

# A GIANT WITHOUT LIMBS<sup>1</sup>: THE INTERNATIONAL CRIMINAL COURT'S STATE-CENTRIC CO-OPERATION REGIME

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[The International Criminal Court is one of the great international institutions in mankind's history with the potential to reconfigure significant aspects of the international system with regard to criminal jurisdiction. But like the international penal institutions before it, the success of the ICC revolves around international cooperation. An institutional check on the ICC's power is that it will have to work through States. States Parties will be asked to arrest and surrender suspects, investigate and collect evidence, extend privileges and immunities to ICC officials, protect witnesses, enforce ICC orders for fines and forfeiture and, at times, prosecute those who have committed offences against the administration of justice. The ICC will rely heavily on the cooperation of States Parties individually and collectively for its success. This article provides an analysis of the ICC's international cooperation and judicial assistance regime as well as an insight into the approaches that States Parties have adopted in seeking to give effect to the letter and spirit of their obligations domestically.]

## INTRODUCTION

It was at the end of World War II that the door to the future possibility of a permanent international criminal court was practically opened with the establishment of two international military tribunals at Nuremberg and Tokyo. In 1946, the inaugural session of the UN General Assembly adopted Resolution 95(I) which affirmed 'the principles of international law recognised by the Charter of the Nuremberg Tribunal and the judgment of the [IMT] Tribunal.'<sup>2</sup> In 1951, the UN established a Special Committee of the General Assembly for the purpose of drafting a convention for the establishment of an international criminal court.<sup>3</sup> After decades of political wrangling and disagreement in 1998, States finally agreed to adopt

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<sup>1</sup> This title is inspired in part by the comments of Professor Antonio Cassese, former President of the International Criminal Tribunal for the former Yugoslavia made in 1997. In an article, Professor Cassese noted:

...the ICTY remains 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 cooperation of states is not forthcoming, the ICTY cannot fulfil its functions. It has no means at its disposal to force states to cooperate with it. [Emphasis added]

Antonio Cassese, 'On Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law', (1998) 9 *European Journal of International Law* 1, 13

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<sup>2</sup> GA Res 95, UN GAOR, 1st Sess, UN Doc A/64/Add 1 (1946).

the *Rome Statute* for the establishment of an International Criminal Court,<sup>4</sup> closing the circle on the efforts first inaugurated at the end of World War I. Support for the ICC was overwhelming.<sup>5</sup> However, several key States, most notably the United States, were among those opposing or abstaining.

‘There is little doubt that the end of political and military confrontation between the super powers (also known as ‘cold war’) ... supplied the necessary, albeit not sufficient, precondition for the efforts to create the International Criminal Court to be taken seriously. That political opportunity was, however, far from enough to render these efforts successful. Nonetheless, it developed the right climate in which the political will could grow and from which it eventually has emerged. But there was even more important component: the Rome Conference. It served as a litmus test to see whether or not the international community en globe [had] achieved such a level of development that would enable the nations to restore peace and order and maintain it, using the International Criminal Court.’<sup>6</sup> The overwhelming support for the Court seems to reflect a growing belief that today, ‘nations, States and governments are capable of thinking and making decisions not only in particular (egoistic) categories, but also in a global context...Apparently, the majority of governments and their representatives in Rome came to the conclusion that justice for the most heinous crimes is much too serious and important to be meted out by individual States.’<sup>7</sup>

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<sup>3</sup> See *Report of the Sixth Committee*, reprinted in Benjamin Ferencz, *An International Criminal Court* (1980) Vol 2, 298-305; *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, UN GAOR, 50th Sess, Supp No 22, UN Doc A/50/22.

<sup>4</sup> *Rome Statute of the International Criminal Court, (Rome Statute)*, UN Doc A/CONF 183/9 reprinted in 37 ILM 999. The Statute entered into force on 1 July 2002, paving the way for the establishment of the International Criminal Court.

<sup>5</sup> 120 states voted in favour, 7 states against with 21 states abstaining.

<sup>6</sup> Michael Plachta, ‘Contribution of the Rome Diplomatic Conference for the Establishment of the ICC to the Development of International Criminal Law’ (1999) 5 *University of California Davis Journal of International Law and Policy* 181.

<sup>7</sup> *Ibid.*

The dilemma of building agreement among State Parties without diluting core principles essential to an effective international penal regime coloured the Rome conference.<sup>8</sup> The process of making the *Rome Statute* was a battleground regarding whether the ICC should establish a ‘vertical’ or a ‘horizontal’ paradigm vis-à-vis States. Elaborating on the nature of these paradigms, Professor Antonio Cassese notes:

The former concerns relations between two sovereign States and is therefore a reflection of the principle of equality of States; it gives rise to a *horizontal* relationship. The latter, instead, concerns the relation between a State and an international judicial body endowed with binding authority; it is therefore the expression of a *vertical* relationship.<sup>9</sup>

Considering that fundamental norms, rules, and practices of international law rest on the premise of the State, the paradigm to be adopted was especially important to the ultimate effectiveness of the ICC. The reluctance of States to give way to international criminal jurisdiction with respect to matters which would otherwise be subject to their exclusive sovereignty was clear in negotiations that dealt with the allocation of jurisdiction between the court and national authorities. Many States were wary that an international penal process that was based on the ‘vertical’ paradigm would significantly contribute to the threatening of the overall concept of sovereignty. However, the ICC’s goal of attempting to influence the behaviour of individuals at all levels of authority and power through enforcement of international law only stood a good practical chance through incorporation of the tenets of a ‘vertical’ paradigm which would limit States’ ability to frustrate the work of the ICC. In the end, a number of solutions adopted in the *Rome Statute* ‘differ from typical and traditional constructions, which transpire from international treaty regulations, with respect to constituent

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<sup>8</sup> Chimene Keitner, ‘Crafting the International Criminal Court: Trials and Tribulations in Article 98(2)’ (2001) 6 *UCLA Journal of International Law and Foreign Affairs* 215, 271.

<sup>9</sup> Cassese, above n 1 at 14.

elements of particular forms of cooperation'<sup>10</sup> a manifestation of the 'vertical' paradigm.

The challenge was the need for a trade-off between achieving consistency and building consensus.<sup>11</sup> This was arguably more pronounced in part because the State was being called upon to reconfigure certain key aspects of its domestic jurisdiction as well as State-crafted inter-national regimes in favour of a functioning international regime.<sup>12</sup> Consultations, consensus and compromise were at the heart of the Statute making process. In an articulate encapsulation of this triad, Professor M Plachta states:

Triple 'C' was a dominant tone at the Conference. Consultations-Consensus-Compromise describes both the organisational framework and the tools that were adopted at the Conference. While the first element is procedure-oriented, the last two are result-oriented, with one important distinction between them. The second component sets the threshold, whereas the third determines the contents of the final result. The first two elements out of this triad facilitate and encourage achieving the last one. That compromise will be a matter of 'life and death' became apparent at the very beginning of the Conference, when the delegates started presenting their positions specified in instructions from their capitals. Not surprisingly, those views reflected the many options and alternative solutions contained in the main Conference document. Compromise was, therefore, the only way out of this situation in order to avoid a stalemate. At the same time, the main concern of the delegates was the question of how to reach a middle ground and acceptable solution without compromising and endangering the whole underlying idea. For various reasons, compromise could have been criticised as rendering the adoption of the only 'right' or ideal solution impossible.<sup>13</sup>

Reflecting on the tension between domestic jurisdiction and international penal requirements Dr Chimene Keitner observes that, '[t]he *Rome Statute* embodies a carefully crafted compromise between a State-centred idea of jurisdiction, and a more inclusive international vision. The State-centred idea, in its extreme manifestation, would uphold a State's exclusive jurisdiction to prosecute and try its own citizens for war crimes, genocide, and crimes against humanity, and to prosecute and try citizens of other States who commit such acts on the territory of the forum State. An inclusive vision would promote the idea of universal

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<sup>10</sup> Plachta, above n 6 at 185-186.

<sup>11</sup> Ibid 217.

<sup>12</sup> Ibid 215.

<sup>13</sup> Ibid 186-187.

jurisdiction, whereby individuals of any nationality could be tried for certain crimes by any State acting on behalf of humanity as a whole. The ICC follows a middle path.’<sup>14</sup> Under the *Rome Statute*, primary jurisdiction is assigned to the ICC’s Member States with the ICC as a fallback mechanism. In the event that States are unwilling or unable to carry out their obligation to investigate and prosecute crimes, the ICC’s complementary jurisdiction is triggered allowing the ICC to step in to fill the lacuna.<sup>15</sup>

The Statute adopted at the Rome Conference can be labelled a direct enforcement variant of international criminal law. It reflects the ‘Direct Enforcement Model’ as elaborated by Professor M C Bassiouni,<sup>16</sup> which presupposes the existence of the International Criminal Court and the supporting machinery needed in any criminal justice system. It contains all the necessary elements of the criminal legislation, such as a ‘general part’ which typically includes the principles of criminal liability, defences, and sanctions, ‘code of criminal procedure,’ as well as problems traditionally discussed under the aegis of international cooperation in criminal matters.<sup>17</sup>

An intriguing aspect of the *Rome Statute* which underscores its nature as a constitutive document is that it combines jurisdiction to prescribe, to adjudicate, and to enforce all in one instrument. The Court’s success or failure revolves around its enforcement provisions as encapsulated in Part 9 of the Statute—the international cooperation and judicial assistance regime. The provisions of this part establish the conditions under which the international

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<sup>14</sup> Keitner, above n 8 at 225.

<sup>15</sup> Both the Preamble to the Statute and art 1 express a fundamental principle of the *Rome Statute*: that the Court is to be ‘complementary’ to national criminal jurisdictions. Although complementarity is not defined (and indeed, there is no general ‘definition’ section in the Statute) there are definitional provisions within particular Articles).

community, or more precisely the States Parties to the Statute, may enforce orders and directions of the Court. But like the international penal institutions before it, the success of the ICC revolves around international cooperation. An institutional check on the ICC's power is that it will have to work through States in conducting investigations, obtaining evidence, and apprehending suspects. International cooperation and judicial assistance as set out in the *Rome Statute* is at the very heart of the ultimate effectiveness of the Court by placing an affirmative obligation on States.<sup>18</sup>

This Article has as its modest aim an exposition of the complex international cooperation regime that the *Rome Statute* sought to craft as well as placing this within the wider context of the international system. The goals are threefold: first, to provide a descriptive account surrounding the Rome Statute's international cooperation and judicial assistance regime; second, to offer a legal analysis of the regime as well as an insight into the approaches that States have adopted in implementing their obligations and third, to expose the potential dangers facing the Court especially through Article 98 which contains provisions relating to waiver of immunity and consent to surrender.

### **THE *BLASKIC* CASE: UNDERLINING THE VITALITY OF A 'VERTICAL' PARADIGM & PREDICTING A TOUGH NEGOTIATION**

The creation of the ICTFY and the ICTR raised questions concerning the appropriate relationship between international *ad hoc* institutions and national courts. The Statutes of these Tribunals recognise that national courts have concurrent jurisdiction while clearly

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<sup>16</sup> M Cherif Bassiouni, 'The Penal Characteristics of Conventional International Criminal Law' (1983) 15 *Case Western Reserve Journal of International Law* 27, 37.

<sup>17</sup> See *ibid* 37-47 (describing direct and indirect enforcement models of international law).

asserting the primacy of the International Tribunals.<sup>19</sup> This extraordinary jurisdictional priority is justified by the compelling international humanitarian interests involved and by the Security Council's determination that the situation in the former Yugoslavia, as well as that in Rwanda, constituted a threat to international peace and security. With regard to both *ad hoc* tribunals, States needed to establish domestic procedures for implementing in order to give effect to the obligations or to comply with requests or orders concerning taking of evidence, the surrender or transfer of accused persons etc.

Many States subsequently modified domestic law or enacted new legislation to facilitate fulfilment of their obligations. The new balance achieved between the jurisdiction of national courts and that of the *ad hoc* international criminal tribunals in many ways marked the end of an era when the exercise of criminal jurisdiction fell within the unfettered prerogatives of the sovereign State. Though the Security Council created each of the two existing international criminal tribunals *ad hoc* as an extraordinary response to a specific and narrowly defined threat to international peace and security, to enable them to address these threats, the practice and application of the provisions of the ICTFY and the ICTR Statutes relating to international cooperation, foreshadowed the political and legal disputes over the creation of a permanent International Criminal Court (ICC) and the possible contours of its cooperation regime.

In January 1997, when Judge Gabrielle Kirk McDonald, presiding over Trial Chamber II agreed to the Prosecutor's request to issue *subpoenae duces tecum* to the State of Croatia and

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<sup>18</sup> *Rome Statute*, above n 4, Part 9 contains the provisions on the nature and type of international cooperation and judicial assistance by States.

