III. INTERNATIONAL CRIMINAL COURT

The Institution of the International Criminal Court

*Gerard Strijards**

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Abstract: This article discusses certain key aspects arising from the negotiations leading up to the adoption of a Statute for an International Criminal Court (ICC), to have its seat in The Hague. These aspects include individual criminal responsibility regardless of status as Head of State or constitutional organ and the transformation of international criminal law into domestic law. Also discussed are the two appendices to be added to the Statute pertaining to substantive criminal law and rules of criminal evidence and procedure to be used by the Court. The author argues that the appendix on the law of criminal procedure will be of particular importance to the Netherlands as the host state. The obligations regarding legal assistance of the host state will be dependent on this.

1. INTRODUCTION – A ROMAN APPLAUSE

A frenetic applause burst out, that night of 16 July 1998 in Rome. A demonstration against the delegation of the United States (US), gathered behind its desk. The Head of the US delegation, Mr. David Scheffer, stood there, at a loss, as if he found himself, by accident, fully clothed under the shower. The Roman applause was the climax of six weeks of intense negotiations concerning the formation of an international criminal court which has universal jurisdiction over the most serious violations of humanitarian law. The Statute[1] includes the following serious offences: genocide, crimes against humanity, war crimes, and aggression. In as early as March 1998 the US had expressed its objection against the jurisdictional scope of the intended criminal court. At a hastily convened conference of experts within the context of NATO, the US let it be known that it considered the definitions, par-

* G.A.M. Strijards is Council Advisor of International Criminal Law at the Department of Justice, the Hague, the Netherlands. In that capacity, he is a member of the Delegation of the Kingdom of teh Netherlands negotiating at the United Nations about the Statute for an International Criminal Court. In addition, he is Professor by Special Appointment, of International Criminal Law at the University of Groningen, Groningen, The Netherlands.

1. The Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, UN Doc. A/CONF.183/9 (1998) (ICC Statute). *See* P. Kirsch, *The Road to Rome*, *in* Reflections on the International Criminal Court, Essays in Honour of Adriaan Bos, 1-8 (1999).

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ticularly of war crimes, excessively vague, especially due to the use of new terms and references to as yet incomplete treaties – an explicit power of the Court – analogous interpretations, e.g. in the definition of the prohibitory standard of employing asphyxiating gases. The draft Statute defined as a war crime "[e]mploying asphyxiating, poisonous or *other* gases, and all *analogous* liquids, materials and substances".[2] The lawyers of the Pentagon considered this to be incompatible with the substantive principle of legality, also expressed by the principle of *nulla poena*.[3] The criminal law *nulla poena* principle prohibits analogous reasoning and so-called 'open end' definitions of offences. The Americans believed that the proposed Statute included many such 'open end' definitions, thereby risking politicizing or trivializing the Court. But lingering in the background was the fear of the Americans that the International Criminal Court (ICC) would be used foremost to institute criminal proceedings against members of the US armed forces, also in relation to their participation in UN peace operations in which military force – under the 'cover' of a resolution by the Security Council – is inevitable.[4] The US delegation in Rome participated actively in the negotiations. It suggested many constructive proposals for the chapters in which the rules on state cooperation with and assistance for the new Court has been laid down. They especially backed the Dutch delegation in the formulation of pin-pointed articles in which the enforcement of final sentences by the states parties to the treaty has been regulated. The obligations pertaining to enforcement are a constant source of concern for the Dutch as host country of the ICC. Chief of the US Delegation, Mr. Scheffer, continued up until the very end to suggest amendments to the effect that Americans would never be forced to appear before the ICC without express American consent (and subsequent to that) provide security that countries not willing to recognize jurisdiction of the Court (the so-called 'third parties') by ratification would never, without (their) express consent, be faced with unwelcome criminal proceedings. A proposed amendment to that effect was stopped by a so-called 'no action motion'. This is a procedural proposal to leave in tact a compromise text preserving consensus or at least as large a majority as possible.[5] This motion was proposed by the Norwegian delegation and supported promptly by an overwhelming majority of 120 countries. Consequently, non-governmental organizations, having followed these final squab-

