A GIANT WITHOUT LIMBS: THE INTERNATIONAL CRIMINAL COURT'S STATE-CENTRIC COOPERATION REGIME[1]

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

I INTRODUCTION

At the end of World War II, the possibility of a permanent international criminal court was almost realised with the establishment of two international military tribunals at Nuremberg and Tokyo. In 1946, the inaugural session of the United Nations (UN) General Assembly adopted Resolution 95(I), which affirmed 'the principles of international law recognised by the Charter of the Nuremberg Tribunal and the judgment of the [IMT] Tribunal'. [2] In 1951, the UN established a Special Committee of the General Assembly to draft a convention for the establishment of an international criminal court.[3] After decades of political wrangling and disagreement, states finally agreed to adopt the *Rome Statute of the International*

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[1] This title is inspired in part by the comments of Antonio Cassese, former President of the International Criminal Tribunal for the former Yugoslavia, made in 1997. Professor Cassese noted:

> The ICTY remains very much *like a giant without arms and legs – it needs artificial limbs to walk and work. And these artificial limbs are state authorities.* If the cooperation of states is not forthcoming, the ICTY cannot fulfil its functions. It has no means at its disposal to force states to cooperate with it (emphasis added).

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

[2] *Affirmation of the principles of International Law Recognised by the Charter of the Nuremberg Tribunal,* GA Res 95, UN GAOR, 1st Sess, UN Doc A/64/Add 1 (1946).

[3] Benjamin Ferencz, *An International Criminal Court* (2nd vol, 1980) 298-305.

Criminal Court (the *Rome Statute*) in 1998, establishing an International Criminal Court.[4] This brought to fruition efforts first inaugurated at the end of World War I.

Support for the ICC was overwhelming.[5] However, several key states, most notably the United States, were among those opposing and abstaining from its establishment:

> There is little doubt that the end of political and military confrontation between the superpowers (also known as the 'cold war') ... supplied the necessary, albeit not sufficient, precondition for the efforts to create the International Criminal Court to be taken seriously. That political opportunity was, however, far from enough to render these efforts successful. Nonetheless, it developed the right climate in which the political will could grow and from which it eventually has emerged. But there was an even more important component: the Rome Conference. It served as a litmus test to see whether or not the international community en globe [had] achieved such a level of development that would enable the nations to restore peace and order and maintain it, using the International Criminal Court.[6]

The overwhelming support for the establishment of the ICC reflects a growing belief that:

> [Today] nations, States and governments are capable of thinking and making decisions not only in particular (egoistic) categories, but also in a global context...Apparently, the majority of governments and their representatives in Rome came to the conclusion that justice for the most heinous crimes is much too serious and important to be meted out by individual States.[7]However, the dilemma that arose over fostering agreement among State parties, without diluting core principles essential to an effective international penal regime, coloured the Rome Conference.[8]

The *Rome Statute's* drafting process resembled a battleground, in particular in relation to whether the ICC should establish a 'horizontal' or 'vertical' paradigm vis-à-vis states. Elaborating on the nature of these paradigms, Professor Antonio Cassese notes:

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

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[4] *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, UN Doc A/CONF 183/9, (entered into force 1 July 2002).

[5] 120 states voted in favour, seven states against, with 21 states abstaining.

[6] Michael Plachta, 'Contribution of the Rome Diplomatic Conference for the Establishment of the ICC to the Development of International Criminal Law' (1999) 5 *University of California Davis Journal of International Law and Policy* 181.

[7] Ibid.

[8] Chimene Keitner, 'Crafting the International Criminal Court: Trials and Tribulations in Article 98(2)' (2001) 6 *UCLA Journal of International Law and Foreign Affairs* 215, 271.

[9] Cassese, above n 1, 14.

Considering that fundamental norms, rules, and practices of international law rest on the state, the paradigm adopted would be especially important to the ICC's ultimate effectiveness. The reluctance of states to give way to international criminal jurisdiction, with respect to matters which would otherwise be subject to their exclusive sovereignty, was clear in negotiations dealing with the allocation of jurisdiction between the ICC and national authorities. Many states were concerned that an international penal process based on the 'vertical' paradigm would significantly threaten the overall concept of sovereignty. However, the ICC's goal of attempting to influence the behaviour of individuals at all levels of authority, through enforcement of international law, could only be practically realised through incorporating the tenets of a 'vertical' paradigm. This limits states' abilities to frustrate the ICC's work. In the end, a number of solutions adopted in the *Rome Statute* 'differ from typical and traditional constructions, which transpire from international treaty regulations, with respect to constituent elements of particular forms of cooperation'.[10] This is a manifestation of the 'vertical' paradigm.

There was a need to strike a balance between achieving consistency and building consensus.[11] This was more pronounced because the state was called upon to reconfigure certain key aspects of its domestic jurisdiction as well as state-crafted multinational regimes in favour of a functioning international regime.[12] Consultations, consensus and compromise were at the heart of the statute-making process. In an articulate encapsulation, Professor Michael Plachta states:

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

Reflecting on the tension between domestic jurisdiction and international penal requirements, Dr Chimene Keitner observes:

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[10] Plachta, above n 6, 185-186.
[11] Ibid 217.
[12] Ibid 215.
[13] Ibid 186-187.

> [t]he *Rome Statute* embodies a carefully crafted compromise between a State-centred idea of jurisdiction, and a more inclusive international vision. The State-centred idea, in its extreme manifestation, would uphold a State's exclusive jurisdiction to prosecute and try its own citizens for war crimes, genocide, and crimes against humanity, and to prosecute and try citizens of other States who commit such acts on the territory of the forum State. An inclusive vision would promote the idea of universal jurisdiction, whereby individuals of any nationality could be tried for certain crimes by any State acting on behalf of humanity as a whole. The ICC follows a middle path.[14]

Under the *Rome Statute*, primary jurisdiction is assigned to the ICC's member states, with the ICC as a fallback mechanism. In the event that states are unwilling or unable to carry out their obligation to investigate and prosecute crimes, the ICC's complementary jurisdiction is triggered allowing it to step in to fill the void.[15]

The *Statute* reflects the 'Direct Enforcement Model' as advanced by Professor Cherif Bassiouni,[16] which presupposes the existence of the ICC and the supporting machinery needed in any criminal justice system. It contains all the necessary elements of criminal legislation, such as a 'general part' that typically includes the principles of criminal liability, defences and sanctions, a code of criminal procedure, as well as problems traditionally discussed under the aegis of international cooperation in criminal matters.[17]

An intriguing aspect of the *Rome Statute* is that it combines jurisdiction to prescribe, adjudicate and enforce all in one instrument. The ICC's success or failure depends upon its enforcement provisions as encapsulated in Part 9 (the international cooperation and judicial assistance regime). These provisions establish the conditions under which the international community, or more precisely the state parties to the *Statute*, may enforce the ICC's orders and directions. Like the international penal institutions before it, the success of the ICC depends upon international cooperation. An institutional check on the ICC's powers requires that it work through states in conducting investigations, obtaining evidence, and apprehending suspects. International cooperation and judicial assistance are essential to the ICC's ultimate effectiveness through its imposition of an affirmative obligation on states.[18]

This article considers the complex international cooperation regime created by the *Rome Statute*, and, as a corollary, attempts to determine the position of the regime within the international system's wider context. The goals are threefold: first, to provide a descriptive account of the *Rome Statute's* international cooperation and judicial assistance regime; second, to offer a legal analysis of the regime as well as

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[14] Keitner, above n 8, 225.

[15] Both the Preamble to *the Rome Statute* and art 1 express a fundamental principle: that the Court is to be 'complementary' to national criminal jurisdictions. Although complementarity is not defined, (and indeed, there is no general 'definition' section in the Statute) there are definitional provisions within particular articles.

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

[17] Ibid 37-47 (describing direct and indirect enforcement models of international law).

[18] Part 9 contains provisions on the nature and type of international cooperation and judicial assistance by States.

an insight into the approaches that states have adopted in implementing their obligations; and third, to expose the potential dangers facing the ICC, especially through art 98, which contains provisions relating to waiver of immunity and consent to surrender.

II THE *BLASKIC CASE*: THE VITALITY OF A 'VERTICAL' PARADIGM

The creation of the International Criminal Tribunal for the Former Yugoslavia (the ICTY) and the International Criminal Tribunal for Rwanda (the ICTR) raised questions concerning the appropriate relationship between international ad hoc institutions and national courts. The Statutes of these Tribunals recognised that national courts have concurrent jurisdiction, while clearly asserting the primacy of the Tribunals.[19] This extraordinary jurisdictional priority is justified by the compelling international humanitarian interests involved and also by the UN Security Council's determination that the situation in the former Yugoslavia and Rwanda constituted a threat to international peace and security. With regard to both ad hoc tribunals, states needed to establish domestic procedures in order to give effect to their obligations and to comply with requests or orders concerning the taking of evidence and the surrender or transfer of accused persons. Many states subsequently modified domestic law, or enacted new legislation, to satisfy their obligations. The balance achieved between the jurisdiction of national courts and that of the ad hoc international criminal tribunals in many ways marked the end of an era. Previously the exercise of criminal jurisdiction had fallen within the unfettered prerogative of sovereign states. The UN Security Council created these ad hoc tribunals as an extraordinary response to a specific and narrowly defined threat to international peace and security. However, the practice and application of the ICTY and the ICTR Statutes regarding international cooperation foreshadowed the political and legal disputes over the creation of a permanent International Criminal Court and the possible contours of its cooperation regime.

In January 1997, Judge McDonald, presiding over Trial Chamber II of the ICTY, agreed to the Prosecutor's request to issue *subpoenae duces tecum* to the State of Croatia and its Defence Minister.[20] In doing so, she demonstrated the extent to which state sovereignty had been weakened by the international penal institutions. In addition, this provided an opportunity to give a ringing endorsement to the 'vertical' paradigm as an appropriate model through which to give 'teeth' to international penal institutions seeking to enforce the states' obligations to cooperate.

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[19] *Statute of the International Criminal Tribunal for the Former Yugoslavia* art 9; *Statute of the International Criminal Tribunal for Rwanda* art 8.

