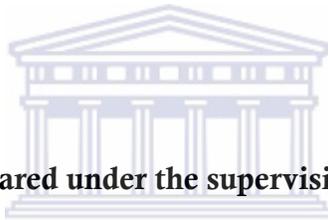


**THE CO-OPERATION REGIME OF THE INTERNATIONAL CRIMINAL COURT:
THE OBLIGATION OF STATES TO ARREST AND SURENDER**

**A Research submitted in partial fulfillment of the requirements of the degree LL.M
(Transnational Criminal Justice and Crime Prevention: International and African
Perspective)**

By

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Declaration

I, Maereg Gebregziabher Gidey declare that the work presented in this research is original. It has never been presented to any other University or Institution. Where other people's works have been used, references have been provided. It is hereby presented in partial fulfillment of the requirements for the award of the LL.M Degree in Transnational Criminal Justice and Crime Prevention: An International and African Perspective.

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Above all, I praise the Lord.

List of Abbreviations

Art	Article
AMIS	African Mission in Sudan
ASP	Assembly of States Parties
AU	African Union
BIA's	Bilateral Immunity Agreements
CAR	Central African Republic
DRC	Democratic Republic of Congo
DPA	Dayton Peace Agreement
EU	European Union
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
ICC	International Criminal Court
IFOR	Implementation Force in Bosnia and Herzegovina
LRA	Lord Resistance Army
MONUC	United Nations Mission in the Democratic Republic of Congo
NATO	North Atlantic Treaty Organisation

OTP	Office of the Prosecutor
US	United States of America
UN	United Nations
UNMIS	United Nations Mission in Sudan
UNAMID	United Nations African Union Mission in Darfur
SFOR	Stablisation Force in Bosnia and Herzegovina
SOFA	Status of Force Agreements



TABLE OF CONTENTS

	PAGE
DECLARATION	i
ACKNOWLEDGMENT	ii
LIST OF ABBREVIATIONS	iii
TABLE OF CONTENTS	v
 CHAPTER ONE	
1. INTRODUCTION	1
1.1 Background of the study.....	1
1.2 Research question.....	2
1.3 Significance of the study.....	3
1.4 Methodology.....	4
1.5 Overview of chapters.....	4
 CHAPTER TWO	
2. THE INTERNATIONAL CRIMINAL COURT: JURISDICTION, TRIGGER MECHANISM AND RELATIONSHIP WITH NATIONAL JURISDICTION	5
2.1 Overview of Establishment and organs of the Court.....	5
2.2 Jurisdictional issues.....	8
2.3 Trigger mechanisms.....	10
2.4 Essential features of the Court.....	12
2.4.1 Complementarity.....	12
2.4.2 State co-operation.....	15

CHAPTER THREE

3. THE SUBSTANTIVE AND PROCEDURAL ASPECTS OF THE COOPERATION REGIME OF THE INTERNATIONAL CRIMINAL COURT ON ARREST AND SURRENDER.....18

3.1 General.....18

3.2 The obligation of States Parties.....19

 3.2.1 General duty to co-operate.....20

 3.2.1.1 Arrest.....22

 3.2.1.2 Surrender.....25

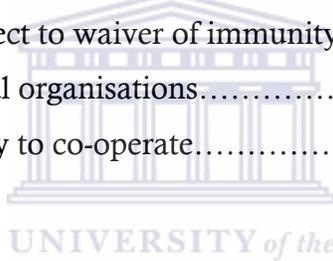
 3.2.2 Duty to adopt domestic law.....27

3.3 The Co-operation required of non-States Parties.....31

3.4 Co-operation with respect to waiver of immunity and consent to surrender.....32

3.5 The role of international organisations.....37

3.6 Enforcement of the duty to co-operate.....41



CHAPTER FOUR

4. THE STATUS OF THE EXECUTION OF THE ARREST WARRANTS ISSUED IN CONNECTION WITH THE CURRENT CASES BEFORE THE COURT.....45

4.1 Introduction.....45

4.2 Democratic Republic of Congo.....45

4.3 Uganda.....48

4.4 Central African Republic.....52

4.5 Sudan.....54

 4.5.1The Al Bashir case.....57

CHAPTER FIVE

5. Conclusion and Recommendation.....63

6. Bibliography.....69

CHAPTER ONE

1. INTRODUCTION

1.1 Background of the study

The success of an international criminal justice system relies on effective co-operation. International criminal courts and tribunals are independent bodies, situated far from where the alleged atrocities are committed. Due to lack of their own enforcement mechanisms, they rely heavily on the co-operation of States to be able to try cases. They have, *inter alia*, to collect evidence as well as secure the appearance of the person in the Court. Unless the person appears voluntarily, which is highly unlikely, the person must be arrested and surrendered so that effective investigation and prosecution is conducted. In this regard, the Statutes of the two United Nations (UN) *ad hoc* tribunals, the International Criminal Tribunal for the former Yugoslavia (ICTY)¹ and the International Criminal Tribunal for Rwanda (ICTR)², established in 1993 and 1994, respectively, by the Security Council, have made the co-operation of member States to the UN, obligatory.

Moreover, the Rome Statute,³ which establishes the International Criminal Court (ICC), under Part 9, deals with international co-operation and judicial assistance. Under Article 86 it has laid down a general obligation on States Parties to the treaty, to co-operate fully

¹ The Statute of the International Criminal Tribunal for the former Yugoslavia, UN Doc. S/Res/827(here after ICTY Statute)

² The Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/Res.955 (here after ICTR Statute)

³ The Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/99.(here after Rome Statute)

during its investigation and prosecution of international crimes. Also, under Article 86 (5) non-States Parties can also be invited on an *ad hoc* basis to provide assistance. If a State enters into such an agreement, it is bound to comply with requests for co-operation. Apart from this, non-States Parties will have an obligation to co-operate, when the Security Council, acting under its Chapter VII powers, refers the matter to the Court and decides that they shall co-operate with the Court. As stated under Article 89 of the Rome Statute, one form of co-operation required of these States Parties or non-State Parties relates to the arrest and surrender the suspect to the Court. This latter provision is the key provision of the Statute as the presence of the person, according to Article 63(1), is a necessary condition which has to be fulfilled in order for the Court to proceed with the case i.e. trial *in absentia* is not allowed.



1.2 Research question

Article 89 and the subsequent provisions deal with the procedure relating to the request for arrest and surrender, how competing requests are to be resolved, as well as the formal requirements of the request. However, the study attempts to address following eminently practical relevant questions, as the Statute deals with such issues only indirectly and insufficiently. These include:

- What would be the effect of a States' refusal, which might happen by inaction, to co-operate with the Court? What would be the ultimate effect of a Security Council referral in such situations?;

- How does one deal with a State's failure to implement in its domestic law mechanisms securing co-operation with the ICC regarding arrest and surrender?;
- What is the effect of Article 98 of the Statute, which relieves the State in which the suspect is found from surrendering the person, when it is inconsistent with the obligation of the State under international law, with respect to the State or diplomatic immunity of the person or an international agreement?; and
- What role can international/intergovernmental organisations play in the arrest and surrender of suspects?

1.3 Significance of the study

The study attempts to identify the concrete mechanisms inherent in the co-operation regime of the ICC in relation to the arrest and surrender of suspects. By doing so, it attempts to contribute to a better understanding of the procedural mechanisms pertinent to the question of arrest and surrender, thereby augmenting the emerging body of international literature focusing on this issue. Moreover, by examining real cases will identify practical deviations and suggests measures that need to be considered to remedy the problem. It is important that the procedures are clarified and followed properly. Otherwise, the ICC will lose credibility internationally, thus undermining the purpose of its creation, which was to combat impunity and to contribute towards achieving justice, peace and well being worldwide.

1.4 Methodology

The study will be largely an analysis of the provisions of the Rome Statute. The study will also take a brief look at the practice of the *ad hoc* tribunals and the cases that are currently before the ICC. This is in addition to the reference that will be made to other international instruments, national laws, books, articles, reports and internet sources.

1.5 Overview of chapters

The study will consist of five chapters. Chapter One is an introduction. It highlights the basis and the structure of the study. The Second chapter deals with the major features of the ICC. It gives a general overview of the establishment and organs of the Court, the trigger mechanisms, the complementary nature of the Court and a general discussion on State co-operation. Chapter Three addresses the substantive and procedural aspects of the co-operation regime of the ICC in relation to the arrest and surrender of suspects. It discusses the obligations of States Parties as well as the co-operation required of non-States Parties. Furthermore, it discusses the role of international organisations and the co-operation required of States in relation to waiver of immunity and consent to surrender. It concludes by discussing enforcement of non co-operation. Chapter Four will be devoted to the practical aspect of the issue under consideration. It will show, the extent of co-operation the ICC has received, in the arrest and surrender of suspects, in the current cases before the Court. The last chapter is the conclusion and a recommendation.

CHAPTER TWO

2. THE INTERNATIONAL CRIMINAL COURT: JURISDICTION, TRIGGER MECHANISMS AND THE RELATIONSHIP WITH NATIONAL JURISDICTIONS

2.1 Overview of Establishment and Organs of the International Criminal Court

A draft treaty with so many unresolved issues and details was laid before a conference of plenipotentiaries for negotiation in Rome where, after an intense negotiations and compromises on all sides, the Rome Statute of the ICC was adopted on 17 July 1998.⁴ The adoption and implementation of the Rome Statute raised profound and interlinked issues of constitutional, institutional, substantive and procedural law.⁵ A total of 120 States voted in favour of the treaty. Seven voted against it and 21 abstained.⁶ The Statute required the ratification of 60 States in order to come into force.⁷ A significant delay between signature and ratification was to be expected because most States needed to enact national laws in order to comply with the obligations imposed by the Statute, as they were specifically required to provide for co-operation with the Court in the investigation, arrest and transfer of suspects.⁸ The Statute entered into force on 1 July 2002.⁹

⁴ Bantekas, L and Nash, S *International Criminal Law* 3rded. (2007) 536.

⁵ McGoldrick, D *et al* (eds.) *The Permanent International Criminal Court: Legal and Policy Issues* (2004) 42.

⁶ The countries that voted against were USA, China, Libya, Iraq, Israel, Qatar and Yemen, while the countries that abstained include Turkey, Singapore, Sri Lanka, Mexico and Ethiopia.

⁷ See Rome Statute *Supra* note 3, Art 126.

⁸ Schabas, WA *An Introduction to The International Criminal Court* 3rded. (2007) 22.

⁹ With the recent accession of the Czech Republic (which makes ICC membership among European Union countries universal), a total of 110 countries are now States Parties to the Rome Statute. Out of them 30 are African States, 14 are Asian States, 17 are from Eastern Europe, 24 are from Latin American and Caribbean States, and 25 are from Western Europe and other States. See

<<http://www.icc-cpi.int/Menu/ASP/states+parties/>> [Accessed on 22 July 2009].

The history of the establishment of the ICC spans more than a century and the “road to Rome” was a long and continuous one.¹⁰ Unlike the *ad hoc* international criminal tribunals of Nuremberg and Tokyo which were set up by the Allies to try Axis war criminals, as well as the ICTY and the ICTR, established by the Security Council to address the specific situations that existed in the former Yugoslavia and Rwanda respectively, the ICC is a permanent international criminal court established by the Rome Statute, which is its founding treaty.

One of the main reasons for the establishment of the ICC was to end the culture of impunity by holding individuals criminally responsible for violations of crimes prohibited by international law. The purpose of the establishment of the Court had also been described as, to “achieve justice for all”, “help end conflicts” and “remedy the deficiencies of the *ad hoc* tribunals”.¹¹ Some also argue that, as a standing institution, its very existence will serve as a deterrent, sending a message to would-be perpetrators.¹² The Rome Statute, however, apart from creating such an institution, has developed the content of international criminal law enormously.¹³

¹⁰ See “History of the ICC” <<http://iccnow.org/?mod=icchistory>> [Accessed on 7 June 2009].

¹¹ See “Rome Statute of the International Criminal Court: Overview” <<http://untreaty.un.org/cod/icc/general/overview.htm>> [Accessed on 7 June 2009].

¹² Lee, RS (ed.) *The International Criminal Court: The Making of The Rome Statute, Issues, Negotiations, Results* (1999) 6.

¹³ In this regard, one of the key innovations of the Statute is the protection and participation framework it creates for victims, according to which they could participate in the proceedings before the Court. There is now also the possibility for victims to receive reparations for the harm they suffered. See Rome Statute *Supra* note 3, Art’s 68(3) and 75.

The ICC is composed of four organs: the Presidency; three divisions (the Appeal Division, the Trial Division and the Pre-trial Division), the Office of the Prosecutor (OTP); and the Registry.¹⁴ As per Article 39(2) (a) of the Statute, the judicial function of the Court is carried out by the judges of each Division sitting in chambers. The function of the Pre-Trial Chamber is to be carried out by three judges of the Pre-trial Division or by a single judge of that Division,¹⁵ the Trial Chamber's function is to be undertaken by three judges of the Trial Division,¹⁶ and the Appeals Chamber is to be composed of all the judges of the Appeals Division.¹⁷

The Pre-trial chamber plays an important role in the first stage of judicial proceedings. This is until, the charges upon which the Prosecutor intends to seek trial, against the person charged, are confirmed (confirmation of charges). Each Pre-Trial Chamber admits evidence, determines if a crime falls under the ICC's jurisdiction, and issues warrants.¹⁸ The Trial Chamber conducts trials and sentences the convicted.¹⁹ The Appeals Chamber hears appeals and has the power to reverse or amend a decision, or sentence or arrange for a new trial before a different Trial Chamber.²⁰

The Assembly of States Parties (ASP), which is composed of one representative from each States Party, is not an organ of the ICC. However, it serves as management oversight and

¹⁴ *Id.*, Art 34.

¹⁵ *Id.*, Art 39(2) (b)(iii).

¹⁶ *Id.*, 39(2)(b)(ii).

¹⁷ *Id.*, Art 39(2) (i).

¹⁸ *Id.*, Art 57.

¹⁹ *Id.*, Art 76.

²⁰ *Id.*, Art 83 (2).

legislative body of the Court.²¹ Among other functions, it also has the power to consider any issue relating to non co-operation.²²

2.2 Jurisdictional Issues

Unlike the previous international criminal tribunals which were established primarily to deal with atrocities committed prior to their creation, although they have also been given a prospective jurisdiction, the temporal jurisdiction (*ratione temporis*) of the Court is limited to those crimes committed after the Statute entered into force.²³ As regards its territorial jurisdiction (*ratione loci*) and personal jurisdiction (*ratione personae*), the ICC has a more limited jurisdiction than the general international jurisdiction “currently enjoyed by States or groups of States over *jus cogens* violations.”²⁴ This is due to the fact that the ICC does not have universal jurisdiction. The Rome Statute therefore creates a treaty based regime, binding those States which formally join the treaty.²⁵ As a result, the Court has jurisdiction only over crimes committed on the territory of a States Party,²⁶ or if the accused is a national of a States Party²⁷ or of a State that has accepted the ICC’s jurisdiction pursuant to Article 12(3) of the Statute. The one exception is where a case is referred to the ICC by the Security Council, as it can refer a situation irrespective of the nationality of the accused or the

²¹ *Id.*, Art 112 (1) and (2).

²² *Id.*, Art 112(2) (f).

²³ *Id.*, Art 11. See also Schabas *Supra* note 8.

²⁴ Chibueze, RO “The International Criminal Court: Bottlenecks to Individual Criminal Liability in the Rome Statute” (2006) 12 *Ann. Surv. Int’l & Comparative Law* 185, 202.

²⁵ Roper, SD and Barria, LA “State Cooperation and International Criminal Court Bargaining Influence in the Arrest and Surrender of Suspects” (2008) 21 *L.J.I.L.* 457, 462.

²⁶ See Rome Statute *Supra* note 3, Art 12 (2) (a).