<sup>19</sup> See Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, annexed to Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993) (*ICTFY Statute*) (The Rules of Procedure and Evidence are in UN Doc IT/32 Rev 2 (1994)), art 9; The Statute of the

its Defence Minister, she opened the door for the ICTFY to demonstrate among other things the extent to which State sovereignty had been weakened by the international penal institutions as well as providing an opportunity to give a ringing endorsement of the 'vertical' paradigm as an appropriate model through which to give 'teeth' to international penal institutions in seeking to enforce the obligations of states to cooperate.

*Prosecutor v Tihomir Blaskic*<sup>20</sup> was, until the summer of 1997, one of the more interesting cases before the ICTFY, if only because the promotion of Colonel Blaskic to General in August 1993<sup>21</sup> made him the highest-ranking detainee in The Hague.<sup>22</sup> On 15 January 1997, at the instigation of the Prosecutor, Judge Gabrielle Kirk McDonald issued *subpoenae duces tecum* to the Republic of Croatia and to its Defence Minister Gojko Susak<sup>23</sup> requesting thirteen specified categories of documents believed to be of evidentiary value in relation to the *Blaskic Case*.<sup>24</sup> The *subpoenae* were issued pursuant to the Prosecutor's request, relying

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International Tribunal for Rwanda is set out as an annex to SC Res 955, UN SCOR, 49th Year, 3453D mtg, UN Doc S/RES/955 (1994) (*ICTR Statute*) contains identical language.

<sup>20</sup> The *Prosecutor v Dario Kordic*, Tihofil also known as Tihomir Blaskic, Mario cerkez, Ivan also known as Ivica Santic, Pero Skopljak, Zlatko Aleksovski, Case No IT-95-14 at <[http:// www.un.org/ICTFY/](http://www.un.org/ICTFY/)> (*Blaskic Casø*) (visited 14 March 2004), Indictment (original) (Indictment (original). Tihofil (also known as Tihomir) Blaskic was according to the indictment, a career military officer who had served as a captain in the Yugoslav Peoples Army (JNA). Throughout the Yugoslav conflict, he held the rank of colonel and was the Commander of the Central Bosnia Operative Zone of the Croatian Defence Council (HVO). General Blaskic was indicted for 'ethnic cleansing' of the Lasva river valley area in Central Bosnia between May 1992 and May 1993

<sup>21</sup> Ibid para 3.

<sup>22</sup> By comparison, the case against Dusko Tadic, the first case to be fully tried by the summer of 1997, was that of a 'small fish'--a local restaurant owner turned nationalist--who had little role in masterminding the conflict or its effects.

<sup>23</sup> On 15 January 1997, Judge McDonald also issued *subpoenae duces tecum* to Bosnia and Herzegovina and to the Custodian of the Records of the Central Archive of what was formerly the Ministry of Defence of the Croatian Community of Herbage Bosna. See Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, at 3-4, Case No IT-95-14-AR108bis (29 October 1997) <[http:// www.un.org/ICTFY/blaskic/Trialc1/decisionse/70718SP2.htm](http://www.un.org/ICTFY/blaskic/Trialc1/decisionse/70718SP2.htm)> (visited 9 December 2000) (Appellate Judgment on the *Subpoenae*) (citing *subpoena duces tecum* to Bosnia and Herzegovina and to the Custodian of the Records of the Central Archive of what was formerly the Ministry of Defence of the Croatian Community of Herzeg Bosna, Judge McDonald, 15 January 1997).

<sup>24</sup> See International Criminal Tribunal for the former Yugoslavia, Press Release, 'Trial Chamber II Hands Down its Decision on the *Subpoena* Issue: The *Subpoena Duces Tecum* Issued to Croatia and its Defence Minister in January 1997 Must be Complied with by 18 August 1997' (18 July 1997) (visited December 2000) <<http://www.un.org/ICTFY/p230-c.htm>> (Trial Chamber II Decision).



on Articles 18(2) and 19(2) of the Statute and Rules 39(ii), (iv), and Rule 54 of the Rules of Procedure and Evidence.<sup>25</sup> Croatia, in a letter dated 10 February 1997, declared its readiness for full cooperation under the terms applicable to all States but challenged the legal authority of the International Tribunal to issue a *subpoena duces tecum* to a sovereign State and objected to the naming of a high government official in a request for assistance pursuant to Article 29 of the Statute of the International Tribunal.<sup>26</sup> The *subpoenae* were suspended ten days later by Judge McDonald in order to discuss ‘important questions of principle’ with the parties, including the power of a Judge to issue a *subpoena* to a sovereign State or to a high government official of that State.<sup>27</sup>

The Trial Chamber considered its own decision and on 18 July 1997 upheld and reinstated the *subpoenae*, declaring that ‘a Judge or Trial Chamber of the International Tribunal has the authority and power to issue orders to States and individuals, including high government officials, for the production of documents required for the preparation or conduct of a trial . . .’ and that those States and officials were under a clear obligation to comply with such orders.<sup>28</sup> Declaring both the order and the term ‘*subpoena*’ to have been appropriate, the Trial Chamber demanded compliance by 18 August 1997.<sup>29</sup>

This was, however, met with further objections, and the *subpoena* issue went to appeal. On 22 September 1997, Croatia’s challenge to the *subpoenae duces tecum* and the *subpoena*

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<sup>25</sup> See International Criminal Tribunal for the former Yugoslavia, Press Release, ‘Blaskic Case: Croatia and Bosnia and Herzegovina Ordered to Comply with Prosecutor’s Request for Production of Documentary Evidence’, Background, para 1 (14 February 1997) (visited December 2000) <<http://www.un.org/ICTFY/p156-e.htm>>.

<sup>26</sup> See Appellate Judgment on the *Subpoenae*, above n 23 at 4 (citing letter from Mr Srecko Jelinic, 10 February 1997).

<sup>27</sup> See Trial Chamber II Decision, above n 23.

<sup>28</sup> See The Blaskic Case, International Criminal Tribunal for the former Yugoslavia Bulletin No 19, 4 VIII 1997, available at <<http://www.un.org/ICTFY/BL/bl19.htm>>, (December 2000) ( Bulletin No 19).

Decision of Trial Chamber II was heard by the Appeals Chamber.<sup>30</sup> Surprisingly, the Appeals Chamber appeared to agree with Croatia, at least in part, and in a dramatic turn it ‘unanimously quashed’ both *subpoenae*. Yet the drama of a unanimous decision to quash the *subpoenae*, on further examination, failed to change the direction of the Tribunal much at all. While quashing the *subpoenae per se*, the Appeals Chamber allowed the Prosecutor to submit a new request for a ‘binding order to [the State of] Croatia alone.’<sup>31</sup>

In effect the Appeal Chamber’s judgment extended the Tribunal’s reach beyond the power to indict, try, and imprison individuals by strengthening the Tribunal’s claim to demand the loosely defined ‘cooperation’ of States. In recalling Croatia’s challenge, in which the State contested the jurisdiction of the Tribunal to issue binding orders to States such as itself, the Appeals Chamber rejected this denial of jurisdiction as a ‘manifest misconception’<sup>32</sup> and asserted that ‘it is self-evident that the International Tribunal, in order to bring to trial persons living under the jurisdiction of sovereign States, not being endowed with enforcement agents of its own, must rely on the cooperation of States.’<sup>33</sup> It went on, in practical terms, to say that the International Tribunal ‘must turn to States if it is effectively to investigate crimes, collect evidence, summon witnesses and have indictees arrested and surrendered to the International Tribunal,’<sup>34</sup> pointing to the very clauses that may be the most objectionable to the States.

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<sup>29</sup> See Trial Chamber II Decision, above n 23.

<sup>30</sup> The Appeals Chamber consisted of Judge Cassese (Italy, presiding), Judge Karibi-Whyte (Nigeria), Judge Li (China), Judge Stephen (Australia), and Judge Vohrah (Malaysia).

<sup>31</sup> International Criminal Tribunal for the former Yugoslavia, Press Release, ‘*Subpoena* Issue--The Appeals Chamber Unanimously Quashes the *Subpoenae Duces Tecum* Issued to Croatia and its Defence Minister’ (29 October 1997) <<http://www.un.org/ICTFY/p253-e.htm>> (Press Release) (visited 12 December 2000).

<sup>32</sup> Appellate Judgment on the *Subpoenae*, above n 23 at 16.

<sup>33</sup> *Ibid* 17.

<sup>34</sup> *Ibid*.

Despite upholding Croatia's arguments for State sovereignty, the Appeals Chamber also ruled that States would not be allowed to claim national security interests for withholding documents or other evidentiary materials requested by the International Tribunal unless the legitimacy of their concerns has been assessed by a Trial Chamber.<sup>35</sup> The Appeals Chamber hoped to avoid frivolous appeals to State security by instituting a strict review standard on all such claims.

The *Blaskic Case*, then, may ultimately be most noteworthy for its role in more clearly defining the reach of the Tribunal over States themselves. With the handing down of the Appeal Chamber's judgment on the *subpoenae duces tecum*--quashing the terminology but upholding the substance--the Tribunal gained some strength in terms of exacting from States more than the unwilling 'cooperation' to which they had bound themselves in the Dayton Accords. The *Blaskic Case* demonstrated that, backed up loosely by the Security Council, the Tribunal in fact has the power to issue binding orders to sovereign States.

Though the *Blaskic Case* demonstrated the tenacity of the State in guarding its sovereignty it broke new ground. It demonstrated that the significance of international penal process and its accompanying tenet of international justice reflects an evolution in the perception of sovereignty heralding a qualitative shift which necessitates an ethical vision in which enforcement of international norms supersedes certain State rights and prerogatives. This institutionalisation of international penal process represents a shift in authority from States to the international community with the notion of international justice now pointing towards a sphere that though controlled by States, is ineffaceably external to power. It was against the background of this monumental case as well as the trials and tribulations that the two ad hoc

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<sup>35</sup> See Press Release, above n 25.

international criminal tribunals had encountered in their operations that States assembled in Rome in the summer of 1998 with the goal of creating a permanent international penal tribunal.

## **THE ROME STATUTE'S INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE REGIME**

Given that the Court does not have at its disposal its own police, military or law enforcement forces, it has to rely entirely on the assistance rendered by the authorities of the States. Moreover, since the Court is not allowed to hold trials in the absence of the accused, the only way to avoid the Court being completely paralysed is to provide it with a tool that can be used to effectively secure the presence of defendants before it. The extent to which States, by becoming parties to the *Rome Statute*, take on obligations to assist the ICC in activities on their own territory is very much an issue of sovereignty. As with other areas defining the relationship between the ICC and States, the *Rome Statute's* final text balances the willingness of States to make commitments necessary for the ICC to function, with a recognition that the ICC will operate in a world of sovereign States.<sup>36</sup> As Jerry Fowler notes,

[t]he accommodation of sovereignty begins with the nature of the general obligation that States undertake by becoming parties to the ICC Statute. Proponents of a strong ICC favoured a duty to 'comply' with orders, rather than an obligation of 'cooperation,' which was deemed to be vague and weak. Article 86 of the ICC Statute, '[g]eneral obligation to cooperate,' reflects the latter formulation, requiring State Parties to 'cooperate fully with the Court.' In an art form solution, however, specific articles on surrender of suspects and other forms of cooperation require States to 'comply with requests' from the ICC.<sup>37</sup>

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<sup>36</sup> See Phakiso Mochochoko, 'International Cooperation and Judicial Assistance' in Roy S Lee (ed), *The International Criminal Court: The Making of the Statute; Issues, Negotiations, Results* (1999) at 305 (describing the end result as 'a balance between the need for perfection on the one hand and States' concern for certain crucial issues on the other').

<sup>37</sup> Jerry Fowler, 'Not Fade Away: the International Criminal Court and the State of Sovereignty' (2001) *San Diego International Law Journal* 145, 146.

The international cooperation and judicial assistance regime encapsulated in Part 9 of the Statute is one of the most complex sections of the *Rome Statute*. The 17 Articles of this Part address the interaction between the Court and States in the arrest and transfer of suspects to the Court, and in the conduct of investigations or prosecutions by the Court on State territory. Not surprisingly, Part 9 is the least ‘supranational’ section of the Statute. Although Article 86 requires States Parties to ‘cooperate fully with the Court in its investigation and prosecution of crimes,’<sup>38</sup> the Articles that follow are riddled with numerous exceptions and qualifications.<sup>39</sup> Only effective, efficient, prompt and real assistance, and cooperation of states will guarantee the viability of the court.<sup>40</sup>

### ***A. Implementing Legislation***

As classically conceived, jurisdiction to enforce concerns rules governing the enforcement of law by a State through its courts, as well as through ‘executive’, ‘administrative’, and ‘police action’.<sup>41</sup> In relation to the envisaged international penal process, the most obvious point is that the ICC has no police force.<sup>42</sup> Indeed, it was unthinkable to propose one either before or during Rome, although there was at least some precedent for doing so.<sup>43</sup> But the orders of the Court, whether they be arrest warrants, judgments, orders to seize assets, or sentences, will need to be enforced. The delegates were not unaware of the problem and many provisions of

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<sup>38</sup> *Rome Statute*, above n 4, art 86.