[20] International Criminal Tribunal for the former Yugoslavia, 'Blaskic Case: Croatia and Bosnia and Herzegovina Ordered to Comply with Prosecutor's Request for Production of Documentary Evidence' (Press Release, 14 February 1997) <http:// www.un.org/ICTY/p156-e.htm> at December 2000.

Prosecutor v Tihomir Blaskic[21](the *Blaskic Case*) was one of the more interesting cases before the ICTY, if only because the promotion of Colonel Blaskic to General made him the highest-ranking detainee in The Hague.[22] On 15 January 1997, at the instigation of the Prosecutor, McDonald J issued *subpoenae duces tecum* to the Republic of Croatia and to its Defence Minister Gojko Susak[23] requesting thirteen specified categories of documents. These documents were believed to be of evidentiary value in relation to the *Blaskic Case*.[24] The subpoenae were issued pursuant to the Prosecutor's request, relying on arts 18(2) and 19(2) of the ICTY Statute and r 39(ii), (iv) and r 54 of the Rules of Procedure and Evidence.[25] Croatia, in a letter dated 10 February 1997, declared its readiness for full cooperation under the terms applicable to all states, but challenged the legal authority of the Tribunal to issue a *subpoena duces tecum* to a sovereign state and objected to the naming of a high government official in a request for assistance pursuant to art 29 of the Statute of the International Tribunal.[26] The subpoenae were suspended ten days later by McDonald J in order to discuss 'important questions of principle' with the parties, including the power of a Judge to issue a subpoena to a sovereign state or to a high government official of that State.[27]

On 18 July 1997, the Trial Chamber upheld and reinstated the subpoenae, declaring that 'a Judge or Trial Chamber of the International Tribunal has the authority and power to issue orders to states and individuals, including high government officials, for the production of documents required for the preparation or conduct of a trial' and that those States and officials were under a clear obligation to comply with such orders.[28] Declaring both the order and the term 'subpoenae' to have been appropriate, the Trial Chamber demanded compliance by 18 August 1997.[29] However, this order was met with further objections, and the subpoena issue was subsequently appealed. On 22 September 1997, Croatia's challenge to the *subpoenae duces tecum* and the subpoena decision of Trial Chamber II was heard

[21] *Prosecutor v Tihomir Blaskic,* Case No IT-95-14, ICTY Trial Chamber I, 3 March 2000 <http:// www.un.org/ICTY/> at 14 March 2004. According to the indictment, Tihomir Blaskic was a career military officer, acting as Commander of the Central Bosnia Operative Zone of the Croatian Defence Council (HVO) during the Yugoslav conflict. Blaskic was indicted for 'ethnic cleansing' of the Lasva river valley area in Central Bosnia between May 1992 and May 1993.

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

[23] On 15 January 1997, Judge McDonald also issued *subpoenae duces tecum* to Bosnia, Herzegovina, and to the Custodian of the Records of the Central Archive, of what was formerly the Ministry of Defence of the Croatian Community of Herbage Bosnia: *Prosecutor v Tihomir Blaskic,* Case No IT-95-14, ICTY Trial Chamber I, 3 March 2000, [42] <http:// www.un.org/ICTY/> at 14 March 2004.

[24] International Criminal Tribunal for the former Yugoslavia, above n 20.

[25] International Criminal Tribunal for the former Yugoslavia, 'Blaskic Case: Croatia and Bosnia and Herzegovina Ordered to Comply with Prosecutor's Request for Production of Documentary Evidence' (Press Release, 14 February 1997) <http:// www.un.org/ICTY/p156-e.htm> at December 2000.

[26] Letter from Mr Srecko Jelinic to The International Criminal Tribunal for the Former Yugoslavia, 10 February 1997, in *The Prosecutor v Tihomir Blaskic,* Decision on the objection of the Republic of Croatia to the issuance of *subpoenae duces tecum*, Case no. IT-95-14-PT, ICTY Trial Chamber II, 18 July 1997.

[27] *The Prosecutor v Tihomir Blaskic,* Decision on the objection of the Republic of Croatia to the issuance of *subpoenae duces tecum*, Case no. IT-95-14-PT, ICTY Trial Chamber II, 18 July 1997.

[28] Ibid.

[29] Ibid.

by the Appeals Chamber.[30] Surprisingly, the Appeals Chamber agreed, in part, with Croatia, unanimously quashing both subpoenae. However, upon closer inspection, the unanimous decision of the Appeals Chamber failed to change substantially the Tribunal's direction. Instead, the Appeals Chamber allowed the Prosecutor to submit a new request for a 'binding order to [the State of] Croatia alone'.[31]

The Appeals Chamber's judgment extended the Tribunal's reach beyond the power to indict, try and imprison individuals, by strengthening the its claim to demand the loosely defined 'cooperation' of states. In recalling Croatia's challenge, the Appeals Chamber rejected this denial of jurisdiction as a 'manifest misconception'. [32] It asserted that 'it is self-evident that the International Tribunal, in order to bring to trial persons living under the jurisdiction of sovereign states, not being endowed with enforcement agents of its own, must rely on the cooperation of states'.[33] It further stated that the International Tribunal 'must turn to states if it is effectively to investigate crimes, collect evidence, summon witnesses and have indictees arrested and surrendered to the International Tribunal'.[34] In doing so they addressed the very clauses that may be the most objectionable to state parties.

Despite upholding Croatia's arguments for state sovereignty, the Appeals Chamber also ruled that states would not be allowed to claim national security interests as a basis for withholding documents or other evidentiary materials requested by the International Tribunal, unless the legitimacy of their concerns has been assessed by a Trial Chamber.[35] To this extent, it hoped to avoid frivolous appeals based on state security by imposing a strict review standard on all such claims.

The *Blaskic Case* is of greatest significance for its role in defining the reach of the Tribunal with respect to states. With the handing down of the Appeal Chamber's judgment on the *subpoenae duces tecum*, the Tribunal gained strength in terms of exacting from states more than the unwilling 'cooperation' to which they had bound themselves in the Dayton Accords. Although *Blaskic* demonstrated the state's tenacity in guarding its sovereignty, it broke new ground. It demonstrated that, loosely backed by the Security Council, the Tribunal possesses the power to issue binding orders to sovereign states. It highlighted the significance of the international penal process and its accompanying tenet of international justice, reflecting an evolution in the perception of sovereignty. The *Blaskic Case* heralded a qualitative shift, necessitating an ethical vision in which enforcement of international norms supersedes certain state rights and prerogatives. This institutionalisation of

[30] The Appeals Chamber consisted of Judge Cassese (Italy, presiding), Judge Karibi-Whyte (Nigeria), Judge Li (China), Judge Stephen (Australia), and Judge Vohrah (Malaysia).
[31] International Criminal Tribunal for the former Yugoslavia, '*Subpoena* Issue--The Appeals Chamber Unanimously Quashes the *Subpoenae Duces Tecum* Issued to Croatia and its Defence Minister' (Press Release, 29 October 1997) <http://www.un.org/ICTY/p253-e.htm> at 12 December 2000.
[32] *The Prosecutor v. Tihomir Blaskic*, Decision on the objection of the Republic of Croatia to the issuance of *subpoenae duces tecum*, Case no. IT-95-14-AR 108*bis*, ICTY Appeals Chamber, 29 July 1997, 16.
[33] Ibid 17.
[34] Ibid.
[35] International Criminal Tribunal for the former Yugoslavia, above n 25.

international penal processes represents a shift in authority from states to the international community. International justice, although controlled by states, is ineffaceably external to their power. It was against the background of this monumental case (as well as others that came before the two ad hoc Tribunals) that states assembled in Rome in the summer of 1998 with the goal of creating a permanent international penal tribunal.

III THE ROME STATUTE'S INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE REGIME

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

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

The international cooperation and judicial assistance regime encapsulated in Part 9 is one of the most complex sections of the *Rome Statute*. The 17 articles of this Part focus on the interaction between the Court and states in the arrest and transfer of suspects to the Court and in the conduct of investigations or prosecutions by the Court on state territory. Not surprisingly, Part 9 is the least supranational section of the *Statute*. Although art 86 requires state parties to 'cooperate fully with the Court in its investigation and prosecution of crimes,'[38] the proceeding articles contain numerous exceptions and qualifications.[39] Only effective, efficient and prompt assistance and cooperation of states will guarantee the viability of the Court.[40]

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

[37] Jerry Fowler, 'Not Fade Away: the International Criminal Court and the State of Sovereignty' (2001) 2 *San Diego International Law Journal* 125, 146.

[38] *Rome Statute of the International Criminal Court* art 86.

[39] Leila Nadya Sadat and S Richard Carden, 'The New International Criminal Court: An Uneasy Revolution' (2000) 88 *Georgetown Law Journal* 381, 444.

[40] Plachta, above n 6, 190.

