act against non-complying States. The *ad hoc* Tribunals therefore depend on the SC for such enforcement, whereas this task is left to the State parties to the ICC Statute in the case of the Court. This failure to secure State co-operation affects the overall effectiveness of the international criminal justice system. In this section, there will be an examination of how the Statutes of the Tribunals and the ICC deal with failure by States to co-operate.

8.1 Failure to Co-operate with the ICTY and the ICTR: Emphasis on SC (In)action

It would have been naïve to expect that co-operation would be secured on each and every occasion. Yet, the Tribunals' Statutes remain silent on the issue and do not contain a specific provision that deals with failure to co-operate. It is again in the RPE where the sanction for non-co-operation can be found[210]. Perhaps it was anticipated that, because the Tribunals were created by the SC, States would comply with requests made by its "offspring"[211].

Although, in theory, failure to comply could entail the application of non-forcible measures under Article 41 UN Charter, no such use has ever been

[209] *Ibid.* Note how many different States have assisted with arresting persons indicted by the ICTR. See Appendix. See ICTR Fact Sheet No. 6, available at: www.ictr.org/default.htm .

[210] Rules 11, 13, 59, 61 and most importantly Rule 7*bis*. RPE. Reference to this Rule was made in the *Decision on the Objection of the Republic of Croatia to the Issuance of Subpoenae Duces Tecum* in the *Blaškić case (IT-95-14-PT), of 18 July 1997,* in para 34 where it was held that "...the adoption of Rule 7 *bis* is clearly to be regarded as falling within the authority of the International Tribunal". For a critical analysis see Mundis in May, Tolbert, Hocking, Roberts, Jia, Mundis, and Oosthuizen, (2001), 436-438, in particular.

[211] Klarin, (2004), 548 maintains that Cassese and other Judges admit that their expectations in the early stages of the ICTY's operation "were the fruit of 'terrible naivety' and 'sheer ignorance'".

made by the SC so far. All the SC has done is to limit itself to issuing statements deploring/condemning failure to comply in the form of presidential statements[212]. It has taken no binding decisions as yet against a State for failure to comply. The closest the SC came to condemning the lack of co-operation was Resolution 1207[213].

The question is then what the Tribunal can do to tackle failure to co-operate. In truth, not very much. A judicial body can only limit itself to judicial findings of non-co-operation. This was summarised in the *Blaskić subpoena case* where the Appeals Chamber held that "the International Tribunal is not vested with any enforcement or sanctionary powers *vis-à-vis* States [...]. However, the International Tribunal is endowed with the inherent power to make a judicial finding concerning a State's failure to observe the provisions of the Statute or the Rules. It also has the power to report this judicial finding to the Security Council"[214]. It went on to underline that "the finding by the International Tribunal must not include any recommendations or suggestions as the course of action the Security Council may wish to take as a consequence of that finding. [...] [T]he International Tribunal may not encroach upon the sanctionary powers accruing to the Security Council pursuant to Chapter VII of the United Nations Charter"[215]. It is therefore up to the SC to decide the form of action and the Tribunal cannot have any input in that respect.

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[212] See Statement by the President of the Security Council, UN SCOR, 3663th mtg., UN Doc. S/PRST/1996/23 (1996); See also Statement by the President of the Security Council, UN SCOR, 3687th mtg., UN Doc. S/PRST/1996/34 (1996) which condemn the Federal Republic of Yugoslavia's lack of co-operation with the Tribunal.

[213] S/RES/1207 (1998), 17 November 1998. Paragraph 3 of this Resolution reads: "Condemns the failure to date of the Federal Republic of Yugoslavia to execute the arrest warrants issued by the Tribunal against the three individuals referred to in the letter of 8 September 1998, and demands the immediate and unconditional execution of those arrest warrants, including the transfer to the custody of the Tribunal of those individuals".

[214] *Prosecutor v Blaškić*, *ibid. supra* n. 8, para. 33.

[215] *Ibid.*, para. 36.

It is clear that there is a gap between the theoretically binding nature of the international Tribunals' orders and *de facto* limitation of co-operation to cases of voluntary State compliance. In fact, given the Tribunals' primacy, it would have been expected that it would be common for the SC to take action to tackle non-co-operation. The SC has so far abstained from using its powers to effectively deal with failure to co-operate with the Tribunals. Although the law allows wide-ranging means to tackle non-compliance, in practice, SC action, or rather inaction, hardly meets its potential, thus having a negative impact on the effectiveness of the system.

It could be therefore argued that, in essence, the enforcement system of the *ad hoc* Tribunals could be equated with that of the ICC, notwithstanding their different legal basis. That is to say, that despite the Chapter VII basis of the Tribunals, compliance, at least in practice, is left to the States themselves, as is the case with the treaty-based ICC. Compliance in the Tribunals in practice is voluntary for both institutions. What matters then is which of the two has the procedures in place for the system to work.

Given SC inaction, the ICTY had to devise other mechanisms to tackle State unwillingness to provide assistance to the Tribunal. There are two interim solutions which merit greater attention. First, the use of sealed indictments, and second, Rule 61 proceedings.

8.1.1 Sealed Indictments: Catching the Indictees by Surprise

The ICTY Prosecutor, Louise Arbour, dealt with the lack of arrests by introducing sealed indictments. Although this is the norm in domestic legal

systems, at the international level, it was certainly a change from the prosecutorial strategy of her predecessor[216]. Arbour herself, although recognising that other factors contributed to the success of her policy, nevertheless was of the opinion that sealed indictments were critical for many of the arrests[217]. The main advantage of secret indictments is the element of surprise. By publicising the indictments, indictees were given a head start and time to flee the former Yugoslavia[218]. Moreover, the use of sealed indictments means that control stays with the OTP to channel their resources the way they want, and they also have the ability to expose NATO's inefficiency in effectuating arrests[219].

Although the authority to issue secret indictment is not explicitly in the Statute[220], the RPE provide the legal basis for non-disclosure[221].

Sealed indictments have given the ICTY the impetus to arrest many of the accused. In 2003, most of the indictments were made public due to assurances given by the FRY and the Republika Srpska that they would arrest the accused, which, in the latter case have not been met[222].

The use of sealed indictments for the ICC might also be of assistance. However, the obligation to inform all States parties and States that would

[216] Goldstone's strategy was based on a public exercise. Throughout his term he travelled extensively to various countries to seek their co-operation with the ICTY. See Goldstone, (2004), 380. Although necessary at the early stages of the Tribunal, it did not bear fruit.
[217] Arbour, (2004), 397.
[218] Arbour, (1999), 39, where she is very critical of public indictments. Moreover, in 41-42, she describes the application of sealed indictments to the ICTR, which received much less attention than the ICTY. With regard to the ICTR, see also Press Briefing by the Chief Prosecutor, ICTY/ICTR, 21 July 1997, quoted in Morris, and Scharf, (1998), 482.
[219] Hagan, *ibid. supra* n. 124, 101.
[220] Retif, (2001), 240.
[221] Rule 53. See also Vohrah in McDonald, and Swaak-Goldman, (2000), who maintains that Rule 53 could be used also beyond the pre-trial phase of proceedings.
[222] Ninth ICTY Annual Report, *ibid. supra* n. 69, para. 216.

normally exercise jurisdiction[223] might significantly curtail the effectiveness of sealed indictments for the ICC.

8.1.2 Rule 61 Proceedings: Judicial Antidote to State Non-compliance?

Among the Tribunals' RPE, Rule 61[224] is definitely the most well known provision. Its legitimacy and effectiveness is controversial. Rule 61 was conceived as a means of tackling unwillingness to co-operate by certain States. Its application, however, has had ramifications for a variety of issues and gives rise to a set of questions which lie beyond the issue of the failure to co-operate[225].

The rationale of this judicial process is provided by Judge Sidhwa in his separate opinion in the *Rajić case*[226]:

> Rule 61 is basically an apology for this Tribunal's helplessness in not being able to effectively carry out its duties, because of the attitude of certain States that do not want to arrest or surrender accused persons, or even to recognise or co-operate with the Tribunal. In such circumstances, it is the International Tribunal's painful and regrettable duty to adopt the next effective procedure to inform the world, through open public hearings, of the terrible crimes with which the accused is charged and the evidence against the accused that would support his conviction at trial.

The nature of a Rule 61 hearing is *sui generis* and of dubious procedural legality. On the one hand, it is not strictly speaking a proper trial, since no determination of guilt or innocence can be made, and subsequent trial

[223] Article 18(1) ICC Statute.

[224] On Rule 61 see *inter alia*, Thierhoff and Amley, (1998), 231-274; Quintal, (1998), 723-759; King, (1997), 523-554; Hildreth, (1998), 499-524; Swaak-Goldman, (1997), 523-532; Maison, (1996), 284-299.

[225] Channelling prosecutorial resources away from investigating more cases into preparing and presenting cases that might never materialise given the inability to arrest the accused is certainly a serious issue.

once the accused is arrested is not precluded. On the other, whilst the Prosecutor submits the indictment to the Trial Chamber in a public hearing and evidence is presented before the confirming judge, witnesses may be heard[227] and *amicus curiae* briefs submitted[228], the accused cannot be represented by counsel[229].

The issue which then arises is whether Rule 61 proceedings introduce trials *in absentia* through the back door. Despite the absence of an express provision in the Tribunal's Statute, it is generally accepted that trials without the accused being present are not allowed[230]. The ICTY has repeatedly stated that: "A Rule 61 proceeding is not a trial *in absentia*. There is no finding of

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[226] See *Prosecutor v. Rajić*, Rule 61 Decision, 13 September 1996, (IT-95-12-R61), *per* Judge Sidhwa, para. 7.

[227] Rule 61(B).

[228] See in the *Karadžić and Mladić Case* (IT-95-5-R61/IT-95-18-R61) Mrs. Elizabeth Rehn, Special Rapporteur for the United Nations Commission on Human Rights, and Mrs. Christine Cleiren, member of the Commission of Experts established pursuant to Security Council Resolution 780 (1992), were invited to testify during the hearings. Nevertheless, other applications have been refused. See in the *Karadžić and Mladić Case* (IT-95-5-R61/IT-95-18-R61), Human Rights Watch was not allowed to submit an *amicus curiae* brief in the Rule 61 proceedings on the basis that: "[...] it does not appear necessary that a brief presenting the proceedings organised by virtue of this text, whose principles and merits cannot be legally challenged, should be submitted. (1/333)". Moreover, Croatia's request to be heard as *amicus curiae* in the *Rajić Case* (IT-95-12-R61) was rejected, notwithstanding however her ability to renew it at the time of the trial (3rd Annual Report, para. 65).

[229] This may be considered a violation of the principle of equality of arms. See *Rajić Case*, IT-95-12-R61, where counsel for the accused was informed in a Notice issued by the Registry that "Rule 61 proceedings are *ex parte*. You may observe the hearing from the public gallery". See also *Prosecutor v. Karadžić and Mladić*, Decision Partially Rejecting the Request by Mr Patelić, Counsel for Karadžić, ICTY IT-95-5-R61/IT-95-18-R61, 27 June 1996 where counsel was denied *locus standi* on the grounds that "[...] Rule 61 Proceedings cannot be considered a trial". However, Trial Chamber I ordered the indictment to be read in the presence of counsel in open court. This seems to be though unusual in the practice of the Tribunal.

[230] This may be inferred by various provisions in the Statute, but most importantly, by Article 21 where it is stated that the accused is entitled to be "tried in his presence". Moreover, Articles 20(2), 20(3) and 20(1) assist in this conclusion. The prohibition of a trial *in absentia* is consistent with Article 14(3)(d) of the International Covenant on Civil and Political Rights, which stipulates the right of accused persons to be present at their trials. Moreover, para. 101 of the SG's Report, *ibid. supra* n. 28 attests to this fact. Trials without the presence of the persons accused are not alien to the international practice. For instance, in the Nuremberg Tribunal, such trials were allowed (See Article 12 of the Charter of the International Military Tribunal, Annexed to the Agreement for the Prosecution of the Major War Criminals of the European Axis, 8 August 1945, 82 UNTS 280) when it was not possible to locate the accused or when that Tribunal found it necessary in the interests of justice. Indeed, Bormann was tried in his absence. Moreover, in the ECHR and under Article 6(1), trials without one's presence

guilt in this proceeding"[231]. In the *Nikolić Case*[232] they found that: "The Rule 61 procedure [...] cannot be considered a trial *in absentia*; it does not culminate in a verdict nor does it deprive the accused of the right to contest in person the charges brought against him before the Tribunal".

The rationale behind Rule 61 proceedings was to provide the international community with a stronger affirmation of the indictment. Once the Trial Chamber is satisfied that there are reasonable grounds to believe that the accused has committed all or any of the crimes charged in the indictment, it makes a finding to that effect[233].

The Trial Chamber shall then issue an international arrest warrant to be transmitted to the international authorities[234]. The purpose of an international arrest warrant is to render the accused an "international fugitive"[235]. Accordingly, a number of actions may be taken in order to arrest the accused and, moreover, to sanction the States that may be liable for the failure to arrest the accused[236].

Perhaps the most useful function of such proceedings can be found in Rule 61(E). Pursuant to this, the Trial Chamber shall certify that the failure to effect personal service of the indictment is attributed partially or totally to the failure or refusal of a State to co-operate with the Tribunal in accordance with

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have been allowed provided that certain conditions are met (See *Colozza and Rubinat v. Italy*, A 89 para 29 (1985)).

[231] See *Rajić Decision, ibid. supra* n. 226.

[232] *Prosecutor v. Nikolić*, Review of the Indictment pursuant to Rule 61, 20 October 1995, (IT-95-2-R61), para. 3.

[233] See Rule 61(C).

[234] See Rule 61(D).

[235] *Prosecutor v. Nikolić, ibid. supra* n. 232, para. 2, where Trial Chamber I held that: "In effect, all States in the international community will be bound, if the warrant is issued, to co-operate in searching for and arresting the accused, who would in consequence become an international fugitive".

[236] To that end, Rule 61(D) provides for the possibility of ordering a State or States to adopt provisional measures to freeze the assets of the accused without prejudice to the rights of third parties.

Article 29. Subsequently, the President, after consulting the Presiding Judges of the Chambers, shall notify the Security Council of this refusal or failure to co-operate[237].

In an attempt to evaluate the significance of Rule 61 proceedings it should be noted that it was certainly a novelty. No international tribunal ever possessed similar powers. It is important to note that the said procedure has never been used in the ICTR, and most probably will not be used again by the ICTY. The procedure itself has not been problematic in practice. Theoretically Rule 61 proceedings could bring in trials *in absentia* although as mentioned above those are precluded. It seems that it did not lead to this result because it does not preclude a subsequent trial in the presence of the accused. It might be considered a poor substitute for trials in the absence of the accused, and as a compromise between the civil and the common law systems. It is hard to tell whether such proceedings were effective or not[238]. Rule 61 was used particularly in the early stages of the Tribunal and was conceived as a means for effectuating the arrest of high ranking indicted criminals such as Karadžić and Mladić, who nevertheless remain at large. The greatest merit of a Rule 61 decision should be considered to be the fact that following such proceedings an international arrest warrant is transmitted to every State whereas otherwise it is only transmitted to the parties concerned. This is perhaps why it has facilitated the arrest of several indictees. Given the workload of the Tribunal though, it could be validly argued that the need for Rule 61 has been fulfilled –*i.e.* to

[237] Accordingly, the following cases have been reported to the Security Council: The Bosnian Serb administration in Pale, in the *Nikolić Case* (UN Doc. S/1995/910) and in the *Karadžić and Mladić Case* (notification by a letter from the President, dated 11 July 1996); the FRY (Serbia and Montenegro) in the *Prosecutor v. Mskšić, Radić and Šlijvačanin* (Vukovar Hospital) (24 April 1996) and *Karadžić and Mladić Case* (11 July 1996); the Federation of Bosnia and Herzegovina in the *Rajić Case* (16 September 1996, S/1996/763); the Republic of Croatia in the *Rajić Case, ibid.*

provide the Tribunal with indictees. It would be therefore safe to contend that it is not going to be used again in the future.

8.2 Failure to Co-operate with the ICC. Déjà Vu in a Treaty?

In the ICC different remedies apply to tackle failure to co-operate depending on whether non-co-operation involves State parties, non-party States that have undertaken an obligation to co-operate, intergovernmental organisations[239], or non-co-operation in case of SC referral[240].

Regarding State parties, upon non-compliance with a request to co-operate by the ICC, Article 87(7) of the Statute stipulates that the Court may inform either the Assembly of States Parties, or the SC if the case had originally been referred to the Court by the Council. The Article formalises the *Blaškić* decision[241] in the sense that the ICC may make a finding, but at the same time, as with the Tribunals, it does not allow the Court to go beyond such finding and impose measures of some sort.

The lack of a systematic approach is evident here. The general rule on failure to co-operate can be found in Article 87(7), whereas the more specialised issues of the failure to co-operate of non-parties to the Statute and intergovernmental organisations are dealt with in paragraphs which precede this general provision[242]. Article 87 is one of those provisions in the Statute which show that agreement on Part 9 was only reached at the very end of the

[238] For a very critical view of Rule 61 and its problems see, Niang (1999), 395-400.
[239] For the obligation to co-operate in each of these cases, see *supra* section 3.
[240] A discussion of referral can be found *infra* chapter 4.
[241] *Ibid. supra* n. 214.
[242] Article 87(5) ICC Statute.

conference at Rome, and thus there is lack of coherence. However, this should not be seen as hindering the regime created by the Statute.

If failure to co-operate relates to a case based on a situation originally referred to the ICC by the SC, then the Court's finding may be referred to the SC. The Council then may take action. This scenario would replicate the Tribunals' co-operation regime and enforcement would be in the hands of the UN, with all the problems this entails.

In all other cases involving State parties, the organ responsible for dealing with non-compliance and deciding on the action to be taken, is the ASP[243]. The nature of the action is, as with the Tribunals, not specified in the Statute. This is surprising given the treaty basis of the Court where rights and obligations are specifically mapped out each step of the way. The drafters here missed an important opportunity to enhance judicial certainty.

Reference to the ASP may also take place in the case of a non-party which has agreed to provide assistance under Article 87(5). In essence, the solution provided for in Article 87(5)(b) is identical to the one in 87(7). The only difference is that the Court cannot make a judicial finding but can only "inform"[244] the ASP or the SC of the non-co-operation.

Article 87 does not contain a paragraph to deal with failure to co-operate by a third State which has nevertheless accepted the jurisdiction of the ICC by virtue of Article 12(3). In the absence of a specific provision, and given that in this case the State abides by the provisions of the Statute for the purposes of a

[243] In that case, Article 112(2)(f) of the Statute comes into play.

[244] The choice of language is significant here. Stronger language is avoided so as not to impinge upon the rights of third parties which have chosen to provide assistance to the ICC. See Ciampi in Cassese, (2002), 1633. See also Kreß, and Prost, *ibid. supra* n.107, 1063, who also raise the issue whether in case of SC referral the ASP may be informed alongside the SC of the third State's non-co-operation, and correctly conclude that Article 12 of the UN Charter does not apply to the relationship between the ASP and the SC. *Ibid.*

particular case, its rights and duties are equated with those of States parties. Article 87(7) then would come into play.

With regard to intergovernmental organisations, the starting point, is that they are not under an obligation to co-operate and the parameters for their co-operation discussed earlier in this chapter should not be disregarded[245]. The lack of reference in Article 112(2)(f) to such organisations should not be taken however to mean that once the organisation has undertaken an explicit obligation to co-operate it can somehow avoid this[246].

Let us now turn to Article 112(2)(f) of the Statute, which provides the mechanism for dealing with non-co-operation. The ASP is entitled to request the compliance of the recalcitrant State and may condemn its failure to co-operate. In that case, the adoption of countermeasures should not be precluded[247]. Failure to co-operate with the ICC entails international responsibility for the State concerned, as failure to co-operate with the Court amounts to a breach of an obligation arising out of an international treaty. Such a breach is an internationally wrongful act, which entails State responsibility in international law[248]. A finding of State responsibility will not assist in securing co-operation with the Court in practice. The ICC is a criminal justice institution, which nevertheless has been created by a treaty. Breach of this treaty is unique in its own way, due to its criminal nature and the repercussions on issues of fairness for the accused for instance.

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[245] See *supra* section 3.3.

[246] In that sense, the *Blaškić* decision, *ibid. supra* n. 214 at para. 33, could be used here as well.

[247] Countermeasures may take the form of economic sanctions. See White, and Abass, in Evans (2003), 508 *et.seq.*

[248] See Articles 1 and 3 of Articles on State Responsibility of States for Internationally Wrongful Acts, adopted by the ILC on 10 August 2001: *Report of the International Law Commission, Fifty-third Session,* A/56/10, Chapter IV, annexed to GA Res 56/83 of 10 December 2001. For a commentary on these Articles see Crawford, (2002), 74-90.

Termination of the treaty with regard to the non-complying State would have been the normal penalty in treaty law[249]. Kreß and Prost, however, note that this should not be an option "given [the Statute's] integral nature and its overall humanitarian goal"[250]. This is an interesting argument based on the fact that the Rome Statute, albeit an international treaty, has a distinct character and application from that of normal treaty rules. In a case involving non-co-operation, it is in the interests of both the ICC and its parties to force the non-complying State to fulfil its obligations under the treaty. And this cannot be achieved by terminating the treaty for the said party.

An issue which then arises is whether and to what extent a State party is entitled to act individually to tackle failure to co-operate. Under 87(7) and 112(2)(f), collective action has to play the most prominent role. It is not clear however if a State may engage in individual action if the ASP does not reach the majority necessary to take action against the non-co-operating State. Customary law would not preclude such action[251] although the right to take counter-measures is generally confined to the "injured" State. The issue though which then arises is on what basis such action could be rationalised and no satisfactory solution can be put forward.

Another issue is whether the SC could intervene and adopt measures to tackle the failure to co-operate by a particular State, in a case which did not originate from a SC referral[252]. Although this possibility is not mentioned in the Statute, it is legally possible for the SC to step in when the situation

[249] Article 60 VCLT.
[250] Kreß, and Prost, *ibid. supra* n. 244, 1068.
[251] There is also a view which requests that the individual action does not go beyond the Assembly's recommendations. Following this approach no individual action would be accepted should the Assembly of States make no recommendation to that effect. See Kreß, and Prost, *ibid. supra* n. 250.
[252] This possibility is examined by Cassese, (2003), 360.

amounts to a threat or breach of the peace. The chances of this happening in practice, however, given the SC inaction in the case of the Tribunals where SC intervention constitutes the only means of enforcing co-operation, are pretty small.

Dealing with failure to co-operate in the ICC is not akin to the ICTY/ICTR. This is mainly due to the treaty basis of the ICC. States are in both systems the key players. And no system can be complete as long as there is no direct enforcement agency. It is true that resorting to States is a defeat of the international criminal justice system since its effectiveness is undoubtedly impaired. However, of the two, the ICC is not any more crippled than the Tribunals, as ultimately they both depend on State willingness to co-operate. And perhaps, given the position the SC has taken to date, State co-operation with the ICC might even be more forthcoming than the *ad hoc* Tribunals. The limitations of State consent and the need for State co-operation though should not be disregarded in practice.

9. Political Pressure

Exerting pressure by diplomatic means is potentially another way of encouraging co-operation. In any case, the political efficacy of enforcement action imposed by the SC will be only as strong as UN member States permit it to be. This is the essence of political effectiveness. States must work together to make sanctions work well. In previous SC enforcement actions, governments have not co-operated in uniform, co-ordinated and consistent ways; sanctions have been rendered less effective as instruments of

international enforcement. Political will is beyond doubt the key to effectively enforcing the work of the Tribunals.

A possible solution to the situation faced by the International Tribunals could be first of all to link the sanctions regime imposed on the States to the issue of non-compliance and, more generally, to publicise widely the failure to co-operate. This would encourage other members of the international community to exercise pressure of their own in order to achieve compliance with the Tribunals' orders. To that end, the Tribunals themselves should make use of the powers they possess to make sure that an outcry against the recalcitrant States is achieved. Wider use of presidential statements[253] and the statements of the Prosecutor[254] should therefore be encouraged. Moreover, since it has been proven in practice that any sanctions regime cannot be workable unless the States want it to be, another means for encouraging compliance could be to link the failure to co-operate with other functions of the State in question in the international arena[255]. For example, membership of an international organisation could be made conditional for the particular State on its co-operation with the Tribunal[256].

Political pressure might also be called upon at the ICC as well. Perhaps more so, as co-operation depends totally on the will of individual States. Using

[253] In fact, President McDonald has issued several statements calling on the co-operation with the Tribunals.

[254] See statement by Carla del Ponte of 6 October 2000 which touches upon issues of co-operation with the ICTY (PR/P.I.S./532-e).

[255] However, finding the right balance will always be a problem. From the deplorable pledging of aid by the US for the surrender of Slobodan Milošević to the "innocent" call by Cassese to ban former Yugoslavia from the Atlanta Olympics in 1996 (See ICTY Press Release CC/PIO/088-E, 13 June 1996), there has to be a middle way.

[256] For instance, membership of Croatia to the Council of Europe could have been linked to the issue of its co-operation with the Tribunal. Or, even in the event of an application for membership to the European Union its co-operation record could be examined.

political pressure appropriately might have the desired effects. However, the risk of abuse should not be disregarded.

Conclusion

Co-operation is important for both the Tribunals and the ICC. An examination of their respective Statutes reveals that the regimes differ significantly, at least in principle. From the absolute obligation to co-operate in the Tribunals, to the equally strong obligation for State parties, materialised in a somewhat more accommodating procedure, in the ICC, State co-operation is crucial for the effectiveness of the evolving international criminal justice system.

In a way the co-operation regimes of the relevant institutions replicate the principles of jurisdiction they are premised upon. Similar to the operation of the primacy principle, no guidance is given as to the specific steps that need to be taken by States to achieve co-operation with the Tribunals. State input is minimal in that respect, as the obligation is rigid and absolute. For the ICC, however, akin to complementarity, control is left almost exclusively to States. States are the main actors in both regimes and their willingness to offer co-operation is key to their overall efficiency. In order to achieve this, the ICTY and the ICTR have adopted a coercive system, which should work better. This is not so in practice. Despite the system's rigidity, States have consistently tried to evade co-operation, making the Tribunals adopt half measures. The ICC regime, bereft of SC authority, may appear weaker. However, its stratified co-operation, whereby competing requests are accommodated, postponement is

envisaged and ultimately refusal to co-operate in limited circumstances, might be beneficial in practice. At least States parties to it undertake an obligation to co-operate with the Court at the moment they choose to be bound by its Statute. This does not mean that co-operation will always be forthcoming, particularly from genuinely unwilling States.

In essence, both regimes are similar in the problems they face despite their different constitutional bases. Also the effectiveness of both regimes is comparable. What differs is the emphasis on State action. In the ICC consultation has replaced confrontation, which was the approach taken in the Tribunals.

Like Theseus, who inside the labyrinth was guided by Ariadne's thread to find his way out after his encounter with the mythical Minotaur, States are guided by the Statutes and the RPE towards achieving an effective co-operation regime. Whether jubilation awaits at the other end, is a hard question to answer. The pointers are present in the Statutes, but it all depends on the States themselves to achieve the desired effect and give meaning to the provisions of the law.

Chapter Four

Propitiating Zeus: States, International Criminal Courts and the Security Council

International criminal justice is founded on a number of relationships, one of which involves the Security Council (SC). The focus so far has been on how States interact with the Tribunals and the Court. The present chapter aims to demonstrate that the relationship between the SC and the Tribunals or the ICC influences the interface between national and international legal orders. The SC, apart from being the principal organ of the United Nations entrusted with the maintenance of international peace and security[1], is also a factor capable of changing the dynamics of international criminal adjudication, as it may replace, supplement or negate State volition.

In international criminal justice, the SC serves as a catalyst between States and institutions. First, because the SC has played an important role in the establishment of the Tribunals, or in the case of the ICC, because the Statute envisages a significant role for the SC, which will affect the Court's functioning. In both instances, State interaction with the institutions is affected by SC action in the field of international criminal justice.

This is not the appropriate forum to examine the structure of the SC and its division of power, but mention of the politics in the Council will be made in those instances where it has clearly affected or is likely to affect the approach taken with regard to the Tribunals and/or the ICC. Moreover, wider collective security issues, although fascinating, will not be discussed in this chapter. The SC's role largely revolves around three major axes: (i) involvement in the

creation or termination of some of the institutions, (ii) possibility of intervention in their operation, and (iii) enhancement of State co-operation. The latter has already been dealt with in the previous chapter. In any case, the relationship between the SC and the Tribunals and the Court will be seen under the prism of the impact the SC has on the inter-relationship between national legal orders and the international criminal justice system, which is the main relationship examined in this thesis.

1. Peace v. Justice? Or Peace through Justice?

The first issue that merits some attention is the relationship between peace and justice, not least because of UN involvement in the field of justice[2]. In order to appreciate the interaction between national and international orders, it is important to emphasise that both the Tribunals and the Court do not operate in a vacuum. They co-exist with national courts. Moreover, they operate in situations where peace has been disrupted. In such situations, the SC would most certainly have taken action as well. More importantly, the UN itself has moved towards the direction of justice.

In the case of the Tribunals, the link between peace and justice can be traced back to their establishment[3]. According to the Tribunals' first

[1] Article 24 UN Charter.
[2] White, (2002), 48-58.
[3] The representative of Hungary noted in the discussion of SC Res. 808: "The way the international community deals with questions relating to the events in the former Yugoslavia will leave a profound mark on the future of that part of Europe, and beyond. It will make either easier or more painful, or even impossible, the healing of the psychological wounds the conflict has inflicted upon peoples, who for centuries have lived together in harmony and good neighbourliness, regardless of what we may hear today from certain parties to the conflict. We cannot forget that the peoples, the ethnic communities and the national minorities of Central and Eastern Europe are watching us and following our work with close attention". (Provisional Verbatim Record of 22 February 1993, UN SCOR, 48th Sess., 3175th mtg. at 8, 19-20, UN Doc.

Prosecutor, Richard Goldstone, the decision for their creation "was necessarily founded upon the recognition of a direct link between peace and justice"[4]. Of relevance is also the link between the life of the Tribunal and the restoration of peace in the former Yugoslavia[5]. For the ICC, reference to peace and justice can be found in the preamble[6] and arguably, in the provisions describing the relationship with the SC[7].

There are several reasons put forward in favour of the proposition that justice leads to an enduring peace[8]. First, trials help purge threatening leaders and rehabilitate renegade States[9]. In the former case, so long as the leaders remain in power they are likely to cause instability. In the latter however, the value of trials should be seen only as part of the social process of reformation of a rogue State.

Second, and quite significantly, through justice, guilt is individualised[10]. It is important, as Meron puts it, to put the blame on individual perpetrators, instead of an entire nation, "if there is to be any real

S/PV.3175). Moreover, Slovenia maintained that "[T]he establishment of such a tribunal is a necessary and very important step, given the fact that those responsible for such crimes would be judged by an impartial judicial body as well as the fact that it could also contribute positively to the finding of solutions for the restoration of peace in the above-mentioned regions". (Letter from the Permanent Representative of Slovenia to the United Nations, to the SG, UN Doc. S/25652 (22 April 1993)).

[4] Goldstone, (1996), 486.

[5] Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, UN SCOR, 42d Sess., UN Doc. S/25704 (1993), para. 28: "As an enforcement measure under Chapter VII, however, the life span of the international tribunal would be linked to the restoration and maintenance of international peace and the security in the territory of the former Yugoslavia, and Security Council decisions related thereto". Note, however, how tenuous this link is in SC Res. 1503 (2003) and 1534 (2004) which outline the Tribunals' completion strategy. Reference to the Tribunals' contribution to lasting peace and security is made only in the Preamble and not the operative parts of the Resolutions.

[6] See Preambular para. 3.

[7] See *infra*.

[8] For a critical view see Reisman, (1998), 46: "The wars in former Yugoslavia provide acutely painful examples of the limited utility of war crimes tribunals for stopping wars and making peace".

[9] Bass, (2000), 287-289, 295-296.

[10] Goldstone, *ibid. supra* n. 4, 488.

hope of defusing ethnic tensions in th[e] region"[11]. However, the problem with this approach, is where to draw the circle of guilt[12] and some selectivity is inevitable. In practical terms that could range from a handful of people to a substantial number, all depending on a wide or narrow interpretation of whom to indict.

Third, public and official acknowledgement is brought to the victims assisting their healing process[13]. This "catharsis"[14] is perhaps the most obvious of the reasons presented here.

Fourth, an accurate record of the history is achieved[15]. Few, for instance, would dismiss that the Holocaust ever occurred, for the Nuremberg Trials provide a comprehensive exposition of the facts and an accurate telling of the truth. And this can be applied also in the context of the *ad hoc* Tribunals and the Court. Inevitably, however, the historical record can only be accurate within the limitations of the particular case before the Court.

Fifth, criminal conduct is better controlled through policing and able criminal justice[16]. Just like domestic criminal law, the same holds true for the commission of international crimes.

And this leads to the final point, which is deterrence[17]. And deterrence involves two aspects: specific deterrence, which refers to the perpetrators of certain crimes and aims at deterring them from repeating the crimes they have already committed and general deterrence, which aims at discouraging criminal

[11] Meron, (1993), 134. For a critical view on the issue of individualisation of guilt see Alvarez, (1998), 2032-2035 and 2082-2089.
[12] Bass, *ibid. supra* n. 9, 297.
[13] Goldstone, *ibid. supra* n. 4, 489.
[14] Williams, and Scharf, (2002), 20-21.
[15] Goldstone, *Ibid. supra* n. 13.
[16] *Ibid.*, 490.
[17] *Ibid.*

behaviour of the society at large[18]. However, it is difficult to affirm that the Tribunals or the Court have or will have a deterrent effect since there can be no empirical evidence to support a claim that a crime has not been committed due to the existence of the said institutions.

The above justifications are by no means exhaustive. Nor can all of them be verified in practice. They should be treated as indications on the wider question of the interplay between peace and justice.

Having explored some justifications behind the notion that justice brings peace, it is worth succinctly examining whether negotiating peace and justice are either mutually exclusive or, in fact, complementary. The problem which arises is how to reconcile the two. No peace without justice is certainly an appealing idea. However, in the context of complex peace negotiations it is important sometimes to delay justice for peace[19]. This does not mean that justice is denied altogether. It is simply postponed to a slightly later point in time.

Of the possible examples of peace and justice, the case of Yugoslavia is most indicative. Germany could have been another example, where this premise could have been tested. But, in the aftermath of WWII Germany was a defeated country and the link between the Nuremberg trials and peace is not that evident. To the extent that Nuremberg has helped to build Germany as it is today, it could be argued that the link is present[20]. The Dayton Peace Agreement, which followed the establishment of the Tribunal, provides a clearer indication of the link between peace in the making and accountability. In this case, persons indictable by the Tribunal were the key players in the

[18] Akhavan, (1998), 746.
[19] Anonymous, (1996), 256-258.

negotiating process[21]. It was soon realised that no viable peace could be achieved without their participation and, at least at that stage, peace seemed more important than justice[22].

A somewhat different view suggests that the Tribunal could be used as a bargaining chip in order for peace negotiations to succeed[23]. This position though is likely to undermine the aims of the Tribunals and compromise their success. Whatever the answer to this question, it is worth emphasising that justice should be at the forefront. It may be delayed, but should not be forever postponed. No lasting peace may be achieved without justice.