²⁷ *Id.*, Art 12(2) (b).

location of the crime, once it has determined that there is threat to the peace and security of the world.²⁸

The crimes within the jurisdiction of the Court, define its' material jurisdiction (*ratione materiae*). These are genocide, crimes against humanity, war crimes and the crime of aggression.²⁹ As regards the crime of aggression, however, because of the difficulties in defining it, the jurisdiction over this offence was made conditional on a later amendment of the Statute.³⁰ Even though the jurisdiction of the court is based on a treaty, and reservations to the treaty are not permitted, there is a possibility for a State to opt out of the Court's jurisdiction in respect of war crimes for a period of seven years.³¹

The crimes of genocide, crimes against humanity, war crimes and the crime of aggression are described in the Statute as “the most serious crimes of international concern to the international community as a whole.”³² They are also described as “unimaginable atrocities that deeply shock the consciousness of humanity.”³³ By their very nature, these crimes require a considerable level of organisation to be committed. However, the whole purpose of the Statute is to establish individual responsibility, a principle first enunciated by the Nuremberg tribunal, for these crimes.³⁴

²⁸ Ellis, M and Goldstone, R (eds.) *The International Criminal Court* (2008) 32.

²⁹ Rome Statute *Supra* note 3, Art 5. See also Art's 6, 7 and 8.

³⁰ Kittichaisaree, K *International Criminal Law* (2008) 206. See also *Id.*, Art 5(2).

³¹ See Rome Statute *Supra* note 3, Art 120 and 124.

³² See *Supra* note 3, Art 5..

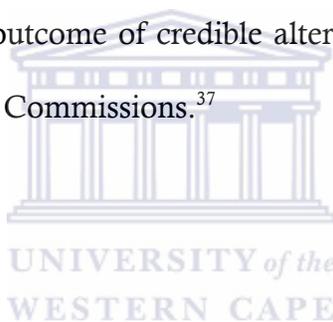
³³ See the Preamble of the Rome Statute *Supra* note 1, Para. 2.

³⁴ “Crimes against international law are committed by individuals' not abstract entities and only by punishing individuals who commit such crimes can the provisions of international law be enforced.” See International Military Tribunal (Nuremberg) Judgment of 1 October 1946, Part 22,447. See Also Rome Statute *Supra* note 3, Art 25.

The Court's jurisdiction extends to all persons regardless of their official capacity or immunities granted to them under national or international law. This means that any Head of State or Government, member of Government or parliament, an elected representative or a government official shall be subject to the jurisdiction of the ICC, if the person is charged with one of the Crimes within the jurisdiction of the Court.³⁵

Moreover, national amnesties, pardons or similar measures that promote impunity for crimes under the Court's jurisdiction and which prevent the discovery of the truth and avoid accountability in a criminal trial, cannot bind the Court.³⁶ However, the Court may, on a case-by-case basis, consider the outcome of credible alternative measures of accountability such as Truth and Reconciliation Commissions.³⁷

2.3 Trigger Mechanisms



There are three procedures according to which referral can be made to the ICC. First, a situation in which one or more of the crimes within the jurisdiction of the Court appear to have been committed, can be submitted to the Office of the Prosecutor (OTP) on the request of a States Party.³⁸ This can be a self-referral or a referral from another States Party. In this case, all States Parties can refer a situation to the OTP, which then has the responsibility to

³⁵ See Rome Statute *Supra* note 3, Art 27.

³⁶ See Amnesty International, 'The International Criminal Court: Checklist for Effective Implementation' <<http://www.iccnw.org/documents/AISummaryCheck.pdf>> [Accessed on 10 June 2009].

³⁷ Werle, G *Principles of International Criminal Law* (2005) 66. This is taking into consideration the fact that in many countries the transition to democracy was not the outcome of the victory of revolutionary forces but rather the result of a compromise negotiated between the people holding power and the groups challenging the dictatorship. In such cases, coming to terms with the past requires special consideration. This was the case, for example, in Argentina, Chile, El Salvador, Guatemala and South Africa. See Tomuschat, C 'The Duty to Prosecute International Crimes Committed by Individuals' in Cremer, *et al Festschrift fur Steinberger* (2002)343.

³⁸ Rome Statute *Supra* note 3, Art 13 (a) and Art 14.

evaluate the information in order to determine whether an investigation should be initiated.³⁹

Second, the Security Council, acting under Chapter VII of the UN Charter, can refer a situation about the commission of one or more of the crimes to the OTP whether the case involves a States Party or not.⁴⁰ Where the Security Council has determined that there is a threat to international peace and security, and has referred a case concerning a core crime to the ICC, “this will more or less constitute jurisdiction, and will be sufficient for the Prosecutor to assume that there is a reasonable basis for investigating the crime.”⁴¹

Third, the Prosecutor may initiate investigations *proprio motu* on the basis of an information received from various sources, such as States, intergovernmental or nongovernmental organisations.⁴² If the prosecutor concludes that there is a reasonable basis to proceed with an investigation, he/she will have to submit a request for authorisation to the Pre-Trial Chamber.⁴³

Be that as it may, Article 16 of the Statute provides for a power of ‘deferral’ to the Security Council. The latter, acting under Chapter VII of the UN Charter, can request the Court, by a resolution, not to commence or proceed with an investigation or prosecution for a period

³⁹ See Rome Statute *Supra* note 3, Art 53 (1).

⁴⁰ *Id.*, Art 13 (b).

⁴¹ See McGoldrick *Supra* note 5, 82.

⁴² See Rome Statute *Supra* note 3, Art’s 13 and 15(1) and (2).

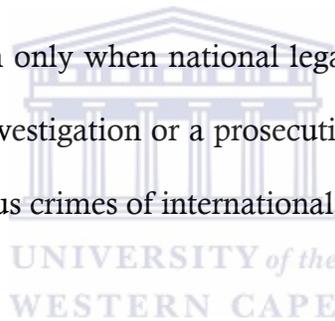
⁴³ *Id.*, Art 15(3) and (4). Currently, the ICC is investigating four situations. Three of the situations are self referrals from States Parties: the Democratic Republic of the Congo; Uganda; and the Central African Republic. The fourth is a referral from the Security Council concerning the Situation in Darfur, Sudan.

of 12 renewable months, if it has established “the existence of any threat to the peace, breach of peace or act of aggression.” However, the Statute is silent on whether a States Party may request the withdrawal of a case which it had earlier referred.

2.4 Essential features of the International Criminal Court

2.4.1 Complementarity

The principle of complementarity is the corner stone of the Statute. It concerns the allocation of jurisdiction between the ICC and national courts. According to this principle, the ICC may assume jurisdiction only when national legal systems are genuinely “unable” or “unwilling” to carry out an investigation or a prosecution. This implies that, the primary responsibility for punishing serious crimes of international concern falls on national criminal courts.⁴⁴



Unlike the primary jurisdiction established for the *ad hoc* tribunals of the ICTY and the ICTR, the principle of complementarity “thus assigns the primary responsibility for the enforcement of the prohibitions of genocide, crimes against humanity and war crimes to national courts, while providing for certain standards they have to meet”.⁴⁵ This is pursuant to the Preamble of the Statute which states that, “the most serious crimes of concern to the international community as a whole must not go unpunished and that, their effective

⁴⁴ Benvenuti, P ‘Complementarity of the International Criminal Court to National Criminal Jurisdiction’ in Lattanzi, F and Schabas, W (eds.) *Essays on the Rome Statute of the International Criminal Court* (1999) 21.

⁴⁵ Kleffner, J “The Impact of Complementarity on National Implementation of Substantive Criminal Law” (2003) 1 *J.Int’l Crim. Just.* 86, 87.

prosecution must be ensured by taking measures at the national level and by enhancing international co-operation.”⁴⁶

As long as the matter is being appropriately dealt with by a national legal system, the Court will not have jurisdiction. This makes the ICC a court of last resort. In this regard, it must however be noted that, the matter stands in a different light when the Security Council refers a situation involving a non-States Party.⁴⁷

The Statute, apart from enunciating the principle of complementarity in the Preamble as well as in various of its’ provisions,⁴⁸ also provides guidelines on how to determine what is meant by the “unwillingness” or “inability” of a State, specifying the requirements that trigger the complementary role of the ICC. In order to determine the “unwillingness” of a State, the Court, having regard to the principles of due process recognised by international law, must establish whether one or more of the following elements occur: “the proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned; there has been an unjustified delay in the proceedings and/or the proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which is inconsistent with an intent to bring the persons concerned to justice.”⁴⁹

⁴⁶ See the Preamble of the Rome Statute *Supra* note 3, Para. 4.

⁴⁷ Triferrer, O *Commentary on the Rome statute of the International Criminal Court: Observers Notes, Article by Article*, 2nded. (2008)13. See also Fletcher, GP and Ohlin, JD “The ICC- two Courts in one?” (2006) 4 *J.Int’l Crim. Just.* 428, 428-433.

⁴⁸ See Rome Statute *Supra* note 3, Art’s 1, 17-19.

⁴⁹*Id.*, Art 17(2).

The test of “unwillingness” of a State is in effect a test of good faith. It requires proving the intent of a State, as it involves a deliberate decision not to hold an accused accountable. This might not be difficult in obvious cases but it would be an intractable task when dealing with a State that may be effective at disguising its intentions.⁵⁰ As far as the test of “inability” is concerned, it is defined in a more objective manner. Article 17(3) specifies that “in order to determine inability in a particular case, the Court shall consider whether due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.”

The adoption of complementarity is regarded as a compromise which emerged in negotiations for the ICC and serves as the delicate balance between the competing interests of State sovereignty and judicial independence.⁵¹ Moreover, it is based on the consideration that, national institutions are in a better position to dispense justice, for they normally constitute a convenient forum where both the evidence and the alleged perpetrator are found.⁵² In this regard, however, it should be noted that, “the principle of complementarity applies not only to jurisdiction to prosecute, but also to all aspects of the relationship between the ICC and national courts, including judicial assistance, [surrender] and other forms of State co-operation with the ICC.”⁵³

⁵⁰ Lee *Supra* note 12, 75.

⁵¹ See Bekou, O “The Complementarity Regime of the ICC”

<<http://www.weltpolitik.net/Sachgebiete/Globale%20Zukunftsfragen/Internationaler%20Strafgerichtshof/Analysen/The%20%22Complementarity%20Regime%22%20of%20the%20ICC.html>> [Accessed on 8 June 2009].

⁵² See Benvenuti *Supra* note 44, 59.

⁵³ Brown, BS “Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals” (1998) 23 *Yale J. of Int'l L.* 383, 417.

2.4.2 State co-operation

State co-operation is one of the crucial factors that determines the credibility of the ICC as an independent and impartial institution. As the former President of the Court, Philippe Kirsch, noted in his 2007 address to the UN General Assembly, the ICC has been established on two pillars: a judicial pillar, represented by the Court itself, and an enforcement pillar, reserved for States, which by extension goes to international organisations.⁵⁴ “Co-operation is the inter-play between these two pillars, where the judicial pillar requires the enforcement pillar to play its part in order for the system created by the Rome Statute to work”.⁵⁵

In the absence of an international enforcement agent, the Court’s decisions must be implemented indirectly by States. Thus, the enforcement of the Rome Statute is made dependent on national support (including through international organisations) for all matters pertaining to its implementation, *inter alia*, from the collecting of evidence, the security of witnesses, the conduct of searches and seizures, the forfeiture of assets, the execution of arrest warrants, to the surrender of persons.⁵⁶ It is only effective, efficient, prompt and real assistance and co-operation of States that will guarantee the viability of the court.⁵⁷

⁵⁴ Kirsch, P “Address to the United Nations General Assembly. 1 November 2007” Available at <http://www.icc-cpi.int/NR/rdonlyres/754F8043-22DB-4D78-9F8C-67EFBFC4736A/278573/PK_20071101_ENG.pdf> [Accessed on 12 June 2009].

⁵⁵ Arbia, S “No Peace without Justice” Available at <http://www.icc-cpi.int/NR/rdonlyres/76042F62-3001-4C23-9D5C-4B3C8BD3BAB1/280578/Statement_Registar2.pdf> [Accessed on 14 June 2009].

⁵⁶ Rastan, R “Testing co-operation: The International Criminal Court and National Authorities” (2009) 21 *L. J.I.L.* 431, 431.

⁵⁷ Maogoto, JN “A Giant without Limbs: The International Criminal Court’s State Centric Co-operation Regime” (2006) *By Press Legal Series Paper* 1350, 13.

Part 9 of the Rome Statute contains the legal framework of international co-operation and judicial assistance. It addresses the interaction between the Court and States, in the conduct of investigations or prosecutions and in the arrest and transfer of suspects to the Court. During the negotiations in Rome, one of the key concerns was the relationship of the ICC to States and the obligations that they would have to the Court *vis-à-vis* their own citizens and citizens of other States.

The extent to which, States by becoming parties to the Statute, assume obligations to assist the ICC in its activities on their own territory, is an issue of sovereignty. All the provisions of Part 9 of the Statute exemplify the differences during the negotiations, on striking the proper balance between national sovereignty and international authority.⁵⁸ These debates are often framed by reference to “horizontal” and “vertical” powers. As first expressed by the Appeals Chamber of the ICTY in the *Blaškić subpoena* case, the terms attempt to describe the consensus based and a reciprocal legal framework governing interstate legal assistance in criminal matters, as distinguished from the hierarchical and supranational relationship of an international court with national authorities.⁵⁹

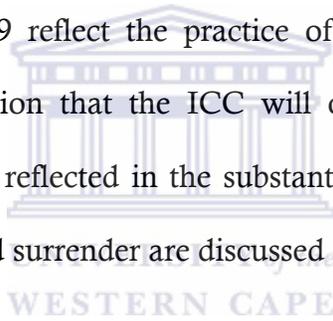
If the “horizontal” model is applied to international courts, except for the legal power to adjudicate crimes perpetrated by individuals subject to State sovereignty, the international court will have no superior authority over States. Neither can it force States to provide their

⁵⁸ See Rastan *Supra* note 56, 432.

⁵⁹ See *Prosecutor v. Blaškić*, Case No. IT-94-14, 1997. Available at <<http://www.un.org/icty/blaskic/appeal/decision-e/71029JT3.html>> [Accessed on 25 July 2009].

co-operation, nor exercise coercive powers within the territory of sovereign States.⁶⁰ In the second model, however, the international judicial body is vested with far-reaching powers *vis-à-vis* individuals subject to the sovereign authority of States as well as the States themselves.⁶¹ It will be empowered to issue binding orders on States and in cases of non-compliance, may set in motion enforcement mechanisms, which, in short, endows it with authority over a State that manifestly differentiates it from other institutions.⁶²

The Rome Statute is regarded as creating a mixture of the “horizontal” and “vertical” regimes.⁶³ In some respects, the ICC follows the supra-state model of the *ad hoc* Tribunals while other provisions of Part 9 reflect the practice of mutual legal assistance regimes between States, with a recognition that the ICC will operate with the co-operation of sovereign States. This regime as reflected in the substantive and procedural aspects of the provisions dealing with arrest and surrender are discussed in the next chapter.



⁶⁰ Cassese, A *International Criminal Law* 2ed. (2008) 346.

⁶¹ *Ibid.*

⁶² *Ibid.*

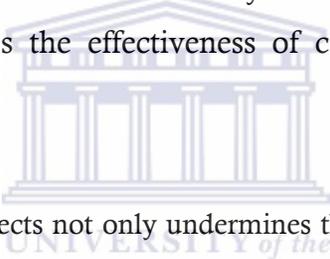
⁶³ See Rastan *Supra* note 56.