A *Implementing Legislation*

As classically conceived, the jurisdiction to enforce encompasses rules governing the enforcement of law by a state through its courts, as well as through 'executive', 'administrative', and 'police action'.[41] In relation to the envisaged international penal process, the most obvious point is that the ICC has no police force.[42] Indeed, it was unthinkable to propose one either before or during the Rome Conference, although there was at least some precedent for doing so.[43] Nevertheless, the Court's orders require enforcement, whether they are arrest warrants, judgments, sentences or orders to seize assets. The delegates of the Rome Conference were aware of the problem, with many provisions of the *Statute* directly addressing this issue.[44] However, virtually all of these provisions are qualified by three principles. First, the Court will not be permitted to sanction states directly for non-compliance with its orders. Rather, it will be required to make findings of non-compliance and direct those to the Assembly of state parties and the Security Council (in the case of a Security Council referral to the Court). Second, the Court may not compel state compliance with its orders.[45] Third, the Court's personnel will have no right, in most cases, to implement directly the execution of their duties on the territories of states, but will work via the authorities present in the requested state and will be subject to national law.[46]

However, there are exceptional circumstances: pursuant to articles 57(3)(d), 54(3)(d) and 99(4), the ICC can take evidence directly on the territory of a state party without having secured the consent of that state. Article 57(3)(d) establishes that judicial authorisation for a direct investigation on the territory of a state party may be granted without having secured the cooperation of that state. However, this extraordinary power is subject to the condition that the state party is *clearly* unable to execute a request for cooperation, due to the unavailability of any authority competent to execute the request.[47] This article appears to be a safety net, facilitating the Court's activities in failing states where there exists no credible legal system in place, or in failed states where the state, or parts of it, may be under the occupation and control of a third party. Even with reliance on the local legal systems of functional states, art 54(3)(d) provides that the prosecutor may seek the cooperation of any state or intergovernmental organisation and may seek a suitable arrangement with any of them, in accordance with its respective competence and/or mandate.[48] Article 99(4) similarly provides the prosecutor with power to execute

[41] See American Law Institute, 'Restatement of the Law: Foreign Relations Law of the United States' (1986) s401(c).
[42] As one French writer has astutely remarked, the Court represents 'justice sans police': Jean-Eric Schoettl, 'Decisions du Conseil Constitutionnel: Cour Penale Internationale' *L'actualite Juridique – Droit Administratif* (20 March 1999) 230.
[43] Leila Sadat Wexler, 'The Proposed Permanent International Criminal Court: An Appraisal' (1996) 29 *Cornell International Law Journal* 665, 673.
[44] See, eg, *Rome Statute of the International Criminal Court* art 70.
[45] Sadat and Carden, above n 39, 415-416.
[46] Ibid.
[47] *Rome Statute of the International Criminal Court* art 57(3)(d).
[48] *Rome Statute* art 54(3)(d).

directly a request that is unencumbered by compulsory measures. This provision was amongst the most controversial in the *Rome Statute*. It is however carefully drafted and will not in practice grant the prosecutor unbridled power, appearing to rely rather on tacit state consent. The prosecutor must enter into 'all possible consultations' with the requested state party,[49] considering that a hostile or antagonised government will render the authority meaningless.[50]

It is apparent that the ICC will rely heavily on state cooperation for its success. State parties will be asked to arrest and surrender suspects, investigate and collect evidence, extend privileges and immunities to ICC officials, protect witnesses, enforce ICC orders for fines and forfeiture and, at times, prosecute those who have committed offences against the administration of justice. Key to this cooperation will be domestic legislation permitting the state party to assist the ICC when requested. The current pace of ratification is steady, with many states adopting comprehensive ICC legislation on cooperation. The future of the ICC depends on all state parties adopting laws enabling each country to cooperate with the Court. The duty to cooperate with the ICC imposed on states parties by the *Rome Statute* is twofold: a general commitment to cooperate, and an obligation to amend their domestic laws to permit cooperation with the Court.

Articles 86 and 88 form the foundation of the obligation on state parties to cooperate with the ICC. According to art 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'.[51] This general requirement is supplemented by the ICC's Rules of Procedure and Evidence, [52] which govern specific aspects of cooperation in such contexts as the arrest and surrender of individuals and the collection of evidence. Article 88 obliges states to adopt domestic laws to permit cooperation with the ICC.[53] Pursuant to art 88, a state Party has a duty to ensure that its domestic laws provide guidelines for handling requests for arrest and surrender, as well as for other forms of cooperation. This duty arises even before a state Party receives a request. The inclusion of art 88 in the *Rome Statute* is of central importance because of references to domestic law and procedures throughout the Statute.[54] states are expected to implement art 88 in good faith, like any other obligation under the *Statute*, by making legislative changes at the domestic level.

The obligation to cooperate with the ICC has been actively incorporated through municipal mechanisms. Australia and Switzerland opted to include a general

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[49] *Rome Statute* art 99(4)(a).
[50] Annalisa Ciampi, 'Other Forms of Cooperation' in Antonio Cassese et al (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) Volume I, 1736-1739.
[51] *Rome Statute* art 86.
[52] Preparatory Commission for the International Criminal Court, 'Finalised Draft Text of the Rules of Procedure and Evidence', UN Doc PCNICC/2000/L.2/Add.1 (2 November 2000).
[53] *Rome Statute* art 88. Article 88 provides that 'States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part'.
[54] See Göran Sluiter, *International Criminal Adjudication and the Collection of Evidence: Obligations of States* (2002) 194-97.

provision in their implementing legislation to cover overall procedures of cooperation.[55] New Zealand added a provision to already existing obligations to give judicial assistance and cooperation, extending these obligations to cover the ICC. This was an approach that had initially been taken in Scandinavia under Finland's implementing legislation.[56] Similarly, Canada opted to add a provision to existing regimes of cooperation to encompass the obligations undertaken under the *Rome Statute*.[57] This is but a brief overview of efforts by State parties to provide cooperation and assistance, which will be considered in further detail below.

With the steady pace at which the *Rome Statute* continues to be ratified, it is heartening to observe that states continue to pass the domestic laws necessary to cooperate with the ICC:

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

It is essential that all state parties adopt comprehensive legislation implementing the obligations under the *Rome Statute*, as this will allow the Court to begin its work without being repeatedly frustrated by states that do not yet have laws in place allowing them to comply.[59]

It is important at this juncture to consider the various duties of cooperation that the *Rome Statute* enshrines, the nature and content of those obligations, and the manner in which state parties have sought to give effect to the letter and spirit of their obligations.

B *Investigation and Evidence Gathering*

The purpose of the *Rome Statute*, and domestic legislation implementing it, is to enable the Court's investigators to conduct thorough investigations as soon as possible after the commission of offences. Of vital importance to a successful

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[55] *International Criminal Court Act 2002* (Cth) s3; *Federal Law on Cooperation with the International Criminal Court 2001* (Switzerland) art 3.

[56] *International Crimes and International Criminal Court Act 2000* (NZ) s3; *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 2000* (Finland) s 4.

[57] *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24, ss 47-53 and 56-69.

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

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

investigation is states' willingness to provide assistance in a timely fashion. A comprehensive analysis of the utility of domestic legislation will be possible only where ICC officials have undertaken an investigation, and the legislation, as well as the state party's willingness to cooperate, is put to the test. However, prior to addressing issues of investigations and evidence gathering it is essential to recall that the *Rome Statute* is founded upon the principle of complementarity:[60]

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

Article 88 of the *Rome Statute* requires that state parties ensure the existence of procedures under their domestic law to enable them to cooperate with the Court in investigative and evidentiary matters.[62] This duty exists in addition to the general obligation upon stateparties to cooperate fully with the 'investigation and prosecution of crimes within the jurisdiction of the Court'.[63] A distinction must be drawn between investigations commenced pursuant to powers of the Court, and those initiated by the Security Council. Investigations commenced pursuant to the powers of the Court are initiated either by stateparties, who refer situations to the Court according to arts 13(a) and 14, or the prosecutor, who can launch investigations *proprio motu* pursuant to arts 13(c) and 15. These investigations will be governed by the *Rome Statute* and conducted with the assistance of state parties, as mandated by art 86. States that are not parties to the *Rome Statute* have no prima facie obligation to cooperate with ICC investigators.[64]

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

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[60] Article 17 of the *Rome Statute* formulates the complementarity regime of the ICC:

> 1. Having regard to paragraph 10 of the Preamble and Article 1, the Court shall determine that a case is inadmissible where:
> (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
> (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
> (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under Article 20, paragraph 3;
> (d) The case is not of sufficient gravity to justify further action by the Court.

Article 17(2) and (3) proceeds to specify the factors the Court must consider when determining whether a State is indeed unwilling or unable to proceed.

[61] Oosterveld et al, above n 59, 775.

[62] *Rome Statute* art 88.

[63] *Rome Statute* art 86; see also *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, UKTS 58, art 26 (entered into force 27 January 1980).

[64] It should be noted however that pursuant to art 87(5) of *the Rome Statute*, the Court may invite a non-Party State to provide assistance in an investigation on an ad hoc basis.

Council could arguably permit investigators to obtain the assistance of member states that are not parties to the *Rome Statute*. Taken to the extreme, Security Council referrals would allow the ICC to operate under Chapter VII in a manner similar to the ICTY and the ICTR.[65] The Court's ability to obtain states' assistance in the conduct of such rigorous investigations is mandated under art 54(3)(c), which empowers the prosecutor to '[s]eek the cooperation of any State'.[66] The prosecutor is directed to conduct investigations on the territory of a state in accordance with the provisions of Part 9.[67]

Article 93 reaffirms the obligation of state parties to comply with requests for assistance from the Court, in accordance with the provisions of Part 9 and pursuant to their national procedures.[68] Part 9 identifies the many precise forms of cooperation that stateparties are obliged to provide to the Court, and refers specifically to the production of evidence. State parties are required to facilitate the ICC's requests for assistance in, inter alia, identifying and tracking persons or things;[69] taking evidence and testimony under oath as well as producing evidence;[70] questioning individuals;[71] examining places or sites, and exhuming and examining grave sites; executing searches and seizures; effecting the provision of records and documents;[72] and guaranteeing the preservation of evidence.[73] This list concludes with a blanket clause obligating stateparties to provide all other types of assistance 'not prohibited by the law of the requested State' which will facilitate investigations or prosecutions.[74] Bending to sovereignty considerations, conspicuously absent is any subpoena power. Neither the judges nor the prosecutor of the ICC appear to have any power to compel witnesses to appear.[75]

It is apparent that the *Rome Statute* establishes an extensive regime governing the conduct of investigations, the collection of evidence in ICC proceedings, and the

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

[66] *Rome Statute* art 54(3)(c).

[67] See *Rome Statute* art 54(2)(a). Article 54(2)(b) of the *Rome Statue* deals with an exception to the general requirement to obtain a State's cooperation in the conduct of investigations. It refers to art 57(3)(d), pursuant to which the Pre-Trial Chamber may authorise the Prosecutor to conduct specified investigations on the territory of a State Party without that State's cooperation. This is allowed in situations where the State is 'clearly unable to execute a request for cooperation due to the unavailability of any [State organ] ... competent to execute the request for cooperation under Part 9'.