<sup>39</sup> Leila Nadya Sadat & S Richard Carden, ‘The New International Criminal Court: An Uneasy Revolution’ (2000) 88 *Georgetown Law Journal* 381, 444.

<sup>40</sup> Plachta, above n 6 at 190.

<sup>41</sup> See American Law Institute, *Restatement of the Law, Foreign Relations Law of the United States* (1986), §401(c).

<sup>42</sup> As one French writer has astutely remarked, the Court represents ‘justice sans police.’ Jean-Eric Schoettl, ‘Decisions du Conseil Constitutionnel: Cour Penale Internationale’, *L’actualite Juridique--Droit Administratif* (20 March 1999) 230.

<sup>43</sup> Leila Sadat Wexler, ‘The Proposed Permanent International Criminal Court: An Appraisal’, (1996) 29 *Cornell International Law Journal* 665, 673 n 41 (discussing the proposed statute of the London International Assembly which provided for an international constabulary charged with the ‘execution of the orders of the Court and of the Procurator General [of the Court]’).

the Statute address it directly.<sup>44</sup> But virtually all of them are premised on three principles. First, the Court will not be permitted to sanction States directly for non-compliance with its orders. Rather, the Court will be required to make findings of non-compliance and direct those to the Assembly of States Parties and the Security Council, in the case of a Security Council referral to the Court. Second, the Court may not compel State compliance with its orders.<sup>45</sup> Third, the personnel of the Court will have no right, in most cases to proceed directly to the execution of their duties on the territories of States, but will work through the authorities present in the requested State, and will be subject to national law.<sup>46</sup> However there are exceptional circumstances in which the ICC can take evidence directly on the territory of a State Party without having secured the consent of the State Party pursuant to articles 57(3)(d), 54(3)(d) and 99(4).

Article 57(3)(d) establishes that judicial authorisation for a direct investigation on the territory of a State Party may be granted without having secured the cooperation of that State. However, this extraordinary power is subject to the condition that the State Party is *clearly* unable to execute a request for cooperation due to the unavailability of any authority...competent to execute the request...under Part 9'.<sup>47</sup> This article seems to be a safety net to facilitate the Court's activities in failing States where there is no credible legal system in place to do it for the Court or in failed States where the State or parts of it may be under the occupation and control of a third party for instance a peacekeeping force. Even with reliance on the local legal systems of functional States, Article 54(3)(d) provides that the Prosecutor may seek cooperation of any State or intergovernmental organisation and may

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<sup>44</sup> See, for example, *Rome Statute*, above n 4, art 70.

<sup>45</sup> Sadat & Carden, above n 39 at 415-416.

<sup>46</sup> Ibid.

<sup>47</sup> *Rome Statute*, art 57(3)(d).

seek a ‘suitable’ arrangement’ with any of them, in accordance with its respective competence and/or mandate’.<sup>48</sup> Article 99(4) similarly provides the Prosecutor with power to directly execute a request that is unencumbered by compulsory measures. This provision was amongst the most controversial in the *Rome Statute* and threatened to create a major political firestorm. However, the provision is carefully drafted and will not in practice grant the Prosecutor unbridled power rather it seems to rely on tacit State consent. The Prosecutor must enter into ‘all possible consultations’ with the requested State Party, as well<sup>49</sup> considering that an entirely hostile or antagonised government will render the authority meaningless.<sup>50</sup>

In sum, the ICC will rely heavily on the cooperation of States Parties for its success. States Parties will be asked to arrest and surrender suspects, investigate and collect evidence, extend privileges and immunities to ICC officials, protect witnesses, enforce ICC orders for fines and forfeiture and, at times, prosecute those who have committed offences against the administration of justice. Key to this cooperation will be domestic legislation permitting the State Party to assist the ICC when requested. While States may use different approaches to incorporate the same obligation, they do so by meeting the requirements of the *Rome Statute*. The current pace of ratification is steady, with many States adopting comprehensive ICC legislation on cooperation. The future of the ICC depends on all States Parties adopting the requisite laws that will enable each country to cooperate with the Court. The duty to cooperate with the ICC imposed on States Parties by the *Rome Statute* is twofold: a general commitment to cooperate, and an obligation to amend their domestic laws to permit cooperation with the Court.

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<sup>48</sup> Ibid art 54(3)(d).

<sup>49</sup> Ibid art 99(4)(a)

<sup>50</sup> Annalisa Ciampi, ‘Other Forms of Cooperation’, in *Commentary on the Rome Statute*, below n 93, Vol II, 1736-1739.

Articles 86 and 88 form the foundation of the obligation on States Parties to cooperate with the ICC. According to Article 86, ‘States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.’<sup>51</sup> This general requirement is supplemented by the ICC’s Rules of Procedure and Evidence<sup>52</sup> that govern specific aspects of cooperation in such contexts as the arrest and surrender of individuals and the collection of evidence. Article 88 obliges States to adopt domestic laws to permit cooperation with the ICC.<sup>53</sup>

Pursuant to Article 88, a state party has a clear duty to ensure that its national laws provide guidelines for handling requests for arrest and surrender, and other forms of cooperation. This duty arises even before a state party even receives a request. The insertion of Article 88 in the *Rome Statute* is of central importance because of references to domestic law and procedures throughout the Statute.<sup>54</sup> States are expected to implement Article 88 in good faith, like any other obligation under the Statute through making of legislative changes at the national level.

The obligation to cooperate with the ICC has been actively incorporated through municipal mechanisms. States Parties have used several approaches to incorporate the general obligation to cooperate. Australia and Switzerland opted to include a general provision in their

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<sup>51</sup> *Rome Statute*, above n 4, art 86.

<sup>52</sup> Finalised draft text of the Rules of Procedure and Evidence, UN Doc PCNICC/2000/1/Add.1 (2 November 2000).

<sup>53</sup> See *Rome Statute*, above n 4, art 88. Art 88 provides that ‘States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part.’ Ibid.

<sup>54</sup> For more detail, see Göran Sluiter, *International Criminal Adjudication and the Collection of Evidence: Obligations of States* (2002) 194-97.



implementing legislation to cover overall procedures of cooperation.<sup>55</sup> Across the Tasman, New Zealand added a provision to already existing obligations to give judicial assistance and cooperation that extended these obligations to cover the ICC an approach that had initially been manifested in Scandinavia through Finland's implementing legislation.<sup>56</sup> Canada similarly opted for the mechanism of adding a provision to existing regimes of cooperation to encompass the obligations undertaken under the *Rome Statute*.<sup>57</sup> This is but a brief snapshot of efforts by States Parties which will be considered in further detail below under specific heads dealing with the particular nature of cooperation and assistance.

With the steady pace of the ratification of the *Rome Statute*, it is heartening to note that States continue to pass the domestic laws necessary to cooperate with the ICC.

Many States have now implemented comprehensive implementing legislation, which includes provisions regarding incorporating the ICC crimes as well as cooperation obligations. Some have taken the approach of separating implementing legislation into two parts – one for the introduction of the crimes and one for the cooperation requirements, reflecting the usual separation between the Code of Criminal Procedure and the Code of Crimes, in relation to domestic crimes. ...States also need to consider whether they will take this opportunity to go beyond the requirements of the Rome Statute, which are considered the absolute minimum standards in international law.<sup>58</sup>

It is very important that all States Parties adopt comprehensive legislation implementing the obligations under the *Rome Statute* as this will allow the Court to begin its work without being repeatedly frustrated by States that do not yet have laws in place that allow them to

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<sup>55</sup> *International Criminal Court Act 2002*, Act No 41, 2002, 27 June 2002, Australia, s 3; *Federal Law on Cooperation with the International Criminal Court* (CICCL), 22 June 2001, Switzerland (unofficial translation), art 3.

<sup>56</sup> *International Crimes and International Criminal Court Act 2000*, No 26/2000, assented to 6 September 2000, New Zealand, s 3, *Act on the Implementation of the Provisions of a legislative Nature of the Rome Statute of the International Criminal Court and on the Application of the Statute*, No 1284/2000, issued in Helsinki 28 December 2000, Finland (unofficial translation), s 4.

<sup>57</sup> *Crimes Against Humanity and War Crimes Act*, SC 2000, C-24, assented to 29 June 2000 entered into force 23 October 2000, Canada, ss 47-53 and 56-69.

comply.<sup>59</sup> The Article now turns to consider under specific heads the various duties to cooperate which the *Rome Statute* enshrines, the nature and content of the obligations and importantly the manner in which States Parties have sought to give effect to the letter and spirit of their obligations.

### **B. Investigation and Evidence Gathering**

The aim of the *Rome Statute* and domestic legislation implementing the *Rome Statute* is to enable the Court's investigators to conduct thorough investigations as soon as possible after the commission of offences. One key element to successful investigations will be the willingness of States to provide assistance with investigations in a timely manner. Accordingly, a thorough analysis of the utility of domestic legislation will be possible only once ICC officials have undertaken an investigation, and the legislation, as well as the State Party's willingness to cooperate with the investigation, are put to the test. Before addressing issues of investigations and evidence gathering, however, it is essential to recall that the *Rome Statute* is founded upon the principle of complementarity.<sup>60</sup>

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<sup>58</sup> International Centre for Criminal Law Reform and Criminal Justice & International Centre for Human Rights and Democratic Development, *International Criminal Court: Manual for Ratification and Implementation of the Rome Statute* (2<sup>nd</sup> ed, 2003) 14.

<sup>59</sup> See Valerie Oosterveld et al, 'How the World Will Relate to the Court: The Cooperation of States with the International Criminal Court' (2002) 25 *Fordham International Law Journal* 767.

<sup>60</sup> Art 17 of the *Rome Statute* formulates the complementarity regime of the ICC:

1. Having regard to paragraph 10 of the Preamble and Article 1, the Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under Article 20, paragraph 3;

(d) The case is not of sufficient gravity to justify further action by the Court.

Given the status of the ICC--existing within a regime of complementarity--as a court of 'last resort,' the best form of cooperation that States could provide the Court with would be to ensure that their domestic criminal laws: (1) are sufficient to enable thorough investigations of individuals alleged to have committed crimes within the jurisdiction of the Court, (2) provide for the indictment and trial of individuals implicated by evidence of ICC crimes, and (3) are complemented by policies, procedures, and practices that support investigative and judicial processes.<sup>61</sup>

Article 88 of the *Rome Statute* requires that States Parties ensure the existence of procedures under their domestic law that enable them to cooperate with the Court in investigative and evidentiary matters.<sup>62</sup> This duty exists in addition to the general obligation upon States Parties to cooperate fully with the 'investigation and prosecution of crimes within the jurisdiction of the Court.'<sup>63</sup> For the purposes of this section, a distinction must be drawn between investigations commenced pursuant to powers of the Court contained within the *Rome Statute* and those initiated by the Security Council. Investigations commenced pursuant to the powers of the Court are initiated by either States Parties that refer situations to the Court according to Articles 13(a) and 14 of the *Rome Statute*, or the Prosecutor launching investigations *proprio motu* pursuant to Articles 13(c) and 15. These investigations will be governed by the *Rome Statute* and conducted with the assistance of States Parties mandated by Article 86. States that are not parties to the *Rome Statute* have no *prima facie* obligation to cooperate with ICC investigators.<sup>64</sup>

The other type of investigation is those triggered by referrals to the ICC by the UN Security Council acting under Chapter VII of the *UN Charter*. Given the Security Council's overarching authority, the referral to the ICC of cases by the Security Council could arguably

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*Rome Statute*, above n 4, art 17(1). Art 17 of the *Rome Statute* proceeds to specify the factors the Court must consider when determining whether a State is indeed unwilling or unable to proceed. Ibid art 17(2), 17(3).

<sup>61</sup> Oosterveld et al, above n 59 at 775.

<sup>62</sup> See *Rome Statute*, above n 4, art 88.

<sup>63</sup> Ibid art 86; see also *Vienna Convention on the Law of Treaties*, 23 May 1969, UN Doc A/Conf 39/28, UKTS 58 (1980), 8 ILM 679, art 26.