CHAPTER THREE

3. SUBSTANTIVE AND PROCEDURAL ASPECTS OF THE CO-OPERATION REGIME OF THE INTERNATIONAL CRIMINAL COURT ON ARREST AND SURRENDER

3.1 General

Going back to the ICTY, the ICTR, and the Special Court for Sierra Leone, one of the most pressing problems for the international criminal tribunals was the arrest and the surrender of suspects, which often requires “substantial bargaining between the court and the State in which the suspect resides.”⁶⁴ As demonstrated by the history of these tribunals, non-compliance of States undermines the effectiveness of courts significantly. According to Robert and Barria,



‘The inability to apprehend suspects not only undermines the credibility of a justice system but, more fundamentally, thwarts the prosecution of cases and ultimately denies the possibility of justice to individuals as well as the establishment of a historical record, which can serve as a basis for possible national reconciliation. Therefore, [...] the inability to apprehend suspects [is] a more fundamental problem than just enforcement – [it] undermines the entire international human rights regime.’⁶⁵

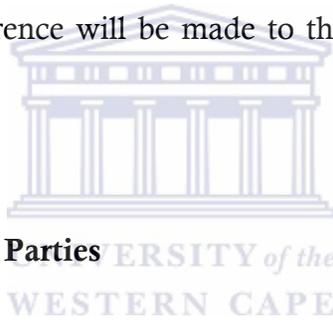
In this regard, the Statutes of the ICTY and the ICTR provide the general and permanent obligations of all member States of the UN to provide full co-operation.⁶⁶ States obligations to arrest, detain and transfer the accused, to these tribunals prevail over any legal

⁶⁴ Roper and Barria *Supra* note 25, 458.

⁶⁵ *Id.*, 457.

⁶⁶ See ICTY Statute *Supra* note 1, Art 9 and 29 and ICTR Statute *Supra* note 2, Art 28.

impediment under national law or extradition treaties.⁶⁷ In general, the obligation of States to comply with requests from the Tribunals stems from membership of the UN.⁶⁸ More specifically however, the Tribunals, having been established under Chapter VII of the UN Charter, are subsidiary organs of the Security Council and hence, their decisions or requests for assistance have been 'equated' to decisions or requests of the Security Council itself.⁶⁹ Unlike these tribunals, the ICC can enjoy the authority of Chapter VII of the UN Charter, only when a case is referred to the Court by the Security Council. Apart from this, the obligation of States Parties can only be seen, as it arises from the Statute. The difficulty in apprehending suspects in the case of the ICTY and the ICTR is useful for the ICC. Hence, in the following discussion, reference will be made to the experience of these tribunals in relation to some points.



3.2 The obligations of States Parties

Given the fact that the ICC will have to rely on its States Parties to carry out in their territories such activities as taking evidence, investigation and the arrest of a person, the crucial question is, the extent to which such States would be under an obligation to cooperate with the Court. During the negotiation of the Rome Statute, delegations were divided on the issue of whether co-operation should be defined as a matter of legal

⁶⁷ See Art 58 of Rules of Procedure and Evidence of the ICTY (IT/32/REV.22) (here after ICTY RPE) and Rules of Procedure and Evidence of the ICTR (here after ICTR RPE).

⁶⁸ See Art's 2(5), 25, 39, 41, 48 and 49 of United Nations Charter.

⁶⁹ See "Remarks on the status and future of state cooperation with the ICTR," Available at <http://69.94.11.53/ENGLISH/international_cooperation/papers_presented/Future-of-State-Cooperation.pdf>[Accessed on 16 July 2009].

obligation that the Court can rely upon or whether such co-operation should remain uncertain, subject to the will or circumstances of a particular State.⁷⁰

“The majority preferred the Statute to establish a clear duty for State Parties to fulfill the Court’s request and favored a formulation of the duty in terms of ‘compliance’ with requests as opposed to ‘co-operation’, which was seen as a generic term that might leave the door open for States not to fully comply.”⁷¹ After a lengthy debate, agreement was reached to recongise a “general duty” to co-operate with the Court. Moreover, rather than spending time on a general provision, it was thought more useful to strengthen the substantive articles to ensure that States fully co-operate at all stages of the proceedings.⁷²

3.2.1 General duty to Co-operate

The obligation of States Parties to arrest and surrender an accused is found in several provisions of the Rome Statute. Articles 86 and 88 are the basis of the obligation of States Parties to co-operate 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.” Here, the meaning of the word “fully” refers to the principle of good faith, which in this context means promptly and with all due diligence.⁷³ This general Article is supplemented by Article 89, which specifically addresses “surrender of persons to the Court” and the ICC’s Rules of

⁷⁰ See Lee *Supra* note 12, 305.

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ See Kreß, C and Prost, K ‘International Cooperation and Judicial Assistance’ in Triferrer, O *Commentary on the Rome Statute of the International Criminal Court: Observers Notes, Article by Article*, 2nd ed. (2008) 1519.

Procedure and Evidence (ICC RPE)⁷⁴ that govern specific aspects of co-operation, such as the arrest and surrender of individuals.

The implementation of a request for arrest and surrender is regulated by both Article 59 and the pertinent provisions of Part 9 of the Statute. While Part 9 contains obligations that give effect to the request, Article 59 contains the method of implementation. The procedure for States Parties to execute requests to arrest and surrender individuals in their territories is straightforward. The Court, under Article 89(1), transmits the request⁷⁵ together with the supporting material required by Article 91 of the Rome Statute.⁷⁶ Upon receipt of requests from the ICC, States Parties must comply in accordance with their domestic laws, which must be in conformity with the provisions of the Rome Statute. In this regard, Rule 184 of the ICC RPE specifies that, requested States must immediately inform the ICC's Registrar in the event that persons indicted by the Court are available for surrender. If the person sought cannot be located, despite the requested State's best efforts, or the person in the requested State is not the one named in the warrant, the State must then "consult with the Court without delay in order to resolve the matter."⁷⁷ The requested State is required to keep confidential, a request for co-operation and any other document supporting the request

⁷⁴ See International Criminal Court Rules of Procedure and Evidence ICC-ASP/1/3 2002 (ICC RPE).

⁷⁵ The organ of the court which is competent to make the request for arrest and surrender is not specified under the statute. However, it is the Pre-trial chamber which is regarded as the competent organ to make the request. See Kreß and Prost *Supra* note 73, 1539. As per Art 87(1)(a), the request for co-operation shall be transmitted through the diplomatic channel or any other appropriate channel as may be designated by each State Party upon ratification, acceptance, approval or accession of the Rome statute. Also Art 87(b) provides that such request may also be transmitted through the International Police Organisation (INTERPOL) or any appropriate regional organisation.

⁷⁶ According to Art 89(2) request for co-operation or any other document supporting the request shall either be in or be accompanied by a translation into an official language of the requested State or one of the working languages of the Court, in accordance with the choice made by that State upon ratification, acceptance, approval or accession.

⁷⁷ See Rome Statute *Supra* note 3, Art 97(b).

except to the extent that the disclosure is necessary for the execution of the request.⁷⁸ This duty of confidentiality applies even for non-States Parties.⁷⁹

3.2.1.1 Arrest

In the vast majority of cases, national authorities must arrest the person before they surrender the person for the purpose of prosecution. “Without arrests there can be no trials and without the trials victims will again be denied justice and potential perpetrators may be encouraged to commit new crimes with the hope of impunity”.⁸⁰ As the Court does not have the power to arrest these persons, it is dependent on States or international organisations to do so. Thus, ensuring the necessary co-operation is a major challenge for the ICC.

Article 58 regulates the issuing of an arrest warrant. Pursuant to Article 58(1) (a), the Prosecutor must meet the burden of proving “reasonable grounds”, which is regarded as the minimum standard, the actual standard which is to be applied by the pre-trial chamber could be higher.⁸¹ Article 58(1)(b) further lists three purposes that the arrest should serve, which shows that the person must be arrested for specific reasons. These include; ensuring the person’s appearance at trial as there is no trial *in absentia*, prevent interference with investigations, and to prevent further or continuing commission of an offence within the Court’s jurisdiction.

⁷⁸ *Id.*, Art 87(3).

⁷⁹ Kreß and Prost *Supra* note 73, 1519.

⁸⁰ Blattmann, R and Bowman, K “Achievements and Problems of the International Criminal Court” (2008) 6 *J.Int’l Crim. Just.* 711, 723.

⁸¹ Sluiter, G “The Surrender of War Criminals to the International Criminal Court” (2003) 25 *Loy.L.A.Int’l & Comp. L.Rev.* 605, 618.

During the negotiation, the term ‘arrest’ raised the question as to whether States could use their national custodial powers or would need to follow the ICC’s specific arrest procedures to take individuals into custody.⁸² This question was related to the issue of co-operation. Some argued that, since national laws vary, the use of those laws could limit the Court’s ability to discharge its basic functions, whereas others maintained that, any derogation from their national laws is considered an invasion of sovereignty.⁸³ States finally agreed to a compromise that the Rome Statute would refer to both the obligations to arrest and surrender and acknowledge procedures under domestic law.⁸⁴ Article 58(5) of the Rome Statute connects the issuing of the arrest warrant with the issuing of a request for arrest and surrender to a State. Accordingly, the Court may issue such a request under Part 9, only after an arrest warrant has been issued under Article 58.⁸⁵

Pursuant to Article 58(7) of the Statute, a Chamber shall issue a summons to appear as an alternative to a warrant of arrest, in situations where a summons is sufficient to ensure the person's appearance before the Court, as well as in situations where the person can and will appear voluntarily before the Court, without the necessity of presenting a request for arrest and surrender. It serves as the only alternative to an arrest warrant, to secure the appearance of the person before the Court. From a human rights perspective, this

⁸² See Maogoto *Supra* note 57, 27.

⁸³ *Ibid.*

⁸⁴ Oosterveld, V *et al* “The Cooperation of States with the International Criminal Court” (2002) 25 *Fordham Int’l L.J.* 767, 770.

⁸⁵ Sluiter *Supra* note 81, 619.

“alternative to deprivation of liberty” is less constraining.⁸⁶ When the provisions were negotiated many delegates speculated that it would only rarely be put in operation in practice.⁸⁷

Once issued, a warrant of arrest will remain in effect unless otherwise ordered by the Court.⁸⁸ However, there is no doubt that the credibility of the Court would be undermined, if an arrest warrant issued by the judges of the Pre-Trial Chamber at the request of the Prosecutor remained ineffective over a long period, because the States Parties were slow, or failed to execute it.⁸⁹

In urgent cases, the Court may request States to arrest an individual provisionally, until the requests for that person's surrender and the required documentation can be provided.⁹⁰ Upon receiving this information, the requested States must perform the arrest and keep that person in custody until a request for surrender from the Court. If no request is made within sixty days of the dates of the provisional arrests, the detained person may be released subject to a subsequent arrest and surrender, if additional requests for surrender are received at a later date.⁹¹

⁸⁶ Friman, H ‘Cooperation with the International Criminal Court: Some Thoughts on Improvements under the Current Regime’ in Politi, M and Gioia, F (eds.) *The International Criminal Court and National Jurisdictions* (2008) 101.

⁸⁷ *Ibid.*

⁸⁸ See Rome Statute *Supra* note 3, Art 58(4).

⁸⁹ Kaul, H-P “Developments at the International Criminal Court: Construction Site For More Justice: The International Criminal Court After Two Years” (2005) 99 *A.J.I.L.* 370, 383.

⁹⁰ For example, when the ICC receives information that a person is preparing to flee the jurisdiction. See Rome Statute *Supra* note 3, Art 92. See also Oosterveld *Supra* note 84.

⁹¹ See Rome Statute *Supra* note 3, Art’s 92(3) and (4). See also ICC RPE *Supra* note 74, Rule188.

3.2.1.2 Surrender

Motivated by serious concerns of sovereignty, the other crucial point during the negotiation 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 adopted. A majority of countries, however, argued for “a *sui generis* approach [...]: to distinguish clearly between extradition and surrender by pointing to fundamental differences between them; to define surrender as unique form of co-operation between States and the [ICC]; and 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”.⁹²

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.⁹³ This 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, whereas ‘extradition’ means the delivering up of a person by one State to another as provided by treaty, convention, or national legislation”. Accordingly, the Rome Statute requires the procedural requirements imposed by States for the surrender of persons to the ICC not to be more burdensome than those applicable to requests for extradition, taking into account ‘the distinct nature of the Court’.⁹⁴ Most importantly, the Statute has done away with much of the traditional grounds for refusing surrender of a person, such as the political offence

⁹² See Maogoto *Supra* note 57, 28.

⁹³ *Ibid.*

⁹⁴ See Rome Statute *Supra* note 3, Art 91(2)(c).

exception, double criminality requirement and the refusal to extradite nationals, and requires States Parties to comply with all requests for arrest and surrender to the ICC.⁹⁵

In the event that persons challenge their arrest before national courts on the basis of *ne bis in idem* under Article 20 of the Rome Statute, Article 89(2) stipulates that requested States must consult immediately with the Court to determine if there has been a relevant ruling on admissibility. If so, and the case was found to be admissible, then States shall execute the request. If an admissibility case is indeed pending, requested States may postpone surrender until the Court rules on admissibility. However the execution of the arrest warrant may not be postponed.⁹⁶

The requested State may also postpone the execution of the request when there is an admissibility challenge under consideration by the Court, pursuant to Article 18 and Article 19 of the Statute.⁹⁷ These can be seen as instances which show that the co-operation regime is influenced by the essential complementarity principle.⁹⁸ The ICC will be most effective, where the State on the territory or by a national of which the crime was allegedly committed, is itself willing to enforce the requests of the court.⁹⁹ Hence, the need for co-operation will occur in many cases, when the State most concerned is “unwilling” or “unable” to take appropriate action itself. However, this will put in question the kind of co-operation to be expected from such State.

⁹⁵ See Sluiter *Supra* note 81, 612. See also Rome Statute *Supra* note 3, Art 89(1).

⁹⁶ Cryer, R *et al An Introduction to International Criminal Law and Procedure* (2007) 412.

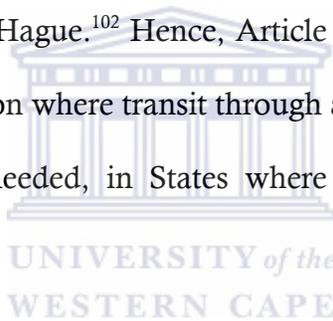
⁹⁷ See Rome Statute *Supra* note 3, Art 95.

⁹⁸ Cryer *Supra* note 96.

⁹⁹ Broomhall, B *International Justice and the International Criminal Court: Between Sovereignty and Rule of Law* (2003) 160.

In case competing requests for arrest and extradition or surrender are made to a States Party by a State and the ICC, the Court's request takes priority if the case has been found admissible and if the requesting State is also a States Party.¹⁰⁰ If the requesting State is not a States Party, the Court will retain priority if it finds the case admissible, unless the State to whom the request is made is under an international obligation to extradite a person to the requesting State.¹⁰¹

The Rome Statute also provides for the practical reality that, on many instances, persons being surrendered to the Court cannot be taken directly from their places of arrest to the ICC's detention facilities in The Hague.¹⁰² Hence, Article 89(3) of the Statute and Rule 182 of the ICC RPE address a situation where transit through a territory of a States Party as well as an unscheduled landing is needed, in States where the Court has not sought prior permission.



3.2.2 Duty to adopt Domestic Law

In the field of co-operation in criminal matters, national law plays a continual role in shaping the scope of national obligations.¹⁰³ When establishing the ICTY and ICTR, the Security Council, recognising that the absence of national laws and procedures would

¹⁰⁰ See Rome Statute *Supra* note 3, Art 90(2)(a).

¹⁰¹ *Id.*, Art 90(4). See also ICC RPE *Supra* note 74, Art 186. This is as opposed to Article 103 of the UN Charter which places the co-operation regime above other international obligations.

¹⁰² See Oosterveld *Supra* note 84, 773.