[68] *Rome Statute* art 93; see also art 96 of the *Rome Statute*, which establishes guidelines for the contents of requests; see also art 99 of the *Rome Statute*, which governs the execution of requests 'in accordance with the relevant provisions under the law of the requested State and, unless prohibited by such law, in the manner specified in the request'; see also art 100 of the *Rome Statute*, which stipulates that costs, other than those exempted by this Article, are to be borne by the requested State.

[69] *Rome Statute of the International Criminal Court* art 93(1)(a).

[70] *Rome Statute of the International Criminal Court* 93(1)(b).

[71] *Rome Statute of the International Criminal Court* art 93(1)(c).

[72] *Rome Statute of the International Criminal Court* art 93(1)(i).

[73] See *Rome Statute of the International Criminal Court* art 93(1)(j).

[74] *Rome Statute of the International Criminal Court* art 93(1)(l).

[75] *Rome Statute of the International Criminal Court* Art 93(7): this provision allows for the temporary transfer of persons in custody for the purposes of identification or obtaining testimony. However, the State is not required to agree to the transfer, which is subject, in any event, to the consent of the person transferred.

forms of cooperation required from stateparties to make them effective. Until state parties incorporate obligations under the *Rome Statute* into their domestic laws, and enable ICC investigations to be conducted within their territories, the prosecutor's efforts to conduct thorough investigations in accordance with art 54 will be stymied.

The legislative initiatives of some states in implementing their obligations to cooperate with the ICC in investigations and evidence collection are particularly important as examples to states that have not yet ratified and implemented the *Rome Statute*.[76] Two broad approaches seem to have been followed. The first approach has involved simply including the ICC on the list of entities from which the state can entertain requests for assistance. The second approach has involved the passage of ICC-specific legislation which implements the necessary administrative and procedural mechanisms for cooperation. An examination of the implementing legislation of the United Kingdom (UK), Canada and Switzerland readily exhibits the character of these two approaches.

Canada and the UK adopted single omnibus bills that address both the criminal and administrative requirements of the ICC.[77] The Canadian legislation allows Canada to provide assistance in investigations and evidence gathering in a similar manner to the way in which Canada currently provides assistance to states and other entities. The legislation not only provides the power to assist the ICC with searches and seizures of evidence but also the power to order questioning in Canada.[78] The UK's procedural approach in this area largely accords with that of Canada, except that the UK specifically enacted legislation to entertain requests from the ICC.[79]

The Swiss approach conforms to that of the UK, in so far as specific legislation[80] has been enacted to address the modes of cooperation with the ICC. However, the Swiss implementing legislation establishes a Central Authority in the Federal Office of Justice, which determines the form and manner in which Switzerland will comply with requests for assistance from the ICC.[81]

C *Arrest and Surrender*

Criminal prosecution is inherently linked to notions of national sovereignty and control over persons and territory. In fact, some argue that the Nuremberg Tribunal succeeded only because the obstacle of the 'sovereignty' of the German State had been destroyed. The inability (or unwillingness) of the German government to try war criminals allowed the Tribunal to act as a substitute. Arguably, the successful establishment of the ICTY and ICTR represents a fundamental departure from Nuremberg, in that the authority under which they were constituted derives not

[76] For an incisive discussion of the approaches adopted by Canada, the United Kingdom and Switzerland, see Oosterveld et al, above n 59.
[77] *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24; *International Criminal Court Act 2001* (UK).
[78] *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24, s 18(7).
[79] *International Criminal Court Act 2001* (UK), ss 27, 33.
[80] *Federal Law on Cooperation with the International Criminal Court 2001* (Switzerland).
[81] *Federal Law on Cooperation with the International Criminal Court 2001* (Switzerland), art 3(2)(b).

from their status as occupied territories, but from the exercise of power by the Security Council.[82] More importantly, these ad hoc tribunals establish an international cooperation regime that obliges states individually and collectively to arrest and surrender. Like these two bodies, the ICC will rely on states' goodwill to discharge both their legal and discretionary arrest and surrender obligations.

The obligation on state parties to arrest and surrender accused persons is found in several articles of the *Rome Statute*. The general art 86 obligation to 'cooperate fully with the Court in its investigation and prosecution of crimes'[83] is supplemented by art 89, which specifically addresses 'surrender of persons to the Court'.[84] Under art 89(1), the Court can transmit a request for the arrest and surrender of a person, together with material supporting that request,[85] to a state on the territory of which that person may be found. The *Statute* is clear as to the obligation of state parties upon receiving such a request: they must comply.[86] The implementation of a request for arrest and surrender is governed by both art 59 and the relevant provisions of Part 9 of the Statute. Whereas Part 9 contains obligations that essentially give effect to the request, art 59 contains the method of implementation.[87] The Court transmits the request together with the supporting material required by art 91. Upon receipt of requests from the ICC, state parties follow their domestic laws, which must be in accordance with the provisions of the *Rome Statute*. Rule 184 of the Rules of Procedure and Evidence stipulates that requested states must immediately inform the ICC's Registrar in the event that

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[82] Nonetheless, both the ICTY and the ICTR were constituted in the midst of continuing national disarray. In Yugoslavia, the functioning national legal system had been compromised and could not be said to reflect basic due process requirements, while in Rwanda it had collapsed altogether. It remains to be seen whether the International Criminal Court, which will generally operate alongside fully operational national legal systems, will be able to do so without considerable political difficulty.

[83] *Rome Statute* art 86.

[84] *Rome Statute* art 89.

[85] See *Rome Statute* art 89(1). Article 91(3) outlines the kind of written material that must accompany the request for arrest and surrender:

> In the case of a request for the arrest and surrender of a person for whom a warrant of arrest has been issued by the [ICC's] Pre-Trial Chamber … the request shall contain or be supported by:
> (a) Information describing the person sought, sufficient to identify the person, and information as to that person's probable location;
> (b) A copy of the warrant of arrest; and
> (c) Such documents, statements or information as may be necessary to meet the requirements for the surrender process in the requested State.
> Ibid art 91(2). In the case of a person already convicted by the ICC but who has escaped, the request must contain:
> (a) A copy of any warrant for arrest of that person;
> (b) A copy of the judgment of conviction;
> (c) Information to demonstrate that the person sought is the one referred to in the judgment of conviction; and
> (d) If the person sought has been sentenced, a copy of the sentence imposed and, in the case of a sentence for imprisonment, a statement of any time already served and the time remaining to be served.

[86] See *Rome Statute* art 89(1): 'States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender'.

[87] *Rome Statute* art 59. Furthermore, as a result of art 55(2) of *the Rome Statute*, an arrested person is entitled to remain silent, to have legal assistance of his choosing, and to be questioned in the presence of counsel. This last right is not obvious in several civil law jurisdictions with respect to extradition-related interrogations.

persons under an indictment of the Court are available for surrender.[88] The state and the registrar must agree on the date and manner of the surrender.[89] As straightforward as these provisions appear, they are the result of lengthy debate and compromise.

1 *Arrest*

In the overwhelming majority of cases, national authorities must arrest a person before they surrender that person for the purpose of prosecution.[90] Article 58 regulates the issuance of an arrest warrant. The Pre-Trial Chamber is designated to issue arrest warrants.[91] To this extent, the *Statute* is consistent with international human rights instruments and the practices in many national criminal jurisdictions; judicial intervention is required to deprive a person of their liberty.[92]

As in many national criminal jurisdictions, the conditions under which the Pre-Trial Chamber must issue an arrest warrant are twofold. First, the prosecutor must show there are 'reasonable grounds' to believe the person concerned committed a crime within the court's jurisdiction.[93] Second, the person must be arrested for a specific purpose.[94] The *Rome Statute's* conditions for the issuance of an arrest warrant are far more onerous than the ICTY and ICTR Statutes. This is because the latter instruments, and the applicable Rules of Procedure and Evidence, do not contain the condition of necessity.[95] Pursuant to art 58(1)(a), the prosecutor must meet the burden of proving 'reasonable grounds'. Although the 'reasonable grounds' standard is the minimum standard under art 58, the actual standard applied by the Pre-Trial Chamber may be more demanding. Article 58(1)(b) further lists three alternative purposes that the arrest should serve. First, where it 'appears necessary' to ensure the person's appearance at trial (since there can be no trial *in absentia*); second, to prevent interference with investigations; and third, to prevent the further or continuing commission of an offence within the Court's jurisdiction.[96]

Certain provisions of the *Rome Statute* governing arrest and surrender are directly related to the actions state parties must undertake in specific circumstances. These situations include procedures for arrest and surrender as well as provisional arrest, challenges by an accused or a state concerning admissibility or jurisdiction of the

[88] Preparatory Commission for the International Criminal Court, 'Finalised Draft Text of the Rules of Procedure and Evidence', UN Doc PCNICC/2000/L.2/Add.1, r 184 (2 November 2000).
[89] Ibid.
[90] Even when the individual is already detained, an arrest warrant by the ICC should be issued to ensure his continued detention in a form of constructive custody. Article 58(7) of *the Rome Statute* authorises the issuance of a summons to appear when a summons is sufficient to ensure the person's appearance.
[91] For a more thorough analysis of the role and powers of the ICC Pre-Trial Chamber see Olivier Fourmy, 'Powers of the Pre-Trial Chambers' in Antonio Cassese et al (eds), *The Rome Statute of the International Criminal Court: A Commentary* (1st vol, 2002) 1207-30.
[92] Thus, an arrest in the absence of a warrant is not 'in accordance with the law' and amounts to an arbitrary arrest. This is consistent with international human rights jurisprudence.
[93] *Rome Statute*, art 58(1)(a).
[94] *Rome Statute*, art 58(1)(a).
[95] The arrest procedures of the ICTY and the ICTR are based on the questionable assumption that a certain level of proof that an individual has committed crimes within the Tribunals' jurisdiction is sufficient grounds for arrest.
[96] *Rome Statute* art 58(1)(b).