Coming back to the former Yugoslavia, it may be argued that the Tribunals failed to bring peace on the ground because at least two of the most serious events in the Yugoslav conflict occurred even though the ICTY was up and running. The Šrebreniča massacre and the human rights abuses in Kosovo took place despite the operation of the Tribunal. This argument, although factually correct, should not be seen as evidence that the ICTY has failed in that respect. The return of peace is definitely a process and, arguably, a long one. And during this period, possible backlashes are unavoidable. Even incidents of the scale and intensity of the ones just described should not be considered as proof that international criminal justice does not work. In any way, it is very difficult to measure the success or failure of the Tribunals in this area. The merits of the Tribunals, on which their success can be identified, should be seen as a whole, and not fragmented to the various aspects of their

[20] Cf. Reisman, *ibid. supra* n. 8, 49.
[21] And it would have been unrealistic to expect that they would agree to a treaty providing for their surrender to the Tribunal.
[22] Shuett, (1997), 101.
[23] D'Amato, (1994), 500; Cf. Ferencz, (1994), 715; Akhavan, (1995), 92; See also Mak, (1995), 556.

operation. In the quest for peace through justice, there is no method to be followed which would give results, and it is up to the historian of the future to judge the efficacy of the measures taken. The division of peace into negative, that is the absence of war, and positive peace, that is a more sophisticated notion of peace tackling underlying problems[24], is helpful in the case of the Tribunals. The Tribunals have succeeded in bringing negative peace to the former Yugoslavia. As to positive peace, international criminal justice instruments should not be seen as a *deus ex machina* that would instantly lead to peace but as part of a process which, if it works, will provide the international community with lasting results in the long term.

Interestingly, but also quite pragmatically, the first president of the ICTY, gave his own frank assessment of the Tribunal's ten year operation on the issue of peace and justice. His view merits full quotation: "The ICTY has met the challenge. True, it has not deterred persons from committing further crimes (in July 1995, when the Srebrenica massacre occurred, the Tribunal had already been in existence for 21 months). Nor has it significantly contributed to restoring peace or to reconciling the opposing ethnic and religious groups. It has, nevertheless, fulfilled at least the hope that so many persons had pinned on it: to do justice"[25].

[24] On the notion of positive peace see White, *ibid. supra* n. 2, 48-51.
[25] Cassese, (2004), 596-597.

2. Laying the Foundations for Interaction: The Creation of International Judicial Institutions

The first broad aspect of SC involvement in international criminal law can be found in the creation of international criminal courts, which is a newly assumed responsibility by the SC. Examining the creation of such institutions is important, as this is the first step towards exploring the SC's role in the area of justice, which, in turn, affects the interaction between States and the said institutions. Without SC involvement in this area, the relationship between national and international jurisdictions would not exist, at least with regard to some of the institutions.

2.1 Creating *ad hoc* Tribunals: A SC Prerogative?

The creation of both the ICTY and the ICTR constitutes, beyond doubt, an unprecedented function performed by the SC. Before examining the ability of the SC to proceed with the Tribunals' establishment and the lawfulness of their creation, the issue of whether the UN General Assembly would have been the most appropriate forum for such action has first to be addressed[26]. The GA is, beyond doubt, the most representative body within the UN family. A democratic sentiment towards the creation of a Tribunal would require the GA's active participation in the process[27]. However, there are inherent

[26] In support of the view that issues of justice are best dealt with by the GA see Koskenniemi, (1995), 325.

[27] It comes of no surprise that Slobodan Milošević in his initial appearance before the ICTY on 3 July 2001 invoked the fact that the Tribunal was not created by the GA as a reason for not being legally established. He maintained: "I consider this Tribunal a false Tribunal and the indictment a false indictment. It is illegal being not appointed by the UN General Assembly [...]". See transcript of *Milošević et al. Case,* (IT-99-37), 2.

disadvantages in involving the GA in the creation of Tribunals, the most important being the fact that the GA can only make recommendations, which are not binding on the Member States[28]. Perhaps to assuage concerns towards non-participation in the Tribunals' creation, the role of the GA was not disregarded. The election of the Tribunals' judges and the approval of their budgets[29] as well as review of their Annual Reports are left to the GA[30]. However, one cannot fail to notice that those functions are declaratory rather than substantial. The most important aspects of the operation of the Tribunals are left to the SC.

It would have been interesting to examine the relationship between domestic and international legal orders had the Tribunals been created by the GA. Although this is a purely hypothetical issue, it is possible that a more consensual system, lacking the coercive element the SC brings into the relationship between the two regimes, would have been chosen, which would perhaps have been closer to the one envisaged for the ICC.

[28] Article 10 UN Charter.

[29] This particular issue has cause problems in practice. Article 32 of the Statute provides that the expenses of the Tribunal "shall be borne by the regular budget of the United Nations in accordance with Article 17 of the Charter of the United Nations". Moreover, the SG stated in his Report *supra* n. 5 that "this provision is without prejudice to the role of the General Assembly in the administrative and budgetary aspects of the question of establishing the Tribunal (S/25704, para. 21). However, a note by the UN Secretariat to the GA concerning the issue provides: "In the view of the Secretary-General... there was no legal bar to the Security Council reaching its own conclusions as to the appropriate financing of the International Tribunal and including a provision on the matter in the Statute which it adopted. Nevertheless, such conclusions are without prejudice to the authority of the General Assembly under the Charter to consider and approve the budget of the Organization and to apportion the expenses of the Organization among its members". (A/47/1002, para. 12). The GA voiced its discontent when it: "[e]xpress[ed] concern that advice given to the Security Council by the Secretariat on the nature of the financing of the International Tribunal did not respect the role of the General Assembly as set out in Article 17 of the Charter". (A/57/1014, para. 3).

2.2 The Legality of the Tribunals' Establishment

The interaction between States and the Tribunals would have been potentially different had the latter not been established legally. It would have been doubtful whether States would have to comply, for instance, with Tribunals' orders, had they been based on a questionable authority. The lawfulness of the Tribunals' establishment should therefore be examined, before exploring their operation on the international scene.

It is suggested that the creation of the two Tribunals by the means of Chapter VII Resolutions be accepted as lawful. As mentioned already, the SC has primacy in dealing with situations that threaten international peace and security. Should a threat or breach of peace occur, the SC may decide which of the measures prescribed in Chapter VII of the UN Charter have to be taken in order to tackle the situation effectively. Among the possible responses, Article 41 of the Charter which deals with measures short of the use of force, is of particular significance.

The situations taking place in the former Yugoslavia and Rwanda amounted to threats to international peace and security. The SC determined that widespread violations of humanitarian law, including reports on mass killings and the practice of ethnic cleansing amounted to a threat to the international peace and security in the former Yugoslavia[31]. In Rwanda, the Council explicitly mentioned in its Resolution 955[32] that the genocide and other

[30] See Articles 13, 32, 34 and 12, 30, 32 of the ICTY and the ICTR Statutes respectively.
[31] S/RES/808 (1993), 22 February 2003, recital 7. Cf. Brownlie, (2003), 575 who maintains that the creation of the ICTY "was associated with a specialized political campaign to destabilize the multi-ethnic State of Yugoslavia, with the ultimate aim of bringing about 'regime change' in Serbia".
[32] S/RES/955 (1994), 8 November 1994, recital 5.

systematic, widespread and flagrant violations of international humanitarian law taking place in Rwanda constituted a threat to international peace and security. It follows that the SC was entitled to take measures for the restoration of the endangered peace.

The creation of the two *ad hoc* Tribunals could be justified under the provision of Article 41 of the UN Charter as constituting a measure short of the use of armed force. This has been acknowledged by both the Report produced by the SG, which led to the creation of the ICTY[33], and the Appeals Chamber in the *Tadić Case*[34]. Although there is no explicit authorisation to create a Tribunal in the above-mentioned provision, it has to be accepted that such a possibility is not ruled out in order for the SC to fulfil its goals. This is evidenced from the fact that the list of measures in Article 41 is not exhaustive. Had the drafters envisaged that the measures in Article 41 were exhaustive, the language of the said Article would have been different, specifically providing for exclusivity of the measures therein[35]. Nonetheless, this does not mean that the discretion of the Security Council is unlimited. Any action pursuant to Article 41 of the Charter has to be consistent with Article 24[36]. However, the only real limitation is that the measures taken should not involve the use of force.

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[33] "The International Tribunal should be established by a decision of the Security Council on the basis of Chapter VII... Such a decision would constitute a measure to maintain or restore international peace and security, following the requisite determination of the existence of a threat to the peace, breach of the peace or act of aggression" *ibid. supra* n. 5, 7.

[34] *Prosecutor v. Tadić*, Appeals Chamber, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, (IT-94-1-AR72), para. 36: "The establishment of the International Tribunal falls squarely within the powers of the Security Council under Article 41".

[35] Cf. Sapru, (1997), 340 who maintains that the context of Article 41 should be seen as exclusive which when read together with Article 39 should provide for a limitation –by means of the specific measures, to the otherwise unrestricted SC power.

[36] This has been interpreted to mean that the SC cannot in principle, act arbitrarily and unfettered by any restraints and "in violation of peremptory norms of the laws of war and /or

Under this premise, it has been accepted that the creation of the Tribunals may be rationalised. A comparison though of the SC action between creating international Tribunals and imposing sanctions under Article 41 should be attempted. It may be that they both have the same legal basis *i.e.* Article 41 of the UN Charter. However, they differ substantially in their effects. Economic sanctions, when inflicted upon a State, are binding in international law on the basis of UN law. This means that the State in question has to take action in order to be consistent with the obligations it has undertaken when entering the UN system[37]. There is a view according to which the wording of the Article, namely the fact that the Security Council may *call upon* the Members of the United Nations to apply such measures, suggests that it is within the discretion of the State to comply or not[38].

This in turn may lead to the argument that economic sanctions do not have direct effect before national courts. This point precisely depends on the national legal system in question[39].

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human rights" and that "its actions must generally be proportionate to the aims sought". See Alvarez, "Judging the Security Council" (1996), 17.

[37] See the first edition of Goodrich, and Hambro, (1946), where it is stated in 246-247 that "[l]e mot inviter [*call upon*], paraît [...] être employé dans le même sens qu' à l' article 40, à savoir selui d'une injonction. Le principe sur lequel se fondent les dispositions de la Charte, relatives à la sécurité, en tant qu' elles se distinguent de celles du Pacte de la Société des Nations, serait réduit à néant si, une fois prise la décision du Conseil de Sécurité de mettre à exécution des mesures n' impliquant pas l'emploi de la force armée, on s' en remettait à la discrétion des membres de l' Organisation libres d' appliquer ou non ces mesures. A l' appui de cette interprétation, vient aussi le fait que l'article 41 constitue une application du principe général énoncé à l'article 39, en vertu duquel le Conseil de Sécurité a le pouvoir de décider quelles mesures seront prises connformément aux articles 41 et 42 pour maintenir ou rétablir la paix et la sécurité internationales".

[38] Cot, and Pellet, (1991), 695 who maintain that such measures are mandatory by virtue of Articles 25, 48 and 49 of the Charter.

[39] As Frowein, and Krisch point out in their contribution in Simma (2002), 747, the United States had enacted laws which violated the embargo against Rhodesia and national courts applied them despite the binding SC Resolutions, stipulating at the same time that no individual rights result from Article 41. Similarly, they refer also to Australia and Germany which both require domestic implementation for SC Resolutions to become part of the national legal system. *Ibid.*

However, this is not the case with the Tribunals and their primacy, which is the external function of their creation by means of SC Resolutions. National courts have a duty to defer once such a request is made to the International Tribunals. Compliance with primacy is, therefore, non-discretionary. At this point, an objection could be raised as to whether the SC can take action which directly involves individuals[40]. It is accepted that situations involving individuals may also threaten international peace and security[41]. As to the nature of the "direct effect" the Tribunals' primacy entails, an analogy may be attempted with a system where direct effect is prominent; that of the EU[42]. The objective of direct effect in EC Law was to promote uniform application and enforcement[43]. Arguably, this is also the case in international criminal law, embodied in the adoption of primacy. However, in the European system the invocability of direct effect rests with the individual and no discretion is reserved for the courts[44]. This is not the case when applying primacy. As seen already in chapter two, the Tribunals decide themselves in which cases they choose to assert their primacy and no discretion is left to States, let alone to individuals who, apart from being defendants, do not otherwise participate in the process. Although the primacy of the international Tribunals differs in kind from other measures which the Council may take in pursuance of its tasks under Article 41, it does not have direct

[40] For the both the ICTY and the ICTR deal with crimes committed by individuals and not by States.
[41] Morris, and Scharf, (1998), 86, where it is stated that similar situations arose in Haiti, Libya, South Africa.
[42] On the direct effect in the European Law see generally Craig, and De Búrca, (2003), 178-211.
[43] This can be easily seen through the EC directives whereby the Union is trying to create a level playing field by setting minimum standards among the member states.
[44] *Van Gend en Loos v. Nederlandse Administratie der Belastingen* (Case 26/62) [1963] ECR 1; *Van Duyn v. Home Office* (Case 41/71) [1974] ECR 1337; *Defrenne v. SABENA* (Case 43/75) [1976] ECR 455.

effect akin to the one perceived in more refined systems such as the EU. Nevertheless, it should be emphasised that although States are obliged to comply with an assertion of primacy, the practical application of primacy in the domestic sphere is left to States which have to enact implementing legislation to enable the execution of a request based on the Tribunals' primacy[45]. In that sense, although primacy is directly applicable, it is not directly effective.

Sanctions, in general, not only differ from the creation of the two *ad hoc* Tribunals in kind, but also in their effects in practice. Other forms of sanctions are fundamentally different in terms of direct applicability and, more generally, in terms of legal effect despite having the same legal foundation.

Having established that creating a Tribunal falls within the measures allowed under Article 41 of the Charter, the creation of the Tribunals by the SC as subsidiary organs, and the problems which arise therefrom, should be examined. The Charter provides on two occasions for the establishment of subsidiary organs. Namely, in Article 7(2) there is the general authority to establish subsidiary organs and in Article 29 the specific authority for the purpose of carrying out the functions of the Council. In order for a subsidiary organ to be established, the principal organ has to delegate to it certain powers, which the principal organ possesses. Those powers have to be express or implied. Some question the power of the SC to create a Tribunal which possesses judicial powers that the SC itself does not have[46]. The SC, being a political body, could not itself have tried the alleged perpetrators for the atrocities that occurred in the former Yugoslavia and Rwanda. It therefore proceeded with creating the *ad hoc* Tribunals. Even if the SC does not have

[45] Benvenuti, in Lattanzi, and Schabas, (1999), 34-36.
[46] Kolodkin, (1994), 393.

these powers, it does, nevertheless, possess the implied power to create a subsidiary organ which would be "necessary for the effective exercise by the principal of powers in the area which it operates", *i.e.* the maintenance of international peace and security[47]. This has been recognised by the Appeals Chamber of the ICTY in the *Tadić Case* as follows[48]:

> The establishment of the International Tribunal by the Security Council does not signify, however, that the Security Council has delegated to it some of its own functions or the exercize of some of its own powers. Nor does it mean, in reverse, that the Security Council was usurping for itself part of a judicial function which does not belong to it but to other organs of the United Nations according to the Charter. The Security Council has resorted to the establishment of a judicial organ in the form of an international criminal tribunal as an instrument for the exercize of its own principal function of the maintenance of peace and security, *i.e.*, as a measure contributing to the restoration and maintenance of peace in the former Yugoslavia.

In the recent past, the SC established subsidiary organs in accordance with Article 29 of the UN Charter, using Chapter VII Resolutions with regard to restoring and maintaining the international peace and security[49]. The same legal basis is used for the Tribunals' creation[50]. According to one view, however, since the SC does not itself possess judicial powers, the creation of

[47] Sarooshi, (1999), 94.
[48] See *Prosecutor v. Tadić*, *ibid. supra* n. 34, para. 38.
[49] The SG makes explicit reference to SC Res. 687 (1991), concerning the situation between Iraq and Kuwait, by which (1) the Boundary Demarcation Commission, (2) the Special Commission and (3) the Compensation Commission were created. Moreover, a number of quasi-judicial bodies have been established in the same way in many other cases known as "sanctions committees" which render interpretations of SC sanctions resolutions on a case-by-case basis. *Ibid. supra* n. 5, 8. See Scharf and Dorosin, (1993), 771.
[50] For the ICTY it is stated: "In this particular case, the Security Council would be establishing, as an enforcement measure under Chapter VII, a subsidiary organ within the terms of Article 29 of the Charter, but one of a judicial nature". (S/25704, 8). See similar approach for the ICTR in S/19995/134, para. 8.

the Tribunals has been pursuant to the general authority enshrined in Article 7(2) and not in Article 29[51].

The International Court of Justice in the *Case Concerning the Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*[52] confirmed the power of a principal organ of the United Nations to establish "an independent and truly judicial body". In this case the ICJ confirmed that the UN GA had the power to establish a judicial organ endowed with judicial functions in order to regulate staff relations. And all this, despite the absence of any express provision in the Charter and despite the fact the principal organ cannot itself perform judicial functions, and notwithstanding that the GA could, in fact, abolish the judicial body by revoking its Statute at some point in the future[53]. Furthermore, in the *Application for Review Case*[54], the World Court found that the GA possessed the power to act in the field of staff administration and was therefore competent to establish a body with judicial functions which it could not itself exercise under the Charter[55]. However, the invocation of these two cases, is not free of doubt. It is important to note that the above cases relate to the creation of an internal body. By contrast, the two Tribunals do not deal with issues internal to the United

[51] Sarooshi, *ibid. supra* n. 47, 98. According to this author the SG seems to have overlooked this slight difference when in his report reference is made to Article 29 for the creation of the Tribunals. Or, more accurately, the SG might simply have intended to underline the difference of this particular Tribunal from the other judicial organs established pursuant to Article 7(2), in the sense that the *ad hoc* Tribunals are "an Article 29-type subsidiary organ of the Council". *Ibid.* fn. 58.
[52] ICJ Reps. 1954, 47.
[53] *Ibid.*, 53, 56 and 61.
[54] ICJ Reps. 1973, 166.
[55] Note however the dissenting opinions: *per* Judge Alvarez, *ibidem.*, 70; *per* Judge Hackworth *ibidem.*, 78-9; *per* Judge Onyeama, *ibidem.*, 226; *per* Judge Morozov, *ibidem.*, 298.

Nations; they have external competence instead, since their jurisdictional primacy affects each and every State[56].

Immediately after the issuing of the SG's report, the Federal Republic of Yugoslavia (Serbia and Montenegro) questioned the Council's authority to establish an international Tribunal, by sending a letter to the SG[57]. In particular, the focus was on the fact that according to its view, the SC could not establish the Yugoslav Tribunal under Article 29 of the Charter as a subsidiary organ[58]. In the case of the ICTR, unlike the FRY, Rwanda did not challenge the legality of its establishment. On the contrary, it requested the creation of such a Tribunal[59]. In the end, however, Rwanda, which happened to be a member of the SC at the time, voted against the adoption of SC Resolution 955 for different reasons. Moreover, at the time of the adoption of ICTR's Statute, two of the members of the SC expressed doubts on the lawfulness of the Tribunal[60].

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[56] See Greenwood, (1998), 103-104.

[57] Letter Dated 19 May 1993 from the Chargé d' affaires, a.i., of the Permanent Mission of Yugoslavia to the United Nations Addressed to the Secretary-General, UN Doc. A/48/170-S/25801* (*reissued for technical reasons) (1993).

[58] "No independent tribunal, can be subsidiary organ of any body, including the Security Council"; *Ibid.*, 3.

[59] Such a request was contained in a *Letter Dated 18 September 1994 from the Permanent Representative of Rwanda to the United Nations Addressed to the President of the Security Council*, 4, UN Doc. S/1995/1115 (1995) requesting "the international community to reinforce government efforts by: ...(c) Setting up as soon as possible an international tribunal to try the criminals".

[60] The representative of Brazil stated the following:

"... Brazil is not convinced that the competence to establish and/or to exercise an international criminal jurisdiction is among the constitutional powers of the Security Council... The authority of the Security Council is not self-constructed. It originates from the delegation of powers conferred upon it by the whole membership of the Organisation under Article 14(1) of the Charter. For that very reason, the Council's powers and responsibilities under the Charter should be strictly construed, and cannot be created, recreated or reinterpreted by decisions of the Council itself...

The Security Council's responsibilities lie not in the judicial or institution-building field, but in the maintenance of international peace and security. Therefore, the invocation of Chapter VII of the Charter for the purpose of establishing an international tribunal goes, in our view, beyond the competence of the Council as clearly defined in the Charter". (See Provisional Verbatim Record of the Security Council, Forty-Ninth Year, 3453d Mtg., pg. 9, S/PV/3453 (8 Nov. 1994), 11.

Moreover, China stated that "people still have doubts and worries about the way in which an international tribunal is established by a Security Council Resolution under Chapter VII.... In principle, China is not in favour of invoking at will Chapter VII of the Charter to establish an

In addition, the issue of the constitutionality of the two Tribunals is also reflected in their jurisprudence. The first time the issue of the SC's legal authority to establish the Tribunal arose, was when the first case was brought before the ICTY – that of Dusko Tadić[61]. He challenged the validity of the Tribunal on various grounds[62]. Among those grounds, the challenge that the Tribunal has not been "established by law" stands out. The Appeals Chamber, held that this requirement was relevant only to national courts and not to international courts because a legislature does not exist in the latter case[63]. Moreover, it maintained that "established by law" might refer to the creation by a non-legislative body which has a limited power to take binding decisions[64]. Neither of the two responses given seems entirely convincing. The former assumes that the standards used in international law are different to those used in national law and the latter in fact gives an answer by using what is contested, *i.e.* whether the SC is authorised to create *ad hoc* Tribunals.

The legality of the establishment of the ICTR was also raised in the course of the proceedings with regard to Joseph Kanyabashi[65]. Trial Chamber II decided to discuss the motion even though it had been filed after the deadline for such motions[66]. It maintained that some of the issues raised had been dealt with by the ICTY's Appeals Chamber in the *Tadić Case* and upheld the

international tribunal through the adoption of a Security Council resolution. That position, which we stated last year...remains unchanged". *Ibid.*, 8.

[61] *Prosecutor v. Tadić,* Trial Chamber, Decision on the Defence Motion: Jurisdiction of the Tribunal, 10 August 1995, (IT-94-1-T); *Prosecutor v. Tadić, ibid. supra* n. 34.

[62] Decision of the Trial Chamber *ibid.*, para. 2. Some of those grounds have been addressed throughout the chapter in the relevant sections and do not need to be repeated here.

[63] Tadić Appeal, *ibid. supra* n. 34, para. 43.

[64] *Ibid.*, para. 44.

[65] *Prosecutor v. Kanyabashi,* Trial Chamber, Decision on the Defence Motion on Jurisdiction, 18 June 1997, (ICTR-96-15-T), 4.

[66] *Ibid.* at 3.

position taken there by rejecting the arguments put forward by the defence counsel[67].

Moreover, the issue of whether the SC possessed the legal powers to create an *ad hoc* international criminal Tribunal arose before national courts in relation to Elizaphan Ntakirutimana, a seventy-one year old Rwandan Hutu living in the United States, who was accused of organising the 1994 slaughter of five to ten thousand Tutsis[68]. When he was indicted by the ICTR, and a transfer request was made to the Texan authorities, his counsel argued that the ICTR was not properly formed since the SC acted *ultra vires* with regard to Chapter VII of the Charter when establishing it[69]. After three years of legal procedures, the American Secretary of State Ms Albright signed the decision authorising Ntakirutimana's transfer to the Tribunal[70].

Despite the above challenges, it is clear that there is enough support for the view that the Tribunals have been legally created. The foundations of their relationship with national courts are sound.

2.3 The Creation of the Sierra Leone Special Court

Although an examination of the SLSC is not in the scope of this study, a brief reference to the SC's role leading to the creation of this unique court is

[67] It stated that it "respects the persuasive authority of the decision of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia and has taken careful note or the decision rendered by the Appeals chamber in the *Tadić* case"; *Ibid.* at 4.
[68] See also *supra* chapter 3.
[69] Memorandum in Opposition to Surrender of Pastor Elizaphan Ntakirutimana, *In Re* the Surrender of Elizaphan Ntakirutimana, Misc. No. L-96-005 (S.D. Texas), 5 March 1997, at 20-24; Second Memorandum in Opposition to Surrender of Pastor Elizaphan Ntakirutimana, *In Re* The Surrender of Elizaphan Ntakirutimana, Misc. No. L-96-005 (S.D. Texas), 5 May 1997, at 1-6; The US Government attorneys contested the above mentioned arguments. See Reply Memorandum in Support of the Surrender of Elizaphan Ntakirutimana, *In Re* The Surrender of Elizaphan Ntakirutimana, Misc. No. L-96-005 (S.D. Texas), April 1997, at 8-9.

essential as a it constitutes a stepping stone to the ICC. The SLSC differs significantly from the *ad hoc* Tribunals mainly because of its *sui generis* nature, which combines elements of both a national and an international Court[71].

The SLSC was created following a request for assistance from the Sierra Leonean government to the SG of the UN[72] which led to the adoption of Resolution 1315 by the SC. By virtue of this Resolution, and by linking accountability for the atrocities occurred in Sierra Leone with peace, the SC asked the SG to produce a report which eventually led to an agreement that created the SLSC[73].

The SC has therefore played a major role in the stages before the establishment of the SLSC. Quite similarly to the *ad hoc* Tribunals, it linked peace to justice and suggested the creation of a Special Court. The difference though lies in the role of the Sierra Leonean government in the Special Court's establishment. Besides having actively requested that a court be established, which is reminiscent of the Rwandan position at least at the outset, consultations with the government were central in the process of its establishment. This element of explicit consent, is the one which mainly differentiates the SLSC from its *ad hoc* counterparts and brings it closer to the ICC. And since it was created after the Statute was complete, it is evidence of the impact the ICC Statute had on the SLSC.

[70] See ICTR/INFO-9-2-225EN, Arusha, 25 March 2000.
[71] See *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone,* UN Doc. S/2000/915, Annex and Enclosure.
[72] S/2000/786.

2.4 The Creation of the ICC

The SC had no direct involvement in the creation of the ICC, as it is a product of an international treaty which was concluded at a conference convened by the UN in Rome in 1998. As a result of this conference, the ICC Treaty was concluded on the 17th of July of that year[74].

2.5 Appraisal

It is evident from the above that the SC played a greater role in the creation of the ICTY and the ICTR, rather than the institutions which followed. The link between the creation of the *ad hoc* Tribunals and the restoration of peace in the territory of the former Yugoslavia and Rwanda was conducive to the SC having an enhanced role. In the SLSC, the SC's role seems to be slightly "curved", in the sense that it is not as absolute as in the two Tribunals, since the relevant State contributed to the process. In the ICC, the SC played no active role in the formation of the new Court. This process might be indicative of a transformation in the international scene. From the "hegemony" of the SC, to co-operation with the national sphere in the form of consultation, to the "emancipation" of States, the Council's role has changed significantly in terms of its involvement in the international criminal justice system. Its active role seems to be subject to a more consensual system, manifested primarily by the creation of the permanent ICC.

[73] Cryer, (2001), 436.
[74] A/Conf.138/9, 1998, 37 *ILM* (1998), 999.

3. The Intervention of the SC in the Operation of the International Criminal Justice System

Another broad aspect of the SC's role is its potential intervention in the operation of the Tribunals and the Court. Depending on the degree of SC intervention, this aspect of its function has potentially a greater impact on the relationship between national and international orders.

3.1 The SC and the *ad hoc* Tribunals

Before proceeding with an examination of the everyday operation of the Tribunals and possible SC intervention, their independence, *in abstracto*, deserves a closer look. It is important to explore whether the Tribunals, because of their nature as subsidiary organs, are permanently controlled by their parent organ, *i.e.* the SC. Because the Tribunals exercise judicial functions, which the SC does not itself possess, they have a degree of independence which precludes interference by the Council[75]. However, this independence is not unlimited, and is within certain boundaries allowed by the SC within the field of restoration of peace and security[76]. In that respect,

[75] Sarooshi, *ibid. supra* n. 51, 103. The same author though later in his book contradicts himself by mentioning that "[t]his [the intention by the Council that the Tribunal is terminated] does not, however, impinge on the Council's prerogative to decide to abolish the Tribunal or to exclude from the jurisdiction of the Tribunal a whole range of cases (thereby granting in effect immunity to persons falling within a specified category). *Ibid.*, 133. However, the above view is partly correct. SC intervention varies. Termination, as will be seen in section 4 *infra*, is the prerogative of the SC. Whether it would be acceptable to exclude certain cases, is a different matter altogether and would constitute intervention.

[76] Cf. Alvarez, *ibid. supra* n. 36, 11 who maintains that "[a]s the Tribunal's decisions issued to date suggest, in at least some of these instances the body is "subsidiary" in name only and can render final judgments that even the Council is not authorized to disturb – and that in turn can

several questions arise. Whether for instance the Council would be free to expand or contract the jurisdiction of the Tribunals without limit, or turn them into a *de facto* permanent criminal court[77]. And in such a case, and provided that the Tribunals disagree with such a SC decision, could they declare it to be null and void[78]? Arguably, those issues are linked with the question of whether the Tribunals possess the power to review SC Resolutions[79].

Coming back to the intervention of the SC in practice, both the SG[80] and the Tribunals themselves[81] have on various occasions expressed their

disturb the Council by suggesting limits on its powers". It is one thing to say that the Tribunals judgments are final and the SC should not intervene, for instance, to amend a judgment, -which is something the Council has abstained from doing so far, but it is quite another to suggest that the Tribunals can limit the powers the SC has under the Charter. This would be beyond what is expected of the Tribunals.

[77] Alvarez, (1996), "Nuremberg Revisited" 250.

[78] These and other interesting questions are succinctly dealt with by Alvarez, (1998), 2078, especially fn 185.

[79] The question of review, although interesting, will not be discussed in this chapter, as it does not affect the inter-relationship between national and international orders directly. See, however, the *Tadić Case, ibid. supra* n. 61, where the Trial Chamber declared that the Tribunal "is not a constitutional court" (para. 5) and the Appeals Chamber *ibid. supra* n. 34, held that "[t]here is no question, of course, of the International Tribunal acting as a constitutional tribunal, reviewing the acts of the other organs of the United Nations, particularly those of the Security Council, its own 'creator'" (para. 20). Despite these pronouncements, the Tribunal went on to review the decision of the Council to create an international Tribunal as a response to a breach of international peace and security and found that the Tribunal was lawfully established by the SC (para. 40).

[80] See SG's Report *ibid. supra* n. 5: "that [the Tribunal] should perform its functions independently of political considerations and not be subject to the authority or control of the Council with regard to the performance of its judicial functions. S/25705 and Add. 1. In the case of ICTR he maintained that "[t]he International Tribunal for Rwanda is a subsidiary organ of the Security Council. ...As such, it is dependent in administrative and financial matters on various United Nations organs; as a judicial body, however, it is independent of any one particular State or group of States, including its parent body, the Security Council. (S/1995/134, para. 8).

[81] *Prosecutor v. Tadić, ibid. supra* n. 34, para. 15: "To assume that the jurisdiction of the International Tribunal is absolutely limited to what the Security Council 'intended' to entrust it with, is to envisage the International Tribunal exclusively as a 'subsidiary organ' of the Security Council... a 'creation' totally fashioned to the smallest detail by its 'creator' and remaining totally in its power and at its mercy. But the Security Council not only decided to establish a subsidiary organ (the only legal means available to it for setting up such a body), it also clearly intended to establish a special kind of 'subsidiary organ': a tribunal. See also, *Prosecutor v. Tihomir Blaškić,* Decision on the Objection of the Republic of Croatia to the Issuance of Subpoena Duces Tecum, 18 July 1997, (IT-95-14-PT), 11: "As a subsidiary organ of a judicial nature, it cannot be overemphasized that a fundamental prerequisite for its fair and effective functioning is its capacity to act autonomously. The Security Council does not perform judicial functions, although it has the authority to establish a judicial body. This serves to illustrate that a subsidiary organ is not an integral part of its creator but rather a satellite of it, complete and of independent character".

conviction that the Tribunals are truly independent. However, mere proclamations do not necessarily mean that they are actually independent.

With the exception of the co-operation regime[82], there is no provision in either of the Tribunals' Statutes that would provide for direct SC involvement in the Tribunals' *modus operandi*. The SC has no power, for instance, to refer a particular case to the Tribunals[83]. This power is exercised by the ICTY and the ICTR Prosecutors. It may be that the SC does not, at least officially, instruct the Tribunals as to whom to prosecute, for instance, but it should be examined whether it somehow impacts on their operation indirectly.

Although institutionally the SC does not seem to intervene too much in the functioning of the Tribunals, it could be expected, in practice, that certain States have some influence. Arguably, this is a different kind of interaction which is not the focus of this thesis. It could be argued that countries which contribute generously on the Tribunals' budgets influence their work[84]. In fact, the Permanent Members of the SC are also likely to have some input in the way the Tribunals work, since the Tribunal depends on their will[85]. The fact that most of the accused brought before the ICTY are of Serbian origin, and those of Croatian or Muslim origin are indicted in smaller numbers, is, according to one view, evidence of the political pressure exercised by the P-5, and the US in particular[86]. The indictment of Slobodan Milošević for crimes committed in relation to Kosovo where the western powers (represented in the

[82] See *supra* chapter 3.
[83] This should be contrasted to the ICC, where the SC although it cannot refer a particular case to the Court, it can nevertheless refer a situation under Article 13(b) of the Statute. See *infra*.
[84] E.g. by seconding staff from particular jurisdictions for instance.
[85] Cassese, (2004), 591, fn. 9, describes an incident in 1995 where Russia approached the Tribunal in order to "freeze" arrest warrants against Karadžić and Mladić, but the interference was rejected by both the then President Cassese and the Prosecutor.
[86] Fatić, (2000), 48-51; Hinic, in Hasse, Müller, and Schneider (2001), 420; Cf. Vohrah, (2004), 390, 394.

SC) had active involvement and not, initially at least, for crimes committed during the conflict in Bosnia, may suggest that the Tribunal is somehow influenced in its work by the SC. In any case, it should be taken into consideration that the Tribunals' orders and judgments affect equally the P-5 and the rest of the world which is an issue likely to be taken into consideration by the Permanent Members when taking action in relation to the Tribunals[87]. Perhaps the most disputable incident, which is referred to by some as the product of SC intervention, is the decision not to prosecute in the case of NATO bombing[88]. The above instances, however, are not sufficient to assert that the Tribunals are not independent in their operation as a whole.

Moreover, the President of each Tribunal has to report yearly to the SC[89]. It could be argued that this would indirectly conflict with their independent functioning provided that the report is a means of controlling their operation. However, an examination of the reports so far shows that they are of a factual nature rather than detailed analysis of the Tribunals' operation[90].

Co-operation with the Tribunals is very important. However, this has been dealt with in the previous chapter and will not be examined here. It suffices to emphasise, however, that SC intervention in the field of co-operation could not be characterised as decisive, since it has abstained so far from imposing sanctions to tackle the lack of co-operation[91].

To sum up, although it would have been foreseeable for the SC to play an active role in the Tribunals' operation because of their nature, the practice

[87] Tomuschat, (1994), 246.
[88] For an analysis of the decision, see generally, Cottier, in Fischer, Kreß, and Lüder, (2001), 505.
[89] Articles 34 and 32 of the ICTY and ICTR respectively.
[90] See Annual Reports available at http://www.un.org/icty/pub.htm and http://www.ictr.org
[91] See *supra* chapter 3.

seems to suggest otherwise. However, the limited intervention taking place to date, does not seem to have caused concern for the effective and independent functioning of the Tribunals, and falls into what is considered to be acceptable in international politics. Consequently, and in terms of affecting the interplay between national and international levels, the SC's role in the operation of the Tribunals is no greater than any other coercive action taken by the SC.