¹⁰³ Sluiter, G "Obtaining cooperation from Sudan — where is the law?" (2008) 6 *J.Int'l Crim Just* 871, 877.

impair assistance, imposes a duty for the States “to take any measures necessary under their domestic law” to make sure they can implement requests for assistance.¹⁰⁴

Similarly, according to Article 88 of the Rome Statute, a States Party has a duty to ensure that its national laws provide guidelines for handling requests for arrest and surrender, and other forms of co-operation.¹⁰⁵ The insertion of this Article in the Statute is of vital importance because requests for co-operation are to be executed in accordance with both Part 9 of the Statute and the procedures under domestic law.¹⁰⁶ This is regarded to exemplify the mixture of ‘vertical’ and ‘horizontal’ regimes of co-operation best.¹⁰⁷ States are expected to implement this duty in good faith, by effecting legislative changes at the national level, in a way that is compatible with Part 9 of the Statute.¹⁰⁸

A State cannot use the absence of a domestic law as an excuse for its failure to comply with a surrender request.¹⁰⁹ However, the laws of some countries may contain a prohibition against extradition. In such cases, as the ICC is not a foreign court or jurisdiction, prohibitions against extradition do not apply.¹¹⁰ Where such a prohibition exists and is based on legislation, provided political will exists, States can implement their obligation to surrender individuals either by creating a separate legal procedure or amend existing

¹⁰⁴ See ICTY Statute *Supra* note 1, Para 4 of and ICTR Statute *Supra* note 2, Para 2.

¹⁰⁵ Article 27 of the Vienna Convention on Treaties, states that, “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.” See Vienna Convention on the Law of Treaties, UN Doc A/CONF.39.27(here after Vienna Convention)

¹⁰⁶ Rastan *Supra* note 56, 434.

¹⁰⁷ See Rome Statute *Supra* note 3, Art 59(1).

¹⁰⁸ Rastan *Supra* note 56, 434.

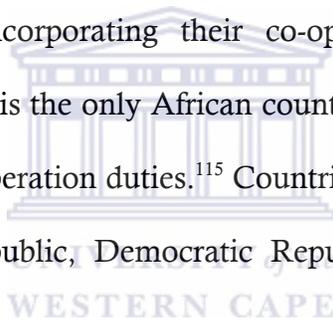
¹⁰⁹ *Ibid.*

¹¹⁰ See Rome Statute *Supra* note 3, Art 89(1) and Art 88. See also Kreß and Prost *Supra* note 73.

¹¹¹ See Maogoto *Supra* note 56, 31.

extradition laws.¹¹¹ However, in the case of a constitutional prohibition, States can adopt a purposive interpretation,¹¹² or a general constitutional amendment (for example in France, Luxemburg, and Portugal) or a specific amendment aimed at exempting the ICC (for example in Germany and Slovenia).¹¹³

It is very important that all States Parties adopt comprehensive legislation, as this will enable the Court to conduct its work without being repeatedly disrupted by States that do not yet have laws that allows them to comply. However, out of the 110 States Parties only 39 States have adopted implementing legislation, among which only some of them adopted an implementing legislation incorporating their co-operation duties.¹¹⁴ Among these countries however, South Africa is the only African country that has enacted implementing legislation incorporating its co-operation duties.¹¹⁵ Countries like Republic of Congo, Benin, Botswana, Central African Republic, Democratic Republic of Congo, Gabon, Ghana,



¹¹¹ See International Criminal Court: Manual for the Ratification and Implementation of the Rome Statute (2008) 23. (here after ICC Manual).

¹¹² Constitutional and similar courts in Ukraine, Honduras and Guatemala adopted the extradition-surrender distinction in interpreting their constitutions as being compatible with the Statute in this respect. The Costa Rica's constitutional court also held that the national constitution that protects citizens from quitting the national territory against their will, should be interpreted in the light of evolving international law standards. See *Ibid.*

¹¹³ *Ibid.* See also Olugbuo, BC "Domestic Implementation of the Rome Statute of the International Criminal Court: A Comparative Analysis of Strategies in Africa" (2003) 30, Available at <<http://www.up.ac.za/dspace/handle/2263/1069>> [Accessed on 20 June 2009].

¹¹⁴ for example Australia: International Criminal Court Act No.41 of 2002, Canada; Crimes Against Humanity and War Crimes Act, S.C 2000, c.C-24, 2000, Finland; 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, 2000, Germany; Act on the Rome Statute of the International Criminal Court of 17 July 1998 (ICC Statute Act) 2000, New Zealand International Crimes and International Criminal Court Act 2000, No.26/2000, Switzerland; Federal Law on Cooperation with the International Criminal Court (CICCL) 2001, United Kingdom: International Criminal Court Act 2001, See "Database of Implementing Legislation" <<http://www.nottingham.ac.uk/law/hrlc/international-criminal-justice-unit/implementation-database.php>>[Accessed on 20 July 2009].

¹¹⁵ See Implementation of the Rome Statute of the International Criminal Court Act, No. 27, 2002. See also Du Plessis, M "South Africa's Implementation of the ICC Statute" (2007) 5 *J.Int'l Crim. Just.* 460, 460-479.

Kenya, Nigeria, Senegal and Zambia have a draft implementing legislation.¹¹⁶ In this regard, it must be noted that none of the situation countries have adopted an implementing legislation.

An agreement may also serve as a substitute for domestic implementing legislation on a provisional basis for a States Party where there has been a delay in its adoption, or it may regulate in a more detailed manner practical arrangements which would normally not be covered by primary legislation, in a way that is fully compatible with the statutory framework.¹¹⁷ However, the future of the ICC depends on all States Parties adopting the necessary laws that will enable each country to co-operate with the Court.

In addition, it is not only the fact of adopting implementing legislation that is important but also the quality of the legislation that is adopted.¹¹⁸ For example, the role of relevant authorities in executing co-operation requests should be specified clearly. It has been argued that, as various countries have different kinds of laws, effective co-operation requires that the Court has good knowledge of the law of the requested State and frames its request accordingly, so that the desired result is obtained.¹¹⁹

¹¹⁶ See “The International Criminal Court: Summary of draft and enacted implementing legislation” <http://www.iccnw.org/documents/AI_Implementation_factsheet06Nov14.pdf> [Accessed on 22 July 2009].

¹¹⁷ See Rastan *Supra* note 56, 441. Examples are co-operation agreements entered into by the ICC Office of the Prosecutor (OTP) with the Democratic Republic of Congo (DRC) and with the government of Sudan (concerning the situation in Uganda).

¹¹⁸ See Arbia *Supra* note 55, 6.

¹¹⁹ See Friman *Supra* note 86, 93.

3.3 The Co-operation required of Non-States Parties

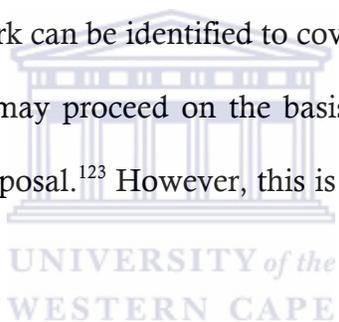
The only two situations in which non-States Parties co-operate with the ICC are, on a voluntary basis and because of a Security Council decision. There is no express duty in the Statute itself requiring non-States Parties to co-operate. However, Article 87 (5) authorises the ICC to invite any State which is not a States Party to provide assistance on the basis of an *ad hoc* agreement. If a State enters into such an agreement, it is bound to comply with requests for assistance.

In addition, in cases of referral by the Security Council, duties of co-operation may also arise for non-States Parties. “It is likely that these duties do not find their ultimate basis in the Rome Statute, which according to the traditional law of treaties is *res inter alios acta* (a transaction between others), but rather are based on the decision of the Security Council”, in terms of which it may use its Chapter VII power to ensure that non-States Parties co-operate with requests by the ICC for assistance.¹²⁰ In this regard, all UN members, that are not a States Party to the Rome Statute, are obliged to carry out decisions made by the Security Council and these obligations prevail over any conflicting provision in other international agreements.¹²¹

¹²⁰ Benvenuti *Supra* note 44, 61. Article 35 of the Vienna Convention on the Law of Treaties, provides that “An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.” Also, Article 34 of the same Convention provides that a treaty does not create either obligations or rights for a third State without its consent. See Wenqi, Z “On Co-operation By States Not Party to the International Criminal Court” (2006) 88 *International Review of the Red Cross* 861, 86.

¹²¹ UN Charter *Supra* note 67, Art 25 and 103.

As was the case in the case of the ICTY and the ICTR, Security Council resolutions referring a situation involving non-States Parties to the ICC, should provide for a clear legal regime in accordance with which co-operation is to be undertaken. However, Security Council Resolution 1593 (2005), which referred the situation in Sudan, does not incorporate such reference. The language used in the resolution is that “[...] the government of Sudan [...] shall cooperate fully and provide any necessary assistance to the Court and the prosecutor pursuant to this resolution [...].” However, it is not clear whether Sudan is entitled to co-operate fully only in accordance with its existent domestic law or Article 88 of the Rome statute, to which there is no reference, could be applied to Sudan.¹²² Göran Sluiter argues that, as no legal frame-work can be identified to cover co-operation relations between the ICC and Sudan, the Court may proceed on the basis of the Statute, as it is the only source of applicable law at its disposal.¹²³ However, this is subject to various challenges that might arise from Sudan.¹²⁴



3.4 Co-operation with respect to waiver of immunity and consent to surrender

Article 98 of the Rome Statute recognises protections arising from international obligations relating to diplomatic or State immunity as well as those obligations arising from an agreement. In particular, Article 98(1) provides for 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

¹²² Sluiter *Supra* note 103, 876.

¹²³ *Id.*, 881.

¹²⁴ For example Sudan might argue that it could not prepare for implementation of Part 9 like an ordinary State party. Moreover, the content of Resolution, gives no support for the imposition of a duty to make legislative changes at the national level. See *Ibid.*

person or property of a third State.” This provision has a substantive and procedural aspect.¹²⁵ Substantively, it refers to “the State or diplomatic immunity” accorded under international law to officials of non-States Parties, found to be on the territory of a States Party that receives a request for assistance from the Court.¹²⁶ In such cases, when the Court requests a State to surrender a diplomatically immune person, it must seek waiver of immunity.¹²⁷ However, the reference in this provision to general international law raises the question as to the status of immunity under customary international law.

Under customary international law there are two types of immunity: immunity *ratione materiae* (functional immunity) and immunity *ratione personae* (personal immunity). Immunity *ratione materiae* exists in relation to acts of any State official performed as part of his or her official duties regardless of where they may be performed. Accordingly, Immunity attaches to those acts also after the official has left office.¹²⁸ Immunity *ratione personae* (personal immunity) on the other hand refers to an immunity granted to heads of States, head of government, foreign ministers and high ranking officials, regardless of whether they travel in an official or private capacity and for acts committed prior to or during their terms of office.¹²⁹ Here, immunity is granted to ensure the effective performance of the functions

¹²⁵ See ICC Manual *Supra* note 111, 39.

¹²⁶ This is due to the fact that States Parties by virtue of Article 27 are believed have waived the immunity of their officials as between themselves for purposes of ICC procedures. See King, H “Immunities and Bilateral Immunity Agreements: Issues Arising from Articles 27 and 98 of the Rome statute” (2006) 4 *N.ZJ Pub. & Int’l Law* 269, 280. Additionally, Article 2(1) (h) of Vienna Convention on the Law of Treaties states that “third State” means a State, not a party to the treaty. See Vienna Convention *Supra* note 105.

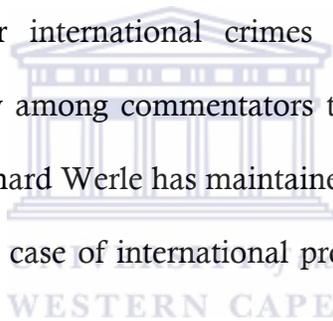
¹²⁷ See Rome Statute *Supra* note 3, Art 98(1).

¹²⁸ King *Supra* note 126, 272.

¹²⁹ *Ibid.*

and not for their personal benefit. Hence, it is limited to incumbent State officials.¹³⁰ It is in this latter respect that the two types of immunity overlap.¹³¹

What seems to complicate the matter is that, on the one hand, international law confers immunity for diplomats, heads of State, heads of government and foreign ministers, as evidenced particularly by the 2002 Belgian Arrest Warrant decision of the International Court of Justice (ICJ).¹³² On the other hand, the decision on the preliminary motion of *Prosecutor v Slobodan Milošević*¹³³ as well as the decision of the Special Court of Sierra Leone in the Charles Taylor case¹³⁴, make it seem debatable whether customary international law recognises such immunities for international crimes in the context of international prosecutions anymore. The view among commentators tends to be in line with the latter two decisions. In this regard Gerhard Werle has maintained that, the denial of immunity for incumbent high State officials in case of international prosecutions for international crime



¹³⁰ Benzing M “U.S Bilateral Non-Surrender Agreements and Article 98 of the Statute of the International Criminal Court: An Exercise in the Law of Treaties” (2004) *Max Planck UNYB* 8, 201.

¹³¹ Cassese, A “when May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v Belgium case” (2002) 13 *E.J.I.L* 853, 864.

¹³² The ICJ on the one hand stated said that immunity *ratione personae* does not allow for exceptions even for international crimes. On the other hand it stated that an acting Minister of Foreign Affairs may be subjected to criminal proceedings before certain international criminal courts, including the ICC regardless of whether the individual is a high State official of party States or nonparty States. See Case concerning the Arrest warrant of 11 April 2000 (Democratic Republic of Congo v Belgium). Para’s. 58 and 61. Available at <<http://iilj.org/courses/documents/TheYerodiacaseedt.pdf>> [Accessed on 24 July 2009].

¹³³ In this case the trial chamber explicitly stated that customary international law ensures that no person in whatever official capacity enjoys immunity before an international tribunal when that person is accused of serious international crimes. See *Prosecutor v. Slobodan Milošević*, Decision on Preliminary Motions, Case No. IT- 99-37-PT, T.Ch.III, 2001, Paras.26-34. Available at <http://test1.icty.org/x/cases/slobodan_milosevic/tdec/en/1110873516829.htm> [Accessed on 24 July 2009].

¹³⁴ The Court stated that ‘the sovereign equality of States does not prevent a head of States from being prosecuted by an international criminal tribunal or court.’ See *Prosecutor v. Charles Ghankay Taylor*, Case No SCSL-2003-01-I, Para 52. Available at <<http://www.sc-sl.org/LinkClick.aspx?fileticket=7OeBn4RuIEg=&tabid=191>> [Accessed on 25 July 2009]

itself has become a rule of customary international law.¹³⁵ Procedurally however, it is important to note that, it is the ICC which will determine whether immunities exist in a particular situation.¹³⁶ This ensures that the States Party will be able to discharge its obligation to arrest and surrender individuals to the Court when required to do so.¹³⁷

Additionally, Article 98(2) addresses a situation in which a request for surrender from the ICC overlaps with a pre-existing obligation that the requested State has under an international agreement with a third State to ‘extradite’ or ‘surrender’ individuals to the sending State. This provision envisages the requested State to be a States Party or a State which has accepted co-operation duties with the Court, since other States could not be in a situation of conflicting obligations.¹³⁸ It is maintained that, the term “sending State” refers to another State that has sent members of its armed forces onto the territory of the requested State under the terms of a Status of Force Agreement (SOFA) or Status of Mission Agreements (SOMA).¹³⁹

Where the sending State is a States Party, it will not place any constraints on the ability of other States to surrender its nationals to the ICC, since every States Party accepts the

¹³⁵ He argues that in the case of crimes under international law, immunity *ratione materiae* is inapplicable not only to trials before international courts but also in national courts. In relation to *immunity ratione personae* however, there is an exception for prosecution by States for heads of State and government, foreign ministers, and diplomats while they are in office. See Werle *Supra* note 37, 174-178.