2. *See* the preparatory text of the Zutphen intersessional meeting, Report of the Intersessional Meeting from 19 to 30 January 1998 In Zutphen, The Netherlands, UN Doc. A/Ac.249/1998/L.13, at internet gopher://gopher.igc.apc.org/0/orgs/icc/undocs/sutphen/part2.txt. (Emphasis added).
3. This principle expresses that no act or omission is punishable that did not constitute a criminal offence under the law at the time it was committed.
4. *See, e.g.,* the statement by W. Richardson, United States Ambassador to the UN, to the Rome Conference, at internet http://www.un.org/icc/speeches/617usa.htm.
5. Supporters of a broadly acceptable compromise text (the so-called 'like-minded countries') had agreed in the final week that the text, preserving as large a majority as possible, would not be broken open again. Thus, the no action motion to be submitted by Norway could, on the basis of the negotiation rules, count on a comfortable majority. That would be sufficient. Individual amendments, such as the amendment proposed by Mr Scheffer, would then be denied straight away in view of this procedural proposal.

bles between the diplomats breathlessly, began to applaud. Soon the hall was engulfed by a storm of applause as diplomats who, sitting in their benches, turned in protest towards the Americans. A Roman applause. The echo will remain in our memories for a long time to come. America is not amused.

2. THE COMPLEMENTARITY OF THE COURT

Complementarity is the underlying principle governing the jurisdiction of the Court. The Court may act only after it has been established that national states are not capable or prepared to instigate effective proceedings against those most serious offences, mentioned above. The Court has jurisdiction only in cases that would constitute a *vacuum juris* – a void in law enforcement – if they were left to the jurisdiction by the national courts. The term 'complementarity' is really a neologism, introduced by the International Law Commission (ILC) of the UN in its draft of a Statute for an ICC in September 1994.[6] Perhaps the term 'subsidiarity' would have expressed the intention of the authors better. After all, the intention is that criminal law jurisdiction will continue to be exercised primarily by the states themselves. The division of jurisdiction between Court and states is thus based on a positive conflict of jurisdiction, in which the primacy, the first right to exercise jurisdiction, rests with the national state. It is normally better equipped for this. It alone tends to have at its disposal a fully equipped criminal procedural system. The ICC will not have such a system at its disposal. Before it can institute criminal proceedings, it will be dependent upon the willingness of the states party to the Statute, to put their national police and judicial organs (with their monopoly of using violence) at the disposal of the Court – upon request by the Court. Technically, typical of international law, speaking: the Court has no penal enforcement power of its own.

The burning – and unresolved – question remains: who decides whether the requirements of the principle of complementarity have been met? In view thereof, the Court will more or less function as a universal arbiter who determines whether states 'properly' exercise their priority jurisdiction. It does not have primacy, but, oddly enough, does have some supervisory role regarding criminal proceedings. No small task. Take, for instance, the *Pinochet* case. It does not come within the jurisdiction of the ICC. The latter may only claim jurisdiction for offences, that have been committed *after* the jurisdiction of the Court has been put into full force.[7] And since that requires no less than sixty registrations of ratification,[8] this could take some time. But the *Pinochet* case is an outstanding example of the principle of

6. The text of the Draft Statute and the ILC's commentary are found in the Report of the International Law Commission on the Work of its Forty-Sixth Session, 49 UN GAOR (No. 10), UN Doc. A/49/10, paras. 23-91 (ILC Report).
7. ICC Statute, *supra* note 1, Art. 5.
8. *Id.*, Art. 126 (1).

complementarity. What if the Court could exercise its jurisdiction over Pinochet? He is being accused of genocide. This falls within the juridiction *ratione materiae* of the Court. Let us assume that the United Kingdom does not extradite Pinochet to Spain. Not because it does not acknowledge Spain's claim to jurisdiction, but because it rules that the extradition of Pinochet *runs counter to humanitarian standards*, in this case the principle that prohibits particular hardship caused by any act of extradition in cases where it would be disproportionally cruel in view of the advanced age or fragile health of the person to be extradited. The United Kingdom does not institute criminal proceedings either. It considers the evidence produced up to that point as insufficient. Furthermore, it does not accept the passive personality principle[9] construed by Spain as sufficient justification for its claim to extraterritorial jurisdiction, because the original territorial State (Chile) has not expressed any intention to waive its domestic right of prosecution, its *ius puniendi.* This is a typical example of a conflict regarding negative jurisdiction. Spain wants to, but cannot. Chile can, but does not want to. The United Kingdom neither wants to, nor can. But has the requirement of complementarity been met? Is there no national jurisdiction 'available' or 'effective'? When, for instance, national jurisdiction determines that the evidence does not justify criminal proceedings because it does not meet the *prima facie* standards, is that jurisdiction then automatically 'ineffective'? Is the ICC competent to intervene? And does it have the powers to require that the state in question, which could not attain a conviction, offers legal assistance with a view to the prosecution before the Court? Is that not tantamount to indirectly asking that state to disqualify its own criminal proceedings? Does a refusal of legal assistance under such circumstances always amount to contempt of court by the civil servant denying the request by the Court's registrar? And what if the United Kingdom does prosecute Pinochet – simply in order to be 'effective', even though the evidence does not pass the *prima facie* test – the Anglo-Saxon criterion for deciding to prosecute – but the common-law judge rules an acquittal on account of that very reason, because the prosecution was too 'frivolous' in terms of evidence? The Roman Statute includes a significant weakening of the international principle of *ne bis in idem*, in order to reflect the concept of complementarity. Article 20 of the Statute stipulates that where former, previous *national* criminal proceedings, were apparently instituted to acquit the accused of criminal liability according to international standards, the ICC may 'repeat' criminal proceedings. Is that the case when the sufficiency of evidence of the prosecuting organ is questionable? When a conviction is not automatically irrevocable? Which standards apply? Those of national case law? Or is the Court allowed to roll like a millstone through