3.2 The SC and the ICC

The Court is independent in the performance of its functions[92]. Its relationship with the SC is a complicated one. Balancing this independence with the operation of the SC, is not going to be easy. The relevant provisions in the ICC Statute were notoriously difficult to negotiate, and an acceptable solution was only reached at the very end of the Rome Conference and as part of the so-called "package deal". Moreover, the solution adopted does not resemble the original 1994 ILC Draft. As it is not the aim here to provide an account of the different stages of the negotiation and the evolution of the relevant provisions, the problems these provisions might cause on the interaction between States and the Court will be identified and discussed.

The role envisaged for the SC in the ICC involves a three-pronged relationship touching upon aggression, referral and finally deferral of situations to the Court. The SC may also play a part in the co-operation regime of the

[92] This independence is safeguarded in the Statute. See Article 4, which refers to the Court as a whole, and Articles 40 and 42 which specifically mention the independence of the judges and the Prosecutor respectively. Moreover, this independence is recognised by the UN in the Negotiated Relationship Agreement between the International Criminal Court and the United Nations, adopted by the ASP on the 10th of September 2004, and signed at the UN on the 4th of October 2004, in recital 4 of its Preamble and Article 2. For the text of the Agreement see ICC-ASP/3/15*, 13 August 2004, 7.

ICC, particularly in cases of enforcement of requests arising from SC referrals. This issue has already been dealt with already[93]. There are three players in this interaction: the SC, the ICC and State parties to the Court, which have to relate to both the ICC and the Council. The effect the SC has on State interaction with the ICC will be examined in each of the SC's functions above.

Although the SC had no actual role in the establishment of the permanent ICC, it was made clear from the beginning that some role should be envisaged for the Council in the operation of the Court. And this, since the ICC has jurisdiction over the most serious of crimes, which are also likely to constitute threats or breaches of the peace, is the SC's main responsibility. The rationale, therefore, behind the Council's intervention is the same with the *ad hoc* Tribunals; providing assistance in restoring peace and security.

3.2.1 The SC and Aggression

Coming to the first aspect of the SC's intervention, the SC will have a role with regard to the crime of aggression. As no agreement defining aggression has been reached yet, the crime of aggression and, consequently, the SC's role in its determination will not be in the scope of this study. The original ILC proposal, according to which prior to any prosecution, the SC would have to determine the commission of aggression, has been dropped. By virtue of the Statute as it stands today, the Court can deal with a case, regardless of a finding of aggression. Most importantly, the crime of aggression remains to be defined in order to fall within the jurisdiction of the Court. The role of the SC with respect to aggression will then have to be

[93] *Ibid. supra* n. 91.

clarified in a manner "consistent with the relevant provisions of the Charter of the United Nations", *i.e.* with Article 39 of the Charter[94]. Once aggression is included, State interaction with the ICC on the issue will involve complementarity[95].

For the time being though, and in the absence of a definition of aggression for the purposes of the ICC Statute, examination of SC role will focus on the issues of referral and deferral.

3.2.2 SC Referrals – Article 13(b) of the Statute

SC referrals pursuant to Article 13(b) of the Statute fall within the so-called "trigger mechanisms" of the Court's jurisdiction. This particular aspect of the Statute caused much controversy in negotiations which preceded the Rome Conference as well as those during the Conference. The views were divided. Some States consistently opposed any role for the SC[96], whereas others felt that such a role should be recognised.

There is no equivalent of referrals in the *ad hoc* Tribunals. Nor are they envisaged in the Statute of the International Court of Justice[97]. SC referrals pursuant to an explicit reference in the Statute are the prerogative of the ICC and affect the relationship between States and the Court.

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[94] See on that Wilmshurst, in Politi, and Nesi, (2001), 41.

[95] A very recent proposal on the issue emerged in advance of the ASP meeting in the Hague in September 2004. See ICC-ASP/3/SWGCA/INF.1, 7.

[96] Mainly India, supported by Mexico. See A/CONF.183/C.1/L.81, 15 July 1998.

[97] In the ICJ, and in the *Corfu Channel Case (UK v. Albania), Preliminary Objection*, ICJ Rep. 1948, 15, the UK sought to establish the jurisdiction of the Court *inter alia* on a recommendation by the SC to the parties to refer the case to the Court, by holding that this conferred jurisdiction to the ICJ. The Court however did not deal with this argument but seven

3.2.3 Are SC Referrals Desirable?

Several justifications may be put forward for the inclusion of referrals in the Statute[98]. It has been argued that referrals are necessary in order to acknowledge the proper role of the UN Security Council[99]. Given that the SC is the principal organ of the United Nations entrusted with the maintenance of international peace and security, this responsibility ought to be acknowledged by the ICC, which operates in situations where peace and security have been disrupted. This does not mean, however, that the only way to achieve acknowledgement for the SC's role would be by actually including SC referrals in the ICC Statute. In order to strengthen the argument put forward here, the following hypothesis should be examined. Although the issue is hypothetical, given the presence of Article 13(b) in the Statute, it is worth considering whether the SC would have been able to refer situations to the Court even without the inclusion of Article 13(b) in the Statute[100]. The SC could decide freely on the measures to be taken to tackle a situation threatening international peace and security and that could include referral to the ICC. The legal basis of this would be Article 41. Such measures would be subject to Articles 25 and 103 of the UN Charter, by virtue of which the decisions of the SC must be carried out by the Members of the Organisation and obligations under the Charter prevail[101].

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judges rejected it by reference to the word "recommendation" which is not mandatory and saw it as an attempt to introduce "a new case of compulsory jurisdiction" *Ibid.*, 31-32.

[98] The Stanley Foundation, (1998), 21-22.

[99] *Ibid.*, 21.

[100] Indeed, the SC has previously used its powers to create *ad hoc* Tribunals. See *supra*.

[101] In the *Lockerbie Case*, the ICJ held both Libya and the UK were "obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter;

Moreover, it has been suggested that the SC, by referring a situation to the ICC, would secure the necessary political support for the prosecution, as such an indictment would carry more political weight than one arising from a State referral[102]. This argument seems to place SC referrals in a higher position. Although this is not enshrined in the Statute, in the reality of international politics it is likely that a SC referral will be of greater importance[103]. As long as this assists in strengthening State compliance with the ICC regime, this is not necessarily deplorable.

Furthermore, another view maintains that a right for SC referrals would "help to foster harmony by avoiding ambiguities"[104]. Eliminating statutory ambiguities was thought to enhance SC-ICC relations. However, despite the existence of a referral provision in the Statute, problems in the relationship between the Court and the Council may still arise and this is something that will be dealt with in practice and in the UN-ICC Agreement[105].

One more convincing argument for the desirability of SC referrals is that referrals will eliminate the incentive of the SC to create other *ad hoc*

[...] and whereas, in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention". *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Libyan Arab Jamahariya v. United States of America), ICJ Rep. 1992, para. 39.

[102] *Ibid. supra* n. 98.

[103] Along the same lines India, in explaining its vote in the final session of the Plenary of the Conference made the following statement: "The power to refer is now unnecessary. The Security Council set up ad hoc tribunals because no judicial mechanism then existed to try the extraordinary crimes committed in the former Yugoslavia and in Rwanda. Now, however, the ICC would exist and the States Parties would have the right to refer cases to it. The Security Council does not need to refer cases, unless the right given to it is predicated on two assumptions. First, that the Council's referral would be more binding on the Court than other referrals; this would clearly be an attempt to influence justice. Second, it would imply that some members of the Council do not plan to accede to the ICC, will not accept the obligations imposed by the Statute, but want the privilege to refer cases to it. This too is unacceptable". Cited in Bergsmo, (1998), 353.

[104] *Ibid. supra* n. 98.

[105] See text of the Agreement, *ibid. supra* n. 92.

Tribunals[106], or to use the ICC in an *ad hoc* way, disregarding some of its provisions. The SC created the *ad hoc* Tribunals due to the lack of a permanent international criminal court. With the creation of the ICC, the SC should be less inclined to proceed with the creation of further *ad hoc* Tribunals. An explicit provision for referral in the ICC Statute would achieve this. It should be noted, however, that this does not preclude the SC from creating such Tribunals despite the existence of the ICC. Should this occur, significant political problems would arise[107]. Whether or not this is likely to happen in practice, it would depend on the relationship between the SC and the ICC as well as the particular situation in question. Provided that their interaction is harmonious, the possibility of creating new Tribunals would most likely be obviated. This would be desirable from the perspective of State parties to the Court, as the ICC operates on the basis of its treaty, agreed upon by the State parties to it. Nevertheless, should disagreements on whether to refer or not arise, reflected in the majority needed under Article 27 of the Charter[108], it should be expected that the SC would not be precluded from establishing new Tribunals. In such an instance, UN Members will have to comply with the Council's actions.

Along the same lines, another justification for SC referrals could be a purely logistical issue of securing funding for the new Court[109], as the UN will fund the investigation and prosecutions that would arise from a SC referral of a situation to the Court[110]. And UN funding would, in any case, be most

[106] *Ibid.*, 22.
[107] Bergsmo, (2000), 110.
[108] In the case in which, for instance, the necessary majority for a SC referral to the ICC is not achieved, whereas it is present for the creation of a new *ad hoc* Tribunal.
[109] *Ibid. supra* n. 98.
[110] Article 115 ICC Statute. See also Article 13 UN-ICC Agreement.

welcome, since the UN would guarantee the material resources that would enable the examination of the referred case[111], allowing the ICC to operate without relying exclusively on State contributions.

Article 13(b) referrals apply primarily, and beyond doubt, to States which are members of the UN and which are also parties to the ICC Statute. In this case of course, either another State, or the Prosecutor himself could initiate proceedings as well[112]. Most importantly, however, and for many, more controversially, the provision allowing for SC referrals could apply in relation to States which are UN Members but are not parties to the ICC Statute. Accordingly, SC referrals assist in expanding access to the Court[113]. Had the SC not been allowed to refer cases to the ICC, the Court would only have been able to be seised of jurisdiction through State referral or *proprio motu* action by the Prosecutor. Given the Court's lack of universal jurisdiction[114], the fact that a SC referral will not have to go through the jurisdictional hurdles of Article 12 of the Statute might give the Court new impetus to perform its functions. Although this was not discussed in the negotiation of the Rome Statute, an examination of Article 12 in conjunction with Article 13(b) attests to this fact. Since the application of Article 13(b) is not made conditional on the presence of the preconditions in Article 12(2) and (3), it may be concluded that the SC would be able to refer to the ICC any situation relating to crimes within the Court's Statute. And this, regardless of whether a State is party to it, or has

[111] Bergsmo, *ibid. supra* n. 107, 110.
[112] In accordance with Article 13(a) and 13(c) ICC Statute, respectively.
[113] *Ibid. supra* n. 98.
[114] Universal jurisdiction is absent from Article 12 ICC Statute as a basis for the Court's jurisdiction. During the negotiations at Rome it was suggested that the Court have universal jurisdiction for genocide, crimes against humanity and war crimes. However, this suggestion did not go very far. For an examination of States' unwillingness to include universal jurisdiction in the Statute, and therefore reject a German Proposal on the issue, see generally Kaul, and Kreß (1999), 143.

accepted the Court's jurisdiction on an *ad hoc* basis. This would be a welcome development for international criminal justice generally, for reasons discussed below.

As with the Tribunals' remit over non-UN Members[115], an interesting question is whether the SC could refer a situation to the Court concerning a State, non-UN Member. *Arguendo* that the UN Charter may in fact bind non-member States on some occasions[116], the SC could then refer a situation to the Prosecutor of the Court.

On the other hand, this process would allow the SC to intervene in a purely consensual institution such as the ICC, and transform it into a non-consensual mechanism for justice. The new Court then is expected to operate in a *quasi ad hoc* manner to tackle situations which otherwise would not have been within its ambit. It is unrealistic to expect that rogue States, where most of the crimes falling under the jurisdiction of the Court are likely to be committed, will become parties to the ICC treaty. In such cases, the contribution of the SC in ending impunity, although arguably selective, would be invaluable. This intervention, however, in an otherwise consensual system, seems to impinge upon the freedom each State possesses to decide whether to become party or not to a particular international regime established by a treaty. For States, which are not parties to the ICC, such SC action, however, would be consistent with coercive SC action generally and as such it would have to be complied with.

Of particular relevance are also the criticisms which surround SC referrals. Opposite views maintain that referrals subject the operation of the

[115] *Supra* chapter 3.
[116] Vitzthum, in Simma, *ibid. supra* n. 39, 140-147.

Court to the decisions of a political body and, therefore, undermine its independence and credibility[117]. However plausible this argument may sound, it should be noted that the SC is not empowered to intervene as much as it would be allowed to in the case of the *ad hoc* Tribunals. As will be evidenced from an examination of the preconditions in the next section, the decision to proceed or not with a particular situation and indict the alleged perpetrators, rests with the ICC. In that respect, the Court's independence is not impaired. Of greater merit though is the view that maintains that SC referrals will mainly involve non-Permanent-Members of the SC because of the use of the veto power[118]. It would have been unrealistic to expect that the P-5 would vote in favour of referring a situation to the ICC in which they themselves are involved, leaving thus the non-Permanent Members of the SC and the rest of the States "vulnerable" to such SC action. Arguably, this would alter the interface between States and the Court as it selectively submits most States to the Court's scrutiny, while sparing the privileged few. This is a real danger for international criminal justice which cannot, however, be altered, save for a re-organisation of the UN system. It should not be perceived, however, that P-5 are immune from the ICC's jurisdiction altogether, provided that they sign up to it and the preconditions for exercising jurisdiction are met[119]. In any case, the legitimacy of referrals will be undermined if the P-5 do not ratify the ICC Statute.

To conclude, SC referrals raise interesting questions of interaction between national and international jurisdictions. Despite some shortcomings,

[117] Yee, in Lee, (1999), 146.
[118] *Ibid.*, 147.
[119] The Court in relation to the P-5 is more likely to suffer from the use of Article 16 rather the present provision. See *infra*.

they will not necessarily be more burdensome than existing SC action under Chapter VII, similar to that taken with regard to the Tribunals. In that sense, SC referrals have a supplementary role. They enhance State interaction with the Court, stepping in to complement the system.

3.2.4 Preconditions for Referring a Situation to the Court

Coming to the specifics of Article 13(b), the first observation is that the SC can only refer a "situation" to the ICC. This term was the subject of much discussion. Already in the 1994 ILC Draft it was noted that the SC "would not normally refer to the court a "case" in the sense of an allegation against named individuals"[120]. The ILC members had suggested the term "matter" which would allude to a situation to which Chapter VII applies[121]. In the 1995 and 1996 PrepComs the options were still open and the terms "matters", "cases", and "situations" were examined. The term "cases" was eventually dropped before the Rome Conference[122]. At the same time, "matters" was thought to be too specific by a number of delegations, whereas the term "situations", too broad by the rest[123]. The choice of the term "situation" is in line with the language used generally in the Charter[124] and, in Chapter VII, in particular, to which referral is directly linked. In addition, it is also found in Article 13(a), which provides for referrals.

[120] See Commentary to the 1994 ILC draft, Yearbook of the International Law Commission, 1994, para. 2.
[121] *Ibid.*
[122] Yee, *ibid. supra* n. 117, 149.
[123] *Ibid.*
[124] Similar debates for instance occurred also in the case of Article 34 UN Charter.

Once the SC refers a situation to the Prosecutor, the Council cannot influence the conduct of individual criminal prosecutions that may result from this referral[125]. The Prosecutor is the one who will individualise the case. Any opposite solution would impact on the Court's independence in the performance of its functions. In any case, the ICC's Prosecutor enjoys prosecutorial discretion. It would be in the hands of the Prosecutor to decide whether to initiate an investigation or not following a referral. Prosecutorial discretion is a fundamental aspect of the ICC regime[126]. It is therefore clear from Article 53(1) of the Statute read together with Article 53(2) that the Prosecutor can, in accordance with the Statute, conclude either to initiate an investigation or that there is not a sufficient basis to prosecute. Article 53(3) further provides the opportunity for the SC to request the Pre–Trial Chamber to review the Prosecutor's decision and request him to reconsider his decision. This is a significant provision, because it submits the decision of one person to a review by a body[127].

It needs to be noted that no reference is made in either Article 53 or Article 13 to the formal requirements of the decision to request review and reconsideration on behalf of the Council. It should be inferred, however, that the SC decision for review must be made under Chapter VII of the Charter. Since the original referral decision, as will be seen shortly, requires Chapter VII action, it would be logical if the decision to request a review based on the outcome of the original decision, be made by the SC acting under Chapter VII as well. Article 53, however, is the only provision in the Statute which, whilst

[125] Williams, in Triffterer, (1999), 349. Cf. Scheffer, (2001-2002), 90.
[126] See generally, Marston Danner (2003), 510; Ntanda Nsereko (2004); Gallavin, (2003), 179; Arbour, Eser, Ambos, and Sanders, (2000), 141-144; Brubacher, (2004), 71.

finding application also in the relationship between the Court and the SC, does not explicitly refer to Chapter VII[128].

The second condition for referrals is that the SC must be "acting under Chapter VII of the Charter of the United Nations". And this Chapter is devoted to the maintenance and restoration of international peace.

The link between Chapter VII and consequently peace, with the Court, which is concerned with justice, signifies that the drafters of the ICC Statute had in mind the link between peace and justice[129]. The Court is a step towards achieving peace; hence the wording in this Article.

Moving to the specifics of this second precondition for referral, the wording of the provision is significant. "Acting under Chapter VII", is at first sight, different from the somewhat akin provision of "a resolution adopted under Chapter VII" found in Article 16 ICC Statute. On a closer examination though, this does not seem to create a particular problem. The SC does not have to take measures under Articles 41 or 42 of the Charter in order for a referral to be in accordance with the provision of the Statute[130]. Using the phrase "acting under Chapter VII" before referring to the Court, and a determination that a threat or breach of the peace has indeed occurred, in accordance with Article 39 of the Charter, would suffice. This would be in line with the SC practice so far where, when acting under Chapter VII, it does not usually specify the exact Article of the Charter under which it acts and even the

[127] For potential problems on this approach see, Sarooshi, in McGoldrick, Rowe, and Donnelly, (2004), 99-100.
[128] Oosthuizen, (1999), 327 and also fn. 53 *ibid.*
[129] See *supra* section 1.
[130] It is important to note also that when the SC established the *ad hoc* Tribunals it asserted that it was acting under Chapter VII without citing any particular provision of this Chapter.

mere language of Article 39 is sufficient[131]. Moreover, once the decision to refer is made at the SC, it will be transmitted to the Court via the SG[132].

Theoretically, at least, there is the question whether the UN General Assembly could refer a case to the ICC, acting under the *Uniting for Peace* Resolution[133]. There is no specific mention of such a possibility in the ICC Statute nor was it discussed in the negotiations which preceded its adoption. Could it be argued that, failing to reach a decision, that the SC's power to make referrals is transferred to the GA? Although extremely unlikely to occur in practice, it could be suggested that since the power to deal with situations that threaten peace is, exceptionally, granted to the GA, the power to refer a situation to the Court would not contravene the aims of Article 13(b)[134].

3.2.5 SC Referrals and Complementarity

Another interesting question is how SC referrals would affect the application of complementarity[135]. What would happen for instance if a State genuinely investigates or prosecutes, in accordance with the principle of complementarity, and the SC refers the same situation to the Court? As mentioned in chapter 2, complementarity constitutes the basis on which the international criminal justice system, established by the Rome Statute, is

[131] SC Res. 598, demanding the mandatory cease-fire in the 1980-8 Iran/Iraq conflict, was unusual in that it expressly stated that the SC was acting under Articles 39 and 40 of the Charter.
[132] Article 17(1) UN-ICC Agreement.
[133] GA Res. 377 A (V), 3 November 1950, para. A(1). The adoption of this resolution by the GA allows it to take measures for the maintenance of international peace and security where there appears to be a threat to the peace, breach of the peace or act of aggression and in the event in which the SC is blocked due to lack of unanimity.
[134] Although discussion was made in the ILC in order to include in the Statute a provision which would enable the GA to refer a situation to the Prosecutor on its own and along with the

founded. National Courts take precedence in dealing with crimes falling within the jurisdiction of the Court. Assuming, therefore, that a case is being dealt with by the national courts of State X, and provided that this State is not proven "genuinely unwilling or unable" to investigate or prosecute[136], the ICC would not have jurisdiction. However, in the case where the SC refers a situation pertaining to the commission of the same crimes, then the ICC will, *prima facie*, be seised of jurisdiction. In that case, the very same situation would have been declared inadmissible had the Court had been seised of jurisdiction following a State referral. Yet, when the SC refers the situation to the Prosecutor, could the approach be any different? For the purposes of coherent administration of justice it would be preferable if the Prosecutor finds the case to be inadmissible by virtue of the complementarity principle. In that respect, Article 53(2) mentioned above could also be of assistance. The Prosecutor may declare the case inadmissible under Article 17 and inform the SC of his decision. Pursuant to Article 17, it is left to the Court to decide its own jurisdiction[137]. This is in accordance with the widely recognised principle of *la compétence de la compétence.*

It should be noted, however, that the concept of complementarity is linked to State action and not to SC action. In other words, it governs the relationship of the States with the Court and not the relationship between the SC and the Court.

If, however, the SC asks States by a SC Resolution not to prosecute, then these States have an obligation under Article 25 of the UN Charter not to

SC, this was dropped at an early stage. See para. 5 of the ILC Draft Commentary. *Ibid. supra* n. 120.

[135] For an examination of complementarity, see chapter 2.

[136] In accordance with Article 17 ICC Statute.

prosecute. Nevertheless, this does not preclude the Court from seizing jurisdiction in accordance with complementarity[138]. Although States would be clearly bound to comply with the SC Resolution by virtue of Article 103 UN Charter, the question which then arises is whether the ICC would also be bound by Article 103[139]. Although such an analogy would have facilitated unity of approach, practice does not support such an argument[140]. On the other hand, had Article 103 been accepted as binding on the Court as well, it would have unduly restricted the independence on which this institution is premised, and which is recognised by the UN[141].

If the SC wished to undermine the ICC, it would have to adopt Resolutions obliging States to oppose the ICC. However, the fact that the ICC is a separate institution, which is distinct from the States, signifies that Article 103 will not be of assistance to the Council in case it wanted to control the Court directly.

Article 13(b) is certainly one of those provisions which could render the Council one of the Court's partners. In the words of Sir Franklin Berman "the powers of the Court are brought into play when the [SC] makes a reference to it, in other words to empower the *Court*, not the Council"[142]. It gives the opportunity for the ICC to overcome the weaknesses of the Statute in the jurisdictional regime enshrined therein and to play an important role in the administration of international justice.

[137] Article 19(1) ICC Statute.
[138] Condorelli, and Villalpando, in Cassese, (2002), 640.
[139] For an informed analysis of the many aspects this issue entails, see Sarooshi, *ibid. supra* n. 127, 106-109 who answers the question in the negative.
[140] Bernhardt, in Simma *ibid. supra* n. 39, 1298-1299.
[141] Article 4 ICC Statute; Article 2 UN-ICC Agreement.
[142] Berman, in von Hebel, Lammers, and Schukking, (1999), 174.

3.2.6 SC Deferrals - Article 16 of the Statute

A rather more invasive role for the SC is envisaged in Article 16 of the Statute entitled "Deferral[143] of investigation or prosecution". According to this provision, the SC is empowered to stop the Court's handling of a particular case for a limited period, should the SC believe that the action taken by the Court is likely to hamper the Council's efforts to maintain international peace and security[144]. Article 16 encompasses another aspect of the relationship between the ICC and the SC, which is going to affect the functioning of the new institution. The presence of the said provision in the Statute caused much controversy and was the subject of lengthy negotiations[145]. On the one hand, it explains the close link between collective security and international criminal justice but, on the other, it totally subjects the operation of the Court to the will of a political organ[146].

Supporters of this provision maintained throughout the negotiations that it would prevent the ICC from interfering in the maintenance of international peace and security which is the primary responsibility of the SC[147]. There seems to be an oxymoron here. Although the SC's creation of the Tribunals seems to suggest that justice leads to peace –positive peace that is, in the case

[143] Note the use of the term "Deferral" in this Article as opposed to Articles 9 and 8 of the ICTY and the ICTR Statutes respectively, examined in chapter 2.
[144] Cf. Cassese, (1999), 163 who maintains that the SC "may request the Prosecutor to defer his activity only if it explicitly decides that continuation of his investigation or prosecution may amount to a threat to the peace".
[145] Kirsch, and Holmes, (1999), 8.
[146] India, in explaining its vote in the final session of the Conference stated: "The power to block is in some ways even harder to understand or to accept. On the one hand, it is argued that the ICC is being set up to try crimes of the gravest magnitude. On the other, it is argued that the maintenance of international peace and security might require that those who have committed these crimes should be permitted to escape justice, if the Council so decrees. The moment this argument is conceded, the Conference accepts the proposition that justice could undermine international peace and security" As cited in Bergsmo, *ibid. supra* n. 103 at 358.
[147] Yee, in Lee, (1999), 150.

of the ICC, it is thought that, occasionally, peace and justice are mutually exclusive and, in that respect, the operation of the Court must temporarily be put on hold. The origins of Article 16 can be traced back to Article 23(3) of the ILC Draft. However, the said Article, did not allow for the commencement of a prosecution unless the SC decided otherwise[148]. This approach was eventually dropped during the negotiating process giving more independence to the ICC and to its constituent States. Had it been accepted, it would have been akin to the provision of Article 12 of the UN Charter. However, Article 12 refers only to the General Assembly and not to the International Court of Justice, whose function is thought to be complementary. To borrow a phrase used by Rosenne, there is a "functional parallelism" between political and judicial organs of the UN[149]. And this has been manifested in a number of cases when the ICJ was faced with the question whether it could look into a case already before the SC[150]. An equivalent provision to deferrals is not found either in the case of the *ad hoc* Tribunals, despite their creation by SC Resolutions where the inclusion of a similar provision could perhaps have been expected due to the basis of their creation. Despite the shift away from the ILC Draft following the so-called 'Singapore Compromise'[151], it is still striking that a political organ has the power to make a political decision and impose it on the Court[152].

[148] Article 23(3) ILC Draft *ibid. supra* n. 120.
[149] Rosenne, (1997), 127-138.
[150] See *Aegean Sea Continental Shelf case*, (Greece v. Turkey) (Provisional Measures), Order, 1976, ICJ Rep. 3, at 12; *United States Diplomatic and Consular Staff in Tehran* (United States of America v. Iran), 1980 ICJ Rep. 7 at 21-22; *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States of America) (Jurisdiction and Admissibility), 1984 ICJ Rep. 392, at 431-433 where the Court said at 433-434: "The fact that a matter is before the Security Council should not prevent it being dealt with by the Court and that both proceedings could be pursued *pari passu*".
[151] Singapore put forward a proposal in the August 1997 session of the Preparatory Committee, A/AC.249/WP.51 by which it reversed the ILC Draft, but it was not until the UK support in December 1997 that this proposal shaped Article 16 as it stands today.
[152] On the relationship between political and judicial organs in the ICC regime, see Gowlland-Debbas, in Boisson de Chazournes, Romano and Mackenzie, (2002), 212-217.

Two points need to be made with regard to Article 16 and the relationship between States and the ICC. Article 16 allows the SC to bypass State consent, expressed in creating the Court. In that respect, the SC, not only alters State interaction with the Court, but it negates it altogether. In addition, the ICC's judicial independence might then be infringed by this provision.

Conversely, in an attempt to minimise the impact of this, perhaps the most striking feature of the ICC treaty is that it places a legal framework on the Security Council. Most importantly, this framework is devised without all of the Council's P-5 having consented to it. The Statute contains preconditions for the exercise of Article 16, which potentially impose limitations on the Council. In this sense, it is important for the interaction of State parties with the ICC, as, provided that these preconditions are accepted by the Council, their interaction with the Court is channelled through an agreed position. And State consent is potentially less restricted by the Council than it could have been without the presence of Article 16 conditions.

However, it is important to emphasise, that in terms of United Nations law, Article 16 may be ignored by the Council, which could override the conditions laid down therein. Resolution 1422[153] and its successor 1487[154] are examples of this. These Resolutions, part of the US offensive against the Court, go beyond Article 16. Even though the language used therein purports to respect Article 16 of the Statute, by referring, for instance, to Chapter VII, and by complying with the twelve-month period found in this Article[155], in essence, it disregards Article 16 completely. Article 16 was introduced in the Statute to ensure that the Court does not, by its investigations or prosecutions, harm the

[153] S/RES/1422 (2002), 12 July 2002.
[154] S/RES/1487 (2003), 12 June 2003.

SC's efforts in restoring peace and security. For a referral to be made, there is a prerequisite that such a situation, exists. In the context of SC Res. 1422 and 1487, there was no specific situation examined by the Court, which would hinder the SC from the performance of its mandate[156]. Rather, the above Resolutions constituted an unprecedented, wide-ranging and totally unnecessary intervention in a purely consensual system, and were nothing less than an assault on the Court[157]. In June 2004, Res. 1487 was not renewed, amidst concerns about the treatment of Iraqi prisoners in the Abu Ghraib prison in Baghdad, restoring some faith in the SC and its role in international criminal justice and allowing State parties to the ICC to continue to enjoy protection by its treaty.

3.2.7 The Preconditions for Deferral

Having examined the context for the application of Article 16 in the relationship between States and the ICC, let us now turn to the preconditions for deferral. First, it is of interest to see what the terms "investigation or prosecution" used in the Article entail. Neither investigation nor prosecution are defined in the Statute. However, it could be said that an investigation consists of the total number of actions taken by the Prosecutor in order to

[155] For an analysis of the preconditions for deferral see the section that follows.

[156] Operative paragraph 1 of SC Res. 1422 is revealing: "Requests, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise". See also Operative paragraph 1 of SC Res. 1487, which is *verbatim*.

[157] For an analysis of the wider issues surrounding Res. 1422, see Cryer, and White, (2002), 143. See also Stahn, (2003), 85; Lavalle, (2003), 195; Sarooshi, *ibid supra* n. 127, 115-120;

confirm the charges against an alleged perpetrator regarding crimes falling within the jurisdiction of the Court[158]. The prosecution phase would entail all actions following the confirmation of the charges in accordance with Article 61[159]. In any case, since both investigations and prosecutions are subjected to Article 16, it would make no difference in practice to define which starts when[160].

In addition, following an Article 16 decision, an investigation which has "commenced or proceeded with" must be stopped. A crucial issue is first of all, when an investigation or prosecution "commenced". If the starting point of an investigation is specified, the next step is to proceed with it and continue with the prosecution. This may be inferred by Article 53(3) of the Statute and is so regardless of how the jurisdiction of the Court is triggered. It follows from this provision that the investigation commences when the Prosecutor finds a "reasonable basis to proceed". Another relevant point is how the SC is going to be informed about the commencement of an investigation[161]. This is a practical issue rather than a legal requirement and it would suffice to say that the SC consists of States some of which would have the necessary information[162].

Staying investigations and prosecutions will entail serious problems regarding the gathering and preservation of evidence, examination of

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Zappalà, (2003), 114; El Zeidy, (2002), 1503. Res. 1422 raises interesting issues of collective security which go beyond the scope of this thesis.

[158] See Bergsmo, and Pejić, in Triffterer, (1999), 378.

[159] *Ibid.*, 379. See also another possible reading according to which prosecution consists of the actions taken after the issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear by virtue of Article 58. *Ibid.*

[160] It should be noted that the preliminary examination of a case under Article 15(6) of the Statute does not constitute part of the investigation and is therefore unaffected by Article 16.

[161] Note for instance that there is no provision equivalent to Article 18(1) which would oblige the Prosecutor to notify the SC. Moreover, in the UN-ICC Agreement, provision is made only regarding the procedure to inform the Court post the adoption by the SC of a Resolution pursuant to Article 16, and not for the Court to inform the SC before such Resolution. (Article 17(2) UN-ICC Agreement).

[162] Bergsmo, Pejić, *ibid. supra* n. 158, 380.

witnesses, and arrest of the accused[163]. Unfortunately, the Statute does not provide for ways to handle these issues[164]. Provided that the SC does not instruct the Court on how to act with regard to these issues, the evidentiary problems likely to arise could be dealt with under Article 54(3)(f). However, when the question of setting the accused free arises, it would be significantly more complicated to find a solution. It would, first of all, depend on who had arrested the accused and in whose custody he/she is at the time of deferral. In any case though, it would be contrary to international human rights standards to keep the alleged perpetrator in custody for as long as the situation is handled by the SC. On the other hand, setting him/her free does not seem desirable since his/her *de novo* arrest might be problematic and not always forthcoming. Depending on the stage of the proceedings, however, issues of *ne bis in idem* may also arise[165].

The twelve-month time limit found in Article 16, first appeared in the Preparatory Committee following a Canadian proposal in August 1997[166], and was since retained in the Article. Arguably, the period for which the SC requests a deferral does not have to be twelve months. It would not create any problems should it be shorter. An interesting problem would arise, however, should the SC decide to impose an interruption of the Court's function, for a period longer than twelve months. The SC would be free to do this. Under Article 103 UN Charter, States would be bound by its decision provided that the relevant SC Resolutions are made under Chapter VII. This is not the same

[163] *Ibid.* at 380-381; Oosthuizen, *ibid. supra* n. 128, at 337.
[164] Article 16 makes no reference to this. There was a Belgian proposal at the Rome Conference and a *nota bene* was included in the last draft of the then Article 10, option 1 suggesting the need for "further discussion" of the issues pertaining to the preservation of evidence. See Bureau's proposal of 10 July 1998, UN Doc. A/CONF.183/C.1/L.59, 13.
[165] See *supra* chapter 2.
[166] Bergsmo, and Pejić, *ibid. supra* n. 158, 375.

for the Court[167]. On this issue, Gowlland-Debbas observes that States do not impose conditions on the Council, as such. Instead, they are at liberty to devise a framework in a treaty they have consented to. If the SC does not observe these conditions, then the Court will not be restricted in the exercise of its jurisdiction[168]. Although this position seems very appealing, from the perspective of States, it disregards the practicalities of its application, given that States would be bound by Article 103 to follow the SC determination. It may be that the Court is not bound by such Resolution, but, depending on its content, it may make the Court's task impossible, given the latter's dependence on State co-operation.

One other issue would be what is meant with the phrase "acting under Chapter VII"[169]. The requirement of a Chapter VII Resolution was among the last points to be inserted into the Statute in order to insure that there is a formal vote for the deferral[170]. A determination that a situation falls within Article 39 of the Charter is necessary. Occasionally, political reasons may preclude a finding under Article 39 of Chapter VII. This does not mean though that a binding resolution cannot be produced[171]. This determination would suffice and no measures taken pursuant to Articles 41 and 42 are needed.