¹³⁶ ICC Manual *Supra* note 111, 38. See also ICC RPE *Supra* note 74, Rule 195.

¹³⁷ *Ibid.*

¹³⁸ Benzing *Supra* note 130, 199.

¹³⁹ These agreements provide exclusive jurisdiction over troops stationed in another State. See “Bilateral Immunity Agreements” <http://www.amicc.org/usinfo/administration_policy_BIAs.html> [Accessed on 26 July 2009].

jurisdiction of the Court over its nationals.¹⁴⁰ In other cases, mainly where non-States Parties are involved however, the Court will have to obtain the consent of the sending State.¹⁴¹ Legal experts argue that, delegates involved in the negotiation of Article 98 of the Statute did not intend to allow the conclusion of new agreements, but rather to prevent legal conflicts which might arise because of existing agreements, or new agreements based on existing precedent, such as new SOFAs.¹⁴² They emphasize also that, the SOFA's aimed at by Article 98(2) apply exclusively to 'persons' sent to another country on official, typically military business, by their State and accepted by the host State for that purpose.¹⁴³

Conversely, the United States has waged a campaign for the adoption of broad bilateral agreements referred to as Bilateral Immunity Agreements (BIAs) or Bilateral Non-Surrender agreements, with the aim of preventing surrender to the ICC of all US nationals, whatever the purpose of their presence in the other State as well as non-nationals working for the US government.¹⁴⁴ By the end of its term, the Bush Administration had concluded BIAs with over 100 nations, quite a number of which are States Parties, the last with Montenegro on April 19, 2007.¹⁴⁵ It has done so, as a reflection of its own interpretation of Article 98(2) and,

¹⁴⁰ ICC Manual *Supra* note 111, 41.

¹⁴¹ See Rome Statute *Supra* note 3, Art 98(2).

¹⁴² See "Us Bilateral Immunity Agreements or so called 'Article 98 Agreements'" < <http://www.globalpolicy.org/component/content/article/164/28427.html> > [Accessed on 26 July 2009].

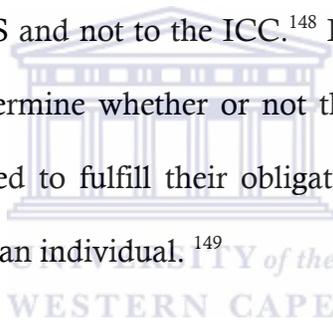
¹⁴³ Maogoto *Supra* note 57, 41.

¹⁴⁴ See Meyer, EM "International Law: the Compatibility of the Rome Statute of the International Criminal Court with the US Bilateral Immunity Agreements included in the American Service Members Protection Act" (2005) 58 *Okla. L. Rev.* 97, 125.

¹⁴⁵ See *Supra* note 142.

as a direct consequence of the conditionality for military and economic assistance to foreign governments set forth in the American Service Members Protection Act (ASPA).¹⁴⁶

As to whether the BIAs are among the international agreements contemplated by the Statute, there is a widely held view among scholars that, the drafters of Article 98(2) did not intend to provide an exception to the jurisdiction of the ICC as broad as the one included in the current form of the BIAs.¹⁴⁷ Supporters of this latter argument argue that, among other duties, the BIAs conflict with the duty of a States Party to ‘cooperate fully’ with the ICC and defeats the main purpose of the ICC, which is to fight impunity as the States Party will surrender an individual to the US and not to the ICC.¹⁴⁸ However, in deciding to make the request, it is for the ICC to determine whether or not these agreements are valid, which means, States Parties are required to fulfill their obligations to the Court when they are requested to arrest and surrender an individual.¹⁴⁹



3.5 The Role of International Organisations

After the signature of the Dayton Peace Agreement (DPA), the ICTY, faced with continuous lack of co-operation by State authorities, was forced to turn to North Atlantic treaty organisation (NATO), which was the only armed force in the region capable of

¹⁴⁶ See Scheffer, D “Article 98(2): America’s Original Intent” (2005) 3 *J.Int’l Crim. Just.*333, 350. See also American Service-members’ Protection Act 2002.

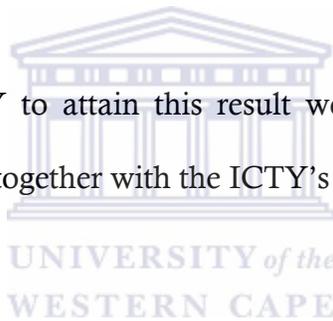
¹⁴⁷ There are three types of BIAs. The first type provides that both parties agree not to surrender each other's nationals to the ICC without the consent of the other party. Under the second type of BIA, the second State is prohibited from handing over a U.S. national to the ICC, but the United States may still surrender nationals of the second State to the ICC. The third type of BIA contains a provision "requiring those States not to cooperate with efforts of third states to surrender persons to the [ICC]" and applies for States that have neither ratified nor signed the Rome Statute. See Meyer *Supra* note 144, 129.

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

enforcing the Tribunal's arrest warrants.¹⁵⁰ The DPA established a multinational implementation force (IFOR)¹⁵¹ and granted it the authority "to use military force to search for and arrest persons indicted by the International Tribunal", despite which it contributed minimally to the ICTY's efforts to bring criminals of the Former Yugoslavia to justice.¹⁵² A year later it was replaced by NATO led stabilisation force (SFOR)¹⁵³, which had done significant number of arrests for the ICTY until it was replaced by European Union Stabilisation Force.¹⁵⁴ "This set a precedent in modern history for having a multinational military force being empowered and directed to execute arrest warrants issued by an international criminal tribunal".¹⁵⁵

The legal grounds for the ICTY to attain this result were based on the reliance on the extensive language of its' statute together with the ICTY's rule-making powers.¹⁵⁶ Moreover,



¹⁵⁰ Zhou, H "The Enforcement of Arrest Warrants by International Forces: From the ICTY to the ICC" (2006) 4 *J.Int'l Crim. Just.* 202, 202.

¹⁵¹ NATO founded IFOR to implement the military aspects of the DPA in Bosnia and Herzegovina. It was deployed in 1995 with one year mandate. See "Peace and Support operations in Bosnia and Herzegovina" <<http://www.nato.int/issues/sfor/index.html>> [Accessed on 22 July 2009].

¹⁵² The DPA does not give explicit instructions to IFOR about cooperating with the ICTY or, in particular, apprehending indictees. However, it orders its signatories to comply with the ICTY and authorizes IFOR "to take such action as required, including the use of necessary force, to ensure compliance" with the DPA. See Minogue, EC "Increasing the Effectiveness of the Security Council's Chapter VII Authority in the Current Situations before the International Criminal Court" (2008) 61 *Vand. L. Rev.* 647, 671.

¹⁵³ The Stabilisation Force (SFOR) operated under Chapter VII of the UN Charter, deriving its authority from UN Security Council Resolution 1088 of 12 December 1996. The mission was officially ended on 2 December 2004. See *Supra* note 151.

¹⁵⁴ See Boas, G and Schabas, W (eds.) *International Criminal Law Developments in the Case Law of the ICTY* (2003)113-157.

¹⁵⁵ See Zhou *Supra* note 150.

¹⁵⁶ *Ibid.* Art 19(2) states that '[...] the judge may at the request of the Prosecutor issue such orders and warrants for the arrest, detention, surrender or transfer of persons [...]'. Moreover, Rules 54-61 were adopted by the court pursuant to the power of the Tribunal's Judges to make Rules of Procedure and Evidence for any 'appropriate matters' as provided under Article 15 ICTY Statute. However, in a further effort to prompt NATO in the enforcement of the ICTY's arrest mandates, the Tribunal created Rule 59 which in sub Para.(a) provide that '[...]on the order of a permanent Judge, the Registrar shall transmit to an appropriate authority or international body or the Prosecutor a copy of a warrant for the arrest of an accused on such terms as the

in the former Yugoslavia, NATO forces were already deployed in the region and had “agreed not only to act as a peacekeeping force, but also to contribute to a significant extent in carrying out enforcement functions, including making arrests.”¹⁵⁷

The Rome Statute provides also two options pursuant to which international forces could be called for assistance. These are on the request of either the Prosecutor or the Court. In the event that the Prosecutor has decided to open an investigation, Article 54(3) states:

The Prosecutor may:

- 
- (c) Seek the cooperation of any State or intergovernmental organization or *arrangement* in accordance with its respective competence and/or mandate; [Emphasis added]
 - (d) Enter into such *arrangements* or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person;

The incorporation of the word ‘arrangement’ in sub-paragraph (c) is said to allow the Prosecutor to request the co-operation of peacekeeping forces.¹⁵⁸ However, Article 87(6) of the Rome Statute addresses the relationship between the Court and intergovernmental organisations providing that:

Judge may determine together with an order for the prompt transfer of the accused to the Tribunal, in the event that the accused be taken into custody by that authority or international body or the Prosecutor.’

¹⁵⁷ See Zhou *Supra* note 150.

¹⁵⁸ See Kreß and Prost *Supra* note 73, 1065. A Memorandum of Understanding between the UN and the ICC had been signed concerning cooperation between the United Nations Mission in the Republic of Congo (MONUC) and the International Criminal Court on 8 November 2005.

‘The Court may *ask* any intergovernmental organization to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate.’[Emphasis added].

Here, it can be noticed that a corresponding ‘arrangement’ to ‘international organisations’ is missing. However, commentators argue that the omission was not deliberate and thus, the Court is in a position to co-operate with all kinds of peace keeping forces within the latter’s mandate.¹⁵⁹ As can be seen from the provision however, the Court may only ‘ask’ any intergovernmental organisation’s assistance, which may be agreed upon with such organisation. Apart from this, intergovernmental organisations are not under an obligation to co-operate with the Court or the Prosecutor. Consequently, the manner for the operation of such forms of co-operation are outside the co-operation regime of Part 9, which deals with the States Party obligations and are subject to a separate agreement.¹⁶⁰ Therefore, apart from the forms of co-operation voluntarily agreed upon, international organisations cannot be obliged to co-operate, even when the ICC is acting pursuant to a Security Council referral.¹⁶¹ An example in this regard is the co-operation agreement concluded between the European Union (EU) and the ICC.¹⁶²

¹⁵⁹ *Id.*,1527.

¹⁶⁰ See Rastan *Supra* note 56, 444.

¹⁶¹ *Ibid.*

¹⁶² See “Agreement between the International Criminal Court and the European Union on Cooperation and Assistance”(ICC-PRES/01-01-06) <http://www.icc-cpi.int/NR/rdonlyres/6EB80CC1-D717-4284-9B5C-03CA028E155B/140157/ICCPRES010106_English.pdf> [Accessed on 15 August 2009].

3.6 Enforcement of the duty to Co-operate

Although the Rome Statute places binding treaty obligations on all States Parties, the ICC does not have an enforcement mechanism with which to threaten States to co-operate with the ICC. “Article 87(7) confirms the ICC’s power to issue a judicial finding of non-compliance” where a States Party fails to comply with a request to co-operate with the ICC.¹⁶³ However, the remedies in case of non-compliance depend on the mechanism which triggered the Court's jurisdiction. Where a State fails to comply with a request to co-operate by the Court, thereby preventing the Court from exercising its functions and powers, the dispute may be referred to either the ASP or to the Security Council, depending on who referred the matter to the Court.¹⁶⁴

The Statute does not specify whether the ASP can impose sanctions on States Parties. Hence, provided that the ICC has no standing army or other forces to compel a States Party to co-operate with the ICC, various arguments are forwarded as to the measures the ASP's can impose. Some commentators argue that penalties are limited to actions such as denying that State's ASP representative vote.¹⁶⁵ Arguing about the Statute’s ambiguity as to the precise legal status of the Assembly, the other possibility provided by Kreß and Prost is to see the Assembly as an organ *sui generis* of the Court even though it is not mentioned in Article 34, and hence, it could on behalf of the Court invoke the international responsibility

¹⁶³ Article 119(1) of the Rome Statute provides that “[a]ny dispute concerning the judicial functions of the court shall be settled by the decision of the court. In this regard, Regulation 109(1) and (2) of the Regulations of the Court (ICC-BD/01-01-04, 2004) specify the competent chamber or the chamber that has made the request for cooperation as the competent body to make the finding. See Sluiter *Supra* note 81, 615.

¹⁶⁴ See Rome Statute *Supra* note 3, Art 87(7).

¹⁶⁵ See Minogue *Supra* note 152, 649.

of a State and demand its co-operation by condemning its internationally wrongful behavior.¹⁶⁶

It is argued that the ICC could have gone further and provided for the consequences of the Court's finding of non co-operation by a State. Cassese argues that the Statute could have specified that the ASP's might agree upon countermeasure or authorise contracting States to take such counter measures. He further argues that, even though the Statute does not exclude such a possibility, it would have been appropriate to expressly provide for the possibility of the Security Council stepping in and adopting sanctions, even in cases where the matter is referred to the Court by a State or initiated by the prosecutor *proprio motu*, provided that such refusal amounts to a threat to the peace.¹⁶⁷

On the other hand, a Security Council referral has the power of Chapter VII of the UN Charter behind it, which the ICC could use to enforce its decisions. The Security Council can use its Chapter VII power to order forces to co-operate with the ICC. Apart from this, the Security Council has the power to compel States to co-operate with the ICC and to take consequential actions under Article 41 of the Charter by, for example, terminating diplomatic relations or imposing economic sanctions, against those States that do not co-operate. However, "there is no precedent for the Security Council taking this kind of action."¹⁶⁸ Notwithstanding repeated notification by the presidency of the *ad hoc* Tribunals of the failure of certain States to comply, the Security Council has failed to take action

¹⁶⁶ See Kreß and Prost *Supra* note 73, 1525.

¹⁶⁷ See Cassese *Supra* note 60, 347.

¹⁶⁸ See Minogue *Supra* note 152.

beyond condemning non-co-operation.¹⁶⁹ As has previously been pointed out, in the former Yugoslavia while it was NATO and coalition forces that had done most arrests for the ICTY, while in Rwanda, most arrests have been made by neighboring States (The recent arrest by the Ugandan Police of one of the four most wanted suspects from the Rwanda's 1994 genocide, Idelphonse Nizeyimana, after he entered the country from neighboring Democratic Republic of Congo, can serve as a notable example in the latter respect).¹⁷⁰

Given the relative ineffectiveness of such a mechanism in obtaining the arrest and transfer of fugitives, the Office of the Prosecutor of the ICTY had also turned to other non-judicial measures to obtain the co-operation from the recalcitrant States. These include, seeking assistance from the international community to arouse non co-operating States and also by creating strong incentives, such as conditioning aid programs and admission to international organisations (EU and NATO) for full co-operation with the ICTY.¹⁷¹

Similarly, the ICC Prosecutor, in his 2008 address to the ASP, for example, called for “diplomatic and public support by States to reduce the political and financial support that indicted persons are receiving, to isolate them, to control the networks supplying them with money and weapon and to encourage demobilisation or defections of their combatants and

¹⁶⁹ Rule 7bis of the ICTY RPE provides that “In the event of a State’s non-compliance with Article 28 obligations, the Prosecutor, a Judge, or a Chamber may request that, the President of the Tribunal report the non-compliance to the Security Council for enforcement measures.”

¹⁷⁰ Kaul H-P ‘The ICC and International Criminal Cooperation-Key Aspects and Fundamental Necessities’ in Politi, M and Gioia, F (eds.) *The International Criminal Court and National Jurisdictions* (2008) 89. See also *Supra* note 69.