<sup>64</sup> However, it should be noted that pursuant to art 87(5) of the *Rome Statute*, the Court may invite a non-Party State to provide assistance in an investigation on an ad hoc basis. See *Rome Statute*, above n 3, art 87(5).

permit investigators to obtain the assistance of Member States that are not parties to the *Rome Statute*. Taken to the extreme, Security Council referrals would allow the ICC to operate under Chapter VII in a manner similar to the ICTFY and the ICTR.<sup>65</sup> The Court's ability to obtain the assistance of States in the conducting of such rigorous investigations is mandated under Article 54(3)(c) of the *Rome Statute*, which empowers the Prosecutor to '[s]eek the cooperation of any State.'<sup>66</sup> The Prosecutor is directed to conduct investigations on the territory of a State in accordance with the provisions of Part 9.<sup>67</sup>

Article 93 of the *Rome Statute* reaffirms the obligation of States Parties to comply with requests for assistance from the Court, in accordance with the provisions of Part 9 of the *Rome Statute* and pursuant to their national procedures.<sup>68</sup> Part 9 identifies the many precise forms of cooperation that States Parties are obliged to provide to the Court, and refers specifically to the production of evidence. States Parties are required to facilitate the ICC's requests for assistance in, *inter alia*, identifying and tracking persons or things;<sup>69</sup> taking evidence and testimony under oath as well as producing evidence;<sup>70</sup> questioning individuals;<sup>71</sup> examining places or sites, and exhuming and examining grave sites; executing searches and

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<sup>65</sup> See William A Schabas, *An Introduction to the International Criminal Court* (2001) 101, where it is suggested that the issues of admissibility criteria and complementarity following a Security Council referral have been left (perhaps intentionally) unresolved. See also Jelena Pejic, 'The International Criminal Court Statute: An Appraisal of the Rome Package' (2000) *International Law* 65.

<sup>66</sup> *Rome Statute*, above n 4, art 54(3)(c).

<sup>67</sup> See *ibid* art 54(2)(a). Art 54(2)(b) deals with an exception to the general requirement to obtain a State's cooperation in the conduct of investigations. The subparagraph refers to paragraph 57(3)(d), pursuant to which the Pre-Trial Chamber may authorise the Prosecutor to conduct specified investigations on the territory of a State Party without that State's cooperation in situations where the State is 'clearly unable to execute a request for cooperation due to the unavailability of any [State organ] ... competent to execute the request for cooperation under Part 9.' *Ibid* art 57(3)(d).

<sup>68</sup> *Ibid* art 93. Art 96 establishes guidelines for the contents of requests. See *ibid* art 96. Art 99 governs the execution of requests 'in accordance with the relevant provisions under the law of the requested State and, unless prohibited by such law, in the manner specified in the request.' *Ibid* art 99. Art 100 stipulates that costs, other than those exempted by this Article, are to be borne by the requested State. See *ibid* art 100.

<sup>69</sup> See *ibid* art 93(1)(a).

<sup>70</sup> See *ibid* art 93(1)(b).

<sup>71</sup> See *ibid* art 93(1)(c).

seizures; effecting the provision of records and documents;<sup>72</sup> and guaranteeing the preservation of evidence.<sup>73</sup> The list of these means of cooperation concludes with a blanket clause that obligates States Parties to provide all other types of assistance ‘not prohibited by the law of the requested State’ and which will facilitate investigations or prosecutions.<sup>74</sup> Bending to sovereignty considerations, conspicuously absent is any *subpoena* power. That is, neither the judges nor the Prosecutor of the ICC (or defence counsel, presumably) appear to have any power to compel witnesses to appear.<sup>75</sup>

As established by this elaboration of relevant provisions, the *Rome Statute* establishes an extensive regime governing the conduct of investigations, the collection of evidence in ICC proceedings, and the forms of cooperation required from States Parties to make them effective. Until States Parties incorporate their obligations under the *Rome Statute* to assist the Court into their domestic laws and procedures and enable ICC investigations to be conducted within their territories, the Prosecutor’s most fundamental efforts to conduct thorough investigations in accordance with Article 54 will be stymied.

The practical ICC legislative initiatives of some of the States that have implemented their obligations to cooperate with the ICC in investigations and evidence collection are particularly important as examples to States that have yet to ratify and implement the *Rome Statute*.<sup>76</sup> Two broad approaches seem to have been followed by states. First, simply adding these obligations to the ICC to the list of entities from which the State can entertain request

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<sup>72</sup> See *ibid* art 93(1)(i).

<sup>73</sup> See *ibid* art 93(1)(j).

<sup>74</sup> *Ibid* art 93(1)(l).

<sup>75</sup> Art 93(7) does permit the temporary transfer of persons in custody for purposes of identification or for obtaining testimony, however, the State is not required to agree to the transfer, which is subject, in any event, to the consent of the person transferred. See *Rome Statute*, above n 4, art 93(7).

for assistance and secondly the passage of ICC specific legislation which puts in place the necessary administrative and procedural mechanisms for cooperation. A look at the implementing legislation of the UK, Canada and Switzerland readily exhibits the character of these two approaches.

Canada and the UK adopted single omnibus bill that addresses both the criminal and administrative requirements of the ICC.<sup>77</sup> The provisions in the *Canada Act* that amend the *Mutual Legal Assistance in Criminal Matters Act* ('MLA Act'),<sup>78</sup> allow Canada to provide assistance to the ICC in investigations and evidence gathering in manners similar to the way in which Canada currently provides assistance to States and other entities. The *MLA Act* not only provides the power to assist the ICC with searches and seizures of evidence but also the power to order questioning in Canada.<sup>79</sup> The UK's procedural approach in this area largely mirrors that of Canada except that the UK specifically enacted legislation to entertain requests from the ICC.<sup>80</sup> The Swiss approach conforms to the UK approach in so far as it enacted specific legislation<sup>81</sup> addressing the modes of cooperation with the ICC but does not incorporate this through existing laws.<sup>82</sup> Instead, *Swiss Civil Law* establishes a Central Authority in the Federal Office of Justice that determines the form and manner in which Switzerland will comply with requests for assistance from the ICC.<sup>83</sup>

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<sup>76</sup> See Oosterveld et al, above n 59 for an incisive discussion of the approaches adopted by Canada, UK and Switzerland as a template of three different approaches.

<sup>77</sup> Canadian Implementing Legislation, above n 57; *International Criminal Court Act 2001* enacted 11 May 2002, UK, available at <http://www.hmso.gov.uk/acts2001/20010017.htm>.

<sup>78</sup> *Mutual Legal Assistance in Criminal Matters Act*, RSC, ch 30 (1985) (Canada).

<sup>79</sup> Canadian Implementing Legislation, above n 57 at s 18(7).

<sup>80</sup> UK Implementing legislation, above n 77 at ss 27, 33

<sup>81</sup> Swiss Implementing Legislation, above n 55.

<sup>82</sup> *Manual for Ratification and Implementation*, above n 58 at 89.

<sup>83</sup> Swiss Implementing Legislation, above n 55 at art 3(2)(b).

### ***C. Arrest and Surrender***

Criminal prosecution is inherently tied to notions of national sovereignty and the control over persons and territory which are fundamental to that notion. In fact, some argue that the Nuremberg tribunal itself succeeded only because it in some ways substituted itself for the inability of the German government to try war criminals with the obstacle of sovereignty of the German State as a bar to the enforcement of justice having been destroyed by the historic events of May and June, 1945. Arguably, the successful establishment of the Yugoslavia and Rwanda tribunals represents a fundamental departure from Nuremberg in that the authority under which they were constituted derives not from their status as occupied territories, but from the exercise of international power by the Security Council.<sup>84</sup> More importantly, the ad hoc international criminal tribunals establish an international cooperation regime that obliges States individually and collectively to arrest and surrender. Like these two bodies, the ICC will rely on the goodwill of States in discharging both their legal and discretionary arrest and surrender obligations.

The obligation on States Parties to arrest and surrender accused is found in several articles of the *Rome Statute*. The general Article 86 obligation to ‘cooperate fully with the Court in its investigation and prosecution of crimes’<sup>85</sup> is supplemented by Article 89, which specifically addresses ‘surrender of persons to the Court.’<sup>86</sup> Under Article 89(1), the Court can transmit a request for the arrest and surrender of a person, together with material supporting that

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<sup>84</sup> Nonetheless, both the Yugoslavia and the Rwanda tribunals were constituted in the midst of continuing national disarray, where the functioning national legal system had been subverted and compromised and could not be said to reflect basic due process requirements (Yugoslavia) or had collapsed altogether and did not exist (Rwanda). It remains to be seen whether the International Criminal Court which will generally operate alongside fully operational national legal systems will be able to do without considerable political difficulty.

<sup>85</sup> *Rome Statute*, above n 4, art 86.

<sup>86</sup> *Ibid* art 89.

request,<sup>87</sup> to a State on the territory of which that person may be found. The Statute is clear as to the obligation of States Parties upon receiving such a request: they must comply.<sup>88</sup> The implementation of a request for arrest and surrender is governed by both Article 59 and the relevant provisions of Part 9 of the Statute. Whereas Part 9 contains essentially obligations that give effect to the request, Article 59 contains the method of implementation.<sup>89</sup> The procedure for States Parties to execute requests to arrest and surrender individuals in their territories is straightforward: the Court transmits the request together with the supporting material required by Article 91 of the *Rome Statute*. Upon receipt of requests from the ICC, States Parties follow their domestic laws, which must be in accordance with the provisions of the *Rome Statute*. Rule 184 of the Rules of Procedure and Evidence stipulates that requested States must immediately inform the ICC's Registrar in the event persons under indictment of

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<sup>87</sup> See *ibid* art 89(1). Art 91 outlines the kind of written material that must accompany the request for arrest and surrender.

In the case of a request for the arrest and surrender of a person for whom a warrant of arrest has been issued by the [ICC's] Pre-Trial Chamber ... the request shall contain or be supported by:

- (a) Information describing the person sought, sufficient to identify the person, and information as to that person's probable location;
- (b) A copy of the warrant of arrest; and
- (c) Such documents, statements or information as may be necessary to meet the requirements for the surrender process in the requested State.

*Ibid* art 91(2). In the case of a person already convicted by the ICC but who has escaped, the request must contain:

- (a) A copy of any warrant for arrest of that person;
- (b) A copy of the judgement of conviction;
- (c) Information to demonstrate that the person sought is the one referred to in the judgement of conviction; and
- (d) If the person sought has been sentenced, a copy of the sentence imposed and, in the case of a sentence for imprisonment, a statement of any time already served and the time remaining to be served.

*Ibid* art 91(3).

<sup>88</sup> See *ibid* art 89(1) ('States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.').

<sup>89</sup> *Rome Statute*, above n 4, art 59. Furthermore, art 55(2) applies to the Prosecutor or national authorities' questioning of an individual, pursuant to a request made under Part 9. It also applies to hearings connected with the art 59 arrest proceedings. As a result, the arrested person is entitled to remain silent, to have legal assistance of his choosing and to be questioned in the presence of counsel. In particular, this last right is not obvious in several civil law jurisdictions with respect to extradition related interrogations.



the Court are available for surrender.<sup>90</sup> States and the Registrar must agree on the date and manner of the surrender.<sup>91</sup> However as straightforward as these provisions appear, they were the result of serious debate and compromise.

## 1. Arrest

In the overwhelming majority of cases, national authorities must arrest the person before they surrender the person for the purpose of prosecution.<sup>92</sup> Article 58 regulates the issuance of an arrest warrant. The Pre-Trial Chamber is designated to issue arrest warrants.<sup>93</sup> Here, the Statute is consistent with international human rights instruments and the practice in many national criminal jurisdictions because judicial intervention is required to deprive a person of his or her liberty.<sup>94</sup>

As in many national criminal jurisdictions, the conditions under which the Pre-Trial Chamber must issue an arrest warrant are twofold. First, the prosecutor must show there are ‘reasonable grounds’ to believe the person concerned committed a crime within the court’s jurisdiction.<sup>95</sup> Second, the person must be arrested for a specific purpose.<sup>96</sup> The *Rome Statute*’s conditions for the issuance of an arrest warrant are stricter than the ICTY and ICTR Statutes. The latter instruments, or the applicable Rules of Procedure and Evidence do not contain the condition

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<sup>90</sup> See ICC Rules, above n 52, rule 184.

<sup>91</sup> Ibid.

<sup>92</sup> Even when the individual is already detained, an arrest warrant by the ICC should be issued to ensure his continued detention in a form of constructive custody. Art 58(7) authorizes the issuance of a summons to appear when a summons is sufficient to ensure the person’s appearance. *Rome Statute*, above n 3 at 44.

<sup>93</sup> For a more thorough analysis of the role and powers of the ICC Pre-Trial Chamber, see Olivier Fourmy, ‘Powers of the Pre-Trial Chambers’ in Antonio Cassese et al (eds) *The Rome Statute of the International Criminal Court: A Commentary* (2002) Vol I, 1207-30.

<sup>94</sup> That arrests in the absence of a warrant do not take place ‘in accordance with the law’ and thus amount to arbitrary arrest is consistent with international human rights jurisprudence. See, eg, UN Doc CCPR/C/69/D/770/1997, UN GAOR, 69th Sess, Supp No 40, Annex 9, at 172-77; see also UN Doc A/55/40 (2000) (discussing the Human Rights Committee’s supervision of the states’ observance of the International Covenant of Civil and Political Rights).