Court, the actual surrender of individuals and their transit through the territories of state parties and instances of competing requests for arrest and surrender. State parties will be required to adapt their national law to ensure that they are able to fulfil their cooperation obligations under the *Statute*.[97] Nonetheless, a significant residual role remains for national law, which will continue to control the form and procedure governing requests for assistance[98] as well as the execution of such requests.[99]

During the negotiation of the *Rome Statute*, states disagreed as to the process that should be used to arrest and bring persons before the Court. The term 'arrest' raised the question as to whether states could use their national custodial powers or would need to follow ICC-specific arrest procedures to take individuals into custody. This question was linked to the issue of cooperation more generally: for some, national laws varied so much that use of those laws could conceivably limit the Court's ability to discharge its basic functions, whereas for others, any derogation from their national laws would be deemed unacceptable as an invasion of sovereignty.[100] Article 58(5) of the *Rome Statute* connects issuance of the arrest warrant with issuance of a request for arrest and surrender to a state. According to this provision, the Court may issue such a request under Part 9, only after an arrest warrant has been issued under art 58.[101] Part 9 contains the regulations and conditions pertaining to the issuance and transmission of requests for an arrest and surrender, with one important exception: the provisions under Part 9 are procedural. The procedural requirements are set out in arts 87 and 91. Sections 1 and 2 of art 87 contain regulations on the channel of communications and the choice of languages regarding requests for assistance. According to art 87(1)(a), requests for assistance shall be transmitted through the diplomatic channel or any other appropriate channel designated by each state party. The language of the request shall be in the official language of the requested state or one of the Court's working languages, as the state party chooses.[102] These regulations are similar to those in the Inter-State Cooperation Model.[103] This provision is clearly a concession to states who favour a more horizontally oriented cooperation model.

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[97] *Rome Statute* art 88.

[98] See, eg, *Rome Statute* art 91(2)(c), 96(2)(e), 99(1).

[99] Only very limited exceptions exist. One such exception is art 99(4)(a) of *the Rome Statute*, which permits the Prosecutor to execute requests for assistance on the territory of a State Party if the State is one on the territory of which the crime is alleged to have been committed and there has been a determination of admissibility.

[100] Mochochoko, above n 36, 308.

[101] The power to issue requests for assistance is given to the Court as a whole. It appears self-evident, however, that the Pre-Trial Chamber remains the competent organ in this respect.

[102] Some thirty states have lodged a declaration under art 87(2) of *the Rome Statute* concerning the choice of language. States that have not done so will receive requests for assistance in one of the working languages of the court, English or French.

[103] See, eg, *European Convention on Extradition*, opened for signature 13 December 1957, ETS No. 24 (entered into force 18 April 1960).

2 *Surrender*

At the Rome Conference, in the face of serious state concern with regard to sovereignty, a crucial issue was to decide whether or not arrest and delivery of suspects would be carried out within the framework of extradition, or whether a new method was required. Some countries argued for a simple transfer mechanism under which they could send a person to the ICC with little or no domestic process. Other countries fearful of granting too many concessions to the Court argued for the use of extradition, especially to transfer nationals. A majority of countries, however, argued for a *sui generis* approach. The Polish delegation suggested a more structured methodological approach be adopted, one that would reflect what the Roman jurists had taught thousands of years earlier: *bene docet qui bene distinguit.*[104] It was recommended that the solution should:

> 1. Distinguish clearly between extradition and surrender by pointing to fundamental differences between them;
> 2. Define surrender as a genuine and unique form of cooperation between states and the International Criminal Court; and
> 3. 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.[105]

It was clear that two options were available to solve the problem: either maintain extradition or create a new form of delivery separate and distinct from it.[106] states eventually agreed to a compromise under which the *Rome Statute* would refer both to specific obligations for arrest and surrender, whilst also acknowledging procedures in existence under domestic laws.[107] The solution adopted was to oblige states to 'surrender' persons to the Court, with the exact procedure to be followed left to the discretion of individual states, subject to certain limitations.[108]

This compromise is reflected in art 102, which states that for the purposes of the *Statute*, 'surrender' means the delivering up of a person by a State to the Court pursuant to the Statute. In contrast, 'extradition' means the delivering up of a person by one State to another as provided by treaty, convention, or national legislation.[109] Thus 'surrender' as a process through which states turn over individuals to the ICC is quite different from extradition, which takes place only between states. It is significant that states agreed to create a process for the ICC that is more streamlined

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[104] Plachta, above n 6, 191.
[105] For an analysis on the difference between 'extradition' and 'surrender' in the context of the ICC, see Franco Mosconi & Nicoletta Parisi, 'Co-operation Between the International Criminal Court and States Parties' in *The International Criminal Court: Comments On The Draft Statute* (1998) 313-16.
[106] Plachta, above n 6, 190.
[107] For a definition of 'surrender' and 'extradition' in the context of the ICC, see art 102 of the *Rome Statute*.
[108] In order to ensure that there was no confusion between the terms 'surrender' and 'extradition,' art 102 was included in the *Rome Statute*, providing definitions for both.
[109] *Rome Statute* art 102.

than state-to-state extradition.[110] Accordingly, under art 91(2)(c) of the *Rome Statute*, the procedural requirements imposed by states for the surrender of persons to the ICC

> should not be more burdensome than those applicable to requests for extradition pursuant to treaties or arrangements between the requested State and other states and should, if possible, be less burdensome, taking into account the distinct nature of the Court.[111]

The intent of this exercise was to free 'surrender' from a host of conditions, restrictions, and requirements which, developed in other epochs and designed for different purposes, are inappropriate in the context of the ICC. Exceptions, exclusions, and exemptions have traditionally been the main obstacle to extradition being an effective tool in the fight against crime. Accordingly, to strengthen 'surrender' and render it more efficient, the number and scope of grounds for refusal by the requested state had to be significantly restricted.[112]

If it is accepted that the provisions pertaining to surrender have removed all possible grounds for refusal, then, as a corollary, the conclusion must be drawn that the authorities of the requested state are placed in an awkward position of risking either the violation of their domestic laws or of their international obligations. That would also mean that the principle *aut dedere aut judicare* has been replaced by a mandatory requirement of transfer (*dedere*).[113]

Further, certain complications are raised by the 'surrender' regime under the *Rome Statute*. Most significant is the prohibition on extradition of nationals to a foreign jurisdiction that is found in many state Constitutions. A question arises as to whether such prohibitions are consistent with the obligation of state parties to surrender suspects to the ICC. As the ICC will not prosecute *in absentia*, the Court must gain physical control over a suspect for a trial to take place.. However, the apparent tension between constitutional prohibitions against extradition of nationals and ICC obligations diminishes upon a closer examination of the fundamental conceptual differences between 'surrender' to an international criminal court and 'extradition' to another state.[114] This distinction, as highlighted in the *Rome Statue,* is not merely semantic, it is substantive.

In common law countries, the possibility of surrendering nationals to the ICC does not require the adoption of any particular legislative measures, other than those that

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[110] Oosterveld et al, above n 59, 770. One method of streamlining the process was by eliminating the grounds traditionally permitted for the refusal of extradition. No such grounds are included in the *Rome Statute*: art 89.
[111] *Rome Statute* art 91(2)(c).
[112] Plachta, above n 6, 192-193.
[113] Kenneth S Gallant, 'Securing the Presence of Defendants Before the International Tribunal for the Former Yugoslavia: Breaking With Extradition' (1994) *Criminal Law Forum* 557, 569.
[114] See Report of the Ecuadorian Corte Constitucional, Informe del Sr Hernan Salgado Pesantes en el caso No 0005-2000-Cl sobre e'l, *'Estatuto de Roma de la Corte Penal Internacional'*, 6 March 2001, para 7. The Report notes the 'semantic nuanced difference' between the two concepts, but concludes that as extradition applies only between States, the prohibition on the extradition of nationals does not apply to transfer to the ICC.

would facilitate the surrender of the individual to the ICC. It is with civil law countries that a real problem emerges, since most of these countries contain constitutional prohibitions against the extradition of nationals. However, it is important to recognise that the creators of such constitutional prohibitions contemplated 'horizontal cooperation' between national courts and not 'vertical cooperation' with an international court. As the ICC is not a 'foreign court', or a 'foreign jurisdiction,' but rather an international one, the constitutional prohibitions against extradition may not apply. Therefore, the flexibility provided by the *Rome Statute* gives states two options when implementing the obligation to surrender individuals to the ICC: they can either create a separate legal procedure or amend existing extradition laws.

Civil law countries have, therefore, opted for one of three approaches: (1) amending the constitution (2) adopting an interpretative approach or (3) creating a general, centralised model that favours procedural mechanisms. In the first approach, reflected by Germany, states have effected minor amendments

> aimed only at including an exception to the principle, to ensure that the Constitution is not breached by the surrender of a national to the ICC. The advantage of a constitutional amendment with a specific reference to the ICC is that it erases any possibility of a normative conflict at the national level.[115]

In the second approach, states such as Costa Rica, Ecuador and Ukraine have largely interpreted the constitutional prohibition against extradition of one's own nationals in light of the need to conform to international law, considering that the ICC represents the international community and is established with their consent.[116] The third approach is manifested in the implementing legislation of Switzerland.[117] As stated previously, the law establishes a Central Authority in the Federal Office of Justice, which handles all ICC requests for cooperation and requests for surrender.[118] The Central Authority is administered through the Federal Office of Justice, to which responsibility is delegated to surrender to the Court persons being prosecuted, and transmit the results of the execution of the request.[119] Article 5 of the Swiss legislation mandates that cantonal and federal authorities perform all measures ordered by the Central Authority to cooperate with the Court, and that the means prescribed by the Central Authority to implement requests from the ICC must be executed expeditiously, without being subjected to the substantive procedures of the designated cantonal or federal authority.[120] Almost no restriction exists as to the means by which requests are conveyed.

In summing up the approach in civil law countries, it is apparent that most provide for only minimal judicial involvement by domestic courts. Generally, once a person

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[115] International Centre for Criminal Law Reform and Criminal Justice and International Centre for Human Rights and Democratic Development, above n 58, 51.
[116] Ibid 51-52.
[117] *Federal Law on Cooperation with the International Criminal Court 2001* (Switzerland) c 3.
[118] *Federal Law* c 3.
[119] *Federal Law* art 3(1)(e).
[120] *Federal Law* art 5.

resident in the state against whom an indictment has been confirmed has been taken into custody and informed of the charges against them by the examining court, transfer to the ICC shall be approved without the need for formal extradition proceedings and without any need to conduct proceedings and invoke the substantive requirements often specified by domestic laws on extradition. Even in states where courts may be consulted concerning requests for transfer, the degree of judicial review ranges simply from perfunctory identification of suspects to limited evidentiary review.