¹⁷¹ See “Arrest and Transfer of Indictées: The Experience of the ICTY” Available at <http://www.icln.net/htm/Annual%20conference%202006/Presentation_Lopez-Terres.pdf> [Accessed on 28 JULY 2009].

also that, the territorial States, regional States with operational capabilities and relevant organisations to increase their coordination to plan and execute arrests.”¹⁷²

As can be gathered from the experience of the *ad hoc* tribunals, successful enforcement will therefore depend on the meeting of a number of measures. The extent to which States Parties have discharged their obligation, as well as the ICC has been successful in attaining co-operation from non-States Parties, in the execution of the arrest warrants it issued, in current cases before the Court, will be examined in the next chapter.



¹⁷² Address to the Assembly of States Parties by Luis Moreno Ocampo. 14 November 2008, <<http://www.icc-cpi.int/Menus/ASP/Sessions/Documentation/>> [Accessed on 29 June 2009].

CHAPTER FOUR

4. THE STATUS OF THE EXECUTION OF THE WARRANTS OF ARREST ISSUED IN CONNECTION WITH THE FOUR SITUATIONS BEFORE THE INTERNATIONAL CRIMINAL COURT

4.1 Introduction

The previous chapter has looked into the co-operation regime of the ICC and some of the issues arising there from, with specific reference to the obligation of States Parties, the co-operation required of non-States Parties and international organisations, and the enforcement of the duty to co-operate. This chapter will try to highlight on the actual level of co-operation obtained by the ICC, in the arrest and surrender of suspects, in the current cases, which are the four situations before the Court: the Democratic Republic of Congo; Northern Uganda; Darfur in Sudan; and Central African Republic.¹⁷³ In these situations, 13 arrest warrants were issued, among which only four were executed.

4.2 Democratic Republic of Congo

The Democratic Republic of Congo (DRC) is a States Party. On 3 March 2004 Joseph Kabila, the President of the DRC referred all crimes committed in the DRC to the ICC.¹⁷⁴

¹⁷³ Currently, the OTP is also analysing other situations including Afghanistan, Chad, Colombia Cote d'ivoire, Georgia, Kenya and Palestine.

¹⁷⁴ See "The office of the Prosecutor of the International Criminal Court opens its first investigation" <<http://www.iccpi.int/menus/icc/press%20and%20media/press%20releases/2004/the%20office%20of%20the%20prosecutor%20of%20the%20international%20criminal%20court%20opens%20its%20first%20investigation?lan=en-GB>> [Accessed on 12 September 2009].

Four warrants of arrest were issued by the ICC against persons in the DRC. The ICC's Pre-Trial Chamber I issued the first arrest warrant on 10 February 2006 on Thomas Lubanga Dylo. He is alleged to have founded and presided over the *Union des Patriotes Congolais* (UPC), a rebel group in the Ituri region, as well as the *Forces patriotiques pour la libération du Congo* (FPLC), the military wing of the UPC.¹⁷⁵ The warrant also alleges that, due to his "*de facto* authority" over the UPC and the FPLC, Lubanga was responsible for war crimes committed by the FPLC, which included enlisting and conscripting children under the age of 15, and using these children to participate in hostilities.¹⁷⁶

At the time the warrant of arrest was issued, the DRC was holding Lubanga in custody on suspicion of being involved in the killing of UN peacekeepers.¹⁷⁷ On 14 March 2007, the ICC Registry informed DRC authorities of the Pre-Trial Chamber's decisions, and the DRC co-operated with the ICC by sending Lubanga immediately to The Hague on a French military aircraft, with the help of UN peacekeeping forces in the DRC.¹⁷⁸ On 29 January 2007, Pre-Trial Chamber I confirmed the charges and referred the case for trial.¹⁷⁹ His trial began on 26 January 2009, which made Lubanga the first person to be tried by the ICC.

¹⁷⁵ *The Prosecutor v Tomas Lubanga Dylo* (Warrant of Arrest) ICC-01/04-01/06-2 Available at <<http://www.icc-cpi.int/iccdocs/doc/doc191959.PDF>> [Accessed on 12 September 2009].

¹⁷⁶ *Ibid.*

¹⁷⁷ See Minogue *Supra* note 152, 655.

¹⁷⁸ *Ibid.* The UN Security Council also lifted the sanctions imposing a travel ban on Lubanga.

¹⁷⁹ The Pre-Trial Chamber I determined that there is "sufficient evidence to establish substantial grounds to believe that Lubanga is responsible, as a co-perpetrator, for the charges of enlisting and conscripting children under the age of fifteen years into the FLPC and using them to participate actively in hostilities" See *The Prosecutor v Tomas Lubanga Dylo* "Decision on the confirmation of charges" Available at <<http://www.icc-cpi.int/iccdocs/doc/doc266175.PDF>> [Accessed on 12 September 2009].

On 2 July 2007, Pre-Trial Chamber I also issued a warrant for the arrest of Germain Katanga, formerly the highest-ranking commander of the *Front des nationalistes et intégrationnistes en Ituri* (FRPI).¹⁸⁰ The Court found reasonable grounds to believe that Katanga was responsible for crimes against humanity and war crimes.¹⁸¹ In March 2005, the DRC authorities had arrested Katanga in relation to an attack against MONUC (UN Observer Mission for Congo) peacekeepers in Ituri on 25 February 2005.¹⁸² Thus, the DRC executed the arrest warrant promptly and surrendered Katanga to the ICC on October 2007.¹⁸³

The third warrant of arrest was issued by Pre-Trial Chamber I is for the arrest of Mathieu Ngudjolo Chui, an alleged former leader of the *Front des nationalistes et intégrationnistes* (FNI). The Court found reasonable grounds to believe that Chui was responsible for committing crimes against humanity and war crimes, due to his role in the implementation of the attack on Bogoro.¹⁸⁴ Unlike the previous two cases, Chui was not in the custody of the DRC. However, the DRC authorities arrested him on 6 February 2008 and transferred him to the ICC.¹⁸⁵ This demonstrates that, willingness to co-operate speeds up the execution of

¹⁸⁰ *The Prosecutor v. Germain Katanga* ICC-01/04-01/07-1 Available at < <http://www.icc-cpi.int/iccdocs/doc/doc349648.PDF> > [Accessed on 12 September 2009].

¹⁸¹ The Court found reasonable grounds to believe that the FRPI and others attacked the village of Bogoro in the Ituri region, in February 2003, murdering, harming, and imprisoning civilians, pillaging the village, committing sexual enslavement of women and girls, and using children under age fifteen to participate in the attack. *Ibid.*

¹⁸² See Minogue *Supra* note 152,657.

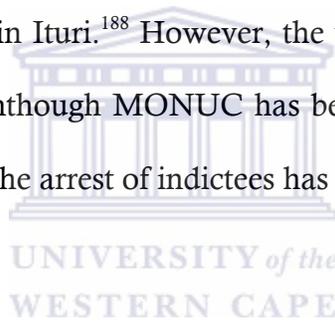
¹⁸³ *Ibid.*

¹⁸⁴ *The Prosecutor v. Mathieu Ngudjolo Chui* (warrant of arrest) ICC-01/04-01/07-260 Available at <<http://www.icc-cpi.int/iccdocs/doc/doc453054.PDF>> [Accessed on 12 September 2009].

¹⁸⁵ See “Arrival of Mathieu Ngudjolo Chui to the Detention Centre of the Court.” <<http://www.iccpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200107/press%20releases/iarrival%20of%20mathieu%20ngudjolo%20chui%20to%20the%20detention%20centre%20of%20the%20court>> [Accessed on 12 September 2009].

the Court's request for arrest and surrender. Pre-Trial Chamber I joined the cases of Katanga and Chui, and conducted a confirmation of charges on 27 June 2008.¹⁸⁶ Their trial will begin on 24 November 2009.

On 28 April 2008, Pre-Trial Chamber I unsealed the warrant of arrest against Bosco Ntaganda, an alleged Deputy Chief of the FPLC and Chief of Staff of the *Congrès national pour la défense du peuple* (CNDP) armed group, active in North Kivu in the DRC, which was delivered on 22 August 2006 under seal.¹⁸⁷ Ntaganda is alleged to have committed war crimes of enlistment and conscription of children under the age of 15, and of using them to participate actively in hostilities in Ituri.¹⁸⁸ However, the warrant has yet to be executed as Ntaganda remains at large. Eventhough MONUC has been in the DRC since 1999¹⁸⁹, the scope of its mandate in securing the arrest of indictees has been interpreted narrowly.¹⁹⁰



4.3 Uganda

Uganda's northern region has been overwhelmed in a violent conflict for 20 years. On one side is the Lord's Resistance Army (LRA) led by Joseph Kony. On the other side is the

¹⁸⁶ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (Decision on the confirmation of charges) Available at <<http://www.icc-cpi.int/iccdocs/doc/doc571253.pdf>> [Accessed on 12 September 2009].

¹⁸⁷ *The Prosecutor v. Bosco Ntaganda* (warrant of arrest) ICC-01/04-02/06 22 Available at <<http://www.icc-cpi.int/iccdocs/doc/doc305330.PDF>> [Accessed on 12 September 2009].

¹⁸⁸ *Ibid.*

¹⁸⁹ The UN Security Council established the UN Mission in the Democratic Republic of the Congo (MONUC) on 30 November 1999. MONUC has the mandate to "co-operate in national and international efforts to bring to justice perpetrators of grave violations of human rights and international humanitarian law" (Resolution 1756 of 15 May 2007).

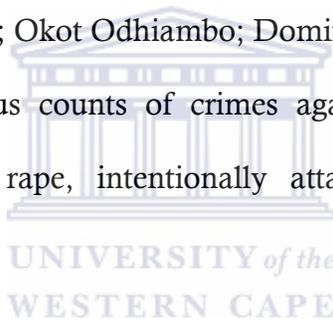
See "Amnesty International: Arrest Now"

<<http://www.amnestyusa.org/document.php?id=ENGAFR590082007&lang=e>> [Accessed on 15 September 2009].

¹⁹⁰ See Roper and Barria *Supra* note 25, 470.

government of President Museveni and his army, the Ugandan People's Defense Forces (UPDF).¹⁹¹ According to human rights groups, the LRA rebels are responsible for murdering, raping, maiming and torturing civilians.¹⁹² They are also accused of abducting, indoctrinating, and physically and sexually abusing young children.¹⁹³

Uganda is a States Party to the Rome Statute. It signed the Rome Statute on 17 March 1999 and ratified it on 14 June 2002. In December 2003 President Museveni referred the situation concerning the LRA to the ICC. On 8 July 2005, Pre-Trial Chamber II issued sealed arrest warrants, which are the first arrest warrants issued by the ICC, for five members of the LRA: Joseph Kony; Vincent Otti; Okot Odhiambo; Dominic Ongwen; and Raska Lukwiya. They were charged with various counts of crimes against humanity and war crimes, including sexual enslavement, rape, intentionally attacking civilians and the forced enlistment of child soldiers.¹⁹⁴



¹⁹¹ "Information Regarding the Referral of the Situation in Northern Uganda to the Prosecutor of the International Criminal Court" <http://www.amicc.org/docs/AMICC_UgandaQ&A.pdf> [Accessed on 9 September 2009].

¹⁹² *Ibid.*

¹⁹³ *Ibid.*

¹⁹⁴ See *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*. (Warrant Of Arrest For Joseph Kony) Issued On 8 July 2005 As Amended On 27 September 2005 available at <<http://www.icc-cpi.int/iccdocs/doc/doc97185.PDF>>; *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* (warrant of arrest for Vincent Otti) ICC-02/04-01/05-54 available at <<http://www.icc-cpi.int/iccdocs/doc/doc97189.PDF>>; *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* (warrant of arrest for Okot Odhiambo) ICC-02/04-01/05-56 available at <<http://www.icc-cpi.int/iccdocs/doc/doc97197.PDF>>; *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* (warrant of arrest for Dominic Ongwen) ICC-02/04-01/05-57 available at <<http://www.icc-cpi.int/iccdocs/doc/doc97201.PDF>>; *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* ICC-02/04-01/05-55 (warrant of arrest for Raska Lukwiya) available at <<http://www.icc-cpi.int/iccdocs/doc/doc97193.PDF>>; [Accessed on 12 September 2009].

On 13 October 2005, Pre-Trial Chamber II unsealed the arrest warrants and concluded that, “there are reasonable grounds to believe” that the five LRA leaders “ordered the commission of crimes within the jurisdiction of the Court.”¹⁹⁵ Moreover, the Pre-Trial Chamber issued requests that, warrants for the arrest and surrender of the five commanders be transmitted to the Uganda as well as DRC and the Sudan, because it was established that the LRA has additional bases in these States and that the indicted individuals move between them.¹⁹⁶ Moreover, Sudan, signed an *ad hoc* agreement with the OTP to surrender any indicted LRA leader.¹⁹⁷

However, it was only Uganda which responded to the Prosecutor's request for an update on the status of warrant execution in those three States.¹⁹⁸ As a States Party, Uganda has made the significant efforts to capture the five indictees. It communicated with the governments of the DRC and the Sudan, as well as with MONUC and the UN peacekeeping forces in the Sudan (UNMIS), to coordinate actions against the LRA.¹⁹⁹

Following the request by the OTP, on 1 June 2006 the International Criminal Police Organisation (INTERPOL) also issued Red Notices for the arrest and detention of those named in the warrant to be transmitted to National Central Bureaux in 184

¹⁹⁵ See “Warrant of Arrest unsealed against five LRA Commanders” ICC-CPI-20051014-110 <<http://www.iccpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200204/related%20cases/icc%200204%200105/press%20releases/warrant%20of%20arrest%20unsealed%20against%20five%20lra%20commanders>> [Accessed on 12 September 2009].

¹⁹⁶ See Minogue *Supra* note 152,660.

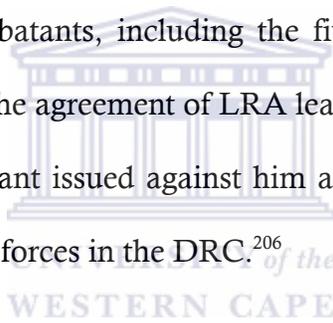
¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.*

countries.²⁰⁰ Among those individuals, however, apart from Raska Lukwiya, who has been confirmed dead and proceedings against him have been discontinued and the warrant of arrest rendered ineffective, the other indictees remain at large.²⁰¹

Despite its continued attempt to capture these individuals, Uganda has mixed views about the unexecuted arrest warrants.²⁰² The Ugandan government has said that it will ‘consider’ dropping the ICC's charges against Kony if he surrenders.²⁰³ On 26 August 2006 Ugandan officials and LRA representatives signed a Cessation of Hostilities Agreement in Juba, Southern Sudan.²⁰⁴ As part of the peace deal, the Ugandan government delegation offered ‘total amnesty’ to all LRA combatants, including the five LRA leaders.²⁰⁵ However, the peace process had failed to gain the agreement of LRA leader Kony, who refused to sign the agreement unless the arrest warrant issued against him and other LRA leaders were lifted first, and began consolidating his forces in the DRC.²⁰⁶



²⁰⁰ The INTERPOL Red Notice system is part of its global network of law enforcement agencies, created to assist in tracing and arresting internationally wanted fugitives. See “Interpol issues first ICC Red Notices” <<http://www.iccpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200204/related%20cases/icc%200204%200105/press%20releases/interpol%20issues%20first%20icc%20red%20notices>> [Accessed on 14 September 2009].

²⁰¹ The ICC is awaiting confirmation of Vincent Otti's death, who reportedly has been killed under orders of Kony in October 2007, before ending proceedings against him. See “ICC Registry officials meet with Lord's Resistance Army Delegation” <<http://www.iccpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200204/related%20cases/icc%200204%200105/press%20releases/icc%20registry%20officials%20meet%20with%20lord's%20resistance%20army%20delegation>> [Accessed on 14 September 2009].

²⁰² See Minogue *Supra* note 152, 661.

²⁰³ *Ibid.*

²⁰⁴ See “The Armed conflict in Northern Uganda”

<<http://www.amnestyusa.org/document.php?id=ENGAFR590082007&lang=e>> [Accessed on 12 September 2009].