<sup>95</sup> *Rome Statute*, above 4, art 58(1)(a).

of necessity.<sup>97</sup> Pursuant to Article 58(1)(a), the Prosecutor must meet the burden of proving ‘reasonable grounds.’ Although the ‘reasonable grounds’ standard is the minimum standard under Article 58, the actual standard applied by the Pre-Trial Chamber, however, may be more demanding. Article 58(1)(b) further lists three alternative purposes that the arrest should serve. These include ensuring the person’s appearance at trial (since trial there can be no trial *in absentia*), prevent interference with investigations and to prevent further or continuing commission of an offence within the Court’s jurisdiction.<sup>98</sup>

Certain provisions of the *Rome Statute* governing arrest and surrender are directly related to the actions States Parties must undertake in specific circumstances. These situations include procedures for arrest and surrender as well as provisional arrest, challenges by an accused or a State of the admissibility or jurisdiction of the Court, the actual surrender of individuals and their transit through the territories of States Parties, and instances of competing requests for arrest and surrender. Although States Parties will be required to adapt their national law to ensure that they are able to fulfil their cooperation obligations under the Statute,<sup>99</sup> a significant residual role remains for national law which will continue to control the form and procedure governing requests for assistance,<sup>100</sup> as well as the execution of such requests, with very limited exceptions.<sup>101</sup>

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<sup>96</sup> Ibid.

<sup>97</sup> The ICTY and ICTR arrest procedures are based on the questionable assumption that a certain level of proof that an individual has committed crimes within the Tribunals’ jurisdiction is sufficient grounds for arrest. The apparent irrelevance of this condition derives from the ICTR’s Rule 65, according to which an accused must prove exceptional circumstances to obtain a judicial order for provisional release. From the perspective of human rights, the reverse situation is far more appropriate. The ICTY Judges have amended Rule 65 by removing the exceptional circumstances requirement.

<sup>98</sup> *Rome Statute*, above n 4, art 58(1)(b).

<sup>99</sup> Ibid art 88.

<sup>100</sup> See, eg, ibid arts 91(2)(c), 96(2)(e), 99(1).

<sup>101</sup> One such exception is art 99(4)(a), which permits the Prosecutor to execute requests that can be performed without any compulsory measures directly on the territory of a State Party if the State is one on the territory that the crime is alleged to have been committed and there has been a determination of admissibility in the case.

During the negotiation of the *Rome Statute*, States disagreed as to the process that should be used to arrest and bring persons before the Court. The term ‘arrest’ raised the question as to whether States could use their national custodial powers or would need to follow ICC-specific arrest procedures to take individuals into custody. This question was linked to the issue of cooperation more generally: for some, national laws varied so much that use of those laws could conceivably limit the Court’s ability to discharge its basic functions, whereas for others, any derogation from their national laws would be deemed unacceptable as an invasion of sovereignty.<sup>102</sup> Article 58(5) of the *Rome Statute* connects the issuance of the arrest warrant with the issuance of a request for arrest and surrender to a state. According to this provision, the court may issue such a request under Part 9, only after an arrest warrant has been issued under Article 58.<sup>103</sup> Part 9 contains the regulations and conditions pertaining to the issuance and transmission of requests for an arrest and surrender, with one important exception: the provisions under Part 9 are procedural.

The procedural requirements are set out in Articles 87 and 91 of the Statute. Sections 1 and 2 of Article 87 contain regulations on the channel of communications and the choice of languages regarding requests for assistance. According to Article 87(1)(a), requests for assistance shall be transmitted through the diplomatic channel or any other appropriate channel designated by each state party. The language of the request shall be in the official language of the requested state or one of the court’s working languages, as the state party

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<sup>102</sup> See Mochochoko, above n 36 at 308.

<sup>103</sup> The power to issue requests for assistance is attributed to the court as a whole, including all of its organs. Part 9 does not specify the organ empowered to request the arrest and surrender. It appears self-evident, however, that the Pre-Trial Chamber remains the competent organ in this respect.

chooses.<sup>104</sup> These regulations are similar to those in the Inter-State Cooperation Model.<sup>105</sup> It is clearly a concession to states in favour of a more horizontal oriented cooperation model.<sup>106</sup>

## 2. Surrender

At Rome, in the face of serious concerns with regard to sovereignty, the crucial point was to decide whether or not arrest and delivery of suspects would be carried out within the framework of extradition or rather a new method had to be worked out. Some countries argued for a simple transfer mechanism, where they could send a person to the ICC with little or no domestic process. Other countries fearful of granting too many concessions to the Court argued for the use of extradition, especially to transfer nationals. A majority of countries, however, argued for a *sui generis* approach. ‘The Polish delegation suggested that a more structured and a better methodological approach be adopted towards this problem that would reflect what the Roman jurists had taught a couple of thousand years earlier: *bene docet qui bene distinguit.*’<sup>107</sup> It was recommended that the solution should include the following steps:

1. to distinguish clearly between extradition and surrender by pointing to fundamental differences between them
2. to define surrender as a genuine and unique form of cooperation between States and the International Criminal Court; and
3. to frame this form accordingly by specifying its constituent elements with due consideration to the specific nature, organisation, and jurisdiction as well as the needs of the ICC.<sup>108</sup>

‘From the outset, it was obvious that broadly speaking there [were] two options to solve this problem: either to maintain extradition (straight [“regular”] or somewhat modified) or to

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<sup>104</sup> Some thirty states have lodged a declaration under art 87(2) of the Statute concerning the choice of languages. Concerning those states which have not done so, they will receive requests for assistance in one of the working languages of the court, English or French.

<sup>105</sup> See, eg, *European Convention on Extradition* 13 December 1957, Europ T S No 24 at 7, 9.

<sup>106</sup> See Claus Kress & Kimberly Prost, ‘Article 87’ in Otto Triffterer, ed, *Commentary on the Rome Statute of The International Criminal Court: Observers’ Notes, Article By Article* (1999) 1057-58.

<sup>107</sup> Plachta, above n 6 at 191.

create a new form of delivery of a “body of a criminal,” different and separate from extradition.’<sup>109</sup> States eventually agreed to a compromise under which the *Rome Statute* would refer both to specific obligations for arrest and surrender and acknowledge procedures in existence under domestic laws.<sup>110</sup> The solution adopted was to oblige States to ‘surrender’ persons to the Court, with the procedure to be followed left to the individual States, subject to certain limitations.<sup>111</sup> The compromise is reflected in Article 102 which states that for the purposes of the Statute, ‘surrender’ means the delivering up of a person by a State to the Court, pursuant to this Statute, whereas ‘extradition’ means the delivering up of a person by one State to another as provided by treaty, convention, or national legislation.<sup>112</sup> Thus ‘surrender’ as a process through which States turn over individuals to the ICC is a process quite different from extradition, which takes place only between States. It is significant that States agreed to create a process for the ICC that is more streamlined than State-to-State extradition.<sup>113</sup> Accordingly, under Article 91(2)(c) of the *Rome Statute*, the procedural requirements imposed by States for the surrender of persons to the ICC:

should not be more burdensome than those applicable to requests for extradition pursuant to treaties or arrangements between the requested State and other States and should, if possible, be less burdensome, taking into account the distinct nature of the Court.<sup>114</sup>

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<sup>108</sup> See Franco Mosconi & Nicoletta Parisi, ‘Co-operation Between International Criminal Court and States Parties’ in *The International Criminal Court: Comments On The Draft Statute* (1998) 313-16 (attempting to distinguish between ‘extradition’ and ‘surrender’ in the context of the ICC).

<sup>109</sup> Plachta, above n 6 at 190.

<sup>110</sup> See *Rome Statute*, above n 4, art 102 (defining ‘surrender’ and ‘extradition’ in context of ICC).

<sup>111</sup> In order to ensure that there was no confusion between the terms ‘surrender’ and ‘extradition,’ Art 102 was included in the *Rome Statute*, providing definitions for both. See *ibid* art 102. According to Art 102, ‘‘surrender’ means the delivering up of a person by a State to the Court ...’ and ‘‘extradition’ means the delivering up of a person by one State to another as provided by treaty, convention or national legislation.’ *Ibid*.

<sup>112</sup> See *Rome Statute*, above n 4, art 102 (defining ‘surrender’ and ‘extradition’ in context of ICC).

<sup>113</sup> Oosterveld et al, above n 59 at 770. One way the process was streamlined was by eliminating grounds traditionally permitted to refuse extradition. No such grounds are included in Art 89 of the *Rome Statute*. See *Rome Statute*, above n 3 art 89.

<sup>114</sup> *Ibid* art 91(2)(c).

‘The main intent of this exercise was to free the ‘surrender’ from a host of conditions, restrictions, and requirements which, developed in other epochs and designed for different purposes, are inappropriate in the context of the ICC. Exceptions, exclusions, and exemptions traditionally have been the main obstacle to make extradition a fully effective tool in the fight against crime. To strengthen ‘surrender’ and render it more efficient, the number and scope of grounds for refusal by the requested State had to be significantly restricted. ... by removing from the Statute ALL grounds for refusal of ‘surrender.’<sup>115</sup> If we accept that the provisions pertaining to surrender have in fact removed all possible grounds for refusal, then we would have to conclude that the authorities of the requested State, being unable to invoke any bar to ‘surrender’ or ‘transfer,’ are placed in an awkward position of either violating their domestic law or violating their international obligation. That would also mean that the principle *aut dedere aut judicare* has been replaced with by a mandatory requirement of transfer (*dedere*).<sup>116</sup>

Certain complications are raised by the ‘surrender’ regime under the *Rome Statute*. Most significant is the complication of constitutional prohibitions on extradition of nationals to a foreign jurisdiction that are to be found in many constitutions. The question is whether such prohibitions are consistent with the obligation of State Parties to surrender suspects to the ICC. Because the ICC will not prosecute *in absentia*, the Court must gain physical control over a suspect for a trial to take place. The apparent tension between constitutional prohibitions against extradition of nationals and ICC obligations diminishes upon a closer examination of the fundamental conceptual differences between ‘surrender’ to an

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<sup>115</sup> Plachta, above n 6 at 192-193.

<sup>116</sup> Kenneth S Gallant, ‘Securing the Presence of Defendants Before the International Tribunal for the Former Yugoslavia: Breaking With Extradition’ (1994) *Criminal Law Forum* 557, 569.

international criminal court and ‘extradition’ to another State.<sup>117</sup> Article 102 of the Statute defines ‘surrender’ as ‘the delivering up of a person by a State to the Court’ and extradition as ‘the delivering up of a person by one State to another.’<sup>118</sup> This distinction between extradition and surrender is not merely semantic but substantive.

In common law countries, the possibility of surrendering nationals to the ICC does not necessitate adoption of any particular legislative measures other than the one that would facilitate the surrender of the individual to the ICC. It is with civil law countries that a real problem emerges since most of these countries contain constitutional prohibitions against extradition of nationals. However, it is worthy of note that the creators of such constitutional prohibitions contemplated ‘horizontal cooperation’ between national courts and not ‘vertical cooperation’ with an international court. As the ICC is not a ‘foreign court’ or ‘foreign jurisdiction,’ but rather an international one, the constitutional prohibitions against extradition may not apply. Given the flexibility provided by the *Rome Statute*, States have two options when implementing the obligation to surrender individuals to the ICC: create a separate legal procedure or amend existing extradition laws.

Many States have had to pass new laws or adapt existing national laws in order to provide clear authority for surrendering fugitives to the ICC. The adaptation of national law in order to transfer nationals to the ICC proved much more complicated in a great number of States because most of the constitutions--except those of the Anglo-American system--contain a prohibition against the extradition of nationals.

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<sup>117</sup> See *Report of the Ecuadorian Corte Constitucional, Informe del Sr Hernan Salgado Pesantes en el caso No 0005-2000-CI sobre el ‘Estatuto de Roma de la Corte Penal Internacional*, 6 March 2001, at Point 7. It notes the ‘semantic nuanced difference’ between the two, but goes on to note that as extradition applies only between States, the prohibition on the extradition of nationals does not apply to transfer to the ICC.

Civil law countries have opted for three approaches (1) amending the constitution, (2) adopting an interpretative approach and (3) a general, centralized model that favours procedural mechanisms. In the first approach, reflected by Germany, States have effected minor amendments ‘aimed only at including an exception to the principle, to ensure that the Constitution is not breached by the surrender of a national to the ICC. The advantage of a constitutional amendment with a specific reference to the ICC is that it erases any possibility of a normative conflict at the national level.’<sup>119</sup> In the second approach, States such as Costa Rica, Ecuador and Ukraine have largely interpreted the Constitutional prohibition against extradition of one’s own national in light of the need to conform to international law considering that the ICC represents the international community and is established with their consent.<sup>120</sup> The third approach is manifest in *Swiss Civil Law*.<sup>121</sup> The law establishes a Central Authority in the Federal Office of Justice which handles all ICC requests for cooperation and requests for surrender.<sup>122</sup> The Central Authority is administered through the Federal Office of Justice, to which responsibility is delegated to, inter alia, surrender to the Court persons being prosecuted and transmit the results of the execution of the request.<sup>123</sup> Article 5 of the *Swiss Civil Law* mandates that cantonal and federal authorities perform all measures ordered by the Central Authority to cooperate with the Court and the means prescribed by the Central Authority to implement requests from the ICC must be executed expeditiously without being

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<sup>118</sup> *Rome Statute*, above n 4 at art 102.