Surprisingly, it is Anglo-American countries that are keen to ensure that 'surrender' requests from the ICC are subjected to certain domestic safeguards. For instance, in the UK more extensive examination is required by law, which contemplates extradition-like proceedings in courts. The surrender process provided for in the UK legislation is based on legislation originally drafted for the expedient transfer of suspects between the United Kingdom and Ireland. This became the model for the arrest and surrender of suspects to the ICTY and ICTR.[121] Warrant applications brought by constables must include statements under oath that they have reason to believe that a request for arrest has been made by the ICC and that the person is in, or en route to, the United Kingdom. Upon a successful application, an appropriate judicial officer shall issue a warrant for the arrest of the person identified in the warrant[122] and notify the Secretary of State. A 'reasonable basis' (comparable to 'probable cause', the evidentiary standard in UK courts) standard must be satisfied before extradition requests may be certified.

The UK is not alone in clinging to some form of domestic safeguard. In Canada, the ICC legislation addresses arrest and surrender by amending the *Extradition Act*[123] to include a separate procedure for the surrender of persons to the ICC, which is, in essence, an abbreviated version of the extradition process. This approach, as opposed to creating a *sui generis* procedure, was taken because the *Extradition Act* had been amended one year earlier to include surrender to the ICTY and the ICTR. In addition, Canada's extradition process has passed constitutional adjudication by the Supreme Court, and the creation of a streamlined surrender process for the ICC within existing Canadian extradition law is more likely to accord with established constitutional standards.[124] Similarly, other common law countries provide for surrender determinations to be made by the Attorney-General who, in both Australia and New Zealand, has the discretion to refuse requests in 'special' (Australia) [125] or 'exceptional' (New Zealand)[126] circumstances.

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[121] See Council of Europe, 'The Implications for Council of Europe Member States of the Ratification of *the Rome Statute* of the International Criminal Court; Progress Report by the United Kingdom', 7 September 2001, <http://www.legal.coe.int/criminal/icc/docs/Consult_ ICC(2001)/ConsultICC(2001)31E.pdf> at 3 September 2003.
[122] See *International Criminal Court Act 2001* (UK). Section s3(3) addresses applications that should be made in Scotland.
[123] *Extradition Act*, SC 1999, c 18.
[124] See, eg, *Canada v Schmidt* [1987] 1 SCR 500; *Kindler v Canada* (Minister of Justice) [1991] 2 SCR 779; *McVey v United States of America* [1992] 3 SCR 475.
[125] *International Criminal Court Act 2002* (Cth) pt 3.
[126] *International Crimes and International Criminal Court Act 2000* (NZ) pt 4.

Whether the new regime of 'surrender' will be successful depends upon the reaction of states, governments, and their national legislatures, to the concept of 'surrender'. It is heartening to observe that many states, both common and civil law, regard 'surrender' as a genuine form of delivery of requested persons to the ICC, and have convinced their parliaments to adopt or amend statutes. Article 102 seems poised to be a great success.

3 *Transit on Third Party Territory*

In delimiting the barriers of sovereignty, the *Rome Statute* and the ICC's Rules of Procedure and Evidence oblige states to take certain action with regard to arresting persons and surrendering them to the Court. Accordingly, states must be able to cooperate with the ICC in these areas in order to ensure the effective operation of the Court. Such cooperation is realised by the enactment of ICC-specific national legislation.

The *Rome Statute* provides for the reality that, on many occasions, persons being surrendered to the Court cannot be taken directly from their point of arrest to the ICC's detention facilities in the Hague without transit through one or more states. If transit through the territory of a state party is required, that state party must authorise, in accordance with its domestic law and procedures, transportation of the person, unless transit through the state would impede or delay surrender.[127] Further, the person being transported must be detained during the entirety of the transit process. The Court will need to seek voluntary cooperation for moving persons through the territories of non-state parties, as the *Rome Statute* does not bind them.

Considering that many states do not have legislation permitting the detention of a person being transported, implementing legislation is again required. The *Manual for Ratification and Implementation* identifies two mechanisms seen in existing legislation: (1) amendment of existing domestic legislation and (2) establishment of a separate regime in implementing legislation.[128] The first approach is seen in the Canadian legislation, which amends domestic legislation to ensure compliance with art 89.[129] Both Australia and New Zealand fall into the second category, with provisions that mirror art 89.[130] The *Manual for Ratification and Implementation* notes that the provisions in the New Zealand legislation incorporate the obligations set out in art 89 and include self-contained procedures for dealing with persons in transit.[131] The Australian and UK legislation largely mirror the provisions in the

[127] See *Rome Statute* art 89(3). Note that according to art 89(3)(d), no authorisation is required if the arrested person is transported by air and there is no landing scheduled on the territory of the transit State.

[128] International Centre for Criminal Law Reform and Criminal Justice and International Centre for Human Rights and Democratic Development, above n 58, 84.

[129] *Extradition Act*, SC 1999, c 18. For a brief analysis of the amendments relating to the ICC that entered into force on 23 October 2000, see the International Centre for Criminal Law Reform and Criminal Justice and International Centre for Human Rights and Democratic Development, above n 57, 84.

[130] *International Crimes and International Criminal Court Act 2000* (NZ) ss 136-138; *International Criminal Court Act 2002* (Cth) pt 9.

[131] International Centre for Criminal Law Reform and Criminal Justice and International Centre for Human Rights and Democratic Development, above n 58, 84.

New Zealand legislation. However, the UK legislation does treat a request as though it were an ordinary request for arrest and surrender, except that the circumstances render this an expedited process.[132]

4 *Competing Requests*

A complication arises with respect to competing requests between the Court and states. In contrast to the ad hoc tribunals, the ICC does not take priority over other international obligations, such as that provided for in art 103 of the UN Charter. Article 90 addresses the possibility that a state party (the requested state) might receive a request from the ICC *and* from a state not party to the *Statute* (the requesting state) for surrender of the same person.[133] Requests are 'competing' if satisfying one would prevent a state from satisfying the other. A state cannot simultaneously extradite a person to another state and surrender that same person to the ICC. Despite the potential for a state to receive mutually exclusive requests along these lines, not all competition is deemed problematic under art 90. As Dr Chimene Keitner acknowledges,

> ...certain apparently mutually exclusive requests may in fact come under the heading of 'false competitions' — that is, situations involving no real conflict among a requested state's existing obligations, and thus no real competition.[134]

Simultaneous requests by the ICC and a requesting state may create a true competition if and when the ICC determines that the case against the person in question is admissible. If the extradition claim of the requesting state and the surrender request of the ICC are not sought in relation to the same conduct, then the ICC's request has priority, provided the requested state has no existing international obligation to extradite the person to the requesting state.[135] This is a situation of 'false competition'. If extradition and surrender are sought for the same conduct (a 'true competition'), then the requested state must make a decision based in part on factors enumerated in art 90, including the relative nature and gravity of the conduct in question.[136] The goal of the regime set out in art 90 is not to ensure that all persons responsible for international crimes are tried before the ICC. Rather, it is to ensure that they are tried before a competent court and are subject to protections and penalties that meet international standards.

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[132] *International Criminal Court Act 2001* (UK) ss 21-22; see also the discussion in the International Centre for Criminal Law Reform and Criminal Justice and International Centre for Human Rights and Democratic Development, above n 58, 84.

[133] *Rome Statute* art 102; see also Kress and Prost, above n 104, 1016. As the ICC is not a foreign jurisdiction, surrender procedures must be no more burdensome and should, if possible, be less burdensome than those applicable to requests for extradition: *Rome Statute* art 91(2)(c); Kress and Prost, above n 104, 1054.

[134] Keitner, above n 8, 229.

[135] *Rome Statute* art 90(7)(a).

[136] *Rome Statute* art 90(7)(b).

D *Enforcement of the Duty to Cooperate*

Article 87 of the *Rome Statute* sets out general provisions governing requests by the ICC for cooperation with investigations, and includes recourse for the Court in the event that state parties fail to comply with its requests. Upon a finding by the Court that a state party has failed to cooperate, the dispute may be referred to either the Assembly of state parties or to the UN Security Council for resolution.[137] The terms of the *Rome Statute* which mandate cooperation with the Court in a general capacity are equally relevant to demands for cooperation in investigations and for the collection of evidence. Article 87(7) creates a clear process in relation to non-compliance, confirming the ICC's power to issue judicial findings for disputes over the extent of the duty to cooperate.[138] The ICC may make a judicial finding of non-compliance where a state fails to comply with a request to cooperate. Commenting on the efficacy of such a finding, Dr Goran Sluiter observes that:

> A judicial finding of non-cooperation is dual in character. It is an enforcement measure. As such, the impact of an impartial international judicial body establishing that a state has breached its obligations under an international treaty should not be underestimated. Such a finding, establishing a non-cooperating state's illegal actions, may induce its compliance. Second, a judicial finding of non-compliance satisfies the vital prerequisite to submit the matter to those institutional bodies designated to enforce the Statute.[139]

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

It is important to note that although the *Rome Statute* expressly allows the requested state to postpone the provision of legal assistance under certain conditions, this does not amount to a refusal of assistance. Sluiter explains that

> [t]he latter, if accepted by the court, is final. The former, however, may temporarily suspend the duty to provide assistance. It regains its force when the 'conditions of postponement' are no longer applicable. The difference between refusal and postponement may only be marginal in practice, particularly if it concerns a request that begs for swift execution.[140]

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[137] *Rome Statute* art 87(7).

[138] See Alain Pellet, 'Settlement of Disputes' in Otto Triffterer (ed), *Commentary on the Rome Statute of The International Criminal Court: Observers' Notes, Article By Article* (1999) 1843. Pellet states that art 119, when read in conjunction with article 87(7), 'empowers the court to make findings on all questions relating to cooperation between states and the ICC'.

[139] Goran Sluiter, 'The Surrender of War Criminals to the International Criminal Court' (2002) 25 *Loyola of Los Angeles International and Comparative Law Review* 605, 614.