²⁰⁵ Ssenyonjo, M “The International Criminal Court and The Lord's Resistance Army Leaders: Prosecution or Amnesty?” (2007) 51 *Netherlands International Law Review* 80, 54.

²⁰⁶ “The Situation” <<http://www.resolveuganda.org/situation>> [Accessed on 22 September 2009].

The prospects of reaching a peace agreement deteriorated further. In December 2008, a failed Ugandan-led military offensive against the LRA's Congolese bases caused an immense increase of violence, as the latter responded by ordering massive retaliatory attacks on civilians in some areas of the DRC and Sudan, which within a short period of time killed and displaced many people.²⁰⁷ In March 2009, the Ugandan army ended its offensive after failing to capture the top LRA commanders, who continue to order attacks against communities in the region.²⁰⁸ In this situation, the Chamber has not established any refusal to co-operate.²⁰⁹ As in the case of the DRC, even though UNMIS and MONUC can provide assistance, they were limited by the Security Council, to perform other tasks in the region for the purpose of which they were deployed.²¹⁰

4.4 Central African Republic

At the end of 2002 and in the beginning of 2003, a large number of civilians were killed and raped during an armed conflict between the government of the Central African Republic (CAR) and rebel forces, after a failed coup attempt.²¹¹ On 21 December 2004, the CAR which is a States Party to the ICC, referred the crimes committed on the country's territory since 1 July 2002 to the prosecutor of the Court.

On 23 May 2008, Pre-Trial Chamber III issued a sealed arrest warrant on the basis that there were reasonable grounds to believe that, in the context of a protracted armed conflict

²⁰⁷ *Ibid.*

²⁰⁸ *Ibid.*

²⁰⁹ See Kaul *Supra* note 170, 97.

²¹⁰ See Minogue *Supra* note 152,662.

²¹¹ See "The Current Investigation by the ICC of the Situations in the Central African Republic"
<<http://www.amicc.org/docs/Central%20African%20Republic.pdf>> [Accessed on 14 September 2009].

in the CAR *Mouvement du Libération du Congo* (MLC) forces led by Jean-Pierre Bemba Gombo, carried out civilian attacks including acts of rape, torture, outrages upon personal dignity and pillaging committed in the localities of PK 12, Bossongoa and Mongoumba.²¹²

On 24 May 2008, Belgian authorities arrested Bemba on six counts of crimes against humanity and war crimes allegedly committed in the CAR. The judges of Pre-Trial Chamber III requested the kingdom of Belgium to surrender Bemba on 10 June 2008. With the support of the Dutch authorities, Belgium co-operated by transferring him to the ICC on 3 July 2008.²¹³ The initial appearance of Bemba was held before Pre-Trial Chamber III on 4 July 2008.²¹⁴

Pre-Trial Chamber II conducted and finalised the confirmation of hearing on 15 June 2009 and sent Bemba's case to trial.²¹⁵ On 14 August 2009, Pre-Trial Chamber III, to whom the situation was assigned on 19 March 2009, decided to grant Bemba an interim release. However, it was decided that he will not be released until a State agrees to host him. The

²¹² Pre-Trial Chamber III found that there are reasonable grounds to believe that Bemba, as President and Commander in Chief of the MLC, was vested with 'de facto' and 'de jure' authority' by the members of the MLC to take all political and military decisions. See *The Prosecutor v. Jean-Pierre Bemba Gombo* (Warrant of Arrest replacing the warrant of arrest issued on 23 May 2008) ICC-01/05-01/08-15 Available at <<http://www.icc-cpi.int/iccdocs/doc/doc504390.PDF>> [Accessed on 12 September 2009].

²¹³ See "OTP on Jean-Pierre Bemba surrender: this is a day for the victims" ICC-OTP-20080703-PR336 <http://www.icccpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200105/related%20cases/icc%200105%200108/press%20releases/otp%20on%20jean_pierre%20bemba%20surrender%20_%20this%20is%20a%20day%20for%20the%20victims> [Accessed on 14 September 2009].

²¹⁴ See <<http://www.icccpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0105/Related+Cases/ICC+0105+0108/Case+The+Prosecutor+v+Jean-Pierre+Bemba+Gombo.htm>> [Accessed on 2009].

²¹⁵ The Chamber confirmed two counts of crimes against humanity (rape and murder) and three counts of war crimes (rape, murder and pillaging) and that Bemba would be criminally responsible as a commander (pursuant to article 28(a) of the Rome Statute). See *The Prosecutor v. Jean-Pierre Bemba Gombo* "Decision Pursuant to Article 61(7) (a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo" Available at <<http://www.icc-cpi.int/iccdocs/doc/doc699541.pdf>> [Accessed on 14 September 2009].

Chamber has to determine to which State and under which conditions he will be released provisionally.²¹⁶ His trial is scheduled to start in 2010. Once his trial is set to open in The Hague, authorities of the host State have the obligation to surrender him back to the Court.²¹⁷

4.5 Sudan

Unlike DRC, CAR and Uganda, Sudan is not a States Party to the ICC. It was the Security Council, acting under its Chapter VII powers, which referred the violent atrocities committed in Darfur (the western region of Sudan) to the ICC, on 31 March 2005.²¹⁸ In Resolution 1593, the Security Council ordered that "the Government of Sudan and all other parties to the conflict of Darfur shall co-operate fully" with the ICC and the Prosecutor. Furthermore, the Security Council urged all non-States Parties to co-operate fully, even though they do not have any obligation to do so under the Rome Statute. Unlike States Parties, Sudan is thus bound to co-operate with the Court by the terms of Security Council Resolution.²¹⁹

²¹⁶ The ICC Prosecutor has also announced that he will appeal the decision. However, States currently under consideration are Belgium, Portugal, France, Germany, South Africa, The Netherlands and Italy. See <http://www.icccpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200105/related%20cases/icc%200105%200108/press%20releases/icc%20prosecutor_%20no%20temporary%20release%20for%20jean_pierre%20bemba> [Accessed on 14 September 2009].

²¹⁷ *Ibid.*

²¹⁸ A UN Commission of Inquiry was established in 2004 to investigate alleged human rights violations in Darfur, which in its report issued in January 2005 found that government forces had been involved in atrocities which it categorised variously as crimes against humanity and war crimes. See Totten, CD and Tyler, N "Arguing For An Integrated Approach to Resolving the Crisis in Darfur: The Challenges of Complementarity, Enforcement, And Related Issues In the International Criminal Court" (2008) 98 *J Crim. L. & Criminology* 1069, 1083.

²¹⁹ In principle, Sudan's duty to assist the Court in discharging its functions prevails over its obligations under any other international agreement, in accordance with Articles 25 and 103 of the UN Charter.

On 2 May 2007, Pre-Trial Chamber I issued two warrants for the arrest of Ahmad Muhammad Harun (Ahmad Harun), who was then Minister of State for Humanitarian Affairs and who is currently designated as the governor of South Kordofan State²²⁰ and the leader of the *Janjaweed* Militia Ali Abd-Al-Rahman, also known as Ali Kushayb.²²¹ The Pre-Trial Chamber concluded that there are reasonable grounds to believe that, these individuals committed crimes against humanity and war crimes that include persecution, torture, rape and murder.²²²

The Pre-Trial Chamber ordered that, the Registrar prepare two requests for co-operation seeking the arrest and surrender of Ahmad Harun and Ali Kushayb, containing the relevant information and documents, and transmit such requests to the competent Sudanese authorities, all States Parties to the Rome Statute, all UN Security Council members that are not States Parties to the Rome Statute and to other four countries specifically mentioned: Egypt; Eritrea; Ethiopia; and Libya.²²³

²²⁰ “On 7 May 2009 the Sudanese President, Al Bashir, reshuffled his cabinet.” See Sudan Watch <<http://sudanwatch.blogspot.com/2009/05/ahmed-mohamed-haroun-designated-as.html>> [Accessed on 15 September 2009].

²²¹ *The Prosecutor v Ahmad Muhammad Harun ‘Ahmad Harun’ and Ali Muhammad Ali Abd-Al-Rahman ‘Ali Kushayb’* (Warrant of Arrest for Ahmad Harun) ICC-02/05-01/07-2 Available at <<http://www.icc-cpi.int/iccdocs/doc/doc279813.PDF>>; *The Prosecutor v Ahmad Muhammad Harun ‘Ahmad Harun’ and Ali Muhammad Ali Abd-Al-Rahman ‘Ali Kushayb’* (Warrant of Arrest for Ali Kushayb) ICC-02/05-01/07-3 Available at <<http://www.icc-cpi.int/iccdocs/doc/doc279858.PDF>>; [Accessed on 9 September 2009].

²²² The warrant of arrest for Ahmad Muhammad Harun lists 42 counts on the basis of his individual criminal responsibility (articles 25(3)(b) and 25(3)(d) of the Rome Statute) including: 20 counts of crimes against humanity and 22 counts of war crimes. The warrant of arrest for Ali Kushayb lists 50 counts on the basis of his individual criminal responsibility including: 22 counts of crimes against humanity and 28 counts of war crimes.

²²³ See “Warrants of Arrest for the Minister of State for Humanitarian Affairs of Sudan, and a leader of the Militia/Janjaweed” ICC-OTP-20070502-214 <http://www.iccpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc%200205%200107/press%20releases/warrants%20of%20arrest%20for%20the%20minister%20of%20state%20for%20humanitarian%20affairs%20of%20sudan_%20and%20a%20leader%20of%20the> [Accessed 14 September on 2009].

Sudan has made it clear it will not hand over the two suspects, arguing that the Court has no jurisdiction over its citizens.²²⁴ In its Sixth Report to the Security Council of 5 December 2007, the OTP reported that the Government of Sudan was not co-operating and that attacks on civilians and the humanitarian crisis were continuing in Darfur.²²⁵ These findings were restated in the Prosecutor's Seventh Report of 5 June 2008, concluding with a call to the Security Council to take action.²²⁶ On 16 June 2008, and in response thereto, the President of the Security Council, on behalf of the Council recalled its decision under Chapter VII of the UN Charter in Resolution 1593 (2005) and “urge[d] the Government of Sudan and all other parties to the conflict in Darfur to co-operate fully”.²²⁷

Similarly, the 9th report of the OTP of 5 June 2009 also reiterated the same finding of non co-operation, and ended by stating that “The Security Council might find it timely to start work on defining a framework to assist in the implementation of UNSC 1593 and the judicial decisions, which have followed in relation to Darfur, and to enhance the co-operation of all parties concerned.”²²⁸

²²⁴ See “UNAMID” Troops’ Obligation to Apprehend ICC Suspects in Darfur”

<<http://www.sudantribune.com/spip.php?article25935>> [Accessed on 15 September 2009].

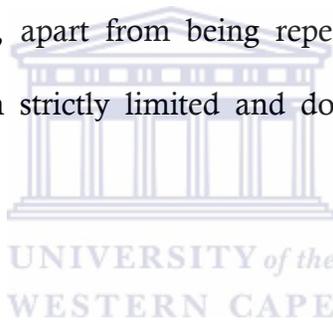
²²⁵ See Sixth Report of The Prosecutor of The International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005) <<http://www.icc-cpi.int/NR/rdonlyres/D084A825-A985-4068-8320-5724AA894430/277791/OTPRP20071205UNSCENG.pdf>> [Accessed on 15 September 2009].

²²⁶ See Seventh Report of The Prosecutor of The International Criminal Court to The UN Security Council Pursuant to UNSCR 1593 (2005). <<http://www.iccnw.org/documents/7thUNSCversionsenttoUN29may.pdf>> [Accessed on 15 September 2009].

²²⁷ Ninth Report of The Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005). Available at <http://www.icc-cpi.int/NR/rdonlyres/C6FE9E52-4845-41BA-A45D-75BA41D8647C/280448/9th_UNSCReport_Eng1.pdf> [Accessed on 15 September 2009].

²²⁸ *Ibid.*

The Pre-Trial Chamber I, in issuing the third warrant of arrest in the situation in Darfur, on Al Bashir, also found that the Government of Sudan has “systematically refused to cooperate” with the Court since the issuing of the two warrants of arrest. As a result, the judges emphasised that, according to Article 87(7) of the Statute, if the Government of Sudan continues to fail to comply with its co-operation obligations to the Court, the competent Chamber “may make a finding to that effect” and decide to “refer the matter [...] to the Security Council.”²²⁹ So far, however, no finding has been made and no measure has yet been taken, and the arrest warrants remain unexecuted. While the African Union (AU) has had troops in Darfur since 2004, the AU Mission in Sudan (AMIS), which were replaced by UNAMID in 2007, apart from being repeatedly challenged by Sudan, the mandate of the troops has been strictly limited and does not include arresting suspects sought by the Court.²³⁰



4.5.1 The Al Bashir case

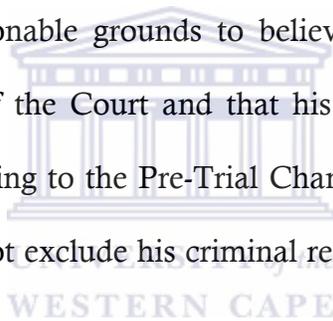
On 4 March 2009 Pre-Trial Chamber I of the ICC issued an arrest warrant for Omar Hassan Ahmad Al Bashir, President of Sudan. This is the first arrest warrant ever issued for a sitting Head of State by the ICC. He is suspected of being criminally responsible, as an indirect

²²⁹ See “ICC issues a warrant of arrest for Omar Al Bashir, President of Sudan” <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/press%20releases/icc%20issues%20a%20warrant%20of%20arrest%20for%20omar%20al%20bashir_%20president%20of%20sudan> [Accessed on 14 September 2009].

²³⁰ See Roper and Barria *Supra* note 25, 472. It was formally established by the Security Council resolution 1769, on 31 July 2007, which authorised the establishment of the African Union/UN Hybrid operation in Darfur, referred to as UNAMID, under Chapter VII of the UN Charter, for an initial period of 12 months. UNAMID formally took over from AMIS on 31 December 2007. The mandate was extended on 31 July 2008 with the adoption of Security Council resolution 1828 for a further 12 months, until 31 July 2009. See “UNMID” <<http://www.un.org/Depts/dpko/missions/unamid/background.html>> [Accessed on 15 September 2009].

(co)perpetrator, on seven charges of crimes against humanity and war crimes.²³¹ The Pre-Trial Chamber directed the Registrar to prepare a request for co-operation, seeking his arrest and surrender that must be circulated to the competent Sudanese authorities, all States Parties to the Rome Statute, and all UN Security Council members that are not States Parties to the Rome Statute.²³² In addition, it instructed the Registrar, as appropriate, to prepare and transmit to any other State, an additional request for arrest and surrender, which may be necessary for the arrest and surrender of Al Bashir.²³³

As in other cases, the Pre-Trial Chamber has issued the warrant of arrest because it determined that, there are reasonable grounds to believe that Al Bashir has committed crimes within the jurisdiction of the Court and that his arrest is necessary to ensure his appearance.²³⁴ Moreover, according to the Pre-Trial Chamber, Al Bashir's official capacity as a sitting Head of State does not exclude his criminal responsibility, nor does it grant him



²³¹The warrant of arrest for Al Bashir lists seven counts on the basis of his individual criminal responsibility under Article 25(3)(a) of the Rome Statute as an indirect (co) perpetrator including: five counts of crimes against humanity: murder - Article 7(1)(a); extermination - Article 7(1)(b); forcible transfer – Article 7(1)(d); torture - Article 7(1)(f); and rape - Article 7(1)(g); two counts of war crimes: intentionally directing attacks against a civilian population as such or against individual civilians not taking part in hostilities -Article 8(2)(e)(i); and pillaging - Article 8(2)(e)(v). See *The Prosecutor v. Omar Hassan Ahmad AL Bashir (Omar AL Bashir)* ICC-02/05-01/09 Available at <<http://www.iccpi.int/iccdocs/doc/doc639078.pdf>> [Accessed on 10 September 2009]. The Prosecutor has appealed against the decision not to charge Al Bashir with the crime of genocide. The judges want the prosecutor to prove beyond a reasonable doubt that Al Bashir committed genocide, which according to the Prosecutor is "[...] the level of evidence required at the trial stage, not at the beginning of the process." See <<http://edition.cnn.com/2009/WORLD/africa/07/08/sudan.bashir.war.crimes/index.html>> [Accessed on 22 September 2009].