<sup>119</sup> *Manual for Ratification and Implementation*, above n 58 at 51.

<sup>120</sup> *Ibid* 51-52.

<sup>121</sup> *Swiss Implementing Legislation*, above n 33 at Chap 3

<sup>122</sup> *Ibid*.

<sup>123</sup> *Ibid* art 3(1)(e).



subjected to the substantive procedures of the designated cantonal or federal authority.<sup>124</sup> Virtually no restriction exists as to the means by which requests are conveyed.

Summing up the approach by civil law countries, most Continental Europe civil law countries provide for minimal judicial involvement of domestic courts. Generally, once a person resident in the State against whom an indictment has been confirmed has been taken into custody and informed of the charges against him/her by the examining court, transfer to the ICC shall be approved without the need for formal extradition proceedings and without any need to conduct proceedings and invoke the substantive requirements often specified by domestic laws on extradition. Even in States where courts may be consulted concerning requests for transfer, the degree of judicial review ranges simply from perfunctory identification of suspects to limited evidentiary review.

Surprisingly, it is Anglo-American countries that are keen to ensure that ‘surrender’ requests from the ICC are subjected to certain domestic safeguards. For instance in the UK more extensive examination is required by law, which contemplates extradition-like proceedings in courts. The surrender provisions of the *UK Act* reads to some extent like a streamlined bilateral albeit one that enables surrender in only one direction: from the UK to the ICC.<sup>125</sup> The process implemented by the *UK Act* is based on legislation originally drafted for the swift transfer of suspects between the United Kingdom and Ireland, which became the model for the arrest and surrender of suspects to the ICTY and ICTR.<sup>126</sup> Warrant applications brought by constables will include statements under oath that they have reason to believe that a

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<sup>124</sup> Ibid art 5.

<sup>125</sup> See UK Act, above n 77 at pt 2.

<sup>126</sup> See Council of Europe, Progress Report by the United Kingdom 3 (2001), available at [http://www.legal.coe.int/criminal/icc/docs/Consult\\_ICC\(2001\)/ConsultICC\(2001\)31E.pdf](http://www.legal.coe.int/criminal/icc/docs/Consult_ICC(2001)/ConsultICC(2001)31E.pdf)

request for arrest has been made by the ICC and that the person is in, or en route to, the United Kingdom. Upon the successful bringing of an application, an appropriate judicial officer shall issue a warrant for the arrest of the person identified in the warrant<sup>127</sup> and notify the Secretary of State. A ‘reasonable basis’ (comparable to ‘probable cause,’ the evidentiary standard in UK courts) standard must be satisfied before extradition requests may be certified.

The UK is not alone in clinging to some form of domestic safeguard. In Canada, the *Canada Act* addresses arrest and surrender by amending the *Extradition Act*<sup>128</sup> to include a separate procedure for the surrender of persons to the ICC, which is, in essence, a shortened, modified version of the extradition process. This approach, as opposed to creating a *sui generis* procedure, was taken as the *Extradition Act* had been amended one year earlier to include surrender to the ICTFY<sup>129</sup> and the ICTR.<sup>130</sup> In addition, Canada’s extradition process has passed constitutional adjudication by the Supreme Court, and the creation of a streamlined surrender process for the ICC within existing Canadian extradition law is more likely to accord with established constitutional standards.<sup>131</sup> This surrender process for the ICC was created through several amendments to the *Extradition Act*. Similarly other common law countries for instance Australia and New Zealand provide for surrender determinations to be

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<sup>127</sup> See UK Act, above n 77 s 3(3) addresses applications that should be made in Scotland.

<sup>128</sup> *Extradition Act*, SC, ch 18 (1999) (Canada).

<sup>129</sup> International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc S/RES/827 (1993), amended by UN Doc S/RES/1166 (1998); UN Doc S/RES/1329 (2000).

<sup>130</sup> Statute of International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring states, between January 1, 1994 and December 31, 1994, UN Doc S/RES/955 (1994), amended by UN Doc S/RES/1165 (1998); UN Doc S/RES/1329 (2000).

<sup>131</sup> See, e.g., *Canada v Schmidt*, [1987] 1 SCR 500; *Kindler v Canada* (Minister of Justice), [1991] 2 SCR 779; *McVey v United States of America*, [1992] 3 SCR 475.

made by the Attorney-General who, in both countries, has discretion to refuse requests in ‘special’ (Australia) or ‘exceptional’ (New Zealand) ‘circumstances.’<sup>132</sup>

Whether the significant new regime of ‘surrender’ would be successful depends first and foremost on the reaction of States, governments, and their national legislatures to the concept of ‘surrender.’ It is heartening to note that many States both common and civil law regard ‘surrender’ as a genuine, *per se* form of delivering up the requested persons to the ICC and have convinced their parliaments to adopt the relevant national law and to amend the existing statutes. Article 102 seems poised to be a great success.

### **3. Transit on Third Party Territory**

In pushing back the barriers of sovereignty, the *Rome Statute* and ICC’s Rules of Procedure and Evidence oblige States to take certain action with regard to arresting persons and surrendering them to the Court. Accordingly, States must be able to cooperate with the ICC in these areas in order to ensure an effective Court through the enactment of ICC specific national legislation.

The *Rome Statute* provides for the practical reality that, on many occasions, persons being surrendered to the Court cannot be taken directly from their points of arrest to the ICC’s detention facilities in The Hague without transiting through one or more States. If transit through the territory of a State Party is required, under Article 89(3), that State Party must authorize, in accordance with its domestic law and procedures, transportation of the person,

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<sup>132</sup> Australia Implementing legislation, above n 55; New Zealand Implementing legislation, above n 56.

unless transit through the State would impede or delay surrender.<sup>133</sup> The person being transported must be detained in custody during the entirety of the transit process. The Court will need to seek voluntary cooperation for transiting persons through the territories of non-States Parties, as the *Rome Statute* does not bind them.

Considering that many States do not have legislation permitting the detention of a person being transported, implementing legislation needs to come in once again to smooth the way. The *Manual for Ratification and Implementation* identifies two mechanisms seen in existing legislation: (1) amendment of existing domestic legislation and (2) establishment of a separate regime in implementing legislation<sup>134</sup>

The first approach is manifest in Canadian legislation which amends domestic legislation to ensure compliance with Article 89.<sup>135</sup> Australia and New Zealand fall in the second category with provisions which mirror Article 89.<sup>136</sup> The *Manual for Ratification and Implementation* identifies that the provisions in the New Zealand legislation incorporate the obligations set out in Article 89 and include self-contained procedures in dealing with persons in transit.<sup>137</sup> The Australian and UK legislation largely mirror the provisions in the New Zealand legislation. However, the UK legislation treats the request as though they were ordinary requests for arrest and surrender except that the circumstances render this to be an expedited process.<sup>138</sup>

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<sup>133</sup> See *Rome Statute*, above n 4 art 89(3). However, under art 89(3)(d), no authorisation is required if the arrested person is transported by air and no landing is scheduled on the territory of the transit State. See id.

<sup>134</sup> *Manual for Ratification and Implementation*, above n 58 at 84.

<sup>135</sup> *Extradition Act*, SC 1999, c C-18, assented to 17 June 1999, amendments concerning the International Criminal Court entered into force on 23 October 2000. See the brief analysis in the *Manual for Ratification and Implementation*, above n 36 at 84.

<sup>136</sup> New Zealand Implementing Legislation, above n 56 at ss 136-138, Australian Implementing Legislation, above n 55 at Pt 9.

<sup>137</sup> *Manual for Ratification and Implementation*, above n 58 at 84.

<sup>138</sup> UK Implementing Legislation, above n 77 at ss 21-22. See discussion in the *Manual for Ratification and Implementation*, above n 36 at 84.

#### 4. Competing Requests

A complication relates to competing requests between the Court and States. In contrast to the ad hoc tribunals, the ICC does not take priority over other international obligations, such as that provided for in Article 103 of the UN Charter. Article 90 on ‘competing requests’ addresses the possibility that a State Party (the requested State) might receive a request from the ICC and from a State not Party to the Statute (the requesting State) for surrender of the same person.<sup>139</sup> Requests are ‘competing’ if fulfilling one would prevent a State from fulfilling the other: a State cannot simultaneously extradite a person to another State and surrender that same person to the ICC. Despite the potential for a State to receive mutually exclusive requests along these lines, not all competition is deemed problematic under Article 90. ‘In particular, certain apparently mutually exclusive requests may in fact come under the heading of “false competitions”--that is, situations involving no real conflict among a requested State’s existing obligations, and thus no real competition.’<sup>140</sup>

Simultaneous requests by the ICC and a requesting State may create a true competition if and when the ICC determines that the case is admissible. If extradition of an individual to the requesting State and surrender to the ICC are not sought for the same conduct, then the ICC’s request has priority if the requested State has no existing international obligation to extradite the person to the requesting State (a false competition).<sup>141</sup> If extradition and surrender are

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<sup>139</sup> *Rome Statute*, above n 3, art 102 on ‘Use of terms’ stipulates: (a) ‘surrender’ means the delivering up of a person by a State to the Court, pursuant to this Statute; (b) ‘extradition’ means the delivering up of a person by one State to another as provided by treaty, convention, or national legislation. *Observers’ Notes, Article By Article* above n 106 at 1016. Since the ICC is not a foreign jurisdiction, surrender procedures must be no more burdensome and should, if possible, be less burdensome than those applicable to requests for extradition ‘taking into account the distinct nature of the Court.’ *Ibid* art 91(2)(c), see *Observers’ Notes, Article By Article*, *ibid* 1054.

<sup>140</sup> Keitner, above n 8 at 229.

<sup>141</sup> *Rome Statute*, above n 4, art 90(7)(a).

sought for the same conduct (a true competition), then the requested State must make a decision based on factors included but not limited to those enumerated in Article 90, ‘but [the requested State] shall give special consideration to the relative nature and gravity of the conduct in question.’<sup>142</sup> The goal of the regime set out in Article 90 is not to ensure that all persons responsible for international crimes are tried before the ICC. Rather, it is to ensure that they are tried before a competent court and are subject to protections and penalties that meet international standards.

#### ***D. Enforcement of the Duty to Cooperate***

Article 87 of the *Rome Statute* sets out the general provisions governing requests by the ICC for cooperation with investigations and includes recourse for the Court in the event that States Parties fail to comply with its requests. Upon a finding by the Court of failure by a State Party to cooperate, the dispute may be referred to either the Assembly of States Parties or to the UN Security Council for resolution.<sup>143</sup> Similar to requests for arrest and surrender, the terms of the *Rome Statute* mandating cooperation with the Court in a general capacity are equally relevant to demands for cooperation in investigations and for the collection of evidence. Article 87(7) confirms the ICC’s power to issue judicial findings for disputes over the extent of the duty to cooperate.<sup>144</sup>

Pursuant to Article 87(7) of the *Rome Statute*, a clear process exists for inducing a party state’s compliance with a request for assistance. The ICC may make a judicial finding of non-

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<sup>142</sup> Ibid art 90(7)(b).

<sup>143</sup> Ibid art 87(7).

<sup>144</sup> See Alain Pellet, ‘Settlement of Disputes’ in *Observers’ Notes, Article By Article* above n 83 at 1843 (concluding that art 119, when read in conjunction with art 87(7), ‘empowers the court to make findings on all questions relating to cooperation between states and the ICC’).

compliance where a party state fails to comply with a request to cooperate with the ICC.

Commenting on the efficacy of such a finding, Dr Goran Sluiter observes that:

A judicial finding of non-cooperation is dual in character. It is an enforcement measure. As such, the impact of an impartial international judicial body establishing that a state has breached its obligations under an international treaty should not be underestimated. Such a finding, establishing a non-cooperating state's illegal actions, may induce its compliance. Second, a judicial finding of non-compliance satisfies the vital prerequisite to submit the matter to those institutional bodies designated to enforce the Statute.<sup>145</sup>

Article 95 of the *Rome Statute* however allows a state to postpone the execution of a request pending the determination by the court of the case's admissibility pursuant to Article 18 or 19 of the Statute. The provision puts the principle of complementarity into effect. According to this principle, prosecution should take place at the national level and the court may only exercise jurisdiction if a state is unwilling or unable to prosecute a case. According to Article 95, until it is certain that the court may actually exercise jurisdiction, there is no need to assist the court.