The type of vote required for deferral is also relevant. It cannot but fall within the ambit of the substantive decisions, as procedural matters involve

[167] For the dichotomy between States and the ICC on the application of Article 103, see *supra* fn. 139-140 and corresponding text. See also Sur, (1999), 44-45.
[168] Gowlland-Debbas, *ibid. supra* n. 152, 205, fn. 27.
[169] Note the difference in wording between this provision and Article 13(b). There is nothing in the Statute or in the Preparatory work to suggest however that there should be a difference in the approach. This phrasal inconsistency could be attributed to the nature of the negotiating process. The fact that the provisions have not been drafted together and as a single entity and were inserted in the body of the text at different stages of the negotiations might have had its bearing on the language used in the various Articles.
[170] Bergsmo, Pejić, *ibid. supra* n. 158, 381
[171] White, (1997), 63. See generally Higgins, (1972), 275-284.

issues such as inclusion of items in the agenda, for instance[172]. In order to suspend the investigation or prosecution before the ICC, agreement of the Permanent Members of the SC is needed. In the case, however, that a Permanent Member has voted against, the Court is free to proceed with the case. This has been characterised as the "only positive function of the veto power"[173] and is indeed of great importance.

The last issue to be considered is the issue of renewal of a deferral request. Article 16 provides that the same conditions apply for renewal, as with the initial deferral. That means that renewals would also have to be requested pursuant to a Chapter VII Resolution. As for the length of the renewal this time, it cannot be longer than twelve months[174]. Article 16 does not limit the right to defer proceedings to the SC which would mean that the deferral could be renewed indefinitely. This might be detrimental for the process, creating judicial uncertainty.

Since both investigations and prosecutions are the responsibility of the OTP[175], it seems that this would be the addressee in Article 16 when reference is made to "the Court"[176].

However unlikely in practice, it would be interesting, to see whether Article 16 would also apply to situations referred to the Court by the SC itself. This should not be precluded as an option, since no provision to the contrary is made in Article 16. However, it seems rather unlikely that the SC will request the deferral of the situation itself had referred to the Court in the first place,

[172] Bailey, and Daws, (1998), 225-226. Cf. Yee, *ibid. supra.* n. 147, 150, who implies, although without giving a specific legal basis, that the decision is procedural.
[173] Lattanzi, (1999), 443.
[174] Bergsmo, Pejić, *ibid. supra* n. 158, 382.
[175] Article 42(1) ICC Statute.
[176] See Cassese, *ibid. supra* n. 144. Cf. Oosthuizen, *ibid. supra* n. 128, who maintains that both the Prosecutor and the relevant Chamber are the addressees.

unless the balance of powers within the SC or the situation at hand has changed in the meantime.

Unfortunately, the implications of deferral have not been considered in any systematic manner in the Rome Statute, the RPE or the UN-ICC Agreement[177]. If this provision is used, it is expected to create many problems in the functioning of the ICC[178]. In particular, Article 16 might raise problems of selectivity or even abuse of the Council's prerogative. The SC could use this mechanism to come to assistance of a State which, although party to the Rome Statute, would like to avoid a finding by the Court concerning crimes committed in its territory[179]. And this could most probably happen with regard to the P-5 or their close allies[180].

Article 16 is a powerful tool at the disposal of the SC and its use and potential abuse in practice will be interesting to follow. In terms of interaction, Article 16 may negate the interface between States and the ICC. In other words, it overrides the consensual system created by the ICC Statute. On the other hand, by including Article 16 States attempt to submit SC action to a particular set of rules; to restrict, in other words, the seemingly unlimited function of the Council. This raises very interesting questions of collective security which will not be discussed here. In any case, this provision demonstrates how the interaction between national and international legal orders may be affected by an external factor, the SC.

[177] The RPE for instance, do not contain any reference to Article 16.
[178] For an examination of some of the foreseeable problems see Condorelli, and Villalpando, *ibid. supra* n. 138, 652.
[179] Lattanzi, *ibid. supra* n. 173, 443.

3.3 Appraisal

The SC's role in the operation of the international criminal justice institutions is noticeable. It seems that although it would have been expected to play a more active role in the two Tribunals – due to their establishment directly by the Council – in reality, a more interventionist role is envisaged for the ICC, where the SC, due to the Court's constituent basis, should, in principle, have no involvement. Through referrals, the potential expansion of the Court's jurisdiction, is counterbalanced by allowing the Council to change a purely consensual system into a coercive one. With regard to deferrals, however, State interaction with the Court is negated and the Court itself may be unnecessarily prevented from exercising its functions under the Statute.

4. The Role of the SC in Terminating International Criminal Justice Institutions

Turning, finally, to the issue of termination, the SC has an important role to play in the *ad hoc* Tribunals. In the case of the ICC, there is no role envisaged for the SC regarding termination, as its treaty basis means that the law of treaties and the provisions on termination come into play[181]. Accordingly, reference in this section will be made only to the ICTY and the ICTR whose termination is controlled by the Council.

Given that the Tribunals are subsidiary organs created by the SC, the latter will also be the organ that will terminate their operation. The subsidiary

[180] Bergsmo, *ibid. supra* n. 107, 111.
[181] On termination of treaties see Aust, (2000), 224-251.

organ must be terminated following the same procedure used for its creation[182]. Since the two Tribunals were created by SC Resolutions, it will also take SC Resolutions under Chapter VII to terminate their function. Implied termination will, therefore, not be acceptable[183]. Accordingly, even if the Tribunals had completed all the cases pending before them, they would not be able to terminate their operation themselves without a prior SC Resolution.

As to the time of termination, it is important to note that the Tribunals were created, as noted earlier, with the view to restoring peace in the territory of the former Yugoslavia and Rwanda and their existence is linked to this[184]. However, despite the fact that peace has returned to those two regions of the world, the Tribunals have not ceased to exist. Instead, a detailed strategy has been devised to complete the Tribunals' operation. According to their completion strategy, all investigations will be completed by the 31st of December 2004, trials at first instance by the end of 2008 and appeals in 2010[185].

Arguably, it would be within the power of the SC to terminate the Tribunals' operation before the completion of their tasks[186]. Even though the Tribunals possess some degree of independence from the SC, necessary to adequately perform their judicial functions, it has to be accepted that were this premature termination to occur, they would have no choice other than comply

[182] Cot, and Pellet, (1991) 216: "[l]es conditions de suppression d'un organe subsidaire sont symétriques des conditions de création: la suppression résulte d'une manifestation de volonté de l'organe principal créateur".
[183] Sarooshi, *ibid. supra* n. 51, 131.
[184] *Ibid. supra* section 1.
[185] See SC Res. 1503, para. 7 and SC Res. 1534, para. 3. For some interesting practical questions on the issue, see Del Ponte, (2004), 518.
[186] Greenwood, *ibid. supra* n. 56, 106.

with the SC's decision[187]. The SC has the residual authority to amend the Tribunals' Statutes and even terminate their operation. And that will occur following a finding of a threat of peace and a judgment that this would be the appropriate measure to tackle the situation.

A potential problem with this is what Caron calls the "reverse veto", by virtue of which one or more of the P-5 could use their veto not to prevent the authorisation of a certain action, but to actually block termination or amendment of action already taken[188]. Conceivably, this might be a problem with the Tribunals as well. If, for instance, Karadžić, Mladić and Gotovina are still at large by 2008, then there might be an argument according to which it would be a failure for the Tribunal to complete its work without these prominent indictees before it[189]. In such a situation, unless the SC adopts a Resolution modifying the Tribunals' completion strategy, it is foreseeable that the power to veto might be used by certain P-5s to block the Tribunals' termination.

Despite the existence of a completion strategy, it is possible that, at a specific point in time, the Tribunals may not have completed all of their procedures[190]. Undoubtedly, there will be outstanding arrest warrants, perhaps

[187] This has been confirmed by the Trial Chamber in the *Tadić case*, *ibid. supra* n. 61, where in para. 20 it was held that: "In argument the spectre was raised of interference by the Security Council in the proceedings of the International Tribunal, for instance, by the abolition of the International Tribunal, in midstream as it were, for wholly political reasons. No doubt this would be within the power of the Security Council, but so too is like action in a national context. National legislatures, with greater or lesser ease, depending upon their powers under their respective constitutions or governing laws, may abolish courts previously created but this in no way detracts from the status of those courts as entities established by law".

[188] Caron, (1993), 577 *et seq.*, who discusses the reverse veto in respect of sanctions in Iraq.

[189] This position was also advocated by the ICTY's president, in his address to the UN GA, 10 October 2003, JL/P.I.S./789-e.

[190] In terms of procedure, it should be accepted that those cases for which jurisdiction of the Tribunal has been established should be considered before the termination of the Tribunal. This will be in accordance with the position taken by the ICJ in the *Lockerbie Case, Preliminary Objections Phase,* 27 February 1998, where it was stated that: "[I]n accordance with its established jurisprudence, if the Court had jurisdiction on that date, it continues to do so; the

also cases before the Trial or the Appeals Chamber, and certainly, even in the absence of the above, prisoners serving sentences. This last category appears to be more problematic. The Tribunals' lives will not be extended until each and every convicted person has completed his/her sentence. No provision is made for those issues in the Statute of either the Tribunals. The SC will obviously have to address these questions in due course. Among the options that they might consider would be to provide for the transfer of the prisoners to the facilities of the ICC. Even if this option seems to be the closest to the international criminal justice model the Tribunals serve, it is not free of concern. The ICC is product of a consensual regime, and might not be an appropriate forum for prisoners originally from countries which have not signed up to the Court. If, however, the SC specifically provides for this option, there is an obligation of compliance. In any case, an international option should be put forward, by allowing some very limited form of the Tribunals to continue to exist, that would supervise the serving of sentences in countries that have accepted prisoners. Sending the accused back to their own countries to serve the remainder of their sentences is another option, which would not necessarily involve international supervision. Were this to be the case, it could be rationalised on similar grounds as in the use of Rule 11*bis* examined in chapter two. However, the difference is that in the case of 11*bis*, the person involved is tried exclusively by domestic courts and has not been subject to an exercise of deferral already, and neither has he/she been subsequently tried at the international level.

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subsequent coming into existence of the above-mentioned [Security Council] resolutions cannot affect its jurisdiction once established". Cf. *Nottebohm, Preliminary Objection, Judgment*, ICJ Rep. 1953, 122; *Right of Passage over Indian Territory, Preliminary Objections, Judgment*, ICJ Rep. 1957, 142.

It is clear that, although the SC possesses the residual authority to abolish the Tribunals, it should be emphasised that "ending the life of a judicial body is a process rather than a single action"[191]. Careful consideration of all the possible issues arising should be taken before proceeding with the termination of those institutions. As far as State interaction with the Tribunals is concerned, States shall remain passive at the termination stage, and will have to comply with the SC. Given that this falls within the remit of the SC, State exclusion from the process is no more burdensome than normal SC action.

Conclusion

The emphasis in the previous chapters was on the instruments that govern the operation of both the Tribunals and the ICC, and on the principles governing the relationship between national and international legal orders. It is clear that State interaction with the institutions is outlined in the Statutes and, provided that States abide by the rules enshrined therein, the interaction should work. In this chapter, the emphasis shifted to the examination of an external factor, the Security Council. Undoubtedly, the SC holds a very important position in the international sphere and its involvement in international criminal justice is likely to affect State interaction with the relevant courts as well.

The role the SC plays differs between the Tribunals and the ICC, and also varies in its intensity, depending on the stage of intervention. In the Tribunals, the Council has an exclusive role in their creation and termination,

[191] See Senior Legal Advisor in the ICTY Gavin Ruxton, as quoted by Shuett, *ibid. supra* n. 22, 98.

and a very much diminished role in their everyday operation. State interface with the *ad hoc* Tribunals is controlled by the Council and its limits are defined by it. The SC replaced the then absent State volition, and stepped in to create *ad hoc* Tribunals to tackle threats to the peace. In the operation of the Tribunals, however, the SC plays no greater role in terms of interaction than any other action normally undertaken by the Council. In the Tribunals' termination, the SC will take the lead again, excluding State input.

In the ICC, SC involvement is limited to the operation of the Court, due to its creation by a treaty. However, the role envisaged there is significant, as it may supplement State consent and expand the limited jurisdiction of the ICC, or may negate State initiative and significantly curtail the Court's operation. On the other hand, the consensual system devised by States may have some influence on the Council itself. A partnership is emerging between the SC and the Court, which although not a full partnership, is crucial for the interaction between States and the ICC.

The SC, like a modern Zeus, is able to make important decisions that affect the entire international community. In mythology, Zeus was the personification of fairness and would intervene to restore the system, in fact, his very own system, for the benefit of the people. The SC, in its function in the field of international criminal justice, intervenes and affects the interplay between States and institutions. However, the parameters are different. From the hegemony of the SC in the Tribunals, to the appeasement of the Council in the ICC, SC involvement in international criminal justice has moved from absolute control to the beginnings of a partnership with States. If absolute

control gives its way to a structured partnership, it will be beneficial to the emerging international criminal justice system as a whole.

Chapter Five

States' Argonautic Expedition to Bring the ICC Home

This study would not have been complete, had the reaction of States to their relationship with international criminal courts not been examined. States participate by enacting legislation which enables them to prosecute the most serious of international crimes domestically and also to co-operate with international criminal justice institutions. This thesis focuses on the relationship between the international and the national orders in the field of international criminal law. The main concepts on which this interaction is based and their practical operation through State co-operation have been examined in the chapters preceding this. The role of the Security Council as an external factor affecting this interplay has received equal treatment. It is evident that the effectiveness of the system depends greatly on the stance States take in implementing these fundamental international criminal law concepts.

Implementation serves manifold purposes. It is an important way of giving meaning to the principles of primacy and complementarity. In order to achieve effective prosecution of the most serious international crimes before national Courts, States are encouraged to implement the Statutes. This is particularly important with regard to the ICC, as it will also assist in bridging the "impunity gap"[1]. Moreover, national implementing legislation ensures that States play their part in providing their support to the evolving international criminal justice system. In fact, the effectiveness of the system depends heavily

[1] See *supra* chapter 2.

on the quality of the said legislation and the ability of a State to co-operate fully with the Tribunals and the Court.

In addition, through implementation States may also assist in rectifying the inherent difficulties faced by ventures such as international criminal courts and make a difference in their operation. Overcoming some of the Statutes' problems would assist the process greatly. The Statutes do not provide much guidance as to the content and manner of the provisions that need to be incorporated[2].

Additionally, States might wish to contribute to the work of the international institutions by making their own mark on issues of concern or by a particular incorporation approach. That implementation is not dictated in a particular manner assists in achieving this. States are given the opportunity to comply with their international obligations whilst respecting their own national law and procedures. National implementation of international concepts is therefore quite important.

With regard to the ICC, this function is of yet greater significance. As the ICC's first Prosecutor said, upon taking up his position in June 2003, "the absence of trials before [the International Criminal Court], as a consequence of the regular functioning of national institutions, would be a major success". This statement makes it clear that, despite its importance, the ICC is not intended to prosecute every single case that falls within its remit. Its role is residual, intervening only where States are "unwilling or unable" genuinely to investigate or prosecute[3]. An additional, and by no means less important function of the Court is to promote effective domestic accountability efforts.

[2] With the exception perhaps of the ICC co-operation regime where the broad objective is stated. See *infra*.

Although the Court will achieve greater legitimacy by being seen to prosecute major international criminals fairly, it will be most successful if it normalises the prosecution of genocide, war crimes and crimes against humanity at the national level. In the two years of the ICC's operation there is already evidence that the Statute is being invoked in domestic proceedings[4].

1. Aim of the Chapter and Methodology

1.1 Aim

It is not the aim of this chapter to provide a complete analysis of various pieces of implementing legislation. Rather, the modest aim of this work is to record some emerging principles within a limited field of application.

The first role State parties play is in implementing certain aspects of the Statute. A distinction should be drawn between those aspects where there is an obligation to implement and those areas where States have discretion as to whether to incorporate aspects of the Statute[5]. For each of these areas, States are free to choose the manner of implementation. This leads to the second role that States play, that of influencing international criminal proceedings through the enactment of appropriate legislation. In turn, such legislation serves to complement the Statute and potentially to rectify its omissions. This is certainly not an easy task. Nor is it likely that States will actively pursue this

[3] See *supra* chapter 2.
[4] See for example Jones, Milling, Olditch, Pritchard and Richards v Gloucester Crown Prosecution Services, [2004] EWCA Crim 1981.
[5] See *infra* section 2.4.

role. However, good pieces of implementing legislation will also have an effect in enhancing international criminal justice.

Each of these roles is fundamental to the overall effectiveness of the emerging international criminal justice system. How States react to the incorporation challenge and what lessons, if any, may be learnt from existing pieces of implementing legislation is central to this chapter. This will allow some understanding of how international criminal law is developing as a distinct discipline within international law and what the problems may arise in practice.

1.2 Methodology

This chapter does not deal with a large number of implementation pieces in any detail, nor does it constitute a comparative study of any sort. The aim of this chapter, as set above, is to serve as an indication of State responses to international criminal justice and, where appropriate, to trace some elements of harmonisation.

The various pieces of legislation will be seen only as evidence of State practice. That national laws constitute State practice (capable, if coupled with *opinio juris*, of becoming customary law) has long been recognised[6]. This thesis strives, as far as possible, to provide an accurate portrayal of the domestic legislation.

The inherent limitations of this project are very important and should not be disregarded when assessing its overall value. Access to the necessary information has definitely been the greatest challenge of all in this effort. States

may have implementing legislation but, on many occasions, this is not publicised widely nor is it easily accessible[7]. This problem is aggravated by the language barrier. Most of the implementing legislation pieces are available in the original language only[8]. As a practical point, to avoid lengthy references to the text of the domestic provisions, it was decided not to provide the actual text in footnotes. Moreover, reference is made to enacted legislation only and not to proposed bills, to guarantee accuracy. The various pieces of implementing legislation for the ICC used in this study as well as a complete set of implementation pieces available to date, are available on the CD-ROM provided. Due to the scarcity of secondary materials on this topic, the analysis is predominantly based on primary sources.

In addition, the choice was made to focus on implementation for the ICC only. This does not mean that implementation of the Tribunals is problem-free[9]. However, given the complexity of the Court's regime combined with the Tribunals' completion strategies, it was thought that within the restraints of a thesis such as this, it would be timely to provide an examination of a particular aspect of the ICC Statute.

Instead of providing a comprehensive analysis of every single piece of legislation discussed here, the focus of the chapter will be on examining the most controversial Articles of Part 9 of the ICC Statute which deals with co-

[6] Jennings, and Watts, (1992), 26.

[7] The author benefited greatly in this respect from a research period spent over two consecutive years at the Max-Planck Institute for Foreign and International Criminal Law, in Freiburg, Germany, where she gained access to various pieces of information not available elsewhere. Thanks are owed to all those who contributed in making this stay possible and indeed worthwhile.

[8] The author worked with the original language of the texts used apart from the Dutch Act, where the translation provided by the Dutch Ministry of Foreign Affairs was used. With regard to the German piece, although notice has been taken of the original, the wording in the unofficial English translation formed the basis of the analysis. Finally, as no English translation is available for the French piece, the original text was used exclusively.

operation The choice of co-operation can be explained in terms of structure and content of this thesis, but also because, despite its complexity[10], academic focus has been on implementation of the substantive part of the Statute[11]. Arguably, the relationship between international criminal justice and national legal orders can be manifested in a number of areas which are prominent when implementing the Statutes of the Tribunals and the Court, such as the incorporation of the crimes or defences into domestic law. Co-operation, however, has been central throughout this thesis and is an issue which merits a greater examination from the perspective of national legal orders, as enforcement of international obligations relies heavily, if not exclusively, on co-operation by States. Co-operation is important for another reason as well. Even though national incorporation of the Statutes is desirable, a distinction should be made between "obligations" and "choices". Since co-operation stems from a legal obligation imposed on States, its implementation is mandatory as opposed to optional, which is the case with the crimes enshrined in the Statute or with the defences available to them[12].

Even though the approach this chapter follows is a thematic one, a decision had to be made as to the order in which the various themes are presented. Such order does not imply judgment on their particular importance. A number of options were available. Either a distinction could be made between important and less important concepts, or the chronological sequence of issues arising before the ICC or before domestic courts could be followed.

[9] See on ICTY implementation Josipović (1998), 35; *idem.*, (2000).
[10] Cf. Turns in McGoldrick, Rowe, and Donnelly, (2004), 337, who maintains that implementation of the co-operation regime is "fairly uncontroversial on the whole".
[11] Neuner, (2003); Cassese, and Delmas-Marty, (2002).
[12] For the obligation to co-operate see *supra* chapter 3. The enactment of implementing legislation to facilitate the implementation of the co-operation regime is founded on Article 88 ICC Statute.

The approach taken here follows the order the provisions appear in the Statute and does not attempt to prioritise some over others. However unorthodox this might seem, it has a distinct advantage. It allows the reader to identify which Statute Articles have been properly implemented by States and which have not. It may be that the order followed in the Statute is not entirely logical or appropriate, as various issues might arise in different stages in practice. Nevertheless, the approach taken is also dictated by the fact that there is no uniform approach adopted by States in that respect. Some pieces follow the Statute, whereas some take the issues as they are likely to arise in practice or as they would have arisen, had this been an entirely domestic procedure. It is hoped, however, that the present approach will not discourage discussion of the relevant issues in considerable detail. For the Articles examined, some key points have been summarised and placed in italics for greater ease of understanding.

The countries chosen for this study are the following: Australia[13], Canada[14], France[15], Germany[16], the Netherlands[17] and the UK[18]. This chapter does not follow a regional approach, but rather each country was chosen because of a particular implementation approach. Australia was chosen because its lengthy Act covers every aspect of co-operation in a distinct way. Canada was chosen because of its strong commitment to international criminal justice

[13] International Criminal Court Act 2002, No. 41, 2002. See Boas, (2004), 179.
[14] Extradition Act, 1999, c. 18. See Oosterveld, Perry, and McManus, (2002), 767.
[15] LOI no 2002-268 du 26 février 2002 relative à la coopération avec la Cour pénale internationale.
[16] Gesetz zur Ausführung des Römischen Statuts des Internationalen Strafgerichtshofes vom 17. Juli 1998 Vom 21. Juni 2002. See MacLean, (2002), 260; Meißner, (2002), 35.
[17] 314 Kingdom Act of 20 June 2002 to implement the Statute of the International Criminal Court in relation to cooperation with and the provision of assistance to the International Criminal Court and the enforcement of its decisions (International Criminal Court Implementation Act).

and because it amended its existing extradition Act instead of adopting a stand-alone piece. France, because it incorporates the co-operation regime in its criminal procedure code, and the relevant provisions are very brief. Germany, because of its unique codification tradition, and the UK, as it represents a good implementation approach which follows the Statute faithfully. The absence of any African country is explained because not enough representative pieces have been adopted to date. South Africa's Act[19], does not present any particular problems and does not form part of this study, as it is, in fact, very good on the whole. Moreover, at the time of writing, no other African country had enacted legislation[20].

The choice of these countries is inevitably selective and hardly representative of the trends in ICC implementation. Needless to say, not every State is referred to in the analysis of each Article, but a selection is made among the most interesting approaches. The value of this work is to shed some light on what is expected to be incorporated by virtue of the Statute and the responses of a handful of States to these challenges. Ultimately, some guiding principles emerge and these will be summarised at the end.

Looking at different pieces of legislation or even different areas of the same piece would reveal more and, perhaps also, different trends and problems. Had another area been selected, the results would, in all probability, vary. However, this does not undermine the value of this study, as indication and

[18] International Criminal Court Act, 2001. Cryer (2002), 733. For the purposes of this study, reference will be made to England and Wales only.
[19] Act No 27 of 2002, Implementation of the Rome Statute of the International Criminal Court Act, 2002. See Du Plessis, (2003), 1.
[20] Uganda and the DRC both have draft implementing legislation. The author (together with S. Shah) is currently engaged in research on Africa and ICC implementation, funded by the MacArthur Foundation. A report and an academic article are currently in preparation.

analysis of a limited area of international criminal law and its implementation remains significant.

2. ICC Implementation: Some General Observations

Before proceeding with an examination of the various implementation pieces, it is of interest to examine some general questions States face when they are considering implementation. This will hopefully shed some light on the approach taken when they ultimately implement the Statute.

2.1 Why implement?

By stark contrast to the *ad hoc* International Criminal Tribunals for the former Yugoslavia and Rwanda where implementation was perhaps, to some extent, not necessary, the ICC regime, given its weaker constitutive basis, needs to be incorporated into domestic law. The Tribunals' creation by means of SC Resolutions signifies that there is a duty, based on the UN Charter, incumbent upon every State to co-operate with the Tribunals[21]. Such duty prevails, in principle, over any contrary domestic law. However, the application of this in practice has been problematic[22].

Also, the Tribunals' limited scope focusing on specific situations and not having, like the ICC, potentially universal ambit, meant that there was no immediate need to incorporate certain aspects of their Statutes, particularly the crimes within the Tribunals' jurisdiction. Moreover, this approach was assisted

[21] *Supra* chapter 3.
[22] *Ibid.*

by the principle of primacy and its operation. As seen already[23], when it is in the interests of justice, the ICTY or the ICTR may request that a case be transferred from national courts to the Hague or Arusha respectively, in accordance with the process of deferral. Taking this argument further, it would not be extreme to argue that the former Yugoslavia and Rwanda were the only countries where implementing legislation to incorporate the crimes in the Tribunals' Statutes was really necessary. And even in those instances, it would not matter in practice whether they have done so, since the Tribunals may assert jurisdiction when they see fit. However, with regard to co-operation, the situation is somewhat different. It may be that the Tribunals base their authority on the UN Charter, which in any case prevails. However, executing a co-operation request needs some authority in domestic law. The technicalities, therefore, of arrest, transfer and collection of evidence for the Tribunals have to be dealt with in practice using domestic laws passed to that effect. Several States, albeit not as many as it would have been hoped, have opted for that route, therefore assisting co-operation with the Tribunals[24].

When comparing the implementation efforts undertaken with regard to the Tribunals with those of the Court, it is immediately obvious that their different constituent basis has an effect on the incorporation stage as well. The ICC, being a product of an international treaty, contains obligations that have to be balanced against other international obligations State parties have, as well as requirements of domestic law, particularly of national constitutions. Despite

[23] *Supra* chapter 2.

[24] See www.un.org/icty; Similar information is not available through the ICTR's website. Most States that opt to implement however, also implement the ICTR Statute at the same time. See http://www.icrc.org/ihl-nat.nsf/WebLAW2?OpenView&Start=1&Count=150&Expand=15#15.

its importance, the Rome Statute does not enjoy an elevated status similar to the UN Charter; and this makes implementation imperative.

2.2 The Timing of Implementation

The first question a State is faced with, when considering enacting legislation to implement the ICC Statute, is whether implementation should take place before or after ratifying the Statute.

The advantages of enacting implementing legislation before ratification may be summarised as giving the State concerned the time needed to review conflicting provisions and to make the necessary amendments. It is important to note that once ratification is complete, the State in question is bound by the Statute and could be caught by its provisions. More specifically, States that had ratified and not implemented before the entry into force of the ICC Statute on the 1st of July 2002, risked being found unable to fully comply with a request to co-operate made by the Court, or in some cases, satisfying the complementarity threshold, which enables the Court to be seized of the matter. In practice, most States ratify first and deal with the implementation process afterwards. This is evidenced from the relatively few pieces of implementing legislation that have emerged at the time of writing, despite the ninety-seven State parties to the Statute[25]. This tendency may be explained by the fact that implementation, however good a State's intentions may be, takes time. It may also be that a State, anxious to provide its support for the Court internationally, proceeds with the ratification, whereas implementation, being an entirely domestic affair, is another victim of the usual red tape inherent in such processes.

2.3 The Manner of Incorporation

Regarding the form incorporating legislation may take, it is totally dependent on the stance a State wishes to maintain on the issue. Some States have opted for one, or more stand-alone Acts[26]. Germany comes directly to mind as an example of the latter, as it has adopted a complete "international criminal code" dealing with the substantive part of the ICC Statute and a separate co-operation law to implement the co-operation regime. However, neither of the two instruments is incorporated within existing pieces of legislation. Rather, they mirror the existence of a domestic criminal code and of a code of criminal procedure. This approach is definitely thorough, in the best of the codification traditions, and allows for a complete analysis of the possible issues that may arise when dealing with international criminal law before domestic courts.

Some other States have opted for amendment of only those provisions, which are affected by the ratification of the ICC Statute. France for instance, incorporates the co-operation provisions into its criminal procedure code[27]. This approach has the distinct advantage that the applicable provisions can be found in a single document, allowing for better access and understanding of the procedures and their interaction with the rest of criminal law and criminal procedure law. The above approach is particularly appealing to civil law countries, where codes are the cornerstone of the system. It entails, nonetheless, the danger that the many aspects of the Statute which need to be

[25] See www.icc-cpi.int/statesparties.html.
[26] For instance, Switzerland, Australia and New Zealand.

incorporated in a particular manner have to be contracted to fit the style of the domestic code. On the other hand, such an approach shows the significance attached to the ICC and renders it part of a State's own procedure, incorporated alongside the rest of the country's criminal legislation, and is not treated as "foreign law", but as part of the judicial system of the State.

The third approach is a combination of the two approaches described above. Namely, there is both a free-standing act, but also the provisions in other pieces of legislation that are affected are amended accordingly. This approach was followed primarily by Canada, although even in the UK's case there has been some amendment of other pieces of legislation affected by the ICC Act.

Moreover, the place of co-operation within the particular implementation piece of a State needs to be considered. Some States opt for a separate piece of legislation dealing with co-operation issues whereas others implement the co-operation regime in the same piece of legislation as the substantive crimes. In such a case the placement of the co-operation regime needs to be examined. Whereas generally co-operation follows the incorporation of the crimes, in the case of the UK, for instance, the co-operation provisions precede the substantive part. This is not at all problematic, as a State is free to choose the order it arranges its materials, but it might be worth considering why the UK has opted for this. Perhaps this represents a realisation that co-operation with the Court will most likely be required in the first instance, regardless of what the position is concerning the crimes. This also may stem from the fact that the UK, as with many other countries, does not really foresee that the ICC would be dealing with situations involving this

[27] Article 1.

State. Of course, such a claim can only be implicit, but it is nevertheless present. However realistic this assumption may be, the possibility of the ICC having jurisdiction over a State should not be completely disregarded with regard to any State. It remains true, however, with regard to certain States, that co-operation with the Court will be at the forefront and as such it merits special attention.

2.4 Areas of Implementation

It has been mentioned already that there are "obligations" and "options" when it comes to which areas need to be incorporated into domestic law.

Quite clearly, a State party to the Statute is under an obligation to co-operate fully with the Court. This is evidenced from Article 86 of the Statute which enshrines the unequivocal obligation to co-operate. Moreover, by virtue of Article 88 of the ICC Statute, States are required "to ensure that there are procedures available under their national law for all of the forms of co-operation". Under this provision it is clear that a State party is under a legal obligation to incorporate the ICC's co-operation regime. However, Article 88 neither specifies the exact procedures to be put in place, nor does it contain any guidance on how these procedures have to be implemented. Article 88 of the Statute contains the aim that needs to be achieved, leaving the means to the State concerned. It is akin, therefore, to an EU Directive in that respect[28]. On both occasions, what matters is the attainment of the goal, regardless of the manner of incorporation. As with a Directive, Article 88 sets the target and it is up to States to choose the means, without departing from the goal.

An equivalent obligation cannot be found in the Statute to incorporate the crimes within the Court's jurisdiction into national criminal law. The reference in the preamble does not create a legal obligation, as according to the VCTL the preamble to an international treaty is not binding[29]. Further the argument that the preambular paragraph codifies existing customary law which obliges implementation is no more convincing[30]. Had this been the case, a strong obligation to incorporate the crimes would have found its place in the main body of the treaty. Despite the importance and desirability of incorporating the substantive part of international criminal law into domestic law, such an act remains discretionary.

States decide to incorporate the crimes, primarily to enable prosecutions before domestic courts. This is certainly a wise choice as it is the first step in ensuring that the complementarity threshold of the ICC will not be met[31].

For States, a decision to include the crimes as part of their incorporation is crucial, since it enables prosecutions in that forum. This is of equal or perhaps even greater importance to them than simply ensuring full compliance with a co-operation request by the Court.

States that have incorporated the ICC crimes into domestic law have largely followed two approaches. They have either adopted them as they are found in the Statute, or have departed from the wording of the Statute and have opted for a wider or narrower approach. Canada[32] is a good example of a wider approach. It allows for prosecution before Canadian courts of crimes under

[28] Article 249(3) EC Treaty.
[29] See fourth and sixth preambular paragraphs. On the legal status of the preamble see *supra* chapter 2.
[30] Kleffner, (2003), 90-94.
[31] However the possibility of inadequate implementation of the crimes leading to the ICC seizing jurisdiction on the basis of complementarity should not be disregarded. Moreover, unwillingness or inability might still come into play giving rise to the Court's jurisdiction.

customary law. Given that not all the crimes in the Statute constitute codification of customary law, Canada's approach is wider than the scope of the Statute in that respect. Moreover, Germany adopts a holistic approach, which through the enactment of the *Völkerstrafgezetsbuch*[33] encapsulates an exercise in restructuring domestic prosecution of crimes falling under the ICC's jurisdiction which is much broader than the incorporation envisaged by the Statute. Such an approach, when done properly, is worthwhile and certainly welcome.

The most common approach among States, which incorporate the ICC crimes, is to reproduce in their domestic laws definitions of crimes as they are found in the Rome Statute[34]. This approach is less complicated, and may be undertaken by any State wishing to incorporate the crimes regardless of particular expertise or available resources. It has the distinct advantage that, in any case, the domestic law will be consistent with the Statute, whose wording is followed to the letter. This, in turn, means that the possibility of complementarity coming into play owing to lack of, or inaccurate, application of the definitions is the Statute is minimised, if not totally eliminated.

Apart from the offences, a State may wish to incorporate the general principles of criminal law and the defences under the Statute. With regard to the defences in particular, it should be noted that States generally include various defences in their domestic criminal laws. Compatibility of these defences with the defences permitted under the Statute needs to be assessed by

[32] Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24, Sections 4, 6.
[33] Gesetz zur Einführung des Völkerstrafgesetzbuches, 26. Juni 2002, BGBI. 2002, I, S. 22254. See Eser, and Kreicker, (2003); Zimmermann, in Vohrah, Pocar, Featherstone, Fourmy, Graham, Hocking and Robson (2003), 977; Werle, and Jessberger, (2002), 191.
[34] eg the UK.

the States concerned, as a wider or narrower defence system might give rise to the Court's complementary jurisdiction[35].

Finally, the possibility of using domestic criminal justice procedures in dealing with the ICC should not be disregarded. The necessity of incorporating ICC procedures concerning trials *in absentia* for instance, or plea bargaining or the right to silence is crucial. Even though there is no obligation to implement such areas, there might be points of conflict between the ICC and existing laws which might need to be reviewed before they arise when dealing with the Court.

In this respect, the difference between a timid approach taken by most States, which is epitomised in the incorporation of the minimum required, *i.e.* the co-operation regime, and another, more confident, approach hopefully shared by more States in the future, which includes more aspects of the Rome Statute, is noticeable. The former approach could be characterised as reactive, whereas the latter as proactive. Both serve a useful purpose, namely, completing the edifice of international criminal justice; each of them has different merits and challenges.

3. Factors that May Shape the Decision to Implement

Having examined some general issues, it is of interest to see whether there are some factors that dictate a particular implementation approach.

[35] See Robinson, in Cassese, Gaeta, and Jones, (2002), 1864-1866.