²³² See "ICC issues a warrant of arrest for Omar Al Bashir President of Sudan" <<http://www.iccpi.int/NR/exeres/0EF62173-05ED-403A-80C8-F15EE1D25BB3.htm>> [Accessed on 10 September 2009].

²³³ *Ibid.*

²³⁴ See Ciampi, A "The Proceedings Against President Al Bashir and the Prospect of Their Suspension Under Article 16 of the Statute" (2008) 6 *J.Int'l Crim. Just.* 885, 885. See also *The Prosecutor v. Omar Hassan Ahmad AL Bashir (Omar AL Bashir)* *Supra* note 231.

immunity against prosecution before the ICC.²³⁵ However, this had triggered diverse reactions from States, international organisations and other international actors.²³⁶

Following the decision in relation to the application made on 14 July 2008 by the Prosecutor for a Warrant of Arrest against Al Bashir, the African Union Peace and Security Council on 21 July 2008 called the request a threat to peace in the region and appealed to the UN Security Council to ask the ICC to suspend action for at least 12 months, by exercising its power to suspend proceedings or investigations by the Court under Article 16 of the Rome Statute.²³⁷

The same position was adopted by the Assembly of the Union in February 2009, which justified the call for deferral by arguing that, if the arrest warrant were approved, it "would seriously undermine the ongoing efforts aimed at facilitating the early resolution of the conflict in Darfur"²³⁸ Moreover, by subscribing to the argument that the ICC was targeting Africa for political reasons, it asked the AU Commission to promptly convene a meeting of African States Parties to discuss on the work of the ICC in relation to Africa.²³⁹ The meeting

²³⁵ See *Supra* note 231.

²³⁶ While the USA, Canada, the UK and other EU countries support the warrant, China, the Arab League and the African Union (AU), saw the indictment as an attempt to destabilise Sudan and worsen the already complicated political atmosphere in Africa.

See "Sudan ICC's Arrest Warrant on Al Bashir" <<http://allafrica.com/stories/200903200400.html>> [Accessed on 12 September 2009].

²³⁷ Peace and Security Council 142nd Meeting, PSC/MIN/Comm (CXLII) <http://www.iccnw.org/documents/AU_142-communique-eng.pdf> [Accessed on 12 September 2009].

²³⁸ Assembly of the Union, Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of the Sudan, AU Doc. Assembly/AU/Dec. 221(XII) (3 February 2009).

²³⁹ See "The African Union" <http://www.asil.org/rio/africanunion_sum09.html> [Accessed on 14 September 2009].

took place on 8 and 9 June 2009, but surprisingly ended by reaffirming a commitment to the Court.²⁴⁰

However, the situation was completely different when the issue was deliberated during the 13th Assembly Session on 1-3 July 2009. The Assembly adopted a decision, in which it determined that, member States would not co-operate with the ICC, which in other words means that, Al Bashir may travel freely across Africa without fear of being arrested and surrendered to the ICC.²⁴¹ In making the decision, it cited Article 98 of the Rome Statute, which states that "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 [...], unless the Court can first obtain the co-operation of that third State for the waiver of the immunity." However, as has been discussed in the previous chapter in relation to the application of this provision, in deciding to make the request, it is for the Court to determine whether immunity is applicable in the particular situation (which in this case the Pre-Trial Chamber I did).

It is submitted that this resolution is in violation of the obligation of the 30 African States Parties to fully co-operate with the Court in the arrest and surrender of suspects. In this regard, South Africa formally announced that it will not abide by the AU resolution taken to

²⁴⁰ *Ibid.*

²⁴¹ Decision On The Meeting of African States Parties to The Rome Statute of The International Criminal Court (ICC) Doc. Assembly/AU/13(XIII) Available at <[http://www.africaunion.org/root/AU/Conferences/2009/july/summit/decisions/ASSEMBLY%20AU%20DEC%20243%20-%20267%20\(XIII\)%20_E.PDF](http://www.africaunion.org/root/AU/Conferences/2009/july/summit/decisions/ASSEMBLY%20AU%20DEC%20243%20-%20267%20(XIII)%20_E.PDF)> [Accessed on 14 September 2009].

stop co-operation with the ICC in the arrest and surrender of Al Bashir.²⁴² A similar view was also expressed by the governments of Botswana²⁴³ and Uganda.²⁴⁴ Since the issuing of the arrest warrant, Al Bashir has limited his visit to non-States Parties. These countries are Egypt, Eritrea, Libya, Qatar, Saudi Arabia, Ethiopia and Zimbabwe.²⁴⁵

In the situation in Darfur, despite the Security Council's referral, none of the arrest warrants issued have been executed, nor has any action taken so far. What rather proved successful was the summons which was unsealed on 17 May 2009, and which had been issued for the first time on 7 May 2009 for Bahr Idriss Abu Garda. Abu Garda is charged with three counts of war crimes allegedly committed during an attack carried out on 29 September 2007 against the AU peace-keeping Mission in Sudan (AMIS), stationed at the Military Group Site Haskanita (MGS Haskanita) in North Darfur.²⁴⁶ The suspect appeared voluntarily before Pre-Trial Chamber I, on 18 May 2009. The confirmation of hearing is scheduled for 19 October 2009. Currently, Pre-Trial Chamber I is also reviewing the

²⁴² See "South Africa legally rebuts AU resolution on arresting Bashir" <<http://www.sudantribune.com/spip.php?article31996>> [Accessed on 14 September 2009].

²⁴³ See "Botswana Faults African Union Decision over Sudanese President Omar al-Bashir" <<http://www.somalipress.com/news/2009-jul-06/botswana-faults-african-union-decision-over-sudanese-president-omar-al-bashir.html>> [Accessed on 14 September 2009].

²⁴⁴ See <<http://blog.taragana.com/n/uganda-willing-to-arrest-sudanese-president-al-bashir-on-international-war-crimes-warrant-108093/>> [Accessed on 17 September 2009].

²⁴⁵ Al Bashir was attending a two-day Common Market for Eastern and Southern Africa summit Zimbabwe was hosting in the northwestern resort town of Victoria Falls. See <<http://blog.taragana.com/n/indicted-sudanese-leader-al-bashir-arrives-in-zimbabwe-for-regional-economic-summit-74385/>> [Accessed on 20 September 2009].

²⁴⁶ Pre-Trial Chamber I, determined that there are reasonable grounds to believe that Abu Garda is criminally responsible for the war crimes of: violence to life, in the form of murder, whether committed or attempted, within the meaning of article 8(2)(c)(i) of the Statute; intentionally directing attacks against personnel, installations, material, units or vehicles involved in a peacekeeping mission within the meaning of article 8(2)(e)(iii) of the Statute; and pillaging, within the meaning of article 8(2)(e)(v) of the Statute. See *The Prosecutor v. Bahr Idriss Abu Garda* ICC-02/05-02/09.

See <<http://www.iccpi.int/Menu/ICC/Situations+and+Cases/Situations/Situation+ICC+0205/Related+Cases/ICC02050209/ICC02050209.htm>> [Accessed on 17 September 2009].

Prosecutor’s application, submitted on 20 November 2008, for the issuing of warrants of arrest or, alternatively, summonses to appear for two other individuals who allegedly participated in the attack on MGS Haskanita.²⁴⁷

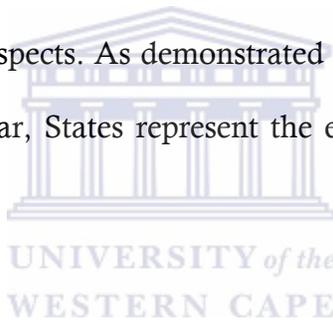


²⁴⁷ “New suspect in the situation in Darfur, Sudan: First appearance scheduled for Monday, 18 May 2009” <http://www.iccpi.int/menus/icc/press%20and%20media/press%20releases/new%20suspect%20in%20the%20situation%20of%20darfur_%20sudan_%20initial%20appearance%20hearing%20scheduled%20on%20monday%2018%20may?lan=en-GB> [Accessed on 17 September 2009].

CHAPTER FIVE

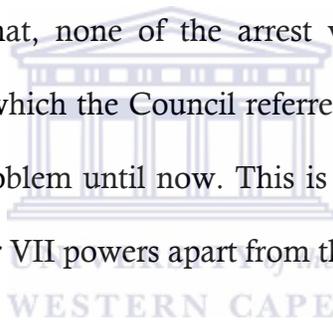
5. CONCLUSION AND RECOMMENDATION

The ICC was established with the chief aim of eradicating impunity, by punishing perpetrators of the heinous crimes within its jurisdiction. These crimes are crimes against humanity, war crime and genocide. In order to dispense justice, however, the Court has to secure the appearance of these individuals before it. As the ICC is not allowed to hold trials in the absence of the accused, and given the fact that the Court does not have its own police, military or law enforcement forces, it has to rely completely on the co-operation of States, for the arrest and surrender of suspects. As demonstrated in the discussion above, while the Court represents the judicial pillar, States represent the enforcement pillar on the basis of which the Court stands.



For its effectiveness, the co-operation regime of the Rome Statute has laid down a clear obligation for States Parties to co-operate fully with the Court, with a corresponding duty to enact an implementing domestic legislation. Once the Court requests the co-operation of a States Party, with respect to the arrest and surrender of suspects, it does not allow for any exceptions. The Court will, however, first address the possible grounds for refusal. Non-States Parties on the other hand have no obligation to co-operate under the Statute, unless they enter into an *ad hoc* arrangement with the Court, or the Security Council referred the matter under its Chapter VII power and decides that they shall co-operate with the Court. Furthermore, the Statute provides the possibility, for the Court to secure the co-operation of international/intergovernmental organisations.

Having established such a clear duty, while the ICC may issue requests and make orders for the surrender of accused persons, it has no direct sanctioning capacity beyond the threat of reporting non-compliance to the ASP's or the Security Council, depending on who referred the matter to the Court. Moreover, the consequence of States that do not comply with the duty to co-operate is not specified under the Statute. In cases where States Parties referred the matter, it is left to the ASP's to determine the Sanction to be applied. On the other hand, Security Council can theoretically back up its referrals with its Chapter VII authority. "Under the current structure of the ICC and in the current political climate however, Security Council referrals to the ICC are not more enforceable than State Party referrals."²⁴⁸ This is evident from the fact that, none of the arrest warrant issued in relation to the atrocities committed in Darfur, which the Council referred, have been executed and nothing has been done to remedy the problem until now. This is because the Security Council has not chosen to exercise its Chapter VII powers apart from the referral itself.



What is more, is that the Security Council has referred a very difficult situation to the Court, without proper reflection as to the applicable legal co-operation instrument to discharge its mandate effectively.²⁴⁹ This makes it uncertain to what degree Sudan is under a legal obligation to provide legal assistance to the Court. This is a particularly intractable problem given the fact that domestic law is relied upon heavily. This means that the Court will have a difficult job in determining that national decisions were wrong. It is important that the legal regime is clarified and adhered to properly.

²⁴⁸ See Minogue *Supra* note 152,680.

²⁴⁹ See Sluiter *Supra* note 103, 884.

Moreover, it has been discussed above that, there are many States Parties, mostly African countries, that do not have an implementing legislation yet, despite their duty under the Statute. This will have a negative impact on the enforcement of the Court's decision. This is, of course, with the recognition of the fact that, effectiveness for a successful enforcement is more dependent upon other practical factors. The following recommendation is thus not limited to the legal aspect of the co-operation regime, but a reflection of the entire observation made in this study. It thus relates to the measure that need to be considered by the ASP's, the Security Council and the Court.

To begin with the legal aspect, Security Council, when referring situations to the Court should make a clear choice as to the appropriate co-operation regime. If the Rome Statute is to apply in substance to non-States Parties, it should be explicitly stated. Otherwise the Security Council should state categorically another regime which it considered more appropriate. In this regard, it is important to recognise that, Part 9 of the Statute is not very helpful for Security Council referrals affecting non-States Parties and unco-operative States. It is therefore necessary to re-examine Part 9 in light of the Court's experiences with the Darfur situation, and include more corrective mechanisms in relation to clearly unco-operative States.²⁵⁰ Taking into consideration the fact that, unco-operative States could use some deficiencies in the co-operation regime to its advantage, it is very important to introduce a degree of flexibility regarding the co-operation law applicable in such cases and provide for stronger corrective mechanisms in relation to the reference to national law.²⁵¹

²⁵⁰ *Ibid.*

²⁵¹ *Ibid.*

Furthermore, in relation to States Parties that do not have a domestic legislation, best practices should be identified and States should be assisted in drafting and introducing implementing legislation.²⁵²

Most importantly, the Court should not tolerate refusals to co-operate. A refusal to co-operate should be dealt with immediately, using the available enforcement procedure, which, as mentioned above, and as set out in Article 87(7), is to report the matter to the Assembly or the Security Council. Postponing this procedure creates the impression that instances of refusal are tolerated. This seems to be the case in the Darfur situation, where, despite the repeated notification by the Prosecutor of a lack of co-operation from Sudan, the Court has postponed making such a finding.

Moreover, in many of the situations before the ICC, field missions of international organisations or peacekeeping or peace-enforcement operations may have better access to a particular territory.²⁵³ In this regard securing their co-operation could become very important for the Court. It is evident from the discussion in the last chapter that, the mandates of peacekeeping missions have been strictly interpreted or not extended to provide co-operation in the arrest of indictees. The experience of the ICTY with SFOR has shown that the conclusion of such agreements will be particularly important where an international organisation is exercising military or law enforcement functions.²⁵⁴ Hence the Court or the

²⁵² See Kaul *Supra* note 170,370 and Kaul *Supra* note 89,102

²⁵³ See Rastan *Supra* note 56,445.

²⁵⁴ *Ibid.*

Prosecutor should consider seeking the co-operation of such intergovernmental organisation that is consistent with the latter's mandate.

Currently some warrants of arrest remain unexecuted and in some of the situations atrocities have continued to be committed. Taking into consideration the fact that the U.S is not in support of the Court, the one aspect of which, as discussed in this study, is expressed by its signing of the bilateral immunity agreements, some argue that if the U.S reversed its position on the ICC, it could influence the Security Council to issue more effective resolutions that would raise the chances of States assisting the ICC in enforcing the arrest warrants. In this regard, there is a stronger reason to subscribe to the argument that, if investigations and prosecutions continue to stall because no arrest warrants are executed, and the ICC has no one to try in its investigations, then “the ICC should debate what modifications it could make to bring the U.S [to the Court], and as a consequence, what sacrifices it is willing to make to its own legitimacy.”²⁵⁵

As a final remark, Summons is less confrontational and humiliating than arrest and could be seen a one step of a process, where the pressure might be increased over time. At least, it has proved effective in the Abu Garda case, in relation to the situation in Darfur, and hence, should therefore be seriously considered.

The continued issuing and prompt execution of arrest warrants would enhance the ICC's credibility significantly. In this regard, future co-operation with the ICC will strengthen the

²⁵⁵ See Minogue *Supra* note 152.

Court's effectiveness, while its lack will prevent the ICC from progressing with its mission to bring criminals to justice. The success of the ICC under these circumstances will depend upon real commitment and co-operation from States Parties. However, it is also important to take into account the above considerations.



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