Though the *Rome Statute* expressly allows the requested state to postpone the provision of legal assistance under certain conditions, this is not the same as a ground for refusing assistance. 'The latter, if accepted by the court, is final. The former, however, may temporarily suspend the duty to provide assistance. It regains its force when the "conditions of postponement" are no longer applicable. The difference between refusal and postponement may only be marginal in practice, particularly if it concerns a request that begs for swift execution.'<sup>146</sup> The main ground for refusal addresses the right to postpone legal services but in extrapolation, the ground for postponement has a significant positive effect for effective

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<sup>145</sup> Goran Sluiter, 'The Surrender of War Criminals to the International Criminal Court' (2002) 25 *Loyola of Los Angeles International and Comparative Law Review* 605, 614.

<sup>146</sup> *Ibid* 633-634.

legal assistance generally in that it underlines that the “general rule” is immediate execution of requests, and postponement is the exception.<sup>147</sup>

### ***E. Immunity & Exclusive Jurisdiction***

Article 98, entitled ‘Cooperation with respect to waiver of immunity and consent to surrender,’ has proved to be a battleground between States that seek to limit the ICC’s freedom of action and States (notably the US) that seek to affirm the superiority of sovereign consent. Article 98 of the *Rome Statute*, provides that the court may not proceed with a request for surrender or assistance that would require the requested state to act inconsistently with its obligations under international law. The state must respect a third state’s diplomatic immunity. ‘Article 98 of the *Rome Statute*, as a ground to refuse assistance, recognises protections flowing from international obligations relating to diplomatic or state immunity. Additionally, it recognises those obligations arising from an agreement, such as Status of Forces agreements. These latter agreements provide exclusive jurisdiction over troops stationed in another state.’<sup>148</sup>

In particular, Article 98(1) contemplates a situation in which the ICC seeks surrender or assistance that ‘would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State.’<sup>149</sup> Article 98(2) addresses a special instance of true competition: a situation in which a request for surrender from the ICC overlaps with a pre-existing obligation

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<sup>147</sup> See *Rome Statute*, above n 3 at 73 (referring to immediate execution).

<sup>148</sup> Sluiter, ‘The Surrender of War Criminals’, above n 145 at 631.

<sup>149</sup> Ibid art 98(1) reads: ‘The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the co-operation of that third State for the waiver of the immunity.’ *Rome Statute*, above n 4.



that the requested State has under an international agreement with a third State to ‘extradite’ or ‘surrender’ individuals to the sending State. More specifically, Article 98(2) envisages the possibility that a member of a non-State Party’s armed forces present in the territory of a State Party might be subject to a request for surrender by the ICC that conflicts with the requested State’s treaty obligation not to extradite the person under a State-to-State agreement, typically a Status of Force Agreement (SOFA), between the requested State and the non-State Party.<sup>150</sup>

‘Although the United States supports the ideals embodied in the *Rome Statute*, it [was] determined to obtain an exemption from the Court’s jurisdiction for members of its armed forces and officials. During the closing hours of the Rome Conference, delegates overwhelmingly voted down US amendments to the Statute to secure this exemption. The United States [felt] vulnerable to political attack through the Court because of its military deployment across the globe and its international role as peacekeeper.’<sup>151</sup> At Rome, the US delegation sought to address these concerns and shield US military personnel from the Court’s jurisdiction. The delegation scored a major triumph with the successful negotiation of Article 98 of the *Rome Statute*.<sup>152</sup> Article 98(2) states:

The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.<sup>153</sup>

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<sup>150</sup> The forces of a State Party would be subject to ICC jurisdiction under the *Rome Statute*, arts 12(1) and 12(2). The forces of a non-State Party would be subject to ICC jurisdiction if the Security Council referred a ‘situation’ to the Prosecutor pursuant to *Rome Statute*, art 13(b), or if a non-State Party’s forces committed war crimes, genocide, or crimes against humanity on the territory of a State Party, art 12(2)(a), or a non-State Party that has accepted jurisdiction, art 12(3). Absent a Security Council referral, crimes may be investigated by the ICC following a request by a State Party, arts 13(a) and 14(1), or on the initiative of the Prosecutor with the approval of the Pre-Trial Chamber, arts 13(c) and 15. *Ibid*.

<sup>151</sup> Erik Rosenfield, ‘Application of US Status of Forces Agreements to Article 98 of the Rome Statute’ (2003) 2 *Washington University Global Studies Law Review* 273, 274.

<sup>152</sup> *Ibid* 276.

<sup>153</sup> See *Rome Statute*, above n 4 at art 98(2).

The article aims to restrict the ICC's power to indict and try military personnel by codifying a certain deference to State-to-State agreements such as SOFAs and extradition treaties.<sup>154</sup> The use of Article 98 as a likely ground to restrict the ICC was soon at the centre of the US campaign to ensure its nationals remain beyond the reach of the ICC. Soon after the conclusion of the Rome Conference and the adoption of the Rome Statute,

The United States saw the drafting of the Rules of Procedure as a potential opening for continued attempts to ensure that no US citizen could be haled before the ICC for crimes committed on the territory of a State Party to the Rome Statute. In particular, the US delegation focused on article 98(2) as a hook for an expanded interpretation of what kinds of "international agreements" might act as limits on the ICC's ability to request the surrender of an individual, without first attempting to secure the consent of that person's State of citizenship.<sup>155</sup>

The US proposed a rule that read as follows: "The Court shall proceed with a request for surrender or an acceptance of a person into the custody of the Court only in a manner consistent with international agreements applicable to the surrender of the person."<sup>156</sup> Peeling back the legal façade of the proposal, Dr Chimene Keitner, astutely observes that:

This underlying agenda or "fundamental requirement" was, and remains, obtaining a guarantee that no US citizen will be subject to ICC jurisdiction under any circumstances as long as the US remains a non-Party to the Rome Statute. As part of an exemption strategy, the US proposed rule is inconsistent with the intended scope of article 98(2), and with the spirit of the Rome Statute. Exempting the nationals of any country from the jurisdiction of the ICC stands in fundamental opposition to the ideals of international justice and to the affirmation of universal jurisdiction over the most serious international crimes.<sup>157</sup>

Eventually a modified version of the US rule was adopted by the Fifth PrepCom as rule 195(2) in the Finalized Draft Text of the Rules of Procedure and Evidence. It is important to note that 'The discussions of rule 195(2) during the Fifth PrepCom served to clarify the

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<sup>154</sup> Keitner, above n 8 at 234.

<sup>155</sup> Keitner, above n 8 at 248.

<sup>156</sup> PCNICC/2000/WGRPE(9)/DP.4 (8 June 2000), available at <http://www.un.org/law/icc/prepcomm/jun2000/englishinf4e.pdf>.

<sup>157</sup> Keitner, above n 8 at 250.

nature, scope, and purpose of article 98(2), an article that had not previously been a focus of attention.’<sup>158</sup>

States can however take unilateral steps in relation to the protections that SOFAs already provide consistent with the treaty including re-opening SOFAs to accomplish this objective. ‘Article 98 places international treaty obligations in a position superior to requests or orders from the Court for surrender or delivery of a suspect. As a result, states can intentionally create international obligations that compete or conflict with the Court’s request for surrender for the sole purpose of avoiding its jurisdiction. Effectively, Article 98 supports current treaties and allows for the negotiation of future treaties or international agreements that would secure a state’s jurisdiction over its citizens to supersede ICC jurisdiction.’<sup>159</sup> There is a strong argument though by treaty proponents that ICC jurisdiction is a freestanding, independent right and that the Receiving State can exercise its own discretion by transferring persons to the ICC, even in the face of a SOFA provision.<sup>160</sup> This is echoed by Dr Chimene Keitner who identifies an important bulwark against any bad faith efforts by noting that:

The rule [195(2)] to article 98(2) is consistent with the Statute as long as it is read strictly in conjunction with the article itself, and with the prevailing understanding of the nature of the agreements at issue accepted at Rome and clarified during the PrepCom (that is, agreements between the sending State and the requested State, creating an international obligation on the requested State).<sup>161</sup>

However when the United States delegation successfully negotiated the inclusion of the Rule 195(2) in relation to Article 98(2) in the *Rome Statute*, it had in mind its SOFAs and their

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<sup>158</sup> Ibid 260.

<sup>159</sup> Rosenfield, above n 151 at 277.

<sup>160</sup> Ambassador David J Scheffer, ‘Fourteenth Waldemar A Solf Lecture in International Law: A Negotiator’s Perspective on The International Criminal Court’ (2001) 167 *Military Law Review* 1, 17.

<sup>161</sup> Keitner, above n 8 at 262.

applicability.<sup>162</sup> Thus Article 98(2) contains arguments waiting to be plucked by States into their SOFAs and ensure that their service members are not surrendered to the Court.<sup>163</sup> The US determination to use Article 98(2) towards political as opposed to legal imperatives was soon manifest. On 30 June 2002, the United States vetoed a six-month extension of the UN peacekeeping mission in Bosnia.<sup>164</sup> This veto blocked a resolution supported by thirteen of the fifteen members of the Security Council. As a result, members of the Security Council acquiesced to the US request and granted all peacekeepers from States not parties to the *Rome Statute* participating in the Bosnia mission blanket protection from ICC prosecution for one year.<sup>165</sup>

Although article 98(2) seems to codify a certain deference to State-to-State agreements such as SOFAs, which are drafted and adopted to facilitate military operations by one State in the territory of another, the Article is far more comprehensive viewed in its context as well as broader international law. ‘The reference to the third State in this scenario as the “sending State” (as opposed to “State not Party to this Statute,” the term used in the other provisions of Part 9) indicates that the drafters of the Rome Statute were concerned with a particular scenario in article 98: the possible interference by the ICC with operations conducted by the armed forces or personnel of a non- State Party in the territory of a State Party. Note,

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<sup>162</sup> Scheffer, above n 160 at 17.

<sup>163</sup> In the words of Former US Ambassador-at-Large for War Crimes Issues, David J Scheffer relating to the loopholes that Art 98(2) creates with respect to SOFAs:

Perhaps more importantly, even as a non-party, under Art 98(2) we [US] can negotiate agreements with other governments that would prevent any American being surrendered to the ICC from their respective jurisdictions without our consent. As a signatory state, we are now in a much stronger position to negotiate such freestanding agreements.

Ibid.

<sup>164</sup> Colum Lynch, ‘Dispute Threatens UN Role in Bosnia: US Wields Veto in Clash Over War Crimes Court’, *Washington Post*, 1 July 2002, A1

<sup>165</sup> SC Res 1422, UN SCOR, 4572d mtg, UN Doc S/Res/1422 (2002).

however, that this “interference” would presumably consist of deterrence, investigation, and, if necessary, prosecution of war crimes, genocide, and crimes against humanity in cases where the sending State or the requested State was itself unwilling or unable to investigate or prosecute.’<sup>166</sup> Thus a literal reading suggests that objections to jurisdiction on any basis other than the requested State’s own willingness to investigate and prosecute the crimes in question constitute a breach of the requested State’s existing obligations under international law.<sup>167</sup>

Under the ICC regime, the deployment of a non-State Party’s troops on the territory of a State Party would continue to be governed by existing agreements under which the sending/contributing State retains criminal jurisdiction over its own soldiers on such missions.<sup>168</sup> However, as Dr Chimene Keitner notes: ‘This arrangement is a feature of, not a limit on, the ICC’s complementary jurisdiction: the ICC would only request cooperation or surrender of a person if those States also possessing jurisdiction proved unwilling or unable to exercise it.’<sup>169</sup> The end result thus appears to be that military personnel will be free from ICC prosecution so long as their State of origin investigates and properly prosecutes any potential crimes they may have committed. On the negative side, past history points to a string of

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<sup>166</sup> Keitner, above n 8 at 233-234. For a detailed discussion, see James Crawford et al, ‘In the Matter of the Statute of the International Criminal Court and in the Matter of Bilateral Agreements Sought by the United States Under Article 98(2) of The Statute’, an opinion prepared for the Lawwater’s Committee on Human Rights and the Medical foundation for the Care of Victims of Torture. This opinion can be accessed at [http://www.humanrightsfirst.org/international\\_justice/Art98\\_061403.pdf](http://www.humanrightsfirst.org/international_justice/Art98_061403.pdf) (visited 15 March 2004).

<sup>167</sup> See, e.g., *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, arts 4 and 12, GA Res 39/46, Annex, 39 UN GAOR Supp (No 51) at 197, UN Doc A/39/51 (1984), 1465 UNTS 85 (entered into force June 26, 1987); *Convention on the Prevention and Punishment of the Crime of Genocide*, arts 1 and 5, GA Res 260(III), UN GAOR, 3rd Sess, pt 1, at 174, UN Doc A/810 (1948), 78 UNTS 277 (entered into force 12 January 1951).

<sup>168</sup> In the event of hostilities, the Contracting Parties to a SOFA will generally review the jurisdictional provisions, and may also exercise the right to suspend the application of any of the provisions of the SOFA. See, e.g. *Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces*, 19 June 1951, art 15, UST 1792.