3.1 The System: Monism v. Dualism

Whether a State follows the monist or dualist tradition becomes relevant at the implementation stage[36]. Monism and dualism not only have important theoretical underpinnings[37] but they also have significance in practice[38]. The system a State follows may dictate particular approaches with regard to the status of international law in domestic law and incorporation thereof. Under dualism, treaty obligations must be separately incorporated into domestic law in order to gain effect domestically. Dualist States, therefore, require an incorporating Act which would give effect to an international treaty at the domestic level. This is true even when SC Resolutions are concerned, for which implementation is required in order to gain effect in the national sphere[39]. On the other hand, under monism, international law prevails and applies directly into domestic law.

When it comes to the ICC, it is important to distinguish between monist and dualist approaches in order to consider whether incorporation of the ICC treaty into domestic law is in fact necessary, or whether such a treaty is capable of having "direct effect". In the latter case, incorporation would not be strictly necessary. The argument in a purely monist country would, therefore, be that implementing legislation is altogether unnecessary since the Rome Statute would be directly applicable in the domestic sphere and would prevail over any conflicting piece of legislation. However appealing this argument may sound

[36] See Brownlie, (2003), 31-33; Ferrari-Bravo, in Macdonald, Johnston, (1986), 715.
[37] Starke, (1936), 66.
[38] Morgenstern, (1950), 42.
[39] See *Tharcisse Muvunyi v Bow Street Magistrate.* In this case, the opinion of the FCO was that it was necessary to implement the SC Resolution under which the ICTR was created in order to enable the transfer of the Muvunyi to the Tribunal. See excerpt of the opinion in, 71 *BYIL* (2000), 544.

for practical reasons, given that any existing legislation conflicting with the ICC Statute would automatically be set aside, is not entirely convincing. For it disregards the importance of the constitutional legal order in a particular country. It is indeed a State's constitutional order that influences the application of either monism or dualism in practice, as it takes a domestic, as opposed to an international, decision to decide whether an international obligation will be implemented or not. With that in mind, an examination of the two systems in the light of constitutional legitimacy is necessary. Under monism, international law forms part of a single legal order and national constitutional law finds itself below international law, whereas under dualism, the two systems are kept distinctly separate and a State determines the importance attached to a particular international law treaty through incorporation[40]. States have adopted varying approaches on the issue, ranging across the spectrum from monism to dualism, with the determining factor being the importance attached to the role of the national parliament[41]. It is true to say, however, that monism and dualism largely represent the two extremes and most States would find themselves somewhere in-between[42].

Incorporating the ICC Statute therefore depends on the constitutional approach with regard to monism or dualism[43]. As most States do not share Paraguay's approach partly explained by the country's history, by virtue of which the country "accepts a supranational legal system that would guarantee the enforcement of human rights, peace, justice, and cooperation, as well as

[40] Denza, in Evans (2003), 421.
[41] *Ibid.* pp. 422-428 where the system in six countries is examined.
[42] For a detailed discussion of the various approaches, see generally Jacobs, and Roberts, (1987). See also, Seidl-Hohenveldern, (1963), 101 *et seq.*.
[43] For a very comprehensive analysis of the challenges monism and dualism pose on constitutional legitimacy, see Feldman, (1999), 105.

political, socioeconomic, and cultural development"[44], certain constitutional amendments might be necessary to clarify the position of the ICC Statute into domestic law. The reality of incorporation, therefore, dictates that regardless of the whether a country is monist or dualist in principle, a close examination of the constitution is necessary to allow compliance with the Statute[45]. In any case, even by looking at the ICC Statute it is not easily discernible how this treaty could be applied without specific legislative authority in the domestic sphere. Accepting the prevalence of international law and its direct application might be true with regard to the substantive aspects of the ICC Statute. However, the same would not be true with regard to the co-operation regime. Although, in principle, the obligation to arrest, for instance, could be found in the Statute, the authority to empower the domestic police to execute such a request and the manner of execution would need to be specifically implemented if a State wishes to comply fully with the Court.

In order to fully appreciate the potential problems of implementing the ICC Statute as a treaty the theory of self-executing treaties requires some consideration. The importance of this issue lies in the fact that regardless of the method of incorporation, it is necessary to establish whether a treaty could have direct effect and subsequently whether the treaty confers rights to individuals either directly or indirectly which may, in turn, be invoked before domestic courts. According to the theory of self-executing treaties, certain international treaties are directly applicable, as if they were the law of the land,

[44] Art. 145 Constitucion de La Republica del Paraguay, available at: http://www.georgetown.edu/pdba/Constitutions/Paraguay/para1992.html

[45] Although specific constitutional issues are dealt with in the next section, it is important to emphasise here that some States have opted to amend their constitutions to facilitate full compliance with the ICC's provisions. In that respect see, most prominently, France, following a decision of the Conseil Constitutionnel (Decision No. 98-408 DC, 1999 J.O. (20) 1317. For a

and do not require further implementation[46]. The doctrine has been the subject of much legal scholarship in the US[47], given the so-called "supremacy clause" in the US Constitution[48]. The primary objection to the direct effect of such treaties has been their essentially political nature. A similar enquiry into whether the ICC Statute could be characterised as a self-executing treaty, however appealing, would be difficult to sustain. And this is not only due to the potential political nature of the ICC Statute, but primarily because the Statute contains many technical provisions, particularly in its co-operation part which require implementation. The strongest argument against can be found in Article 88 of the Statute which provides the legal basis for further action which is necessary for the effective functioning of the Court.

It is clear that regardless of the system followed by a particular State, and regardless of the nature of a treaty as self-executing or not, the constitutional order of a particular State will dictate the approach to be taken. When it comes to the ICC however, it is equally clear that implementation is essential and lies in the fact that without legislation to that effect, a State would be unable to execute a request made by the Court.

commentary on this decision see Rudolf (2000), 391. See amended text of Art. 53.2 of the French Constitution, available at: www.legifrance.gouv.fr.

[46] Aust, (2000), 158.

[47] Evans, (1953), 178; Paust, (1988), 760; Vásquez, (1995), 695. But also see comparatively: Preuss, (1953), 1117. For non-self-executing treaties in the same jurisdiction see: Sloss, (1999), 129, *idem.*, (2002), 1.

3.2 National Constitutions and Their Relationship with the Rome Statute

A major stumbling block in a State's compliance with the Rome Statute may be the national constitution of a State[49]. The various constitutional problems that may arise when a State ratifies the Rome Statute have been identified by the Venice Commission in a report published in 2001[50]. These problems may arise when it comes to the incorporation of the Statute, depending on the stance a State takes with regard to its Constitution and its effect on compliance with a co-operation request.

There are three areas that have been identified where the Constitution might be inconsistent with the Statute: First, the issue of extradition of nationals; second, issues relating to sentencing; and third immunities.

Unfortunately, space does not permit an examination of those but a States, when implementing, would need to review their constitutional instruments and adopt an approach which is in line with the Statute[51].

4. Setting the Standards for Implementation: Some General Issues

The quality of implementing legislation depends solely on the State concerned. The Statute does not provide much guidance, if any, as to how States may proceed with its implementation. Several issues arise in that respect for both the implementing States and the ICC itself.

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[48] Article VI, clause 2, US Constitution, available at: http://www.house.gov/Constitution/Constitution.html

[49] See generally on the issue, Duffy, (2001), 5.

[50] Venice Commission, (2000).

For the States, a need to balance their international obligations with the rest of their domestic laws and their responsibility towards their own people is at the forefront of their concerns. For the ICC, a need to ensure that complementarity works and that the Court's requests for co-operation are complied with, is equally important.

States incorporating the Statute need to set aside time, effort and expertise. The Rome Statute is not a treaty like so many others, where ratification suffices. Some delicate procedures must be put in place and this requires special attention. Developed States are not going to be the ones that are in need of most help. They have an army of lawyers and funds available to build up the requisite expertise, when this is not present already. Developing countries do not have similar capacity. The pressing needs of implementation are likely to affect those countries more, and it is in those countries where conflicts are more likely arise, and crimes falling within the jurisdiction of the Court are likely to be committed.

For the ICC too, implementing legislation is likely to pose a few challenges. The position the Court will take with regard to a State's implementing legislation is not yet clear. A distinction should be made between implementing legislation pertaining to the co-operation regime and to the substantive aspects of the Statute. With regard to co-operation, the ICC will have to deal with, essentially, the failure of a State to execute a particular task requested by the Court. In such an instance, the failure to comply will be examined on its own merits. With the exception of situations where a State refuses to co-operate by invoking the relevant Statute provisions, all other cases of failure to co-operate, due to lack or inadequacy of domestic

[51] For the options available, see Robinson, *ibid. supra* n. 35, 1853-4.

legislation, will in all likelihood be straightforward and the ICC will make a finding to that effect.

More interesting, and potentially more challenging for the Court, will be to assert its jurisdiction on the basis of complementarity in cases where national courts are proven to be unwilling or unable genuinely to investigate or prosecute due to lack of adequate legislation. In such cases, the ICC will necessarily have to pass judgment on the particular piece of legislation. The question which then arises is whether such a judgment by the Court will cover all future cases arising out of a particular situation, or whether each case should be judged *in concreto*. The latter approach seems to be more convincing, as the ICC would have to establish jurisdiction in each case. This is also consistent with complementarity and its application, as the ICC will have to establish the admissibility of each case and will not exclude a cluster of cases based on a finding on a previous case.

A related question concerns the timing of such an intervention by the ICC. It might be worth exploring whether it would be possible for the Court to intervene and examine a State's implementing legislation long before a case arises before it. The ICC could provide a "safety check" of such implementing efforts so as to minimise triggering the Court's jurisdiction when it is least necessary. Admittedly, the majority of cases will not arise following this route. And given the restricted resources the ICC has at its disposal, it is unlikely that such an initiative is, in fact, practicable.

Consistent with the principle of complementarity, the ICC will decide on the adequacy of national implementing legislation. Any opposite view would defy the principle itself. The real problem, however, is not so much the

authority of the ICC to decide, but what standards should be employed for the Court to make this decision. No guidance is provided for in the Statute. Essentially, the question is what a particular piece of legislation should be judged against, for example, the Statute, or perhaps the State's own resources? And in such a case, should ICC implementing legislation be compared to the rest of the State's own legislation? Or even, should there be a comparison with other implementation pieces adopted by other State parties to the Rome Statute?

Answering these questions is not easy. However, the answer to most of the above questions should be in the negative. Clearly, the Court is bound by the Statute, which created it. Hence, the Court will act as the guardian of the Treaty, and consequently, will also be guided by it for its jurisdiction and operation. Compliance of implementing legislation with the Statute is, therefore, essential. Certainly, the ICC cannot and should not embark on an examination of every piece of implementing legislation and how each measures against the rest of the pieces of implementing legislation. This would be a futile exercise, as there is no obligation for harmonisation in the Statute. It could be that the implementation process may well result in some co-ordination, if States adopt similar approaches, but this is not stated in the Statute and is not an immediate aim of the ICC. Of more interest is the case where a State has very limited resources at its disposal and cannot reach adequate standards in its legislation. In the case of a State that has undertaken a *bona fide* implementation, which is however not of the requisite quality, the ICC would potentially have jurisdiction. The issue of limited resources and its impact on the quality of implementing legislation at an early stage after ratification

should perhaps be explored. And this is an argument that might be put forward by the affected States. However appealing, the ICC should not succumb to a "two speed", or culturally different implementation. First, the criminal nature of the Court means that maintaining high standards is important. Second, creating double standards will not help the Court's primary mission which is combating impunity.

Advocating differing standards will not be unique to the ICC. It seems, however, that international practice militates against such a proposition. In *Kalashnikov v Russia*[52] the European Court of Human Rights dismissed Russia's claim that the conditions complained of "did not differ from or were no worse than, those of most detainees in Russia"[53] and found a violation of Article 3 of the ECHR, upholding the internationally recognised standards on detention conditions[54]. Moreover, the Eritrea Ethiopia Claims Commission dismissed the contention in that camp guards and staff lived in the same conditions as the POWs[55] and defended the provisions in Geneva Convention III[56]. Maintaining the treaty's high standards ensures uniformity[57].

So long the same standards are employed by both the ICC and the States concerned, regardless of whether they are rich or poor, or whether they have adequate or inadequate legislation, it is practically irrelevant where the person will be tried. The aim is not to let the culprits go unpunished. Convergence between the ICC's standards and those of the national courts is

[52] ECtHR, Application no. 47095/99, Judgment of 15 July 2002.
[53] *Ibid.* para. 93.
[54] *Ibid.* para. 103.
[55] *Eritrea v Federal Democratic Republic of Ethiopia, Partial Award, Prisoners of War, Eritrea's Claim 17*, 1 July 2003, para. 24.
[56] *Ibid.* para. 101. See Articles 13, 21-29 GCIII according to which detention of POWs must not seriously endanger the health of those POWs.
[57] Cf. evidence of concessions regarding standards may be found in CPT's general comments. See Birtles, (2001), 82.

inevitable if complementarity is applied properly. If a State does not meet the requisite standards of investigation or prosecution, the ICC will step in to deal with the case. From the point of view of the Court, it does not matter where the person is tried, so long he/she gets a fair trial for the crimes as enshrined in Article 5 of the Statute, and an appropriate punishment is imposed when the person is found guilty. For the individual concerned, there might be an issue of preference, but legally, all that matters is that the most serious of crimes are dealt with properly, either at the national or the international levels. For the State though, it might be an issue of pride, if it is deemed not to be willing or able to deal with a case. Particularly where the State genuinely endeavours to apply the Statute but is let down by its actual implementation. In such cases, the ICC ought to uphold its own standards, and assert jurisdiction on the basis of complementarity. Not only will this guarantee uniform application of the law, but it will also provide the impetus for greater compliance with the Statute.

From the above it is clear that setting the Court's standards is crucial. It is very difficult at this stage of the ICC's operation to speculate on the standards it will employ in informing its decision on implementing legislation. It would take a couple of cases and the Court's response in practice to have a clear picture of the direction the Court is likely to take. To a civil lawyer's horror, this might, in fact, be a case where the common law approach, in its most basic expression of making the law as the Court goes along, might be preferable. At this point, it is important to note that in any case, the Court should have as its guide two fundamental principles: that the implementing

legislation should assist its operation, and that the human rights of the accused are respected throughout the process of co-operation.

In the meantime, it would be helpful if the ICC published some guidelines to assist States wishing to implement the Statute. These guidelines, in the form of general principles, would be divided into areas of incorporation, raising specific problems and attempting to provide concrete solutions, could be of assistance to States. The limitations of this approach though are obvious. Such a document would not be binding and will only serve as guidance for States wishing to use it. The main problem is, however, that implementation cannot be done in the abstract and a generic approach cannot work. This is because no two legal systems are entirely identical and different needs therefore arise. Perhaps the best option would be to allow for greater interaction between the ICC and the State concerned with concrete advice given on behalf of the Court at the implementation stage and before a situation giving rise to the Court's jurisdiction occurs. Alternatively, and given the limited resources the Court has at its disposal, tailor-made assistance provided to a particular country or region wishing to incorporate the Statute may fill this gap. In the meantime, an examination of various pieces of legislation is interesting and useful in highlighting strengths and failures.

5. Article 86 ICC Statute: A Duty to Co-operate Fully

Article 86 contains the basic obligation of a State party to the Statute; to co-operate fully with the ICC in its investigations and prosecutions. This provision does not, as such, contain any specific implementation obligations.

There are no specific steps a State needs to take in order to incorporate this provision. Rather, it is a catch-all provision, which sets the benchmark for implementing legislation, as it constitutes a rule of general application. The key element is "full" co-operation of a State. And in order for a State to co-operate "fully", it needs to have implementing legislation which meets the requisite standards.

Irrespective, therefore, of the manner of incorporation, States that enact implementing legislation should ensure that this legislation enables them to co-operate "fully" with the ICC.

Some States prefer to state this as an objective of their relevant piece of legislation[58], but others do not. The criterion of course, is not whether a State perceives that it complies with the ICC Statute, but whether it actually does so in practice.

6. Article 87 ICC Statute: The Practicalities of Co-operation

Article 87 comprises the general provisions with regard to requests for co-operation made by the ICC. It is clear from paragraph 1 that each State should designate the authority to receive these requests by the Court. It is suggested that primarily the diplomatic channel will be used to this effect, but it does not preclude the use of other appropriate channels of co-operation. As this has to be determined by the State party at the implementation stage, upon ratification, acceptance, approval or accession, it would suffice to provide the requisite procedures upon receipt of the request by the designated channel. Also, the possibility that the ICC can use the International Criminal Police

Organisation or any other regional organisation to transmit its request is set out in Article 87(1)(b). A State may thus wish to provide in its implementing legislation for this possibility.

6.1 Article 87(3), (4): Confidentiality and Safety

Confidentiality of the proceedings is guaranteed through Article 87(3) of the Statute. The requested State is required to disclose any information only insofar it is necessary for the execution of the request. States are, therefore, required in their implementation to guarantee the confidentiality of the co-operation request and of any supporting documentation. In most States, such execution will in any way be dealt with in confidence. Moreover, with regard to Article 87(4), the safety, physical and psychological well-being of victims, potential witnesses and their families should be taken into account when dealing with information provided by the requested State to the Court. It may be that according to a particular State's procedure this is already covered, which in turn means that it might not be necessary to provide specifically for this paragraph in domestic legislation. Reinforcing the confidentiality aspect, however, would guarantee careful handling of sensitive information.

Australia devotes an entire Section on confidentiality and implements both 87(3) and (4) very accurately, by incorporating such an obligation in its domestic law and by turning the abstract obligation into a specific one for the person handling the Court's request[59].

[58] Section 3(1).
[59] Section 13.

6.2 Article 87(5),(6),(7): Third Countries, IOs and Failure to Co-operate

Paragraphs 5, 6 and 7 of Article 87 of the Statute concern primarily the ICC itself, rather than the requested State. They will not therefore be examined under this section. Article 87(7) deals with the possibility of a failure to co-operate and has already been discussed elsewhere[60]. Needless to say that a State should, through its implementing legislation, ensure that this provision is never invoked. Failure to co-operate due to poor legislation is unacceptable under the Statute and every step should be taken to eliminate this possibility.

The above provision does not call for implementation as it constitutes a measure which the Court may have recourse to in order to tackle the lack of co-operation. Australia however, in its Section 15 reiterates Article 87(7). The said provision operates as a reminder to the domestic jurisdiction of the consequences to be incurred in case of non-co-operation. This provision may also act as an incentive for the Attorney-General to ensure that, in most cases, co-operation will be guaranteed so as to avoid the sanction of referral of Australia to the ASP[61]. As such, this rather unique provision is helpful and might assist in Australia's greater compliance with the Statute. It also emphasises the importance Australia places on co-operation with the Court.

France does not go through Article 87 implementing each and every aspect of it the way a common law country would do. Instead, Article 627-1 of the French Law constitutes an overarching provision which refers directly to Article 87 of the Statute and which presumably allows for its direct application in France. Article 627-1 is facilitative as it allows for transmission of a request

[60] See *supra* chapter 3.
[61] Article 112(2)(f).

by any means possible in case of emergency. The said provision could also be construed to cover Article 91 of the Statute as well[62].

7. Article 89 ICC Statute: Surrendering Persons to the Court

The procedure regarding surrender of a person to the Court is outlined in Article 89 of the Rome Statute. Some States are familiar with the challenges of incorporating the obligation to arrest and surrender a person to an international criminal court, as they had a similar obligation with regard to the *ad hoc* Tribunals. However, the limited number of States that enacted implementing legislation with regard to the above Tribunals, as well as the role of the SC which, at least in principle in cases of non-co-operation, makes the application of this provision different to the equivalent obligation in the Tribunals. In any case, the essence of the obligation remains the same. States need to ensure that persons sought by the Court are arrested and transferred. This would give a meaning to the principles covering the interaction between the domestic and the international spheres.

Article 89(1) contains a reminder of the general obligation to co-operate with a request to arrest and surrender a person to the Court. This Article follows the same pattern with other Articles in the ICC treaty. It states the obligation, in this case, to arrest and surrender, but the execution of this

[62] See *infra*. It should be observed that Article 627-1 is broader than the above Article, as it allows transmission of the request using any possible measure, which presumably includes a medium not capable of delivering a written record. (Cf. Article 91(2) ICC Statute). Article 627-2 provides the procedure for the co-operation with the ICC. By virtue of the Article, the Prosecutor of the Republic or the instruction judge of Paris execute the request. Interestingly, and this is a unique provision, Article 627-2 second and third paragraphs, includes a procedure for transferring the minutes taken in the course of the execution of a co-operation request to the Court itself. This may be explained by the fact that France, as any civil law country, places a lot of emphasis on written evidence.

obligation is left to the States, which will use their domestic laws. This is understandable since it would have been impossible for the ICC Statute to provide for a generic approach to be followed by all State parties to the Statute. This means that the exact procedure on the ground is, to a large extent, irrelevant for the Court, as long as the State in question complies with the arrest and surrender request, in accordance with Article 89. Allowing the practical application to be regulated by the relevant State has the advantage of providing greater flexibility in the execution of the Court's request, which, in turn, signifies the potential for greater compliance with the Court's request, at least in principle.

In accordance with the final sentence of Article 89(1), in implementing this paragraph, a State should specifically provide for the arrest and surrender of a person to the Court in its domestic law, complying with the ICC co-operation regime. National law is to be employed in that respect.

Even though domestic procedures apply with regard to effectuating arrest and surrender, it should be emphasised that a common characteristic of such procedures should be expediency and effectiveness. For it is in the interests of the Court to have the person before it as soon as practicable.

All States examined here deal with Article 89 in their domestic legislation. And all provide somewhat similar procedures. In this section reference will be made to the most interesting aspects of those, without analysing each step of the process. Article 89 of the Statute is complemented by Article 91 and some of the issues of interest will be dealt with there.

As a general observation, States in using their normal criminal justice proceedings when dealing with arrest and surrender to the ICC, adjust the

relevant provisions to suit the aim of achieving the arrest and surrender, without putting in place special procedures generally to deal with a request from the ICC.

7.1 Permissibility of the Surrender

A reccurring theme seems to be an investigation into the permissibility of the surrender. To satisfy procedural legality in domestic law, a State is entitled to look into the permissibility of the surrender request. However, such examination should focus on procedural formality and should not extend to an investigation into the substance of the request. In other words, an examination into the formal elements of the request, whether for instance all the necessary documents[63] are present, is acceptable, but no examination into the legality of issuance of the ICC's warrant for instance, should be permitted. The Statute does not provide for this possibility and, in any case, surrender to the Court, unlike extradition, does not impinge on the sovereignty of the requested State, as consent has already been given when signing up to the ICC treaty.

France[64], Germany[65] and the UK[66], distinguish between an investigation into the formal requirements of the request and a substantive one. In the

[63] Stipulated in Article 91 ICC Statute.
[64] Article 627-4.
[65] Section 6. The procedure to be followed can be found in Sections 20 *et seq.*. Moreover, the decision on permissibility is made by virtue of Section 22. This provision does not state the criteria on the basis of which the Higher Regional court is going to reach a decision on the permissibility of the request. More crucially, no mention is made to the applicability of the potential grounds for refusal of a request in the course of such proceedings. It seems that an appeal procedure as such is not envisaged. However, the procedure of Section 23 comes close to that, if only in a limited manner since it only is engaged when new circumstances arise after the initial decision has been made. A different type of appeal is envisaged before the Federal Supreme Court (Section 33) open only to the Higher Regional Court, when it considers that a decision of the Federal Supreme court is "necessary to clarify a legal question of fundamental importance or it seeks to deviate from a decision of the Federal Supreme Court or a decision of a different Higher Regional Court regarding a legal question on surrender issues with the ICC".

Netherlands, however, a more detailed procedure is envisaged. Section 24 of the Dutch Act enables the District Court to make a finding on permissibility on the ICC's request. In this regard, the public prosecutor expresses an opinion[67], the person sought is entitled to make recommendations[68] and witnesses or expert may be called to contribute to their proceedings[69]. This provision may prove to be problematic in practice. It is not clear what criteria the domestic court will employ to establish whether this case is permissible whereas it is doubtful whether a clear right to determine permissibility even exists. As surrender of persons does not fall within the category of measures of assistance that may conflict with national security[70], or with a fundamental legal principle of general application[71], the only possible scenario where discussion of the request at the national level is relevant is that of Article 90. In particular, when the surrender request conflicts with a request for extradition relating to the same conduct where there is a pre-existing international obligation to extradite[72]. However, examining permissibility would not be appropriate in such a situation as a case of conflicting request involves an entirely different procedure[73]. Looking into the permissibility of a case implies an examination

This appeal procedure does not operate as the highest domestic remedy available against the decision of the Higher Regional Court regarding the execution of a request for surrender, but constitutes a mechanism for guaranteeing consistency within the German Federal system.
Of interest however is Section 23(5) which provides the Higher Regional Court with the option of postponement of surrender when discussing the permissibility of surrender in the circumstances described in Section 23. This postponement is not linked to Articles 94 and 95 of the Statute which are implemented by Section 48 discussed *infra*.

[66] Section 5(5). According to this provision, an examination into the legality of issuance of the ICC's warrant or into the evidence that led essentially to the indictment of the subject of the surrender order is of no concern to the UK court.

[67] Section 24(2).

[68] *Ibid.*

[69] Section 24(3).

[70] Article 93(4) ICC Statute.

[71] Article 93(3) *ibid.*

[72] Taking into account the factors found in Article 90(6) *ibid.*

[73] See on this issue Section 31, which provides further indication that an examination of the admissibility of the request is entirely different.

of particular conditions that have to be met. As there is an obligation to execute the request for arrest/surrender as evidenced by Article 86 and more specifically Article 89(1), any examination of the admissibility of the request that leads to refusal of execution[74] would be unfortunate and as such should be avoided. In essence, the hands of the District Court are tied as to a finding of impermissibility not based on the Statute, which will lead to refusal of the request by the Minister of Justice[75] and will in turn signify failure to co-operate with the ICC[76]. Be that as it may, no legal remedy against the District Court's ruling is envisaged[77]. So long the request is made in the requisite form under 91(2) and (3), there is no reason to refuse permissibility.

7.2 Executing a Request for Surrender

In France the request is integrated into the French system providing the legitimacy of the procedures necessary to satisfy the proper administration of criminal justice. An expedited procedure is envisaged in France, which involves appearance before the relevant Prosecutor[78], and transfer to a prison in the competence of the Court of Appeal of Paris, appearance before the "Chambre d' instruction"[79] before finally being surrendered to the ICC within a month of the day the decision becomes final[80].

[74] The consequence of a finding of inadmissibility is refusal of execution of the request as evidenced from Section 30(4).
[75] See *infra* Section 30(4).
[76] Article 87(7).
[77] Section 27(4).
[78] Article 627-5. This Article also stipulates that the person is assisted by a lawyer.
[79] Article 627-7.
[80] Article 627-10. In order for the decision to become final under normal criminal procedure, the deadline for appeal must have lapsed without any of the parties entitled to appeal having done so. This is not specified in the Article in question, but this is probably the case here as well. Extension can be provided for however, by virtue of Article 627-13.

A unique provision can be found in the French code. When surrender is finally ordered, the Instruction Chamber has to be satisfied, in accordance with Article 627-8 that there is no obvious mistake. Bizarrely, the lack of obvious mistake appears again in the second paragraph of Article 627-13. This is a rather confusing provision, as it is not clear what would constitute an "*erreur évidente*". Besides a mistake regarding the identity of the person sought, it is difficult to conceive much else that would fall within the typology of an obvious mistake and would merit, as such, reference in this provision. Given, however, that the identity of the accused has already been verified at an earlier stage, it is unclear as to the circumstances in which this provision could be used. Unless this provision is there to allow the possibility of a last minute check for something blatantly obvious which would render the surrender unnecessary, it should be disregarded. So long as this provision is not used as a mechanism to review the ICC's request and is not, moreover, abused in order to deny execution of the request either by disagreeing with the Court or by using national law exceptions, its presence in Article 627-8 and 627-13 is unobjectionable.

The general obligation to surrender a person to the ICC, enshrined in Article 89 of the Statute, is incorporated in Section 11(1) of the Dutch Act, which specifies that a person shall be surrendered to the ICC for either prosecution and trial or enforcement of an ICC imposed sentence. Although Article 89(1) of the Statute does not specify that surrender is sought with these two objectives in mind, it is evident from Article 91(2) and (3), which includes the contents of a request for arrest and surrender, that surrender may only take place for the above reasons. Section 11(1) of the Dutch Act is therefore a clear

example of the scope of surrender within the ICC framework. The procedure before the Dutch District Court to authorise surrender can be found in Sections 21-29 of the Law[81]. The Netherlands adopts an expedited procedure to deal with the request for surrender[82].

The decision to execute the request for surrender lies ultimately with the Minister of Justice of the Netherlands who, provided that the request is permissible[83] and he/she does not consider that they need further information from the ICC[84], shall order the surrender[85]. If, however, the request has been found by the District Court to be impermissible, then surrender is refused[86] and compensation is awarded to the person who was the subject of the surrender request for the deprivation of his/her liberty[87]. Although making provision for compensation is certainly a good thing, the possibility of declaring the request impermissible without any clearly defined rules emanating from the Statute sits uncomfortably with the rest of the provisions in the Dutch Act which appropriately replicate the obligations deriving from the Statute.

The common law approach on surrender envisages a longer procedure before the actual surrender takes place[88]. A common characteristic of this

[81] These provisions cover a number of issues ranging from the rights of the requested person to the exact procedure to be used during the hearing of the surrender request.
[82] Section 22 stipulates that the date of the hearing will be determined '[...] as far as possible as a matter of priority[...].
[83] See *supra*.
[84] Section 30(3).
[85] The practicalities of the surrender are covered by Sections 33-35.
[86] Section 30(4).
[87] Section 44.
[88] See Sections 16-18, 29-33, 38 of the Canadian Act, where the various steps in the process are envisaged. In England and Wales, once the court makes the delivery order, the procedure to be followed can be found in Section 11. However, in Section 8, the consequences of a competent court refusing to make a delivery order are discussed. Notably, no reasons are given why the court would refuse to make such an order.

process is provision for appeal, judicial review and habeas corpus[89]. Moreover, bail is also envisaged, albeit in exceptional circumstances[90]. The process described above does not present any problems as it complies with the Court's requests.

It is clear that States generally afford the same protection to the subject of the ICC's surrender request as they would to any person going through their domestic system. The effectiveness of the processes discussed will be tested in practice, by virtue of the expediency of the overall process.

7.3 Dealing with Irregularities of Arrest and Procedural Defects

Addressing issues of lawfulness of the arrest and respect for the rights of the subject of the surrender order is very important. For the purposes of this section, the approaches followed by France and the UK will be examined, as they represent two diametrically opposite views.

In France, if the person does not appear before the Prosecutor of the Court of Appeal within five days, this has the effect of immediate releasing the apprehended person[91]. Similarly, if the person is not transferred within a month from when the decision has become final the same remedy, that is, setting the

[89] Sections 49-56, 57 and 69 respectively of the Canadian Act; Sections 9 and 10 for appeals in England and Wales and Scotland respectively. For judicial review, see Section 12, and habeas corpus is dealt with in Section 12(2) of the UK Act.

[90] Sections 16-18 UK Act. A consultation procedure is put forward. The court notifies the Secretary of State of the application for bail, who in turn consults with the ICC, which may make recommendations. In Section 18(1)(c) it is stated that "bail shall not be granted without full consideration of any such recommendations". This provision has two potential problems: first, there is no provision on the procedure to be followed if the ICC does not make any recommendations and second, if the ICC makes a negative recommendation with regard to granting bail, there is no indication that the national court will, in fact, follow such recommendation. This Section ensures that ICC recommendations will be examined by the court. The criteria employed in Section 18(3), however, should be considered adequate to enable the court to make the right decision. See also Section 24 Australian Act.

[91] Article 627-6.

person free, is envisaged[92]. These provisions are of great interest. The issue which is at stake here is the human rights of the accused and the way in which their violation can be dealt with. There are two conflicting interests here. First, the presence of the accused before the ICC, and secondly, his/her human rights. Although the importance of protecting the person's human rights should be stressed, it should be accepted that in accordance with Article 85 of the Statute such an incident would give rise to a compensation claim before the ICC[93]. Also, it might be possible to bring a separate action before the French courts to address this issue. Setting the transferee free should, therefore, not be the solution in this particular instance, despite the importance attached to following a specific procedure.

In England and Wales, an application regarding abuse of the above processes may be made either by the court on its own motion or by the person arrested[94]. In the former case the court "may" make a determination on these issues, whereas in the latter case it "shall". The difference of course is that when the person concerned considers that his/her rights have been violated, the State through its court system has a greater responsibility to react to this claim.

The procedure to be applied, as well as the criteria for the above-mentioned determination are, according to Section 5(7) of the UK Act, the same as with an application for judicial review. If the court finds in favour of the claim that the arrest has been unlawful or the person's rights have been breached, it makes a declaration to that effect under subsection 8. However, the court is precluded from granting any other relief[95]. This is extremely useful as

[92] Article 627-10.
[93] See also *supra* chapter 3.
[94] Section 5(6).
[95] Section 5(8).

it means that, effectively, the accused cannot be released, for instance, following irregularities in his/her arrest. Instead of discharging the person, the UK chooses to comply with the strong obligation to co-operate with the Court at the same time limiting the effects of a Section 5(8) declaration to the notification of the Secretary of State, who shall transmit it in turn to the ICC. This approach is entirely appropriate, as it gives the opportunity to the ICC to assess the allegations, and in the case in which they are upheld, to determine the appropriate mode of reparation. Although this position is most suitable to deal with issues of irregularities of the arrest and other human rights violations in the course of executing a request by the Court, it has not been followed by States in their implementing legislation. There is a tendency among law-abiding States to prefer to deal with such issues themselves rather than to allow another body, albeit the ICC, to effectively pass judgment on the domestic system and deal with a particular failure to respect the person's rights while effectuating the arrest. States are also used to dealing with such issues in their domestic procedures and do not perhaps realise the importance of surrender to the ICC. This is not to say that it is acceptable to violate the person's rights in the name of arresting the alleged criminals sought. Rather, the principle has to be that remedies should be available, in consultation with the Court.

7.4 Article 89(2): *Ne bis in idem* Challenges

Article 89(2) operates as a bridge between national jurisdictions and the ICC in terms of admissibility issues. In all probability, the person sought will raise an inadmissibility claim before national courts first, regarding a previous

acquittal or conviction. In such cases, the procedure to be followed is set out in this paragraph. A consultation procedure is chosen to address such issues and this procedure is the one that needs to be provided for in domestic laws. The national court before which the *ne bis in idem* claim is made would then liaise with the ICC to decide the course of action.

To implement Article 89(2) a State should allow for consultation procedure in case of a ne bis in idem claim made before the national courts.

The Netherlands refers to Article 89(2) in Section 7 of its Act which contains a number of instances where consultation will be used[96]. The Dutch approach is a helpful one as Section 7 ensures that consultation is ensured whenever granting the co-operation request would result in a "violation of the principle of *ne bis in idem*". The issue that arises is whether the *ne bis in idem* challenge in Article 89(2) has to be brought before a national court of the State from which surrender is sought, or whether it would suffice had such a challenge been brought before the courts of any State which presumably has jurisdiction. The latter should be accepted as true as any different solution would jeopardise the correct application of the *ne bis in idem* principle, by restricting its ambit unnecessarily.