9. I.e., a state claims jurisdiction outside its territory, because the subjects or nationals of that state are 'victims' (passive form, 'passivus') of the offence committed outside that state. Generally, the passive personality principle is not accepted in Anglo-Saxon countries as sufficient justification for such a violation of the substantive territoriality principle that says that a state must restrict its jurisdiction to offences committed within its own territory.

the spider's web of international law concerning the principle of *ne bis in idem* and the complicated regulations on national, irrevocable judgments?

3. THE IRREVOCABLE JUDGMENT AND THE OBLIGATIONS OF ENFORCEMENT

The parties to the Statute should view the Court as an 'extension' of their national criminal courts. That has been the underlying principle of the International Law Commission from the start.[10] The ILC therefore decided that the actual transfer of an accused *by* a state *to* the Court should not be viewed as a classic 'extradition'.[11] Extradition involves the transfer of a person from jurisdiction A to jurisdiction B. That would not be the case in a transfer for the purpose of exercising the jurisdiction of the ICC. The legal concept would be similar to a case in which the Netherlands, prosecuting a war criminal before the specialized court of Arnhem that must apply the Dutch War Crimes Act,[12] would eventually transfer the case to the International Criminal Tribunal for the former Yugoslavia (ICTY), that it is also obliged (although based on other legal grounds) to consider as an 'extended criminal jurisdiction', hierarchically superior to Arnhem. The ILC has therefore come up with several new terms, in order to emphasize that concepts of legal assistance are introduced here that should not be 'translated' as variations of the concepts of classic legal assistance such as surrender, extradition and informal transfer. The ILC always referred to this type of surrender as 'informal transfer'. The intention, of course, was to exclude obstacles of classic legal assistance such as the nationality principle, the reciprocity principle, the hardship clause and non-extradition for political offences.[13] With regard to the irrevocability of final judgments by the Court, the ILC was in two minds. On the one hand, if the parties to the Statute were to consider the ICC as an extension of their own national jurisdiction, they would be bound unconditionally to treat the judgments directly, without transformation, like the judgments issued or handed down by their national judiciaries, valid as national executory titles. Thus, states would be obliged without any margin of appreciation nor

10. *See* ILC Report, *supra* note 6, at 138.
11. *Id.*, at 133.
12. Wet Oorlogsstrafrecht (War Crimes Act) of 10 July 1952, Stb. 408.
13. *See* ILC Draft Statute, *supra* note 6, Art. 53. The ILC distinguishes the term 'extradition' from 'transfer' with regard to the rules on conflicts regarding requests for legal assistance between ICC and third parties which have made agreements regarding extradition in treaties of classic legal assistance on offences that also come within the jurisdiction of the ICC. The ILC explains: "As to States not parties to the Statute, no obligation of transfer can be imposed, but co-operation can be sought in accordance with Article 56. The term 'transfer' has been used to cover any case where an accused is made available to the Court for the purpose of the trial, in order to avoid any confusion with the notion of extradition or other forms of surrender of persons (e.g. under status of forces agreements) between two States", *see* at 133, sub (2).

latitude to enforce the judgments.[14] On the other hand, the ICC left the parties some flexibility to avoid the obligation to enforce, as the Registrar of the Court can only appoint states as enforcement countries based upon a list of states parties that had explicitly indicated their willingness to do so. States would be allowed to reject enforcement for reasons of expediency, national opportunity, advisability or the lack of penitentiary logistics. Obviously, that was in conflict with the concept that the Court should be equivalent to the national criminal court. After all, judgments of the national judge should be enforced by the administration. That is the essence of *auctoritas rei iudicatae.*[15] Consequently, the idea that the ICC was a 'foreign' (non-national) Court came in through the backdoor in the Statute after all.