[140] Ibid 633-634.

The ground for postponement has a significant positive effect on legal assistance generally. Postponement is an exception to the 'general rule' of immediate execution of requests.[141]

E *Immunity and Exclusive Jurisdiction*

Article 98 of the *Rome Statute,* entitled 'Cooperation with respect to waiver of immunity and consent to surrender,' has proved a battleground between states that seek to enhance the ICC's freedom of action and states (notably the United States) that seek to affirm the superiority of sovereign consent. Article 98 provides that the Court may not proceed with a request for surrender or assistance that would require the requested state to act inconsistently with its obligations under international law with respect to the state or diplomatic immunity of a person or property of a third state.[142] Sluiter states that

> [a]rticle 98 of the *Rome Statute*, as a ground to refuse assistance, recognises protections flowing from international obligations relating to diplomatic or state immunity. Additionally, it recognises those obligations arising from an agreement, such as Status of Forces agreements. These latter agreements provide exclusive jurisdiction over troops stationed in another state.[143]

Article 98(2) addresses a special instance of true competition, 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. More specifically, art 98(2) envisages the possibility that a member of a non-state party's armed forces, present in the territory of a state party, might be subject to a request for surrender by the ICC, which conflicts with the requested state's treaty obligation not to extradite the person under a state-to-state agreement (typically a Status of Force Agreement) between the requested state and the non-state party. [144]

The United States was determined to obtain an exemption from the Court's jurisdiction for members of its armed forces and officials. 'The United States [felt] vulnerable to political attack through the Court because of its military deployment

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[141] See *Rome Statute* art 73.

[142] Article 98(1) of *the Rome Statute* reads: 'The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the co-operation of that third State for the waiver of the immunity'.

[143] Sluiter, above n 140, 631.

[144] Under art 12(1) and 12(2) of the *Rome Statute,* the armed forces of a State Party are subject to ICC jurisdiction. The armed forces of a non-State Party are subject to ICC jurisdiction in one of three situations:

1. If the Security Council refers a 'situation' to the Prosecutor: *Rome Statute* art 13(b)
2. If a non-State Party's forces commits war crimes, genocide, or crimes against humanity on the territory of a State Party: *Rome Statute* art 12(2)(a)
3. If the non-State Party accepts the jurisdiction of the ICC: *Rome Statute* art 12(3).

Absent a Security Council referral, crimes may be investigated by the ICC following a request by a State Party (art 13(a) and 14(1)), or on the initiative of the Prosecutor with the approval of the Pre-Trial Chamber (art 13(c) and 15).

across the globe and its international role as peacekeeper'.[145] However, delegates at the Rome Conference overwhelmingly vetoed America's proposed amendments to the Statute to secure this exemption.[146] The delegation scored a major triumph with the successful negotiation of art 98 of the *Rome Statute*.[147] Article 98(2) states:

> The Court may not proceed with a request for surrender which would require the requested state to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending state required to surrender a person of that state to the Court, unless the Court can first obtain the cooperation of the sending state for the giving of consent for the surrender.[148]

The article aims to restrict the ICC's power to indict and try military personnel by codifying deference to state-to-state agreements, in particular Status of Forces Agreements (SOFAs) and extradition treaties.[149] The use of art 98 as a possible ground to restrict the ICC, was soon at the centre of US efforts to ensure its nationals remained beyond the ICC's reach. Soon after the conclusion of the Rome Conference and the adoption of the *Rome Statute*

> the US delegation focused on article 98(2) as a hook for an expanded interpretation of what kinds of 'international agreements' might act as limits on the ICC's ability to request the surrender of an individual, without first attempting to secure the consent of that person's state of citizenship.[150]

The US proposed a rule that took the following form: 'The Court shall proceed with a request for surrender or an acceptance of a person into the custody of the Court only in a manner consistent with international agreements applicable to the surrender of the person'.[151] Removing the legal façade of this proposal, Keitner astutely observes that:

> This underlying agenda or 'fundamental requirement' was, and remains, obtaining a guarantee that no US citizen will be subject to ICC jurisdiction under any circumstances as long as the US remains a non-party to the Rome Statute. As part of an exemption strategy, the US proposed rule is inconsistent with the intended scope of article 98(2), and with the spirit of the Rome Statute. Exempting the nationals of any country from the jurisdiction of the ICC stands in fundamental opposition to the ideals of international justice and to the affirmation of universal jurisdiction over the most serious international crimes.[152]

Eventually a modified version of the US rule was adopted as rule 195(2) in the Finalized Draft Text of the ICC's Rules of Procedure and Evidence.[153] It should be

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[145] Erik Rosenfield, 'Application of US Status of Forces Agreements to Article 98 of *the Rome Statute*' (2003) 2 *Washington University Global Studies Law Review* 273, 274.
[146] Ibid.
[147] Ibid 276.
[148] *Rome Statute* art 98(2).
[149] Keitner, above n 8, 234.
[150] Keitner, above n 8, 248.
[151] Preparatory Commission for the International Criminal Court, UN Doc PCNICC/2000/WGRPE(9)/DP.4 (8 June 2000) <http://www.un.org/law/icc/prepcomm/> at 3 September 2003.
[152] Keitner, above n 8, 250.
[153] Preparatory Commission for the International Criminal Court, 'Finalised Draft Text of the Rules of Procedure and Evidence', UN Doc PCNICC/2000/L.2/Add.1 (2 November 2000).

observed that '[t]he discussions of rule 195(2) ... served to clarify the nature, scope, and purpose of article 98(2), an article that had not previously been a focus of attention'.[154]

States can however take unilateral steps in relation to the protections that SOFAs provide to protect armed forces from the ICC's jurisdiction:

> Article 98 places international treaty obligations in a position superior to requests or orders from the Court for surrender or delivery of a suspect. As a result, states can intentionally create international obligations that compete or conflict with the Court's request for surrender for the sole purpose of avoiding its jurisdiction. Effectively, Article 98 supports current treaties and allows for the negotiation of future treaties or international agreements that would secure a state's jurisdiction over its citizens to supersede ICC jurisdiction.[155]

There is a strong argument that ICC jurisdiction is a freestanding, independent right and that the receiving state can exercise its own discretion by transferring persons to the ICC, even in the face of a SOFA provision.[156] This argument is echoed by Keitner, who identifies an important bulwark against any bad faith efforts:

> The rule [195(2)] to article 98(2) is consistent with the Statute as long as it is read strictly in conjunction with the article itself, and with the prevailing understanding of the nature of the agreements at issue accepted at Rome and clarified during the PrepCom (that is, agreements between the sending state and the requested state, creating an international obligation on the requested state).[157]

However, when the United States delegation successfully negotiated the inclusion of r 195(2) in relation to art 98(2) it was contemplating its SOFAs and their applicability.[158] Article 98(2) thus contains arguments waiting to be used by states in their SOFAs to ensure that their service members are not surrendered to the Court.[159] The United States' determination to manipulate art 98(2), for political rather than legal imperatives, was soon apparent. On 30 June 2002, the United States vetoed a six-month extension of the UN peacekeeping mission in Bosnia.[160] This veto blocked a resolution supported by 13 of the 15 members of the Security Council. As a result, the Security Council acquiesced to the US request that all peacekeepers from states not parties to the *Rome Statute* participating in the

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[154] Keitner, above n 8, 260.

[155] Rosenfield, above n 146, 277.

[156] David J Scheffer, 'Fourteenth Waldemar A Solf Lecture in International Law: A Negotiator's Perspective on The International Criminal Court' (2001) 167 *Military Law Review* 1, 17. David Scheffer is the former United States Ambassador-at-Large for War Crimes Issues.

[157] Keitner, above n 8, 262.

[158] Scheffer, above n 157, 17.

[159] Ibid. With respect to the loopholes that article 98(2) of *the Rome Statute* create for SOFAs, Mr Scheffer states that:

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

[160] Colum Lynch, 'Dispute Threatens UN Role in Bosnia: US Wields Veto in Clash Over War Crimes Court', *The Washington Post*, 1 July 2002, 1.

Bosnian mission, be granted blanket protection from ICC prosecution for one year.[161]

Although art 98(2) seems to codify deference to state-to-state agreements, in particular SOFAs, which are drafted and adopted to facilitate military operations by one state in the territory of another, the article is far more comprehensive.

> The reference to the third state in this scenario as the 'sending state' (as opposed to 'State not Party to this Statute,' the term used in the other provisions of Part 9) indicates that the drafters of the Rome Statute were concerned with a particular scenario in article 98: the possible interference by the ICC with operations conducted by the armed forces or personnel of a non-state party in the territory of a state party. Note, however, that this 'interference' would presumably consist of deterrence, investigation, and, if necessary, prosecution of war crimes, genocide, and crimes against humanity in cases where the sending state or the requested state was itself unwilling or unable to investigate or prosecute.[162]

Thus, a literal reading suggests that objections to jurisdiction, on any basis other than the requested state's own willingness to investigate and prosecute the crimes in question, constitute a breach of the requested state's existing obligations under international law.[163]

Under the ICC regime, the deployment of a non-state party's troops on the territory of a state party would continue to be governed by existing agreements, under which the contributing state retains criminal jurisdiction over its own soldiers on such missions.[164] However, as Keitner observes, '[t]his arrangement is a feature of, not a limit on, the ICC's complementary jurisdiction: the ICC would only request cooperation or surrender of a person if those states also possessing jurisdiction proved unwilling or unable to exercise it'.[165] The end result thus appears to be that military personnel will be free from ICC prosecution, so long as their state of origin investigates and properly prosecutes any potential crimes they may have committed. Nevertheless, history points to a string of failures by contributing states to investigate alleged war crimes by its military personnel serving in peacekeeping missions.[166]

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[161] *United Nations Peacekeeping,* SC Res 1422, UN SCOR, 4572nd mtg, UN Doc S/Res/1422 (2002).