Germany implements this possibility in Section 3 of its Law. Notably, such a challenge may be brought on the basis of conviction or acquittal before the ICC itself or a court in another State[97]. It is unclear from this Section whether conviction or acquittal before German Courts would also fall under the same Section. It is implicit in Section 3 that such a challenge may not be brought against proceedings before German courts. In one sense this may be

[96] See *infra* analysis of Article 97.
[97] Section 3.

explained because no State wishes to be held "genuinely unwilling or unable" by virtue of complementarity. In fact, most States would think that this would apply with regard to other States and not themselves. This provision is evidence of this attitude. However improbable it is that German courts will be proven to be unwilling or unable genuinely to deal with a case in accordance with Article 17 of the Statute, the possibility of this happening should nevertheless be incorporated into domestic law. Coming back to the German Section 3, it is interesting to see that the possibility enshrined in Article 89(2) to postpone the execution of a request pending a determination of admissibility by the Court, is translated into an obligation to postpone by the German law[98]. This is not necessarily wrong, nor does it imply failure to co-operate with the ICC. It simply connotes a higher threshold to be applied in case of an admissibility challenge instead of a lower one preferred by the Statute.

7.5 Article 89(4)

A different situation altogether is envisaged in Article 89(4) of the Statute. It is essentially a competing request but this request pertains to the requested State party and not to a third State. In case of the same person being proceeded against or serving sentence for a crime other than the one sought by the Court[99], Article 89(4) will come into play. This provision requires a consultation procedure to be in place after the requested State has made a decision to grant the request.

[98] Note the use of the command verb "shall" in the penultimate sentence of Section 3.
[99] Because if it is the same crime, then issues of admissibility arise.

To implement Article 89(4), a State is required to consult with the ICC after making its decision to grant the request.

Germany implements the said provision in Section 27 of its Law. Instead of providing for a consultation process Germany opts for surrendering the person to the ICC "temporarily". In essence, precedence is given to the Court and this Section contains the procedure to be followed upon return of the suspect[100]. This is certainly the correct approach as it recognises the significance of the surrender to the Court at the expense of domestic proceedings, which despite the importance of the crimes involved, might not necessarily be of a similar gravity to the ones for which surrender is sought. An interesting interaction might arise, however, if the same conduct gave rise to two different crimes[101] since Article 89(4) refers to "crime" and not conduct.

8. Article 90 ICC Statute: Dealing with Competing Requests

Implementing competing requests involves a number of steps to be taken by a State depending on the nature of the request. Article 90 covers a range of different situations which need to be addressed in domestic law.

The responsibilities of the requested State could be summarised as follows: First, provision should be made to notify the Court of the competing requests. Second, the distinction between the different cases within Article 90 should be clear and consistent with the Statute. In particular, a distinction should be made between dealing with a request concerning the same and different conduct as well as between State parties and non-parties with

[100] The various possibilities are discussed in paragraphs 2-4 of Section 27.
[101] The obvious example being genocide and crimes against humanity for instance.

reference also to the admissibility of the case. Finally, although not spelt out clearly in the Rome Statute, granting precedence to the request by the Court over a competing extradition request could validly be an underlying concept in the incorporation of this provision into domestic law. This is due to the particular significance of the crimes falling within the jurisdiction of the ICC.

A brief examination of various pieces of implementing legislation reveals different approaches on the issues discussed above. Even though competing requests are expected to arise, France, for instance, does not provide for this at all in its code. Moreover, other States do not cover every aspect of Article 90, thus leaving gaps in its incorporation.

The Netherlands on the other hand, deals with Article 90 in a very simple, yet effective, manner. In a two-line provision it is stated that competing requests will be dealt with by the Minister of Justice "having regard to article 90 of the Statute"[102]. Section 31 of the Dutch law renders Article 90 of the Statute directly applicable in the Netherlands and all the various possibilities enshrined therein will be dealt with in accordance with the Statute. In that way, inconsistencies in the application are avoided and the thorny issue of competing requests is addressed in the most appropriate manner. This approach is only second best to one that would confer priority to a request made by the ICC, whenever possible.

Article 90 is implemented by Section 4 of the German Law. Section 4(1) does not refer to the fact that a request for surrender and extradition respectively has to be made by both the Court and that other State and that these competing requests have to relate to the same conduct. The situation described in Section 4(1) involves a request for extradition made by a State and

the same conduct involved gives rise to the Court's jurisdiction. This situation is slightly different to the one described in Article 90 of the Statute and, in fact, wider than Article 90. It may be assumed that given the wording in Section 4 any request for any conduct which gives rise to the Court's jurisdiction, would suffice to trigger Article 90. This is not the case. The purpose of Article 90 is to allocate conflicting requests to appropriate fora depending on the specific instances and by solving potential disputes that would otherwise arise. The requested State is required under Article 90(1) to notify the ICC of the conflicting extradition request. Section 4(1) does not do this explicitly. Instead, it provides for an additional function: it gives the ICC the opportunity to request and, upon consent of the requesting State and provided that this is not prohibited by an international agreement, to obtain a copy of the extradition request and the relevant documents. It is Section 4(2), which implements Article 90(1) appropriately, by providing for notification of the Court. Moreover, this Section ensures that the requesting State is also notified of the ICC's conflicting request. This is not found in the Statute which is only concerned with the Court's functions. However, notification of the requesting State is appropriate and Germany opts for doing this in the same provision which is very logical.

Germany does not follow the structure of Article 90. It chooses a consolidated treatment of the different situations that might arise. Section 4(3) is a good example of this approach. In a single paragraph, the German law contains all the situations in which priority is given to the ICC's request in accordance with the Statute[103]. The principle adopted here is that extradition

[102] Section 31.
[103] Section 4(3), which refers to Article 90(2), (4) and (7)(a) of the Statute.

should be postponed[104] and that the Court's request should take precedence. What is unique about this paragraph is that it does not distinguish between the types of conduct for which surrender/extradition is sought. Instead, all the instances where, in accordance with the Statute, priority should in any case be given to the Court, are dealt with in a single provision. Section 4(3) is at first sight quite confusing. However, the relevant Articles of the Statute are mentioned explicitly in this Section and thus are directly applicable. Nonetheless, the emphasis is on whether prior approval of extradition has taken place when a request for surrender is received. A closer look at the Statute reveals that the approach is, in fact, an interesting one and consistent with the letter of Article 90. Despite not following the structure of Article 90, the attempted codification of the provisions discussed above works entirely satisfactorily as it represents a somewhat distilled version of the provisions granting precedence to the Court. Section 4(4) appears to be somewhat superfluous because it reiterates that extradition shall be postponed until a decision is made by the ICC on the proceedings that triggered the surrender request. To a large extent, this is evident from Section 4(3). All Section 4(4) does is to specify the outcome of the postponement of the extradition request. Moreover, it stipulates that this applies with regard to Article 90(5) and (6) as well, which are not dealt under Section 4(3) and, as such, it is useful.

With regard to Article 90(5), there is a slight discrepancy in its incorporation by Section 4(5). Article 90(5) deals with the situation in which a case on which the surrender to the ICC is based has not been determined to be admissible. In such a case, this paragraph enables the requested State to

[104] That is if the request has not been granted already at the time of receipt of the Court's request for surrender.

proceed with the extradition request. By contrast to Section 4(6), the Statute does not include a specific time limit after the lapse of which the case is considered to be inadmissible. The German approach here makes sense as a State should not be obliged to wait indefinitely for the determination of the Court. However, unlike Article 90(3) where it is stated that such a determination "shall be made on an expedited basis", neither Article 90(5) nor the RPE include such a provision. Consequently, the two-month deadline found in the German Section 4(6) although reasonable, goes beyond the Statute.

A conscious attempt is made to grant priority to the request made by the ICC, wherever possible, as evidenced by Section 4(6). This Section refers directly to Article 90(6) and 7(b) which encapsulate the two possibilities where the extradition request potentially prevails. Yet, in this case as well, Section 4(6) strives to solve the issue in favour of the ICC, unless "the reasons of approving the extradition request are not clearly predominant". The approach taken here is clearly the preferred one and it shows clear commitment to assisting the ICC in the performance of its tasks by exercising the discretion founded in the Statute in the most appropriate way.

Finally, Section 4(7) states the obvious: that the ICC should be notified of the outcome of dealing with the extradition request is beyond doubt the right procedure to be followed.

Australia is another State that deals with competing requests at some length. Australia devotes a couple of lengthy provisions on the issue of competing requests, which are worthy of a more detailed examination. In the Australian Act, the possibility of competing requests from the ICC and a foreign country regarding the same conduct is examined in Section 37. This

Section operates as an introduction to Sections 38 and 39 which follow and deal with the issue in detail. Section 38 deals with requests made by parties to the Statute, whereas Section 39 with requests made by third parties. Section 37 states that the AG must notify the ICC and the foreign country of the existence of conflicting requests before assessing them under sections 38 and 39. This is in accordance with Article 90(1).

The structure of Section 38 is straightforward. Subsection (1) of Section 38 contains the scope of application of this section. In Subsection 2, the conditions are examined where a request by the ICC must take precedence over a conflicting extradition request. Subsection 3 addresses the possibility of executing the extradition request. Finally, Subsection 4 contains a clause akin to a time restriction clause, the lapse of which, triggers the extradition process. Section 38(1) applies when a request by the Court conflicts with that of another State, which is an ICC party.

For Australia to give priority to the surrender request made by the ICC, the Court must have determined the admissibility of the case pursuant to Articles 18 and 19 of the Statute. Moreover, this determination by the Court should take into account the "investigation or prosecution conducted by the foreign country in respect of its request for extradition". Alternatively, if the Court makes a determination of admissibility under Article 18 or 19 after receiving notification on the request for extradition from the foreign country, then Section 38(2)(b) gives priority to the Court's request. Subsection 2 is in accordance with the Statute, as it repeats almost *verbatim* Article 90(2) of the Statute.

Article 90(3) of the Statute is implemented by Australia in Section 38(3). The Extradition Act 1988 then applies while dealing with the request, but the extradition cannot occur until the case is deemed inadmissible by the Court. This is in accordance with the Statute. The second section of Article 90(3) is dealt with separately by the Australian Act.

Section 38(4) has its basis in the second section of paragraph 3 of Article 90. The Statute mentions that the determination of the admissibility of a case in respect of a conflicting request will be made on an expedited basis. This element of Article 90(3) is echoed in Section 38(4). Australia does not specify what, in its view, would constitute an expedited determination and most importantly, what would not. In any case, it seems that such a determination is left to the Court. The Australian piece of legislation simply reiterates what the Statute promises. The Statute does not state the consequence of a non-expedited finding. With an express reference to paragraph 3(b), Section 38(4) goes a little further than the Statute and implies that the extradition to the foreign country will go ahead in case of a delay by the Court. This is so, as Section 38(3)(b) is rendered inapplicable based on a hindrance in the Court's process. The fact that the Australian legislation devotes an entire subparagraph to this section constitutes evidence of the importance it attributes to this process.

Similar structure to Section 38 is followed by Section 39 of the Australian Act. This is explained as Section 39 relates to the other possibility foreseeable when dealing with conflicting requests; namely, a request regarding the same conduct which comes from a foreign State, which is not a party to the Statute. This possibility is dealt with again in Article 90 of the

Rome Statute. The Statute recognises the difference between a request originating from a State party and one which is not, however, it does not devote a separate Article to that, opting thus for unity of procedure. Australia does not follow the Statute's example but treats the two possibilities in two separate provisions. This approach may, in fact, be preferable, as it allows for a more complete treatment of potential problems, without running the risk of confusion arising from a single Article.

Section 39(2) reiterates Article 90(4) of the Statute and is therefore unproblematic. The Court's request prevails over a conflicting request, should there be no international obligation to extradite to the foreign country and the ICC has determined the admissibility of the case.

The discretion allowed in Article 90(5) is taken up by Subsection 3 of Section 39, which enables Australia to deal with the extradition request[105], provided that the ICC has not yet determined the admissibility of the case[106].

This provision is further enhanced by Subsection 4, which emphasises that the extradition, which in Australia would take place following the Extradition Act 1988 may not occur "unless and until the ICC makes its determination on admissibility and determines that the case is inadmissible". This provision is based on Article 90(5) of the Statute, which allows a State to proceed to deal with the request for extradition to the third State. Australia also includes Subsection (5) in its Act, which basically stipulates that the extradition may go ahead regardless of the determination of the admissibility by the Court, if this determination is not made on an expedited basis. This possibility is not found in the Statute. Hence, Australia goes beyond the Statute in that respect,

[105] under (a).
[106] under (b).

allowing for a further possibility to execute the extradition request, notwithstanding a conflicting request by the Court. Given that there is no international obligation to grant precedence to the competing extradition request, Subsection (5), which is a reminder of Section 38(4) constitutes deviation from the Statute. Obviously, the Statute's intention is to encourage compliance with ICC's co-operation requests and it would be expected from State parties to facilitate this, whenever possible.

An entirely different procedure is followed if the request comes from a country where extradition is required, on the basis of an international obligation. The AG is responsible for making the determination of whether priority will be given to the ICC or not[107]. In making his/her decision, the AG should take into account all relevant matters listed in a non-exhaustive manner in Section 39(7). The said subsection repeats faithfully Article 90(6) of the Statute and is trouble-free. Correctly, the dates the respective requests were received are relevant and indeed important. A pre-existing request by the Court provides a good reason for the requested State to refuse extradition, and to execute the request for surrender of a person to the ICC. Similarly, a request for extradition made prior to the Court's request for surrender should equally be executed, given the existence of an international obligation for its execution. The invocation of the nationality and territoriality principles in Section 39(7)(b) is actually of particular importance, as it emphasises the basis of the Court's jurisdiction and respects these fundamental principles on which its jurisdiction is established, in accordance with Article 12 of the Statute. In fact this sub-paragraph goes beyond Article 12, as it lays emphasis also on the nationality of the victims, which Article 12 fails to do. A further criterion

which may be taken into account is whether the State which formulates the extradition request is likely to surrender the accused to the ICC. This would happen for instance if the said State accepts the Court's jurisdiction on an *ad hoc* basis[108], or complementarity engages, or the State abstains from exercising jurisdiction.

As mentioned in chapter 3, the list of factors enshrined in Article 90(6) of the Statute is not exhaustive. States implementing this provision could determine additional factors which will, in their view, be relevant when dealing with a competing request by the Court and an extradition partner.

Moving to Article 90(7), Australia implements both its sub-paragraphs in Section 40. Subsection 1 contains the applicability of the Section. Clearly, the position differs between a request for which extradition is required following an international obligation and one where is not. Both options are implemented appropriately by Australia which in Subsections 2, 3 and 4 basically repeats Article 90(7) of the Statute to the letter.

As a general point, when implementing Article 90(7), a State could reiterate the procedure adopted with regard to Article 90(6) and even deal with the issue in a single provision, provided that the different situations are given appropriate consideration and are distinguished from each other.

Finally, that the requested State should therefore provide for notification in its implementing law is very clear. Article 90(8) is incorporated into Australian law in Section 41. Subsection 1 precisely reiterates paragraph 8 of Article 90 of the Statute, whereas Subsection 2 further clarifies the procedure, by specifying that there is an additional obligation the AG to

[107] Section 39(6).
[108] Article 12(3).

respond to the ICC's request, notwithstanding section 14 which contains a similar request to respond. No matter how unnecessary this provision might seem, it is quite helpful to avoid confusion.

Unlike Australia, Canada is an example of a State which only partially implements Article 90 of the Statute. Competing requests are dealt with in Section 15(2). This provision stipulates that the Minister is the competent authority to decide which of the competing requests will be dealt with first. Without clarifying the possible situations that may arise when handling competing requests, it fails to set the rules for giving priority to requests made by the Court, when the competing request comes from a State party to the ICC treaty, or when there is no obligation to extradite to the State making the competing request. Moreover, no mention is made of competing requests where there is an obligation to extradite. In essence, Section 15(2) does not implement Article 90 of the Statute in a satisfactory way, unless the Canadian Minister will always give priority to the Court's requests, which cannot be found in the Section itself. The procedure for the authority to proceed can be found in section 15(3) and 15(4).

The UK, on the other hand, adopts a very comprehensive procedure to deal with competing requests. Section 24(b) and Part 2 of Schedule 2 are devoted to handling such requests. Section 8 of Schedule 2, which is the main provision that deals with competing extradition requests[109], does not follow Article 90 of the Statute religiously. It does not contain, for instance, the various scenarios found in Article 90. Nor does it spell out the instances where priority will be given to the ICC, or where the extradition request will be upheld. The Secretary of State is given wide discretion in deciding the course

of action. At the same time, however, the wording of Section 8 reveals a slight preference for ICC surrender, as the options therein are geared towards executing the delivery order and discontinue the extradition proceedings.

The incorporation of Article 90 of the Statute into domestic law, therefore, differs significantly from State to State. Provided that the approach is consistent with the Statute and covers all the various possibilities, the form implementation takes in domestic law does not matter for the application of Article 90 in practice.

9. Article 91 ICC Statute: Arrest and Surrender

The contents of a request for arrest and surrender can be found in Article 91 of the Statute. Two elements of Article 91 are of interest. First, the provision for identification of a person in paragraph 2(a) and most importantly, paragraph 2(c). Paragraph 2(b) is not problematic at all, as it simply states that a copy of the warrant of arrest should be transferred to the State in question.

When it comes to identifying the person sought, the wider issue that comes into play is not so much what information is needed in order to verify a person's identity, but what should happen if the wrong person has been arrested due to a mistake about his/her identity. An examination of the relevant provisions in the implementing legislation of a number of States reveals that this issue is addressed in most implementation pieces. From the point of view of the Court, it is in its interest to have the right person before them. There should be no objection when national courts deal with the issue themselves. However, the approach taken by various States is by no means uniform.

[109] Section 9 is the equivalent provision for proceedings in Scotland.

Whereas the verification of the identity is generally acknowledged to be crucial, States adopt different procedures and deal with the issue at different points in those procedures. Most problematic seems to be the remedy available to the person whose identity has been mistaken, particularly when it comes to which is the appropriate forum to claim compensation.

Section 24 of the Dutch Act deals, in part, with the issue of verification of identity which is dealt with further in Section 25. Under Section 24(1) the District Court is empowered to examine the identity of the person sought. Should the person brought before the Dutch court not be the one who is the subject of surrender, then a consultation procedure is envisaged in Section 25(1) of the Act[110]. In the Netherlands, the surrender request is not rejected straight away in case of a mistaken identity, but a consultation procedure is put in place to deal with the issue. This approach is welcome as the problem is dealt with domestically without putting a strain on the Court but, at the same time, in line with its views which will be communicated to the forum through the consultation process. The result of this consultation process can be found in Section 27(2). If there is a mistake regarding the identity of the subject of the request for surrender the District Court "shall declare the surrender to be inadmissible in its ruling". The wording of this Section is very clear and so it should be. However, it seems that Section 27 does not embrace fully the consultation process described in 25(1) above as it does not stipulate that the inadmissibility finding of the District Court shall be made after the ICC has been consulted on the matter. It should be accepted, however, that the correct interpretation of this provision should be one that takes into account the outcome of the consultation process with the Court. In essence, the wording of

Section 27 does not preclude this interpretation. It would have been preferable, however, had this been spelt out more clearly.

Interestingly, France in its Criminal Procedure Code provides for a right for the person whose surrender is sought to be transferred to the ICC for the verification of his/her identity and generally for any act during the investigation stage, if he/she consents[111]. There does not seem to be any legal objection to that as the consent is in any case present and the transfer is facilitated. However, from the Court's perspective, it would not be desirable if this provision were used very much, as the burden it is likely to impose on the Court would be hard to bear. The fact that the Justice Minister is the one to authorise the possibility enshrined in Article 627-15 though, might be an indication that this option is reserved for exceptional cases only.

Having the correct person before it is certainly very important for the Court. The Canadian legislation tackles this issue appropriately, by establishing a double requirement. First, the name of the person before the court has to be similar[112] to the name enshrined in the documents submitted by the ICC and, the physical characteristics have to match. In Canada's view, physical characteristics are evidenced in "a photograph, fingerprint or other description of the person"[113]. The use of the term "similar" and not "identical" allows for greater flexibility in the identification process. The fact that the name for instance, has not been spelt properly should not be a reason for not identifying the accused. As long as the elements described in Section 37 are akin enough

[110] See also Section 7(2)(i).
[111] Article 627-15.
[112] *i.e.* not identical.
[113] Section 37(b).

to the ones found in the information provided by the Court, the identification of the person is achieved.

States place some importance on the issue of verification of identity. In accordance with Article 59(2) of the Statute, the custodial State has to determine that the warrant applies to the right person. In other words, the authority to embark on an inquiry regarding the person's identity is clear. As no further guidance is provided in the Statute, it should be accepted that in case of mistaken identity the person should be set free. Some co-operation with the ICC on the issue is also important, as the Court would need to be informed of the outcome of such an inquiry.

Article 91(2)(c) presents an implementation challenge. It is a good example of interaction with national systems in practice, where respect for domestic proceedings is important.

Australia deals with issues of arrest and surrender in Part 3 of its Act. Division 2, in particular, deals with the relevant documentation to accompany a request by the ICC. The parts of Article 91 of the ICC Statute that deal with a request by the Court to arrest and surrender a person not yet convicted by the Court, are dealt with in Section 17 of the Australian Act. Although no mention is made in that Section of Article 91(1) it should be accepted that a request made pursuant to Article 91 will not present a problem for Australia[114]. Article 91(2)(a) and (b) are incorporated word for word[115]. This is not true though for Article 91(2)(c) of the Statute. Although documents necessary for the surrender

[114] In fact, Australia has got a Section as part of its general provisions in Part 2 of the Australian Act, (Section 9), which aims to deal with urgent requests. Section 9 replicates Article 91(1) but can be also used in other instances, e.g. Article 92(1).
[115] Section 17(a),(b) and (c).

are referred to in Section 17[116] a crucial omission can be discerned. Australia fails to explicitly implement the part of 91(2)(c) that refers to favourable treatment of the Court, or at least treatment comparable to extradition proceedings. This may or may not impact on Australia's co-operation with the Court. As with many other provisions, it is up to the actual implementation of this provision to decide whether it will be consistent with the Statute. Australia, by establishing such a detailed co-operation regime has already made its choices and attempts to satisfy the Statute's requests. It remains to be seen whether the practical application of Section 17(d), will be contrary to 91(2)(c).

Article 91(3) deals with request for arrest and surrender of a person already convicted by the ICC for a crime falling under the Court's jurisdiction. The relevant documentation required is comparable to what is requested for the arrest or surrender of a person to be tried by the Court. The difference of course lies in the fact that special provisions should be made to take into account the fact that a person is already convicted.

An equivalent to Article 91(2)(c) is not found when dealing with a person already convicted by the Court. This is explained because the ICC in such an instance will have reached its judgment and all the State has to do is to comply with its request. Less is at stake for the national judicial system. What would happen if the State would have some additional requirements is not entirely clear. The application of Article 91(2)(c) is specifically targeted at requests for arrest and surrender following an arrest warrant issued under Article 58 of the Statute.

[116] Section 17(d).

Article 91(3) is very straightforward when it comes to its implementation. Australia repeats the wording of this paragraph exactly in its Act[117].

The Netherlands devotes three Sections on the issue of arrest[118], which implement largely Articles 55 and 59 of the Statute, but do not refer to Article 91 at all. Even though it seems odd that in terms of procedural legality Dutch law does not seem to require that the request for arrest be accompanied by specific documents as *per* Article 91 of the Statute, the procedure laid down for arrest is simple, efficient and in accordance with the Statute[119].

Germany, in Section 2 of its Law incorporates the obligation to execute a request for surrender[120] and further specifies the two occasions for which surrender is sought, in accordance with Article 91(2) and (3). This provision states the principle which is then elaborated in other Sections of the German Act. Moreover, Section 2 further clarifies that surrender of a person convicted by the Court may take place directly to the State where the sentence will be served. This goes beyond what is required by Article 91 of the Statute but is, nevertheless, a very useful addition. Section 2 of the German Law, however, does not mention arrest at all. Similarly, Section 5, which implements Article 91(2) and (3) in more detail does not refer to arrest either. There are two interesting points to be made about Section 5(1): first, the requirement that a document be provided by the Court describing the criminal act allegedly committed. This is not uncommon in domestic practice. States are entitled to

[117] Section 18. It is worth mentioning that Australia devotes an entire Section to Article 91(3) and does not deal with it in Section 17 with which the rest of Article 91 is incorporated. This distinction makes sense as the two procedures, namely, requests for arrest and surrender of a person following a warrant of arrest and request for surrender of a person already convicted are very different to each other.

[118] Sections 18, 19 and 20.

[119] Section 20, for instance, implements Article 59(3) and (4) ICC Statute.

seek information on the offence the requested person is sought for. This may well be a remnant of extradition processes but it is well within the scope of Article 91(2)(c) and it is by no means unreasonable, nor is it likely to be "more burdensome" than extradition requests. Interestingly, a document describing the alleged act would suffice and no arrest warrant for any additional acts is necessary[121]. This cannot be found in Article 91 but, provided that no prosecution, detention or punishment for different conduct to that which the surrender relates, then it is consistent with the rule of speciality found in Article 101 of the Statute[122]. Section 5(1) also acknowledges the discretion enshrined in the Article 91(2)(c) of the Statute. However, the final two sentences of Section 5(1) do not add much in terms of specific requirements imposed by Germany. Without identifying the specific provisions to be employed, it is simply stated that "the applicable provisions shall be set forth"[123]. The Section goes on to effectively render the relevant aspects of the Statute directly applicable by reference to them. What this Section fails to do, however, is to incorporate Article 91(4) of the Statute which obliges a State Party to consult with the ICC on matters arising out of the application of Article 91(2)(c) which is the provision discussed here. No provision is made for such consultation by Germany, which constitutes a serious omission.

The implementation of Article 91(3) is more challenging in Germany. On the one hand, Section 5(2) incorporates Article 91(3) directly into the German legal order, but on the other it imposes further conditions which do not have a clear legal basis in the Statute. A certificate of enforcement and some

[120] By virtue of Article 89(1) of the Statute.
[121] Section 5(1).
[122] Article 101 is implemented in Section 25.
[123] *Ibid. supra* n. 121.

sort of assurance by the ICC that the Court agrees with the surrender of the person to the State of enforcement[124] are not among the documents contained in Article 91(3). Moreover, although this possibility should not be precluded, it is not clear from Article 91(3) of the Statute that surrender of a convicted person shall take place directly to the State of enforcement. The German Section appears to contain an element of mistrust towards the Court and seeks assurances regarding the State of enforcement. It is hard to imagine that the ICC would request the surrender of a person already convicted without having ensured that an enforcement agreement is in place and that surrender of the German authorities to the enforcement State is sought. These two requirements, albeit perfectly logical, do not fall within the scope of Article 91(3). As mentioned already, Article 91(3) does not contain a sub-paragraph akin to Article 91(2)(c), allowing the requested State to impose its own conditions, and as such, the German Section 5(2) might be considered to be beyond what is permitted under the Statute.

Article 91(2) and (3) are incorporated into UK domestic law by Section 2. With regard to Article 91(2) the UK Act stipulates that endorsement of the warrant accompanying the request shall be endorsed if the appropriate judicial officer is satisfied that "the warrant appears to have been issued by the ICC"[125]. Two observations may be made here. First, the UK does not require all the documents enshrined in Article 91(2) in order to endorse the warrant, and second, the standard set for endorsing it seems quite low. It suffices that the warrant appears to have been issued by the ICC. This may be explained since the ICC warrant would have been transmitted through the diplomatic route and

[124] As required by Section 5(2)(1) and (2) respectively.
[125] Section 2(3).

the possibility of the warrant not having been issued by the Court is limited. When the request relates to arrest and surrender of a person already convicted by the ICC[126], Section 2(4) applies, which reiterates the relevant Statute Article in a precise manner[127]. Moreover, the effects of an endorsed warrant under Section 2 or a warrant issued following provisional arrest can be found in Section 14. This provision clarifies the position of such a warrant within the UK legal system. Although a useful provision, its natural place in the UK Act would have been together with the provisions dealing with endorsement/issuance of the said warrant.

The approaches examined here show that the implementation of Article 91 differs significantly from State to State. Article 91(2)(c), in particular, because of its nature allowing flexibility in its incorporation, is subject to different treatment by various States. The guidance the Statute provides, however, should be considered in every instance.

10. Article 92 ICC Statute: Provisional Arrest

The purpose of including provisional arrest in the Statute is to guarantee that an indictee is arrested and awaits transfer, pending presentation of the relevant documentation supporting a request for surrender. States

[126] Article 91(3).

[127] With the exception of a requirement for "a copy of any warrant of arrest for that person" which can be found in 91(3)(a). This omission is not of any practical significance as a warrant of arrest shall be issued in the UK.

generally incorporate this provision into their domestic laws, albeit very differently[128].

Germany and Canada incorporate provisional arrest with processes which are similar to preventive measures under domestic law; that is even before the request has been received, provided that certain conditions are met which relate to the seriousness of the crimes, prevention of a person's escape or commission of an offence, for instance[129]. All the ICC Statute requires is urgency. Arguably, the Statute does not clarify what would constitute an urgent case, which is presumably left to the ICC to decide. The question which then arises is whether Germany and Canada adequately implement Article 92 of the Statute. For the field of application is, at first sight, different from the one in the Statute. Provisional arrest is justified in these two countries for reasons of public interest rather than urgency. However, a request for surrender in urgent cases would almost certainly be rationalised under protection of the public interest. Both Canada and Germany are, therefore, in compliance with the Statute. However, the subject of this order in Germany, cannot remain in

[128] The Netherlands implements Article 92(1) in Section 13(1), whereas Sections 13(2)-(4), 14, 15, 15 and 17 lay down the procedures to be followed for the materialisation of provisional arrest. Although the Dutch Act devotes a couple of sections on this issue, none of them replicates Article 92 of the Statute in any detail. It is striking for instance that there is no mention of the documents required to accompany a request for provisional arrest. On the contrary, Australia implements 92(1) in a general provision (Section 9), which enables it to co-operate with the ICC in urgent cases. The various elements of Article 92(2) can be found, with some minor grammatical amendments, almost *verbatim* in Section 19 of the Australian Act. Germany incorporates Article 92(1) in Section 11(1). The emphasis of this Section is on detention following provisional arrest, but the elements of 92(2) are applicable by means of direct reference. The UK incorporates Article 92 in Section 3, whereas Section 4 contains the procedure to be followed after the person has been provisionally arrested. Apart from information on the probable location of the person, the rest of the documents of Article 92(2) are not explicitly required under the UK Act.

[129] Section 11(2) contains the conditions for this in Germany, whereas Sections 12-13 are the relevant Canadian provision.

custody indefinitely, Section 11(3) sets out the procedure for lifting these measures[130].

Another element, found in the Canadian and the UK pieces, is the necessity of a link with the forum for provisional arrest to take place. Some indication of presence, actual or future is required. Although Article 92(2)(a) ICC Statute stipulates that information on the person's probable location is necessary, for provisional arrest, it seems that both Canada and the UK place greater emphasis on this issue, probably because, quite rightly, they do not wish to be involved in actively looking for a person who has no link with the country.

The most important aspect of Article 92 that needs to be incorporated is setting the person free provided that the necessary documents have not be received within sixty days[131]. Interestingly, however, provisional arrest does not preclude surrender to the ICC provided that the person provisionally held consents to that effect and such action is permitted by the law of the requested State. Reference to domestic law in this provision is important, as it allows some leeway for States to examine their own provisions and decide whether to incorporate this possibility or not. It would be advisable, if not prohibited by domestic law, to include this possibility as it ensures that the person is transferred to the ICC. Given that the coercive element is removed by requiring the consent of the person involved, it is difficult to see why a State would object to incorporating this provision.

[130] Quite rightly, preventive detention shall not be continued if the ICC does not make a request or in any case shall not exceed one month without a formal request for provisional arrest or arrest a surrender having been made by the ICC, in which case the normal procedure of Article 92 and its implementation apply. This is in accordance with due process standards. The provision however does not mention the possibility of the German State prosecuting the alleged criminal themselves.

[131] In accordance with Rule 188 RPE.

All States examined provide for immediate release following the lapse of the sixty-day deadline[132]. Abiding by the Statute deadlines is a good practice, as it allows for coherent administration of justice and eliminates the possibility of conflicting provisions.

Canada's approach deserves closer scrutiny. Release of the person provisionally arrested is dealt with in Section 14. Section 14(1)(a) contains a purely procedural reason for release; namely, non-issuance of the authority to proceed. Section 14(1)(b) pertains to "extradition agreements" which contain a time limit in which the request must be made and the documents provided. The ICC Statute, albeit not an extradition agreement as such, contains a time-limit for the actual surrender request to be made[133]. The same deadline can be found in 14(1)(b)(i) of the Canadian Act, which is therefore in line with the Statute. Section 14(1)(b)(ii) goes a step further. Provided both that the request has been made and the documents have been received, should the Minister not have acted according to Section 15 of the same Act and thirty days have lapsed from the expiry of the period specified under the RPE, then the person must be discharged. This time, the onus is on Canada to execute the request. The Court is presumed to have acted according to the Statute and its RPE, but Canada has not taken action. It is doubtful that this section could apply to the ICC as such an option is not based on Article 92. Conversely, if the ICC Statute is not considered to be an extradition agreement for the purposes of this provision,

[132] See Section 25(1)(a) Australian Act; Article 627-14 French Law, which implements primarily Article 92(3); Section 15(5) Dutch Law; Section 11(1) German Law; Section 14 Canadian Act.
[133] Article 92(3).

Section 14(1)(c) would apply as the period specified therein is identical to the deadline enshrined in the Statute[134].

Section 14(2)(b) is important, as it allows for an extension of up to thirty days. The use of the verb "shall" denotes the significance attributed to the extension when the request comes from the ICC. This provision goes beyond requested from Canada and in the case of 14(1)(b)(i) it gives a further opportunity to the ICC to actually proceed with the request for surrender, whereas in the case of section 14(1)(b)(ii) it rectifies the effect of this section, giving another chance for Canada to comply with the Court's request. Moreover, Section 14(3) allows for interim release of the person applicable only for the period of the extension[135]. This is reasonable, as it would be consistent with the domestic procedure and human rights provisions. Canada largely incorporates Article 92.

Moreover, provision for consent to be given regarding surrender is made in most implementation pieces[136]. In the UK, as far as consent is concerned, the UK includes a general Section on consent which could be of use here as well[137]. By consenting to the surrender, the person consents to immediate delivery and forgoes protection afforded by domestic law. The apparent omission in the Canadian Section 14 regarding a procedure allowing the requested person to consent to the surrender, and for this to take place

[134] Section 14(1)(c)(ii) raises the same questions as 14(1)(b)(ii).

[135] It is evident from 92(3) that the person must be held in custody.

[136] In the Netherlands consent is provided for in Section 36(1). The rest of this Section as well as Sections 37-40 provide the procedure to be followed in such cases, outlining the various possibilities. Quite interestingly, Section 38 stipulates that in case of consent to the surrender request when the public prosecutor decides that the person will be surrendered to the ICC (presumably following a decision that such a consensual surrender would not contravene the law of the requested State in accordance with Article 92(3) of the ICC Statute) a hearing before the District Court is not applicable. This may be justified by the fact that the legislator felt that a person who consents to his/her surrender and in a sense foregoes his/her rights availed under

without delay, is rectified in a general Section dealing with consent[138]. Germany too widens the possibility of a streamlined surrender process to any situation where surrender has been requested by the ICC and where the person concerned consents to the surrender[139]. Providing for a less burdensome provision of surrender is welcome and the German approach in that respect is valuable. Australia does not mention the possibility of surrendering a person provisionally arrested to the ICC by virtue of his/her consent[140]. This omission is not crucial as the implementation of this provision is left to the particular States. It seems that this is a "softer" co-operation provision, when compared to the obligation to co-operate for instance, or the duty to surrender. Although Article 92(3) is covered by the general obligation to co-operate, it allows some leeway in its implementation, which has as a point of reference the domestic law of the State.