<sup>169</sup> Keitner, above note 8 at 235.

failures by sending states to investigate alleged war crimes by its military personnel serving in peacekeeping missions.<sup>170</sup>

Currently the United States is pursuing a policy of negotiating treaties with each ICC member state to grant immunity to US military personnel. The Bush Administration is intent on continuing such a policy even in the face of bitter opposition by the European Union.<sup>171</sup> In sum,

The ‘fundamental objective’ of the US in the ICC negotiations [was] and remains, ‘to prevent, unless certain conditions are met, the surrender to or acceptance by the ICC for trial of nationals of non-party States who are acting under governmental direction and whose actions are acknowledged as such by the non-party State.’ This sought-after exemption would even preclude a non-party national from surrendering voluntarily to the ICC, an unprecedented restriction on the possibility of self-surrender.<sup>172</sup>

However, reality is not as simple as the US rationale and the agreements might seem to suggest. It is the very thing that the US seeks to safeguard that ultimately stands in the way—sovereignty. The principle of territorial sovereignty or territorial supremacy establishes that a State has ‘exclusive competence to take legal and factual measures within a territory and prohibit foreign governments from exercising authority in the same area without consent.’<sup>173</sup> In *Wilson v Girard*<sup>174</sup> the US Supreme Court citing *The Schooner Exchange v McFadden* held, ‘a sovereign nation has exclusive jurisdiction to punish offences against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction.’ Recent state practice shows that States are keen to retain jurisdictional prerogative whether pursuant to domestic or to international obligations. For instance in

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<sup>170</sup> See eg Jackson Maogoto, ‘Watching the Watchdogs: Holding the UN Accountable for International Humanitarian Law Violations of the ‘Blue Helmets’’. (2000) 5 *Deakin Law Review* 47.

<sup>171</sup> Ben Barber, ‘EU Applicants Told Not to Give US Immunity; World Court’s Writ at Issue’, *Washington Times*, 13 August 2002, at A1

<sup>172</sup> Keitner, above n 8 at 242-243.

<sup>173</sup> Peter Malanczuk, *Akehurst’s Modern Introduction to International Law* (1997) 75.

*Netherlands v Short*,<sup>175</sup> an American soldier charged with murder was only released to US authorities upon an undertaking that he would not be subject to the death penalty since such an action would violate the Dutch court's responsibilities under the *European Convention on Human Rights*.<sup>176</sup> It is not hard then to picture that a State Party to the ICC even in the face of a SOFA has obligations under the *Rome Statute* grounded in international law that would override a SOFAs which simply seeks to circumvent the ICC.<sup>177</sup>

#### **F. Enforcement of Forfeiture Orders and ICC Fines**

The *Rome Statute* enables the ICC to issue orders for the forfeiture of property considered to be derived from crimes within the ICC's jurisdiction. In order to effect forfeiture, the Court is also empowered to issue orders freezing assets that are the proceeds of crime<sup>178</sup> located within the territories of States Parties. The *Rome Statute* also permits orders for the forfeiture of individuals' property derived from crime<sup>179</sup> to be imposed as part of the sentence, either in and of themselves or in addition to prison terms, that may be imposed by the Court on individuals convicted of crimes within its jurisdiction.<sup>180</sup> Finally, in terms of enforcement of the Court's financial punitive powers, the ICC represents an innovation in international criminal sanction as the first-ever international tribunal explicitly empowered to impose fines<sup>181</sup> against individuals.<sup>182</sup> All of these important powers of the criminal judicial process

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<sup>174</sup> *Wilson v Girard*, 354 US 524, 529 (1957).

<sup>175</sup> 29 ILM 1375 (1990).

<sup>176</sup> *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 UNTS 222 (1950).

<sup>177</sup> For a detailed exposition of this, see Crawford et al, above n 166.

<sup>178</sup> See *Rome Statute*, above n 4, art 93(1)(k).

<sup>179</sup> See *ibid* art 77(2)(b).

<sup>180</sup> Under art 77, imprisonment and fine/forfeiture are permitted as penalties for genocide, crimes against humanity, war crimes and (eventually) aggression, whereas fines/forfeiture may be a penalty in and of itself only for crimes against the administration of justice under art 70. See *ibid*.

<sup>181</sup> See *ibid* art 77(2)(a).

<sup>182</sup> The Nuremberg Tribunal had broad remedial discretion but never imposed a fine. See *Charter of the International Military Tribunal*, art 27, in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945, 58 Stat 1544, 82 UNTS 280 ('The Tribunal shall have the right

allotted to the Court by the *Rome Statute* must be affirmed nationally by its States Parties in order to be enforceable and thereby have an efficient and effective ICC. With regard to enabling the ICC to be proactive and to have an additional means by which to combat international crime by seizing the proceeds of crime more generally, the *Rome Statute* empowers the Court to order measures to effect its orders for forfeiture of the proceeds of crimes within its jurisdiction.<sup>183</sup>

Orders for forfeiture are also available under the *Rome Statute*. Article 77(2) addresses the Court's ability to order forfeiture of property derived from crime as part of a convicted individual's sentence. In addition to imprisonment, the Court may order the forfeiture of proceeds, property, and assets derived directly or indirectly from the crime, without prejudice to the rights of *bona fide* third parties. Article 77(2) also enables the Court to impose fines as part of the sentences it levies.<sup>184</sup> Part 10 of the *Rome Statute* addresses the enforcement of the ICC's sentences and orders, and specifically imposes a duty on States Parties to enforce fines and forfeiture measures as penalties.<sup>185</sup>

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to impose upon a defendant, on conviction, death or such other punishment as shall be determined by it to be just.'). Neither the ICTR nor the ICTFY are empowered to impose fines, although both Tribunals have adopted provisions for fines as penalties for procedural misconduct, such as contempt of the Tribunals. See *ICTR Rules of Procedure and Evidence*, rules 77(A), 91(D), available at <http://www.ictr.org>; *ICTFY Rules of Procedure and Evidence*, UN Doc IT/32/Rev 21, rules 77(H), 77bis, 91(E), available at [http://www.un.org/icty/basic/rpe/IT32\\_rev21con.htm](http://www.un.org/icty/basic/rpe/IT32_rev21con.htm).

<sup>183</sup> The *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810, arts 3, 5 (1948), (the right to liberty and the right not to be subjected to torture or to cruel, inhuman, or degrading treatment).

<sup>184</sup> See *ibid* art 77(2) ('In addition to imprisonment, the Court may order: (a) A fine under the criteria provided for in the Rules of Procedure and Evidence.').

<sup>185</sup> Art 109(1) of the *Rome Statute* provides that 'States Parties shall give effect to fines or forfeiture ordered by the Court under Part 7, without prejudice to the rights of bona fide third parties, and in accordance with the procedure of their national law.' *Ibid* art 109(1). A duty on States Parties to use national procedures to trace, freeze, or seize the proceeds of crimes within the jurisdiction of the ICC in order to facilitate eventual forfeiture orders, has already been identified as existing under art 93(1)(k). Art 109(2) requires that '[i]f a State Party is unable to give effect to an order of forfeiture, it shall take measures to recover the value of the proceeds,



Under the *Rome Statute* and the Rules of Procedure and Evidence, States Parties must ensure that they have laws and procedures in place to perform four primary functions: (1) trace, freeze, and seize the proceeds of ICC crime;<sup>186</sup> (2) effect forfeiture of the proceeds of crime;<sup>187</sup> (3) collect fines;<sup>188</sup> and (4) transfer to the Court any property or proceeds they obtain as a result of their enforcement of a judgment of the Court.<sup>189</sup> States have proceeded in distinct and creative manners in implementing these obligations within their domestic laws.<sup>190</sup>

The Manual for Ratification and Implementation identifies three general approaches:

- (1) providing for a general power to enforce all orders directly or
- (2) separate powers for both fines and reparation orders or
- (3) general power for enforcement but leaves out procedural details<sup>191</sup>

Australia and the UK are to be counted in the first approach. They convert the ICC orders into orders issued by the national courts.<sup>192</sup> In addition, these two countries adopt a ‘self-contained

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property or assets ordered by the Court to be forfeited, without prejudice to the rights of bona fide third parties.’ Ibid art 109(2).

<sup>186</sup> This is an inherent part of imposing fines and forfeiture.

<sup>187</sup> See ICC Rules, above n 52, rule 147. Forfeiture as part of a sentence is provided by order, and at any hearing to consider an order of forfeiture, see *ibid* rule 147(1), the Court shall hear evidence on the identification of the specific proceeds, see *ibid* rule 147(1), and consider the interests, if made aware, see *ibid* rule 147(2), of bona fide third parties in the property sought forfeited, see *ibid* rule 147(4). Orders for forfeiture must specify, *inter alia*, the identity of the person, see *ibid* rule 218(1)(a), the proceeds and property ordered forfeited, see *ibid* rule 218(1)(b), information on the location of the property covered by the order, see *ibid* rule 218(2), and that the State, if unable to give effect to the order, shall undertake to recover value of the same, see *ibid* rule 218(1).

<sup>188</sup> See *ibid* rule 146. Rule 146 outlines the criteria to be considered by the Court in deciding whether to levy a fine and the consequences of non-payment. See *ibid* It is interesting to note that rule 220 provides for the non-modification of judgments, in which fines are imposed, by mandating that the Presidency inform the State Party in which the fine is sought enforced that the fines imposed shall not be modified by the enforcement efforts of their national authorities. See *ibid* rule 220.

<sup>189</sup> See *ibid* rule 148. Rule 148 provides that ‘[b]efore making an order pursuant to art 79, paragraph 2, a Chamber may request the representatives of the Fund to submit written or oral observations to it.’ *Ibid*. The significance of this rule is that orders for transfer may be effected by the Court with consultation.

<sup>190</sup> See *eg* Oosterveld *et al* above n 59.

<sup>191</sup> *Manual for Ratification and Implementation*, above n 58 105

<sup>192</sup> Australian Implementing Legislation, above n 55 at Pt 10 and 11; UK Implementing Legislation, above n 35 at s. 49.

regime for executing such orders.’<sup>193</sup> Canada adopts a largely similar approach to that in Australia and the UK albeit through the amendment of existing legislation to facilitate the provision of the specific assistance requested by the ICC. A hybrid approach is seen in Norwegian legislation which provides for general authority to carry out ICC requests within the framework of its existing legislation.<sup>194</sup>

## CONCLUSION

The ICC will provide an indispensable backup to national jurisdictions in deterring, investigating, and prosecuting serious international crimes. The momentum behind the ICC testifies to the increasing realization by countries that international norms may require international enforcement mechanisms, especially where individual perpetrators are beyond the reach of their own domestic courts. Signing, ratifying, and implementing the ICC provides States with an opportunity to review their existing criminal procedures, and to ensure that these are consonant with international standards such as those relating to due process, the protection of victims and witnesses, and jurisdiction over internationally recognised crimes. The ICC will provide important incentive for States to fine tune their domestic penal mechanisms and importantly obviate the need to establish reactive ad hoc international tribunals on a case by case which in practice has proved to be particularly difficult in view of the political goodwill required.

The ICC in comparison to the ad hoc international criminal tribunals contains elaborate guidelines in relation to both the nature and manner of fulfilling obligations encapsulated in the *Rome Statute*. This paradoxically both weakens and strengthens the Court. As noted by Dr

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<sup>193</sup> *Manual for Ratification and Implementation*, above n 36 at 105.

<sup>194</sup> *Ibid* 105.

Goran Sluiter, '[t]he ad hoc tribunals were established with limited mandate. As a result of their swift creation, the Tribunals, especially the judges themselves, created much of the law. Therefore it comes as no surprise that the judges have opted for what is, in their eyes, the most effective cooperation regime. On the other hand, the establishment of the ICC by treaty triggered protracted rounds of negotiations, which soon revealed that participating states were not prepared to have the institution shape its own laws in any way. Since the shaping of the legal assistance regime was left to the participating states, the resulting compromise left the system significantly weaker on a number of points.'<sup>195</sup> Despite this, it is of practical importance that the court retains discretion to determine the content of the duty to cooperate and in many instances, its cooperation regime is predominantly hierarchical and vertical in nature.<sup>196</sup>

The success of the ICC will ultimately be determined by the level of cooperation it receives from States. Having no police force, military, or territory of its own, the ICC will rely heavily on States Parties to, among other things, arrest individuals and surrender them to the Court, collect evidence, and serve documents in their respective territories. This assistance will be central to the Court's ultimate success. Without this assistance, the ICC will find itself seriously crippled in conducting its proceedings and meeting the lofty aspirations of the international community. So far the outlook is good, States Parties have overwhelmingly put in place the necessary legal and administrative mechanisms that will facilitate cooperation with the ICC. It remains to be seen whether this enthusiasm will be reflected once the ICC's operations get underway.

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<sup>195</sup> Sluiter, 'The Surrender of War Criminals', above n 145 at 650

<sup>196</sup> Ibid 651.