[162] Keitner, above n 8, 233-234. For a detailed discussion, see James Crawford et al, 'In the Matter of the Statute of the International Criminal Court and in the Matter of Bilateral Agreements Sought by the United States Under Article 98(2) of The Statute', (Opinion prepared for the Lawyers' Committee on Human Rights and the Medical Foundation for the Care of Victims of Torture, 5 June 2003).
<http://www.humanrightsfirst.org/international_justice/Art98_061403.pdf> at 15 March 2004.

[163] See, eg, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* opened for signature 10 December 1984, UN Doc A/39/51 (1984), 1465 UNTS 85, arts 4, 12 (entered into force 26 June 1987); *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, UN Doc A/810 (1948), 78 UNTS 277 arts 1, 5 (entered into force 12 January 1951).

[164] In the event of hostilities, the contracting parties to a SOFA will generally review the jurisdictional provisions, and may also exercise the right to suspend the application of any of the provisions of the SOFA.

[165] Keitner, above n 8, 235.

[166] See Jackson Maogoto, 'Watching the Watchdogs: Holding the UN Accountable for International Humanitarian Law Violations of the 'Blue Helmets' (2000) 5 *Deakin Law Review* 47.

The United States is presently pursuing a policy of negotiating treaties with each ICC member state to grant immunity to US military personnel. The Bush Administration is intent on continuing such a policy even in the face of bitter opposition by the European Union.[167] In essence:

> The 'fundamental objective' of the US in the ICC negotiations [was] and remains, 'to prevent, unless certain conditions are met, the surrender to or acceptance by the ICC for trial of nationals of non-party states who are acting under governmental direction and whose actions are acknowledged as such by the non-party state'. This sought-after exemption would even preclude a non-party national from surrendering voluntarily to the ICC, an unprecedented restriction on the possibility of self-surrender.[168]

However, this is not as simple a situation as the US and its agreements might suggest. It is the very principle that the US seeks to safeguard that ultimately stands in its path: sovereignty. The principle of territorial sovereignty establishes that a state has 'exclusive competence to take legal and factual measures within a territory and prohibit foreign governments from exercising authority in the same area without consent'.[169] In *Wilson v Girard*[170] the US Supreme Court held that 'a sovereign nation has exclusive jurisdiction to punish offences against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction'. Recent state practice shows that states are keen to retain jurisdictional prerogative, whether pursuant to domestic or international obligations. For instance, in *Netherlands v Short*,[171] an American soldier charged with murder was only released to US authorities upon an undertaking that he would not be subject to the death penalty, since such an action would violate the Dutch Court's responsibilities under the *European Convention on Human Rights*.[172] It is therefore apparent that a state party to the ICC has obligations under the *Rome Statute* which are grounded in international law and override a SOFA that merely seeks to circumvent the ICC.[173]

F *Enforcement of Forfeiture Orders and ICC Fines*

The *Rome Statute* enables the ICC to issue orders for the forfeiture of property considered to be derived from crimes within its jurisdiction. In order to effect forfeiture, the Court is also empowered to issue orders freezing the proceeds of crime[174] located within the territories of state parties. The *Rome Statute* also permits orders for the forfeiture of *individuals'* property derived from crime,[175] either in

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[167] Ben Barber, 'EU Applicants Told Not to Give US Immunity; World Court's Writ at Issue', *The Washington Times*, 13 August 2002, 1.
[168] Keitner, above n 8, 242-243.
[169] Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7th ed, 1997) 75.
[170] *Wilson v Girard*, 354 US 524, 529 (1957).
[171] 29 ILM 1375 (1990).
[172] *European Convention for the Protection of Human Rights and Fundamental Freedoms,* opened for signature 4 November 1950, 213 UNTS 222 (entered into force 21 September 1970).
[173] For a detailed exposition, see Crawford et al, above n 163.
[174] See *Rome Statute of the International Criminal Court* art 93(1)(k).
[175] See *Rome Statute of the International Criminal Court* art 77(2)(b).

themselves or in addition to prison terms. The presence of financial punitive powers marks a major innovation: the ICC is the first international tribunal explicitly empowered to impose fines[176] against individuals.[177] All these important powers, conferred on the Court by the *Rome Statute*, must be affirmed nationally by its state parties in order to be enforceable.[178]

Article 77(2) addresses the Court's ability to order forfeiture of property derived from crime as part of a convicted individual's sentence. In addition to imprisonment, the Court may order the forfeiture of proceeds, property, and assets derived directly or indirectly from the crime, without prejudice to the rights of bona fide third parties.[179] Part 10 of the *Rome Statute* addresses the enforcement of the ICC's sentences and orders, and specifically imposes a duty on state parties to enforce fines and forfeiture measures.[180]

Under both the *Rome Statute* and the Rules of Procedure and Evidence, states parties must ensure that they have laws and procedures in place to perform four primary functions: (1) trace, freeze, and seize the proceeds of ICC crime[181] (2) effect forfeiture of the proceeds of crime[182] (3) collect fines[183] and (4) transfer to the Court any property or proceeds they obtain as a result of their enforcement of a judgment.[184]

States have proceeded in distinct and creative ways to implement these obligations within their domestic laws.[185] The Manual for Ratification and Implementation identifies three general approaches:

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[176] See *Rome Statute of the International Criminal Court* art 77(2)(a).

[177] The Nuremberg Tribunal had broad remedial discretion but never imposed a fine: see *Charter of the International Military Tribunal* art 27, in *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, adopted 8 August 1945, 82 UNTS 280. Neither the ICTR nor the ICTY are empowered to impose fines, although both Tribunals have adopted provisions allowing for fines as penalties for procedural misconduct: see *ICTR Rules of Procedure and Evidence* r77(A), 91(D) <http://www.ictr.org>; *ICTY Rules of Procedure and Evidence* r77(H), 77bis, 91(E) <http://www.un.org/icty/>.

[178] *Universal Declaration of Human Rights*, adopted 10 December 1948, GA Res 217A (III), UN GAOR, UN Doc A/810 (1948), arts 3, 5.

[179] See *Universal Declaration of Human Rights* art 77(2).

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

[181] This is an inherent aspect of the imposition of fines and forfeiture.

[182] See Preparatory Commission for the International Criminal Court, 'Finalised Draft Text of the Rules of Procedure and Evidence', UN Doc PCNICC/2000/L.2/Add.1 (2 November 2000) r147. Orders for forfeiture must specify, inter alia, the identity of the person (r 218(1)(a)), the proceeds and property ordered forfeited (r 218(1)(b)), and information on the location of the property covered by the order (r 218(2)). The State, if unable to give effect to the order, shall undertake to recover value of the same: r 218(1).

[183] Ibid r 146. Rule 146 outlines the criteria to be considered by the Court in deciding whether to levy a fine and the consequences of non-payment.

[184] Ibid r 148. Rule 148 provides that '[b]efore making an order pursuant to art 79, paragraph 2, a Chamber may request the representatives of the Fund to submit written or oral observations to it'. The significance of this rule is that orders for transfer may be effected by the Court with consultation.

[185] See eg, Oosterveld et al, above n 59.

- Providing for a general power to enforce all orders directly; or
- Providing for separate powers for both fines and reparation orders; or
- Providing for a general power for enforcement, but leaving out procedural details.[186]

Australia and the UK are to be counted in the first approach. They convert the ICC orders into orders issued by their national courts.[187] In addition, these two countries adopt a 'self-contained regime for executing such orders'.[188] Canada adopts a similar approach to that of Australia and the UK, albeit through the amendment of existing legislation to facilitate the provision of the specific assistance requested by the ICC. A hybrid approach is evident in Norwegian legislation, which provides for general authority to carry out ICC requests within the framework of its existing legislation.[189]

IV CONCLUSION

The ICC provides an indispensable backup to national jurisdictions in deterring, investigating and prosecuting serious international crimes. The momentum behind the ICC's establishment testifies to the increasing realisation by countries that international norms may require international enforcement mechanisms, especially where individual perpetrators are beyond the reach of domestic courts. Signing, ratifying, and implementing the ICC provides states with an opportunity to review their existing criminal procedures and to ensure that these are consonant with international standards, such as those relating to due process, the protection of victims and witnesses, and jurisdiction over internationally recognised crimes. The ICC will provide an important incentive for states to develop their domestic penal mechanisms and obviate the need to establish reactive ad hoc international tribunals.

By comparison with the ad hoc tribunals, the ICC provides elaborate guidelines in relation to both the nature and manner of fulfilment of its obligations. This paradoxically both weakens and strengthens the Court. As observed by Sluiter,

> [t]he ad hoc tribunals were established with limited mandate. As a result of their swift creation, the Tribunals, especially the judges themselves, created much of the law. Therefore it comes as no surprise that the judges have opted for what is, in their eyes, the most effective cooperation regime. On the other hand, the establishment of the ICC by treaty triggered protracted rounds of negotiations, which soon revealed that participating states were not prepared to have the institution shape its own laws in any way. Since the shaping of the legal assistance

[186] International Centre for Criminal Law Reform and Criminal Justice and International Centre for Human Rights and Democratic Development, above n 58, 105.
[187] *International Criminal Court Act 2002* (Cth) pt 10, 11; *International Criminal Court Act 2001* (UK) s 49.
[188] International Centre for Criminal Law Reform and Criminal Justice and International Centre for Human Rights and Democratic Development, above n 58, 105.
[189] Ibid.

> regime was left to the participating states, the resulting compromise left the system significantly weaker on a number of points.[190]

Despite this, it is of fundamental importance that the Court retain the discretion to determine the content of the duty to cooperate, and in many instances, its cooperation regime is predominantly hierarchical and vertical in nature.[191]

The success of the ICC will ultimately be determined by the level of cooperation it receives from states. Having no police force, military, or territory of its own, the ICC relies heavily on state parties to arrest individuals and surrender them to the Court, collect evidence and serve documents in their respective territories. This assistance will be vital to the Court's ultimate success. Without it, the ICC will find itself crippled in conducting its proceedings and meeting the international community's lofty aspirations. So far the outlook is promising. State parties have put in place the necessary legal and administrative mechanisms to facilitate cooperation with the ICC. It remains to be seen whether this enthusiasm will be reflected in practice once the ICC's operations commence in full.

[190] Sluiter, above n 140, 650.
[191] Ibid 651.