The UK, however, is the only country where consent may be given not only by the person himself but also by the person acting on his behalf if there is a case of physical or mental incapacity[141]. This provision has been evidently lifted from domestic procedures as it also refers to circumstances where it is inappropriate for a person to act for himself by reason of his youth. Given that minors cannot be tried by the ICC[142] this provision is unnecessary.

Finally, where the person has been released from custody following the lack of a surrender request within sixty days of the provisional arrest pursuant

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Dutch law and safeguarded by the Dutch courts, does not need the same protection when compared to a person who does not consent to their surrender to the ICC.

[137] Section 7.

[138] Section 70. This provision does not specifically refer to provisional arrest and surrender but is an overarching provision which could be applied with regard to any aspect of the surrender.

[139] Section 32.

[140] Section 25 simply refers to release from provisional arrest.

[141] Section 7(2).

[142] Article 26 ICC Statute.

to Article 92(3), he/she may be arrested again at a later date, when the surrender documents are delivered. The essence of this provision acts as a reminder, in the sense that it attempts to ensure that release due to a procedural technicality, in this case, presentation of the relevant documents within a given date, does not mean that the circumstances which have triggered the Court's jurisdiction and consequently the person's indictment, have ceased to exist. It implies that the State cannot rely on the person's release to refuse surrender once the necessary documents are presented. On the other hand, through this provision the significance placed on the correct procedure is emphasised. As such, Article 92(4) does not necessarily need to be incorporated into domestic law.

Australia opts to include such a possibility in its domestic law[143]. Canada on the other hand, does not explicitly incorporate Article 92(4). In the UK letting the accused go free does not preclude *de novo* arrest, should the warrant be produced at a later stage[144]. This is in line with Section 92(4). What matters is the protection of the person's rights while in custody. Having spent a maximum amount of time awaiting an arrest warrant, the person is set free, but this does not mean that he/she is exonerated from the suspicion of crimes allegedly committed. Future arrest, therefore, remains an option and provided the requirements of the Statute are met, it may take place. The rationale for having this provision is probably to rebut claims that a further arrest would constitute a violation of the *ne bis in idem* since the person would have already been arrested and released.

[143] See Section 25(2).
[144] Section 4(7).

The relationship between the Court and national courts seems to be a balancing act between the international and the national norms, between the quest for an effective ICC and respect for the remaining State sovereignty. It is imperative that the ICC is flexible, however, this should not to be the detriment of fulfilling its aims.

11. Article 93: Other Forms of Co-operation

Apart from arrest and surrender, State parties are required to provide a number of co-operation acts to assist the ICC in its investigations or prosecutions. All the acts listed in Article 93(1) need to be provided for at the domestic level. The list of acts seems at first, exhaustive, but upon closer scrutiny, by virtue of 93(1)(l) it is actually broader, as it requests a State to provide "any type of assistance" not prohibited by its law in order to facilitate the Court's investigation or prosecution. Implementing Article 93(1) is crucial for the effectiveness of the Court.

Implementation of Article 93(1) involves a number of acts that need to be provided for in domestic law, with domestic procedures to facilitate execution of such requests, is advisable. States need to review their domestic procedures and examine for which of these acts they need to legislate. In such a case, paying close attention to the Statute is important.

Australia in implementing Article 93(1) adopts wording which follows the Statute very closely. Section 7 reiterates the Statute almost *verbatim*[145]. In the incorporation of 93(1)(e), Australia broadens it to include every person

other than the prisoner, instead of witnesses and experts which is found in the ICC Statute[146]. This gives greater leeway to the Court to ask for any person to appear before it, and allows Australia to co-operate with such a request. Moreover, the non-inclusion of exhumation and examination of graves sites, in Section 7(1)(a)(viii) of the Australian Act, is not detrimental to the equivalent in Article 93(1)(g), since an examination of sites may plausibly include graves. This is further evidence of the attention paid by the Australian drafters to the Statute's wording. There is a genuine attempt to clarify and perhaps rectify its misconceptions. In addition, although not quite the same, "property [...] assets and instrumentalities of crimes" for the purpose of eventual forfeiture are omitted, as this presumably would already be covered under proceeds of crimes in Australia, whereas mention of crimes within the jurisdiction of the Court is added[147].

Of more interest is the implementation of 93(1)(l). Section 7(1)(b) implements appropriately the above-mentioned ICC provision. In fact, it is wider, because it allows also enforcement of ICC orders post conviction. This is welcome, as it gives it further scope for application. However, although Article 93(1)(l) of the Statute is limited to "other forms of co-operation", the same is not true for Section 7 of the Australian law, which comprises the obligation to arrest and surrender as well.

France adopts a very different approach. To begin with, it does not specifically implement Article 93 as a stand-alone provision in its domestic law. Instead, it refers to it, presumably when there is an issue which needs to be

[145] The obvious change in the various elements of 7(1)(a) from "the Court" to "the ICC", is made in order to avoid ambiguities, and is of no consequence. Similarly, the change of preposition, from "under" oath, to "on" oath, in Section 7(1)(a)(iii) is also unimportant.
[146] Section 7(1)(a)(vi) of the Australian Act.

regulated specifically. No reference is therefore made to Article 93(1) at all. apart from Article 93(1)(k)[148]. This provision stipulates the procedure to be followed in order to execute the "precautionary measures" enshrined in 93(1)(k). Accordingly, for these measures, French civil procedure law is taken into account and the cost is born by the Treasury[149]. Although Article 93(3)(k) does not provide a time-limit for the imposition of these measures, France imposes a limit of two years, allowing, however, a possibility of renewal in case in which the ICC so requests[150]. This provision is typical of the dialectic relationship that should be encouraged between the Court and the requested State. The ICC's aim is to have these measures in place. The requested State implements this following, nevertheless, its own procedure, which in the case of France is to impose a time-limit of two years. This is a very reasonable deadline as, in all probability, these measures will not be necessary after two years. Should, however, it be still the case that the ICC requests co-operation in the form of these measures, then France has a procedure in place to renew the application of such measures. In this manner, both the aim of the ICC is achieved, and the domestic procedural rules of the requested State are observed. The crucial point of course is that domestic procedure should not be used with the view to refusing, or even delaying, the execution of the Court's request. This is not the case with regard to the French code in this particular instance.

The Dutch approach is different yet again. Section 45 constitutes a catch-all provision which is framed in a general manner and does not refer to

[147] Section 7(1)(a)(xii) *ibid.*
[148] Article 927-3.
[149] *Ibid.*
[150] *Ibid.*

the particular sub-paragraphs of Article 93(1) of the Statute. Instead, it provides that any request for co-operation referred to in Article 93 "shall, [...] be executed in the desired manner"[151]. It would have been better, had this seemingly absolute provision not been qualified with the words "to the extent possible" found also in 45(1). It would have been preferable to adopt the wording of Article 93(1) which simply allows the requested State to use its own procedures to execute the request rather than the current wording which might be interpreted as leaving some doubt as to whether the request shall be executed wholly or partially. With regard to Article 93(1)(l) the approach is entirely consistent with the Statute. Section 45(2) incorporates Article 93(1)(l) in a precise manner.

Moreover, Section 46 further clarifies Section 45 in prescribing the manner of execution of a request. In essence, the Netherlands adopts the procedures laid down in the ICC Statute when dealing with an Article 93 request. Moreover, Section 46(2) places an obligation on Dutch authorities to guarantee the safety of the persons concerned and, in that respect, conditions may be imposed relating to the manner of execution of the request. Even though this Section does not draw upon a particular paragraph of Article 93 it does not contradict it, as the safety of the persons involved in the execution of the request is or, in any case, should be at the forefront of the Court's efforts. Employing a particular manner of execution is consistent with the leeway allowed to States to use domestic procedures when executing a request made under Article 93 of the Statute.

A special provision regarding the manner of serving of documents can be found in Section 47. This specific mention of documents can be perhaps

[151] Section 45(1).

explained by the enhanced role documents play generally in a civil law country.

Germany however devotes an entire Part[152] to what it calls "additional mutual assistance". The provision which contains the principle implementing other forms of co-operation is Section 47, which is framed in a very general manner. Separate provisions implement selectively specific aspects of Article 93 of the Statute. Reference to Article 93(1)(k) is made for instance in Section 51[153], whereas Section 53 relates partly to Article 93(1)(e). Although the Statute only talks about "voluntary appearance" of persons as witnesses or experts, Section 53 is limited to persons who are at large and are requested to appear as witnesses. The coercive procedure enshrined here does not contravene the Statute. Although appearance of witnesses before the ICC is voluntary, States may continue to provide for coercive power in their sphere of competence. With regard to 93(1)(j) Germany affords the same protection to victims and "protected persons"[154] as for proceedings before the German criminal system[155]. However, Section 56 fails to address the issue of preservation of evidence referred to in the Statute. This might prove to be a crucial omission in practice. Without problem is the procedure envisaged for the service of documents dealt with in Section 57. Finally, apart from a reference in its title, no mention is made to Article 93(1)(l) in Section 59. This Section contains rules relating to the surveillance of telecommunications. Nothing similar is envisaged in Part 9 of the Statute. However, what this Section probably does is to interpret Article 93(1)(l) as allowing any type of

[152] Part 5.
[153] Asset seizure is dealt with in Section 52.
[154] Which should be taken to include witnesses.
[155] Section 56.

measure to be requested from Germany, except for telecommunications surveillance to which specific regime applies and is therefore laid down in Section 59. This Section is not an example of good drafting. A better approach would have been to reiterate Article 93(1)(l) and, since telecommunications surveillance is a crucial issue for Germany, to make special provision for this type of assistance, subject to the conditions enshrined in Section 59. This would have been acceptable due to the wording of Article 93(1)(l). The positive thing about the current structure is that, arguably, no possibility for refusing any other type of assistance is envisaged.

In the UK, Article 93 is implemented in Part 3 of its Act. Identification of a person[156] is incorporated in Section 34 and Schedule 4. Although no mention is made in the Statute of how to take fingerprints and DNA evidence, the UK has chosen to specifically incorporate this possibility, which requires coercive powers, and does so in the above provisions in a satisfactory way. As for Article 93(1)(b) and (i) which relate to the taking of evidence and provision of records and documents, they are incorporated in Section 29 of the Act which enables domestic courts to have the same powers to require attendance of witnesses and the production of documents as in domestic court proceedings. This provision should be read in conjunction with Section 36 of the Act. With regard to 93(1)(c) the relevant provision is Section 28 whose main characteristic is that it does not provide for any form of compulsion. This may be explained by the fact that individuals cannot be compelled to incriminate themselves by being subject to questioning. Section 31 incorporates Article 93(1)(d) and is unproblematic. Moreover, Sections 33 and 35 implement Article 93(1)(g)(h) satisfactorily by providing the necessary authority for

exhumations and execution of searches and seizures. Article 93(1)(j) is not specifically implemented in the UK Act, but is must be presumed that this can be done administratively. With regard to 93(1)(k), however, the powers enshrined in Section 37 and Schedule 5 as well as Section 38 and Schedule 6 are very wide powers indeed, and guarantee compliance with the Statute. Finally, Article 93(1)(l) is not implemented at all in the UK. It should be accepted that in the unlikely event that a request not covered in Article 93(1)(a)-(j) arises, the UK will have to deal with it *in concreto*, and possibly, administratively.

11.1 Articles 93(2)-(6)

Whereas Article 93(2) of the Statute does not require implementation, since it provides guidance to the ICC regarding the way witnesses or experts should be treated, the same is not true for the three paragraphs that follow. Articles 93(3), (4), (5) and (6) deal with the possibility of a State invoking its right to refuse co-operation. Although this possibility is fairly limited, a State party to the Statute should, in its implementing legislation, ensure that this is not abused.

The first possibility for a State to refuse execution of a co-operation request is if this request conflicts with a fundamental principle of general application. Despite the difficulty in identifying such principles, in implementing Article 93(3), a State has to provide for a consultation procedure to deal with such a conflicting request. It is important to note that this provision

[156] Article 93(1)(a).

should only be used in very exceptional cases and this fact must be reflected in the implementing legislation.

When implementing this provision, a State should first, provide for consultation, and even more importantly, stipulate which of the principles it considers to have such an elevated status and are likely to conflict with a request by the Court. In any case, the scope of this provision is to be used in exceptional cases only and every precaution should be taken to minimise its applicability. The rule, therefore, remains that compliance with the Statute is strong, in accordance with Article 86.

France specifically refers to Article 93(3) of the Statute in Article 627-3, third paragraph. However, it fails to specify the situations in which France would invoke Article 93(3). This is not very helpful as it leaves room for abuse of the strictly mapped exception found in the Statute. All the third paragraph of Article 627-3 does is to ensure that consultation procedure has been followed in accordance with the Statute Article and failing that, "every difficulty[157]" relating to the execution of the request will be transferred by the Prosecutor of Paris to the competent authorities[158].

A similar approach should be taken with regard to Article 93(4). However, there is no obligation to hold consultations with the ICC with regard to this provision. The guiding principle should be again to avoid excessive invocation of Article 72.

The Netherlands specifically refers to Article 72 of the Statute[159]. However, it does not provide outright refusal to execute the request and instead subjects the situation to consultation with the ICC. This approach is preferable

[157] See wording of Article 627-3, third paragraph.
[158] Meaning obviously the competent authority within the ICC.

to denying the Court's request without consultation, as it might still be possible to agree a solution that would not put at stake the national security of the State.

In the UK, the relevant provision with regard to national security is Section 39. This provision has to be read in light of Articles 93(4) and 72 of the Statute. The first point is that in order to determine whether something is prejudicial to the security of the UK a certificate by the UK is necessary which constitutes conclusive evidence to that effect. The procedure envisaged involves a very lengthy consultation process with the ICC. The approach taken here is evidence of the UK's commitment to restricting the ground for refusal based on national security, as it effectively gives the requested State significant powers to deny the Court's request.

Article 93(5) of the Statute refers back to Article 93(1)(l) and it obliges a State to consider whether any other type of assistance under the latter Article can be provided subject to conditions or in another date or manner which should be first accepted by the Court or its Prosecutor. The requested State should therefore provide for such consideration in its implementing legislation.

Australia implements this provision appropriately, by adopting the exact wording of the Statute in that respect[160].

Germany refers to Article 93(3)-(5) as well as 9(b) in Section 48 which simply provides for postponement of executing the Court's request. This provision is not in contravention with the spirit of the Statute since it does not contain an outright refusal to co-operate but allows a possibility to resolve the matter in a way which would be in favour of the Court. However, judging from the wording of Section 48 no strict consultation procedure is put forward. A

[159] Section 7(2)(h).
[160] Section 11(2).

firm reference to the Statute[161] should be enough to guarantee that the right procedures will be followed.

Should all such efforts fail, and a State refuses to provide assistance to the Court, it ought to inform the ICC promptly to that effect[162]. The domestic legislation ought to provide for such a possibility as well. Australia, in its Act incorporates this provision in Section 14. Although Article 93(6) only refers to refusal to co-operate, Australia uses this provision also in case of postponement[163] or inability[164] to co-operate with the Court. In that sense, Section 14 is wider than 93(6). As far as 93(6) itself is concerned, it is incorporated fully. Section 14 nevertheless encompasses a more generic answer to the Court's requests, and comprises all the instances where Australia would have to respond to a request made by the ICC[165].

In Canada's Extradition Act there are a number of grounds of refusal[166], which by virtue of Section 47.1 do not apply when dealing with a request for surrender to the ICC. As such, no reason for refusal is permitted under the Canadian Act. Section 45 however and particularly 45(1) comes to reinforce the prohibition of refusal to co-operate, as it is stated that "the absence of reasons for refusal [...] prevail over sections 46 and 47". This is another indication of the Canadian commitment towards the Court.

In implementing the limited right to refuse co-operation to the Court, a State should endeavour to limit the invocation of the relevant provisions to the

[161] "in accordance with the Rome Statute".
[162] Article 93(6).
[163] Section 14(2).
[164] Section 14(3). This section is framed in a rather general manner. As long as it is not used to deny the execution of a request for co-operation made by the Court, above and beyond the limited exceptions found in the Statute, its presence in the Act should not be problematic.
[165] Hence reference is made in subsection (4) to urgent requests and in subsection (5) to the language documents or evidence should be provided to the Court.
[166] Sections 44, 46 and 47.

absolute minimum, and should ensure that the overarching obligation to co-operate in accordance with Article 86 is not curtailed in any way.

11.2 Article 93(7): Temporary Transfer

Moving on Article 93(7), in case of a temporary transfer pursuant to Article 93(7), apart from the consent of the person involved, the requested State must also agree to the transfer and may attach conditions to which both it and the ICC may agree[167].

The Netherlands implements this Article in Section 48 of its Act. The only condition they seem to place is that should a person be serving a custodial sentence in the Netherlands at the time of the temporal transfer to the ICC, his/her time spent in custody there shall be deducted from his/her sentence. This makes sense and is not, strictly speaking, a condition on the execution of the request but rather an appropriate act in accordance with due process principles of domestic law.

Germany incorporates Article 93(7) in Section 54 in a manner consistent with the Statute. Section 54(1) mentions that consent is necessary to effectuate this temporary transfer[168], whereas 54(2)-(4) contains the various conditions attached by Germany in accordance with Article 93(a)(ii). Assurances are sought that the temporary transfer will not impact on the sentence already served in Germany and that no additional punishment or penalty of any sort will be imposed save for some exceptions specifically

[167] Article 93(7)(a)(i) and (ii).
[168] Article 93(7)(a)(i).

mentioned in the provision[169]. Moreover, in line with Article 93(7)(b), Section 54(4) contains the obligation imposed on the ICC to return the person to the requested State. A prohibition on revoking the consent to the temporary transfer, as well as reference to Articles 70 and 71 of the Statute as exceptions to the conditions imposed by this Section, can also be found therein. The approach taken by Germany is exemplary. Not only does it implement the Statute in this instance entirely appropriately, but thought has also been given to the possible interaction with other relevant provisions.

Canada's temporary transfer is somewhat different to what is enshrined in the Statute. Temporary surrender in the Statute relates to "identification or for obtaining testimony or other assistance"[170], whereas in Canada it may take place so that the extradition partner may "prosecute the person or to ensure the person's presence in respect of appeal proceedings that affect the person"[171]. The scope of application of the Canadian provision is entirely different. Should it be accepted that "prosecution" includes preliminary acts such as identification and testimony then this provision, in the absence of a more specific one, might be of help in incorporating Article 93(7). In that case, another element mentioned in the Statute is lacking. Namely, that the person needs to consent to this transfer[172], whereas the rest of the assurances would be acceptable *mutatis mutandis* under Article 93(7)(a)(ii). A clearer provision which would correspond to the temporary transfer enshrined in the Statute would have been welcome.

[169] Section 54(2) and (3).
[170] Article 93(7)(a)
[171] Section 66(1).
[172] Article 93(7)(a)(i).

The UK implements 93(1)(f) and (7) in Section 32. Consent is the most important aspect of this provision which is incorporated[173] without any problems.

11.3 Article 93(8): Confidentiality

Confidentiality is safeguarded in Article 93(8). States may wish to transmit documents or information on a confidential basis which can be used by the Prosecutor to generate new evidence[174]. These documents may be disclosed and used following Parts 5 and 6 of the Statute[175].

Australia incorporates Article 93(8) by authorising the AG to provide the necessary information or documents whilst undertaking to implement 93(8)(c) as well[176]. Interestingly, Australia, in Section 11(3), and also in Subsection (4), attaches conditions to the provision of such assistance, without specifying the types of conditions. This is not provided for in Article 93(8) and thus the manner in which this provision will be applied in practice is crucial.

Article 93(9) deals with competing requests which do not involve surrender to the Court or extradition to a third State by virtue of an international obligation and establishes a duty for the requested State to resolve the situation, in consultation with the Court. In the event that this effort fails, the general principles of Article 90 apply, in accordance with Article 93(a)(ii).

The requested State should therefore include in its implementing legislation a duty to consult with the Court in the case of 93(9).

[173] Section 32(4).
[174] Article 93(8)(b).
[175] Article 93(8)(c).
[176] Section 11(3) and (4) respectively.

This however does not apply in the case of 93(9)(b) and the requested State is only required to inform the ICC about the particular situation. This provision has not been taken up by States in their implementation.

11. 4 Article 93(10)

Article 93(10) is a very interesting provision because it operates as a bridge between the international and the national systems. By empowering the ICC to assist with domestic proceedings upon request, States allow the Court to provide its expertise in dealing with cases falling under its jurisdiction. This would have the result of a more uniform approach to such cases and if used, will assist in reducing excess burden of the Court[177], particularly in States which do not quite meet the unwillingness and inability threshold of the Statute.

Article 93(10) despite being in the co-operation part of the Statute, is not among the provisions that must necessarily be implemented into domestic law, as it would be for a State to decide whether or not it will request the Court's assistance. That said, however, States may wish to provide for such possibility. The Netherlands is an example of a State that provides for such a possibility[178]. Although this is a very interesting provision, it is not specified in the Dutch law whether such assistance may be requested for both investigation and trial. Neither are the crimes for which such a request may be made specified. From the general wording of Section 5 it should be assumed that Article 93(10) is incorporated in its entirety. Of interest is Section 5(2) which

[177] Provided of course that the ICC have the facilities and available personnel to assist following such a request.

defines the probative value of the documents received by the ICC in the course of their assistance to the Netherlands.

Despite its place in the co-operation part of the Statute and more specifically under "other forms of co-operation", Article 93(10) is construed as a much wider provision. According to this Article, assistance may be provided with respect to both investigation and trial for crimes falling under the jurisdiction of the ICC, but interestingly, also with regard to "serious crimes under the national law of the requesting State". This provision, should not be seen as broadening the ambit of the Court's jurisdiction, but merely as an encompassing provision which would facilitate the provision of assistance even when the crimes falling under the Court's jurisdiction are not present in domestic law using the Statute's terminology.

Section 64 of the German Law describes the form of a request under Article 93(10) rather than the possible use of this provision and as such is of limited interest. The final provision in Part 6 however is more rewarding. Section 67 states: "Conditions that the Court has tied to the mutual assistance shall be complied with". This overarching provision comes as a bit of a surprise at the end of a Part which is more likely to have little value in practice. In any case, it is consistent with the facilitative approach adopted generally by Germany.

12. Article 94 ICC Statute: Postponement

Should a request by the ICC interfere with an ongoing investigation or prosecution of conduct which is different from that to which the request relates

[178] Section 5.

to, then the requested State may postpone the execution of the Court's request for a mutually agreed period, in accordance with Article 94.

In implementing Article 94 of the Statute, a State has to provide for a procedure to co-operate with the ICC for the postponement of the execution of the request, in accordance with Article 94 of the Statute. Bearing in mind that postponement is not refusal to co-operate, the procedure in place must reflect this and must allow for greater flexibility in ensuring co-operation with the Court.

Australia provides for this possibility in its Act[179]. Section 34 applies when a request for surrender made by the ICC involves a person, who is the subject of an ongoing investigation or prosecution in Australia for different conduct to that sought by the ICC. Section 34(1) specifies the field of the application, whereas Subsection 2 describes the possible options. The Attorney-General, after consulting the ICC, may either proceed with the execution of the request for surrender[180] or postpone it[181]. Of interest is also subsection 3 of Section 34.

It is important to stress that this provision is in general in accordance with Article 94 of the Statute. However, the possibility of giving precedence to dealing with conduct, which does not fall within the Court's jurisdiction and which could foreseeably be of much lower importance and gravity, is a bit troublesome.

France does not refer specifically to Article 94 in its Criminal Procedure Code. However, Article 627-11 stipulates that the requested person is prosecuted or found guilty in France for crimes other than the ones for which

[179] Section 34.
[180] Section 34(2)(a).

surrender is sought. In that respect, Article 627-11 is broader than Article 94 as it also covers situations where the person has been found guilty. In any case, this is of no consequence as France does not provide for the possibility of postponement in such an instance. Instead, the approach taken in France is that surrender must follow the same procedure as with a normal request for surrender, as evidenced by Article 627-11[182].

The Netherlands on the other hand does not specifically refer to postponement of execution of a request. Instead, a request by the ICC which would conflict with an ongoing investigation or prosecution in a case other than that to which the request relates is dealt with by consulting the Court[183]. The Netherlands goes beyond the scope of Article 94 of the Statute as it allows consultation with the Court for a request which relates to the same act currently in progress or in preparation in the Netherlands[184]. However, since such a case may not be used as a reason for postponement of the execution of a request, and so long as a possible failure in the consultation process does not lead to refusal of executing the request for co-operation, the provision is not particularly problematic. Rather, it should be seen as a means of ensuring procedural legality for the purposes of domestic law, since the ICC is not a Court integrated into domestic system, representing a higher court in the judicial process found within this particular State. It might be necessary to

[181] Section 34(2)(b).
[182] It should be noted that the only difference in the procedure is that the person does not benefit from the possibility of release as with the case of Article 627-6, 627-9 and 627-10. This may be explained by the fact that the person in question has already been afforded such protection at the time he/she was the subject of investigation for these other crimes. Moreover, Article 627-11 deals in its last paragraph with the issue of suspension of prescription. Accordingly, the proceedings before the ICC suspend the prescription of a public action and of the sentence. This provision is appropriate as the French State would not be able to raise prescription with the view to objecting to the transfer of the person sought to the ICC.
[183] See the general consultation provision of Section 7(2)(g).
[184] *Ibid.* Section 7(2)(f).

provide for such a procedure in order to facilitate the execution of the ICC's request.

In Germany, Article 94(1) is incorporated by Section 48 which covers a number of provisions[185]. Section 48, which does not distinguish between the various situations to which it applies, allows for postponement of the proceedings until a determination is made on how to proceed with the Court's request. This provision does not incorporate the Articles it refers to by introducing specific conditions to be observed or otherwise, but it simply refers to them making them directly applicable. In that way, compliance with the Statute is guaranteed.

Canada implements Article 94 in Section 64 of its Act. The part of the Section incorporated here is that relating to "a surrender order made in respect of a person accused of an offence within Canadian jurisdiction". In such a case postponement of the surrender is ordered by the Minister. Unlike the requirement in Article 94 to postpone for a period of time agreed with the Court, Section 64 states that postponement may take place until the person has been discharged[186]. Although not entirely in compliance with the Statute, this provision is not inappropriate as in all likelihood surrender will take place once a determination of the situation before the domestic court takes place. It would have been preferable however to follow the Statute. Nevertheless, this caveat is rectified in the first part of the very first sentence of Section 64, which states "unless the Minister orders otherwise". The Minister of Justice is given discretion in this Section and when dealing with the ICC, the use of this discretion should be encouraged. It should be noted however that Section 64(1)

[185] Article 93(3)-(5),(9)(b) and Article 95 are also implemented by Section 48.
[186] By acquittal, expiry of the sentence or otherwise.

does not distinguish between an offence sought by the Court in respect of the surrender request, and one which relates to a different crime than the one for which the person is prosecuted in Canada. This distinction is vital since, if the request for surrender relates to a different case, then Article 94 is engaged and postponement might be possible. The same could not be said though if it involves the same case[187].

In England and Wales, Part 1 of Schedule 2 deals with this issue. Section 2 is the main provision which is very accommodating of the surrender request and implements Article 94 appropriately. The guiding principle is co-operation with the ICC and consultation wherever necessary. The procedure put forward by the UK is very elaborate and attempts to foresee every possible scenario. Article 94 of the Statute refers to postponement of execution of a request in respect of an ongoing investigation or prosecution of a "case different from that to which the request relates". Section 2 fails to make this distinction and relates to any possible conflicting request. However, it goes beyond the Statute in the sense that discontinuation of proceedings is envisaged as well as opposed to postponement only. The effect however on custodial sentences can be found in Section 5.

On the whole, postponement of an execution request follows the Statute and is not generally problematic when it comes to implementation.

[187] In the same Section, the possibility of postponing the surrender because of a sentence being served in Canada for an offence different to the one for which surrender to the ICC is sought is

13. Article 95 ICC Statute: Postponement due to an Inadmissibility Challenge

When, in accordance with Articles 18 and 19, the Court considers an inadmissibility challenge, there is a possibility for the requested State to postpone the execution of a co-operation request until the ICC has determined the admissibility of the case before it. Article 95 of the Statute provides for this possibility which should in turn be acknowledged in the domestic implementing legislation.

To comply with Article 95 a State should provide for postponement of co-operation pending an admissibility challenge before the ICC.

Australia implements Article 95 in two different Sections of its Act[188]. Section 35 applies if the admissibility challenge pertains to Australia, whereas Section 36, to other such possible challenges. These two provisions will be examined in turn. Section 35 deals with the case in which Australia wishes to challenge the Court's involvement with a case currently under investigation or prosecution in Australia, or which has been dealt with and a decision was made not to prosecute. In fact, this Section relates to questioning the ICC's assertion of jurisdiction by virtue of complementarity, in accordance with Article 19(2)(b) of the Statute. Because such a challenge is more perhaps more important or indeed interesting from the point of view of Australian domestic law, an entire Section is dedicated to it. The remainder of the admissibility challenges are dealt with in Section 36. Both Sections 35 and 36 adopt the same approach: the Attorney-General may postpone the execution of the co-

also explored. This pertains to Article 89(4) ICC Statute.
[188] Sections 35 and 36.

operation request pending determination of the admissibility of the Court[189], and depending on the outcome, he/she either refuses the surrender[190], or if the case is deemed admissible, proceeds with the surrender provided that there is no other reason to postpone or refuse the execution of the request[191]. The Australian approach, whilst implementing the relevant Statute provision, allows for better interaction between the various provisions in the Statute. The Australian legislator has given a great deal of thought as to how the admissibility provisions interact with the co-operation regime and although their implementation is compatible with the Statute, the possibility is explored that regardless of the outcome of the admissibility challenge, other reasons which give rise to postponement or refusal of surrender may come into play.

The Netherlands implements Article 95 in Section 8 of its Act. This Section embraces the spirit of Article 95, which allows a State to postpone the execution of a request in case of an admissibility challenge. The Dutch Section, however, contains much stronger wording in that a request relating to the case for the surrender of a person "shall" be suspended should an admissibility challenge be made and for the length of time this is being considered by the ICC. Section 8, therefore, renders the postponement of executing a request an obligation rather than a possibility which is what is envisaged in Article 95. It would have been preferable to have endorsed the wording of the Statute in that respect, which would have given flexibility to the requested State to evaluate the situation and decide whether to proceed with the execution of the request or

[189] Section 35(2) and 36(2) respectively. It is important to note that Australian in both those Sections adopt the wording of Article 95 and states that the Attorney General "may" (instead of a more rigid "shall") postpone. It leaves therefore room for surrender, regardless of a challenge pending before the ICC.
[190] Section 35(3) and 36(3) respectively.
[191] Section 35(4) and 36(4) respectively.

otherwise postpone its execution. Section 8(2), however, incorporates the section of Article 95 which enables the ICC Prosecutor to proceed with the collection of evidence in accordance with Articles 18 and 19 of the Statute. The Dutch Section 8(2) is therefore in accordance with Article 95 of the ICC Statute.

In Germany, Section 48 applies to Article 95 as well, as above[192].

Canada deals with this issue in roundabout way. The relevant provision is Section 40(5) which allows for an extension of time[193] to be granted to the Minister regarding his/her decision concerning the surrender provided that submissions have been made to the Minister in accordance with Section 43. Section 40(5)(a) stipulates that if these submissions relate to the admissibility of the case or the jurisdiction of the Court[194], then the extension described above may be extended "for a period ending not more than 45 days after the Court's ruling on the issue". Although no mention is made of postponing the execution of a request[195], the extension envisaged in this Section has exactly the same effect because in essence, the forty-five day extension applies *after* the Court's ruling, which means that until then the person may not be surrendered to the ICC.

In the UK, challenges before the ICC on the basis of Articles 18 and 19 are dealt with in a single paragraph in the Section which sets out the proceedings regarding the delivery order[196]. By virtue of Section 5(4), adjournment of the proceedings may take place should such a challenge be brought before the Court. This incorporates Article 95 appropriately. However,

[192] See *supra* analysis of Section 48 with regard to Article 94(1) of the Statute.
[193] Under Section 40(1) the Minister may order the surrender of the person within ninety days.
[194] Under Articles 18 and 19 of the Statute.
[195] Postponement is mentioned for instance in Section 41.

no specific mention is made of the latter part of Article 95 which enables the Prosecutor to collect evidence in accordance with the Statute. This has not been taken up by other States, when implementing this Article.

14. Article 96 ICC Statute: Contents of Request for Other Forms of Assistance

Article 96 contains the form which a request for assistance other than arrest and surrender should take, and as such does not need to be implemented by a State. However, when such a request touches upon specific requirements under national law, the requested State shall consult with the ICC on these issues.

A State should therefore provide for consultation to deal with requests enshrined in Article 93 to be made by the Court pursuant Article 96.

15. Article 97 ICC Statute: Consultations

The principle in Article 97 is that whatever the problem may be with a request made by the Court, the requested State should consult the ICC to identify ways of resolving the problem. To that effect consultation procedures must be in place to allow for such interaction between the State to which the co-operation request is addressed and the ICC. The Article goes on to provide for an indicative list of issues with regard to which consultation might arise.

A State party, in implementing Article 97 should avoid refusing the execution of the Court's request straight away and must enter in consultation with the Court without delay. It is imperative thus to provide for such a

[196] Section 5(4).

possibility in its domestic legislation, where emphasis should be given to finding solutions to possible problems.

Australia adopts this very helpful approach and provides for consultations with the ICC in case of problems with the execution of a co-operation request[197]. The Australian provision does not mirror the possible problems that might arise when a request is made, which can be found in Article 97. Given its non-exhaustive nature, this is not detrimental and the Australian view on this issue is entirely appropriate. What Australia has done is, in fact, to include a rather general provision[198], which stipulates that consultation must be sought for any reason likely to cause problems with the execution of a co-operation request[199].

A somewhat similar, but also in many ways different, approach is adopted by the Netherlands. Section 7 of the Dutch law incorporates potential obstacles envisaged in executing the request for co-operation with the ICC. This provision contains the situations laid down in Article 97(a), (b) and (c)[200]. However, as with Australian Section 7, the Dutch provision is not limited to incorporating Article 97 only. Instead, the said provision contains a comprehensive list of many situations that may arise when dealing with a request to arrest and surrender a person to the ICC and consolidates the

[197] Section 11(1).
[198] Section 11.
[199] This also includes a request under 93(1)(l) and requires that before it is refused, it should be explored whether it could nevertheless be provided subject to the conditions laid down in Section 11(2) of the Australian Act. See *supra*.
[200] The Dutch Act however separates subsection (b) of Article 97 of the Statute into two subsections, namely, 7(2)(b) and (c). Although this has no impact whatsoever on the actual incorporation of the obligation to enter consultations with the Court, it constitutes a better form of drafting as although both instances described in 97(b) deal with factual issues, they nevertheless merit equal, and therefore, separate attention.

necessity of consultation with the Court in a single provision[201]. In this it differs greatly from Australia. The Dutch approach is methodologically preferable. All the possible instances where consultation with the ICC might be necessary, can be found in a single provision, rather than in various Sections of the Act. This enhances legal certainty as it is clear in which cases the possibility of refusing co-operation may be averted following consultation with the Court.

Section 7(6) of the Dutch Act contains an additional provision for consultation which emanates from the unique position held by the Netherlands as the host State for the ICC. Accordingly, if a request addressed to the host State cannot be granted, the Netherlands by virtue of the said provision and in accordance with the headquarters agreement shall engage in consultation with the ICC.

16. Article 98 ICC Statute: Immunities

Although Article 98 has proven to be crucial in the way the US in particular has reacted to the coming into force of the Rome Statute, there is not much a State can do to implement this Article in its domestic legislation. Perhaps, mention should be made of the issue of immunities. A State, in accordance with Article 27 of the Statute should provide in its implementing legislation that official capacity is irrelevant when crimes falling under the jurisdiction of the Court are involved, allowing therefore for the prosecution of such crimes at least at an international level, if not at the national as well.

[201] The various other possibilities for consultation discussed in Section 7 are being dealt with in this chapter under the provisions they refer to.

Immunities have been dealt with in by most States in their substantive criminal law acts rather than their procedural acts dealing with co-operation and will not be examined here[202].

17. Article 99 ICC Statute: Execution of requests under Articles 93 and 96

Article 99 clearly stipulates that for the execution of requests for assistance, use shall be made of national procedures of the requested State. This, in turn, implies that the relevant procedures to facilitate such requests must be in place. There is no extra burden placed on the requested State, as evidenced from Article 99(3), where it is stated that States do not have an obligation to translate the documents into the two working languages of the Court, but shall submit the documents in the original form. In general, the spirit of this provision is to facilitate execution of the requests, without imposing unnecessarily burdensome provisions which will only delay the process, without affording greater protection for either the individual concerned, or the evidence involved. Article 99(4) is a significant provision. Allowing execution of the Court's requests directly on the territory of the State party, without even the presence of the State's authorities, is important for the effectiveness of the Court and is the most coercive provision in the Statute. As such, it should be implemented. This Article also provides for the possibility of execution of requests following consultations with the requested State Party.

[202] Mention should be made, however, of Section 16 of the International Crimes Act (Act 270 of 19 June 2003), implementing the substantive provisions of the Statute in the Netherlands, which is unique in the sense that it affords immunity to "foreign heads of state, heads of government and ministers of foreign affairs, as long as they are in office, and other persons in so far as their immunity is recognised under customary international law", as well as "persons who have immunity under any Convention applicable within the Kingdom of the Netherlands". See also for a procedural approach to Article 98, Australian Section 12.

Few States have opted to implement this provision. Germany incorporates Article 99(1) in a rather generous manner allowing ample access to members of the Court and their authorised representatives. Moreover, and certainly in practical terms more crucially, Germany implements Article 99(4) of the Statute. In its Section 62, a clear facilitative approach is taken to allow the Prosecutor and its staff to conduct on-site investigations in accordance with the Statute. The emphasis is on Article 99(4)(b) without, however, imposing specific conditions *ab initio*. Moreover, the permissibility of on-site investigations is stressed provided that this is done without compulsory measures. Overall, the provision is in accordance with the Statute Article but does not go beyond what is expected. Given, however, that most States refrain from directly implementing Article 99(4), Germany's approach should be considered a success.

18. Article 101 ICC Statute: Rule of Speciality

The Rule of Speciality explained in chapter three is implemented by Australia in Section 48 of its Act. This Section replicates the Statute Article and as such incorporates the rule of speciality in Australia appropriately.

Although no specific mention is made to the rule of specialty as this is found in Article 101 of the Statute, the Netherlands nevertheless in Section 12(1) of its Act incorporates the rule in its domestic law. Section 12(1) is in accordance with Article 101(1). The situation with regard to 101(2) though is less clear. Section 12(1) does not explicitly provide for a waiver of the rule of speciality. What Section 12(1) does is to make surrender conditional on the

express consent of the Dutch Minster of Justice. As the translation of Section 12(1) is not clear in that respect, the consent described here may be taken to amount to the requisite waiver found in the Statute. Section 12(2), however, is reminiscent of extradition procedures where normally such a clause is inserted to avoid extradition of a person to a third State following his/her extradition to the requesting State. The inclusion of Article 101 in the Statute is unfortunate. Even more unfortunate is, however, the inclusion of clauses traditionally used in extradition proceedings when it is clear from the Statute that the Court is not mandated to surrender a person to a third State for offences committed prior to the surrender to the ICC. It may be that Section 12(2) allows for such a surrender to take place following the consent of the Minster of Justice. It is unlikely though that such a situation will arise in practice. To add to the confusion, it is not clear which State would be considered a third State under the said provision. A third State is, potentially, any State besides the Netherlands. But is the concept of a third State in this instance limited to States parties to the Statute or does it go beyond these to include even non-ICC parties? Should this be the case, it is almost inconceivable that the ICC would surrender a person to a State which is not party to the Rome Statute.

The reverse of the situation described in the Dutch Section 12(2) is envisaged in the Statute when considering the possibility of a competing request found in Article 90(6)[203].

Germany deals with the rule of speciality in its Section 25, which does not reiterate Article 101(1) but deals directly with Article 101(2). The principle enshrined in Section 25(1) is that the exception to the rule of speciality found in 101(2) will in essence always apply. The said Section does not explicitly

provide for a waiver of the rule of speciality. By reference, however, to Article 101(2) in Section 25(1) this should be considered to be the procedure to be followed. Had this Section contained this paragraph only, it would have been the most appropriate application of a very badly drafted and unfortunate rule which is, nevertheless, present in the Statute. However, Paragraphs 2 and 3 add to the uncertainty surrounding the rule of speciality. Section 25(2) seems to add a condition on the ICC which has no legal basis in the Statute.

On the one hand, Germany enables the ICC to prosecute cases beyond the barrier of the rule of speciality, and on the other, it imposes conditions which although trace back to the Statute, are not necessarily facilitative. Section 25(2), for instance, greatly resembles provisions found in extradition treaties which prohibit re-extradition once a person has been extradited to a particular State. A great deal of thought seems to have been given to this provision. Based on the complementarity provisions of the Statute the aim is to uphold this fundamental principle of the Statute as it was intended to be used, in favour of States which are willing and able to deal with a particular case. However, despite the fact that Section 25(2) contains a reference to the relevant Statute provisions, it is not up to Germany to impose such conditions on the ICC. The inclusion of the rule of specialty in the Statute is somewhat limited and does not go all the way, as the Statute is not an extradition treaty. The excellent German approach of Section 25(1) is significantly curtailed by the addition of the second paragraph to this Section. The same justification applies with regard to paragraph 3 of Section 25. Again, there are very good reasons to uphold this approach, as extradition following surrender to the ICC should not be permitted. The solution here should be that the ICC itself would not further

[203] See *supra* implementation of Article 90 of the Statute.

"extradite" a person to any other State. As a matter of fact the ICC would not have basis in the Statute to proceed in such a way and, furthermore, it would not be in the interests of the Court nor would it be practicable to have recourse to such measures. When the ICC requests the surrender of a person it is for the purposes of prosecution or execution of sentence[204]. In other words, Section 25 contains an automatic waiver in paragraph 1, which is then lifted in the circumstances provided for in paragraphs 2 and 3[205]. This does not contravene the Statute as Article 101(2) does not contain a strict obligation to provide a waiver. However, nothing in the Statute obliges the ICC to comply with a request to return the surrendered person to Germany should the case arise.

A related issue is discussed in Section 26, which has not been picked up by many countries. Conceivably, the ICC may request the surrender of a person who has previously been the subject of extradition. Under traditional extradition rules, surrender to the ICC would violate the principle of the prohibition of re-extradition. Germany, largely influenced by such proceedings devotes an entire Section to the issue and specifies the circumstances in which surrender would be allowed. This is not the place to examine this provision in detail. The ICC Statute is silent on the matter and it is difficult to see how Germany will enforce this provision on another State, and so influence that State's relationship with the ICC.

Canada's incorporation of the rule of speciality can be found in Section 40(3) of the Canadian Extradition Act. This provision allows Canada's Minister of Justice to seek assurances that the person will only be prosecuted or

[204] Article 91.

[205] Although no mention is made of Article 101(2) in Section 25, Section 68(7) states that a waiver in accordance with Article 101(2) shall be dealt with by the Federal Ministry of Justice

a sentence will be imposed or enforced for crimes referred to in the order for surrender. Again, this is particularly relevant for extradition cases.

The possibility of non-extradition until the assurances or conditions set by the Minister are met by the extradition partner is found in Subsection 4 of Section 40. This is a purely procedural provision which, if invoked with regard to the ICC, should be dealt with in consultation with the Court. Of interest is also that a possibility of waiving the rule of speciality under Article 101(2) of the Statute is not incorporated directly in the Canadian Act except for the provision in Section 72. This provision allows the requested person to "waive extradition". Reference to the rule of speciality is made in 72(2)(a). Under this provision the requested person and not the State may wave extradition. This is hardly similar to Article 101(2) of the Statute.

Had the drafters of Article 101 intended to provide a fully-fledged rule of speciality, identical to the one found in extradition treaties, they would have done so. Since they included the rule in the Statute, they perhaps ought to have done so. However, with the law as it stands on this issue, it is hard to see that extradition law analogies would work in that respect.

19. Article 102 ICC Statute: Terminology

It would not be necessary to incorporate the use of terms found in Article 102 of the Statute into domestic law as long as the distinction between surrender an extradition is made clear and no confusion is made between these

in agreement with the Federal Foreign Office. Dealing with this issue at the Federal level is evidence of the significance attributed to this provision.

terms. Similarly, there is no need to put aside extradition laws of States when co-operating with the ICC.

There are examples of both approaches available. The Netherlands in Section 11(2) explicitly states that its Extradition Act is not applicable when surrendering a person to the ICC. This is interesting, as it is a good example of Article 102 being directly implemented in domestic law. However, compliance with Article 102 does not necessarily imply non-applicability of extradition law. Canada, for example, has successfully amended its Extradition Act to comply with a request for surrender of a person to the Court. No distinction is made between the use of terms extradition and surrender in the Canadian case. The justification for not having a distinct procedure is that "the extradition process has been tested by [Canada's] highest court and has been found to be constitutionally sound"[206]. The use of extradition proceedings *mutatits mutandis* is not objectionable, but a distinction should be made between those processes which are suitable for executing co-operation requests and those which are not. For instance, in Part 2 of the Extradition Act, where the extraditable conduct is discussed, there is by virtue of 3(1)(b) a requirement for double criminality. This is not necessary for "surrender" to the Court generally. This is hypothetical in the case of Canada, as the legislation already exists[207] and the crimes falling under the jurisdiction of the ICC are already punishable in Canada. It could foreseeably arise though, should implementation of the ICC crimes by Canada have been narrower than the Statute. Yet again, this will not arise in practice as the Canadian Act goes beyond what is requested by States when incorporating the core crimes into domestic law, as it defines the ICC

[206] Robertson, (2004), 9.
[207] *ibid. supra* n. 32.

crimes according to customary or conventional international law[208]. Section 3(2) of the Canadian Act helpfully clarifies that it is irrelevant as to how the conduct is defined by the extradition partner[209] and whether it is akin to Canada's approach. Presumably, this could apply to the ICC as well.

As a general point, as is shown clearly by this examination of the various implementation pieces, what matters is the substance of the relevant piece and not the form it might take.

20. Implementation: Some Guiding Principles

Having examined State implementation efforts with regard to each of the Statute Articles dealing with co-operation, it is clear that each State has its own concerns and priorities and affords different treatment to each of the issues involved.

The point of reference in the preceding analysis has been the ICC Statute. Mindful of the positions taken by States when implementing the ICC regime, in order to identify some guiding principles common to the various pieces of implementing legislation, the basis has to be the Statute.

The guiding principles presented here are by no means unique. It certainly depends on the perspective on implementation; the approach would differ, had different parameters been examined. For instance, should the emphasis be on State interests, the approach would, perhaps, have been quite dissimilar. Since States have signed up to the Statute and have therefore to

[208] *Ibid.* Sections 4, 6.
[209] The ICC is considered an "extradition partner" under the Act, Section 2.

undertake the obligations enshrined therein, they have to abide by the Statute and its standards.

From the preceding Article-by-Article analysis, States should:

1. Allow for full co-operation under the Statute. This in essence means respect for the Statute and facilitation of its co-operation regime.
2. Strive for promptness and expediency when dealing with a co-operation request.
3. Ensure that ICC implementing legislation is not more burdensome than other pieces of legislation, particularly extradition procedures. When possible, the ICC should be treated more favourably.
4. Interpret dubious provisions in favour of the Statute.
5. Minimise the possibility of refusing co-operation.
6. Deal with procedural problems before the ICC and not in the State concerned.
7. Facilitate consultation with the Court, in accordance with the Statute, either through a general clause empowering the State to enter consultations with the ICC, or through specific reference to consultation whilst implementing various Statute Articles.

Conclusion

An examination of the provisions of the Statute and State responses to their implementation reveals that the task of incorporating them into domestic

law is daunting. In the previous chapters, the role States played was examined from the perspective of the Statutes of the international criminal courts. In other words, the emphasis was on the international side. This chapter deals primarily with the domestic aspect of the inter-relationship. When it comes to implementation, States are required to play an active part to contribute to the interplay with the international criminal justice institutions. Incorporation of international criminal law into domestic law is the missing piece to complete the jigsaw of interaction between national and international legal orders. The system cannot become operational without State input. In the process of implementation, however, States face a number of challenges which they have to overcome in order to reap the benefits of international criminal justice. And in this quest for effectiveness of the system something has got to give. Similarly to Jason and the Argonauts who, in order to reach the golden fleece had to go through the clashing rocks costing them the stern of their mythical vessel, States have to make some hard choices, knowing that if they succeed in implementing the Statutes fully, their relationship with international criminal justice institutions is complete.

Conclusions

International Criminal Justice at the Interface: Between Scylla and Charybdis?

The main themes this work has examined revolve around the interplay between national and international legal orders in the field of international criminal justice. The present thesis explores the key concepts that regulate this relationship, as these are found in the Statutes of the *ad hoc* Tribunals and the ICC. Moreover, it looks into their practical application, as well as into factors that influence this interaction and sheds some light on the reactions of the principal actors in the emerging international criminal justice system. An analysis of the dialectic relationship between national and international orders from the viewpoint of international law is at the centre of this thesis.

The above relationship is based on a formalised interaction, governed by distinct principles to be found in the Statutes of the Tribunals and the Court. This thesis does not, to a large extent, question the inception of the international criminal justice order as a whole. Nor does it criticise the choice of concepts dealing with the inter-relationship. Instead, by deconstructing primacy and complementarity, and by exploring their strengths and weaknesses when applied in practice, it advocates, in essence, a model of what could be termed as 'functional or workable interaction'. And in this model States play a leading part. Their relationship with the international level is influenced by their own actions, but also by the actions of the principal organ of the United Nations, the Security Council.

The main argument that permeates this work is that States play a fundamental role in the interaction between national and international courts.

Moreover, the effectiveness of the system is crucial for the success of the international criminal justice venture and largely depends on its players. The Statutes of both the *ad hoc* Tribunals and the International Criminal Court provide the guiding principles towards achieving a functioning international criminal justice regime, but States and the Security Council are to carry out what the Statutes promise: a functioning interplay. It is, therefore, up to them to give meaning to the relevant provisions which would be a dead letter otherwise.

After examining State interaction with international adjudication systems in fields other than international criminal justice, the analysis shifted to the examination of the foundations of the interface in international criminal law and the concepts that regulate the role of States therein. As demonstrated already, the choice of concepts on which their relationship is premised is pivotal. The aim of both primacy and complementarity is neither to deprive national courts of jurisdiction, nor States from assuming their responsibility in dealing with the most heinous crimes. On the contrary, in the case of the Tribunals, emphasis is placed on their concurrent jurisdiction, whereas the ICC complements national courts and intervenes only when it is thought that this is the appropriate action to be taken. As it is not logistically possible, and would perhaps even be undesirable, to try at international level each and every person suspected of having committed war crimes, crimes against humanity or genocide, the principles devised strive to ensure that the interests of justice are served, and that each forum deals with the cases most suitable for it. And this is evidenced from the processes envisaged by which the Tribunals or the ICC are seised of jurisdiction. In the case of primacy, this role is fulfilled by deferral,

whereas in complementarity, it takes a finding that the national courts of a State are "genuinely unwilling or unable" to deal with a case. In essence, both principles achieve approximately the same results. The onus imposed on States, however, differs. In the *ad hoc* Tribunals, State jurisdiction is, in principle, supplanted by the international level, with the Tribunals having to prove that it is in the interests of justice to request deferral of a case. In the ICC, the burden of proof is reversed in favour of national courts. For a State to evade the application of complementarity, it would have to actively engage in investigations and prosecutions that are of a certain standard, which meets the thresholds enshrined in the Statute. In such a case, the ICC would not be able to be seised of jurisdiction.

Primacy played an important part in building up the first truly international criminal Tribunals. It was a means of asserting international authority. Once this was achieved, and also due to changing needs, primacy has evolved to become a more targeted principle and recently aims to involve States more in the adjudication process. Complementarity constitutes a more refined principle, bestowing conditional primacy on national courts. In essence, it does not matter who exercises jurisdiction, as long as the appropriate forum is seised of the case at hand. Despite primacy's transformation over the years, it may not always lead to the best forum to exercise jurisdiction. Complementarity provides a better option in that respect, but the foreseeable problems in its application should not be disregarded. However, it is essentially up to States to comply with the Statute taking conditional precedence in dealing with a case, whilst the Court's Prosecutor adopts a more passive approach.

The interaction between States and international institutions is perhaps more clearly demonstrated in the field of co-operation. In the quest for an effective international criminal justice system, attention must be drawn to the obligations States have to perform, as well as the guidance the relevant Statutes provide.

Full co-operation with the Tribunals or the ICC is never going to be achieved. There are always going to be States, other entities or intergovernmental organisations that, for one reason or another, will fail to observe the strict obligation to provide assistance to international criminal justice institutions. The system designed to deal with such instances of non-co-operation is far from perfect. However, it has to be seen in the context of the relationship between States and such institutions. For the twin Tribunals, enforcement of the obligation to co-operate lies with the SC. The responsibility to see to this obligation complied with is removed from the ambit of the States immediately concerned and is placed with the executive organ of an international organisation. Despite membership of the UN, the above States do not have control over the type of action the SC might take, unless, of course, failure to co-operate comes from one of the Permanent Members of the SC. Compliance, therefore, comes as a threat from above. Once a breach has materialised, the threat may be transformed to concrete action. The mechanisms applicable to the Tribunals were designed to reflect the coercive nature of the system they form part of. In practice, it takes a lot more than the abstract threat of SC action to induce co-operation. Essentially, prosecutorial strategies and non-forcible judicial means have been relatively more successful than SC (in)action. The coercive powers the system is based upon have never,

to date, been put to the test. Instead, weaker means of enforcing co-operation have been used.

Inevitably the ICC's different philosophy is reflected in its co-operation regime as well. States were the primary actors in the Court's creation. They are solely responsible for its operation and success. Failure to co-operate with the ICC is therefore dealt with by State parties to its treaty. However, due to its very nature, coercive powers are not envisaged, except for SC referrals. Several concessions have been made to States with a view to avoiding non-co-operation with the Court. Consultation is the preferred means of dealing with disputes. Moreover, difficult provisions have been "watered down" to the liking of States. The Statute is careful to provide for postponement of co-operation which is complemented by a limited right to refuse the execution of a request.

No matter how weak the system seems in practice, it was argued earlier that it might be no less effective than the Tribunals. Given that the power to enforce co-operation remains with the States whose interests are at stake, it might stand a better chance overall than an abstract threat hanging over States from a centralised authority, which has never taken any action in similar situations. Instead, many of the problems which would normally give rise to non-co-operation would be dealt with, already as mentioned above, in the course of the execution of a co-operation request. The system envisaged for the ICC is therefore less rigid and permits formulation of requests in such a manner so as to be agreeable to the States concerned. This flexibility which, in truth, gives more control to States, is based on an attitude of anticipation, rather than confrontation of the difficulties as and when they arise.

This is not to say that non-co-operation will not be a problem. It will certainly be a major one. The ICC regime has the inherent limitations of a treaty. Moreover, it contains an in-built possibility of non-co-operation. The "unwillingness", pursuant to which the Court may be seised of its jurisdiction, is likely to be a major stumbling block for the co-operation regime as well. It is unrealistic to expect that a State which has not had the will to investigate and prosecute itself and has actively engaged in shielding the accused from criminal responsibility, will co-operate "fully", as Article 86 puts it, with the ICC. The "complementarity paradox" will take its toll in this instance, and it is likely to be a heavy one. For the rest of the cases, however, the co-operation regime will not be weaker in practice than its Tribunals' counterpart. In any case, whatever additional steps are taken to enhance co-operation, they cannot substitute the will of the States which are the main actors in this respect. It is up to them to observe or disregard the obligation to co-operate with the Tribunals or the Court. Ensuring that State co-operation is achieved is crucial to the effectiveness of international criminal justice.

Another facet of the interaction between States and international criminal courts involves an external factor capable of affecting the interplay; the UN Security Council. As demonstrated, the Council intervenes in different ways, depending on the institution and on the stage of the process. The role the SC played in the creation of the *ad hoc* Tribunals is not replicated in the ICC, due to its different legal basis. The transition, since the initial SC involvement in the field of justice culminated in the creation of the *ad hoc* Tribunals, from the exclusion of State input, to a system, such as the ICC, where States play the leading part, is unprecedented. However, when it comes to the operation of the

ICC, State volition is either altered, through the possibility of a SC referral, or totally denied, through deferral. At best, a partnership between States and the Security Council emerges. However, the role of the Council remains strong, and the prospect of its assuming its original hegemonic stance should not be disregarded. The system devised in the Statutes of both Tribunals and the ICC would guarantee a workable interaction if all players adhered to their allocated roles.

Finally, the most obvious contribution of States to the international criminal justice regime is observed is the field of implementation. Although the analysis in the present thesis focused primarily on questions arising out of the incorporation into domestic law of the ICC co-operation provisions, it is clear that State action is decisive in giving meaning to the interaction between States and institutions. National implementation of international criminal law in domestic legal orders not only enables co-operation with the international criminal courts at a practical level, but it also completes the relationship between States and institutions, as it constitutes the only means of empowering national jurisdictions to try war crimes, crimes against humanity and genocide. There is sufficient flexibility in the incorporation process for States to make their own mark on the international criminal justice scene through their implementing legislation. However, this latitude is not absolute and is restricted by the courts' Statute.

Despite the importance of this aspect, it seems that not all State parties have yet risen to the challenge. Following the coming into force of the Rome Statute, the emphasis has shifted away from the ICC to other areas of international law. The current events on the international scene have assisted in

that respect. Terrorism and the "war" thereon currently dominate the discussions and the legal commentaries, whereas the ICC seems to be somewhat *passé*. The coming into force of the Rome Statute, although arguably a very important milestone, is certainly not the end of the road. In fact, the battle against impunity, a concept which was prevalent during the process that led to the creation of the Court, starts after the beginning of the Court's operation and, in reality, when the ICC interacts properly with accountability efforts, either at the international or at the national level, and most prominently, with national courts. The Statute provides the principles on which this interaction is based. It is up to the States to provide the means for it to materialise. And this can only be effectively done through implementation.

The question which then follows is whether the relationship between national and international legal orders actually works. It is immediately obvious to the reader of this thesis that there is a tension between the principles governing this interplay and their application in practice. The concepts that regulate this relation represent perhaps ideals, which may, to an extent, be unattainable in practice. The reality and the problems that come with them are depicted in the practical application of the above concepts. A realisation that the system does not work as well as it was expected, or at least as it was hoped it would, is important in order to explore alternative avenues of enforcement, or simply practical ways of rectifying the problems with the existing framework.

The approach taken in the present work has been one of scrutinising key aspects of the relationship between international criminal courts and national legal orders. As a starting point, a recognition that the above relationship is not unique to international criminal law is important, as it puts

the research hypothesis in perspective and assists in understanding the particular characteristics of this field. By examining the concepts on which international interaction with the national level is based, an evaluation of its foundations and of the inherent limitations is achieved. An inquiry into co-operation allows for consideration of practical problems that may arise. Exploring the role of the Security Council in the field of international criminal justice sets the boundaries of the system and places States and institutions opposite the principal organ of the United Nations. Finally, an in-depth analysis of States' incorporation efforts regarding the ICC co-operation regime assists in highlighting some common approaches among the implementation pieces examined, and completes the exploration of the interface between the national and international regimes, at least up until the point of actual trials by the ICC.

Overall, the effectiveness of the evolving international criminal justice system greatly relies upon how States, institutions and the SC interact with each other and what scope there is to overcome the foreseeable shortcomings and attain a workable relationship. The Statutes of both the *ad hoc* Tribunals and the ICC provide the framework within which the system operates. It is States, however, that bear the burden of turning it into an effective regime. Despite the difference in their constitution and jurisdictional principles, the Tribunals and the permanent Court face some very similar problems. Guided by the Statutes, States possess the ability to foster this interaction and, assisted by the Security Council, to contribute to a functioning international criminal justice system. Aiming for workable interaction means that the relationship

between international criminal courts and national legal orders will not be one between Scylla and Charybdis.

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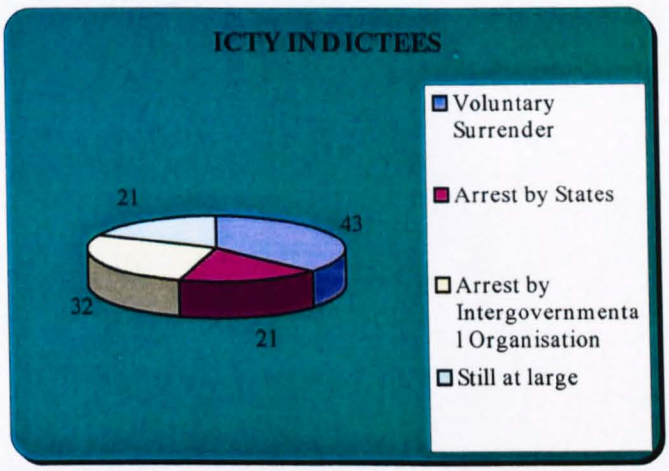
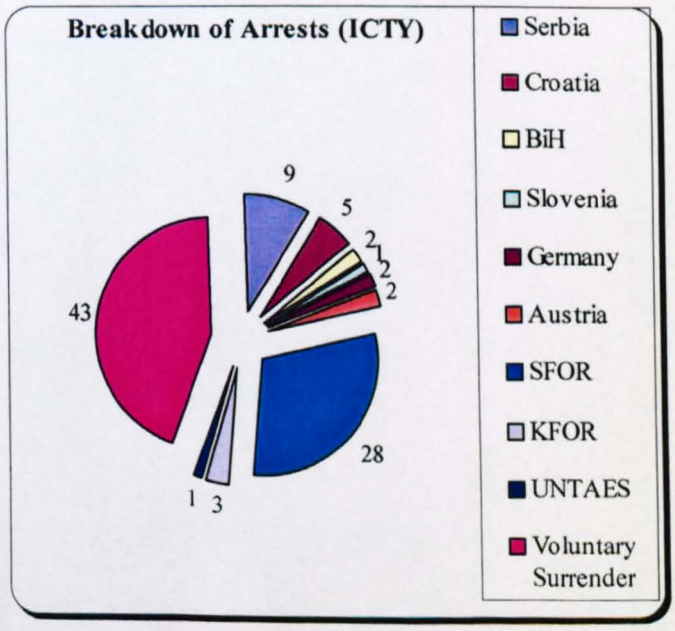
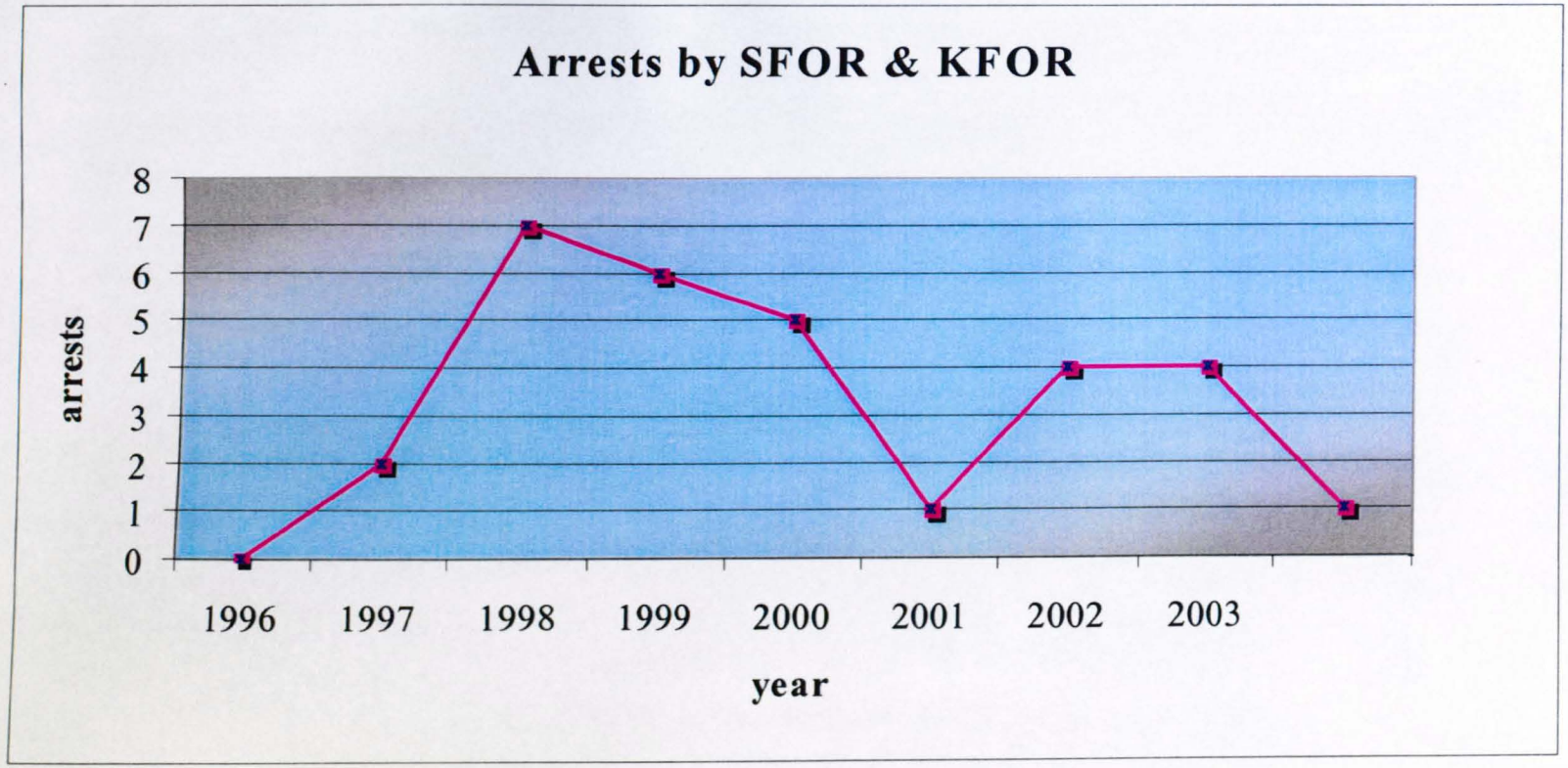
Appendix



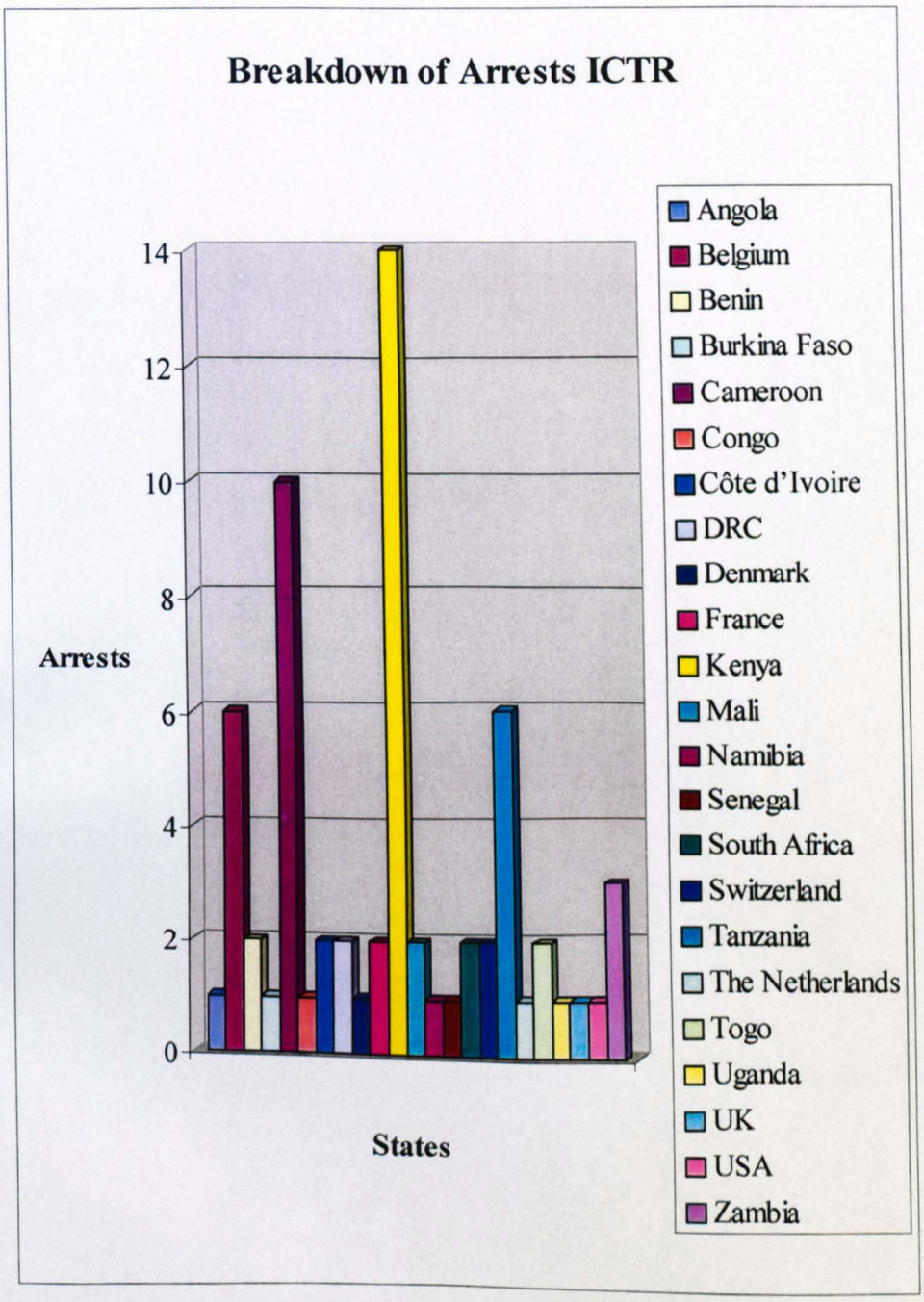
Graph 1: International Criminal Tribunal for the Former Yugoslavia Indictees



Graph 2: International Criminal Tribunal for the Former Yugoslavia Breakdown of Arrests



Graph 3: Apprehension by Intergovernmental Organisations



Graph 4: International Criminal Tribunal for Rwanda Breakdown of Arrests