The ILC also envisaged the ICC as an organ of the UN.[16] In this way, the Security Council would be able to impose an obligation to enforce sentences upon states in many cases, but not, like the ICTY by virtue of its link with the UN Charter. The Charter obliges States to co-operate in enforcing measures taken by the Security Council to maintain peace. In Rome *that* link with the Charter has been abandoned completely. The ICC is drawn up as an independent organization. It must enter into a separate treaty with the UN which, after all, must recognize it as an entity and support it financially. The Statute includes numerous clauses to evade enforcement obligations, even in cases where a state had bound itself to enforcement. Consequently, the ICC has become, yet again, a 'foreign jurisdiction'. A national procedure of transformation is allowed. Faulty penitentiary or operational logistics may be invoked as an obstacle to recognizing a judgment by the ICC, also with regard to fines and confiscatory measures. At the same time, the 'ICC transfer' has moved toward 'extradition'. That legal concept is referred to in the Statute as the 'twin' of

14. This was included by the ILC as a principle in Article 58 of the ILC Draft Statute, *supra* note 6: "States parties undertake to recognize the judgments of the Court". It explained "States parties to the Statute must recognize the judgments of the Court, in the sense of treating those judgments, unless set aside under Part 6, as authoritive for the Purpose of the Statute of Article 42". (ILC Report, *supra* note 6, at 138). However, the ILC acknowledged that states might need a special national *exequatur* procedure, particularly on the ground of a constitutional *habeas corpus* guarantee, in which the subject of the specific country would be certain that he could only be imprisoned based on a *national* irrevocable judgment (*Id.*). This is where the ILC undermined its own principle. Up until the last moment, delegations, including the Netherlands, have tried to keep this principle 'on its feet' on the level of the Statute. In the so-called Zutphen-Draft, *supra* note 2, it was still included, in Article 85, first paragraph, reading: "States Parties [shall] (undertake to recognize) [(and to) enforce directly on their territory] (give effect to) the judgments of the Court (in accordance with the provisions of this part)". The purpose was to *force* parties into a procedure of 'continued enforcement', in which the sentence imposed with the test could be 'continued' directly, as if it were based upon a national judgment of the accepting state. *See* A.A.M. Orie, J.G. van der Meijs & A.M.G. Smit, Internationaal Strafrecht (International Criminal Law) 136 *et seq.* (1991). The test of continued enforcement reflects most clearly the unconditional binding force of the judgment. However, in Rome this proved to be no longer tenable.

15. There is a public-law obligation to enforce. *See* G. Strijards, Revisie, inbreuken en executiegeschillen betreffende het strafgewijsde (Review, Violations and Enforcement Disputes regarding Criminal Judgments) 62 *et seq.* (1989).

16. Regarding these developments, *see* G. Strijards, Een universeel strafhof, chimere of realiteit? (A Universal Criminal Court, Illusion or Reality?) 14-15 (1997).

the transfer. It does not come as a surprise that the parties to the Statute have to enforce legal assistance, on the one hand, in accordance with the Statute, and, on the other hand, in accordance with their respective *national* procedural law. By way of express reference to national procedural law, numerous classic grounds for refusal to grant legal assistance have been resurrected. In conflicts regarding requests for legal assistance, the ICC no longer has primacy – as was assumed by the ILC.

4. *PROPRIO MOTU* POWER OF THE PROSECUTOR

An important step forward is that the Statute grants the Prosecutor the power to instigate investigations *proprio motu*. This is the so-called *proprio motu power*, described in Article 15.[17] Delegations have for a long time resisted that power because they feared unwelcome intervention by the Prosecutor in the structure of their internal legal order, an encroachment on the principle of internal sovereignty. The text of the Statute 'reflects' that. As soon as the Prosecutor concludes that there is 'a reasonable suspicion' – in the author's words – he must submit to the Pre-Trial Chamber a request for authorization to proceed with an investigation.[18] Without authorization, the Prosecutor must suspend his investigative actions. But he may, in the event of fresh facts (*nova*) submit the case once again to the Pre-Trial Chamber. Interested parties, including victims, may make representations to the Pre-Trial Chamber. The fact that the Prosecutor needs authorization for almost all investigative acts, from a judge who watches over his shoulder – particularly to prevent 'frivolous investigations' – is illustrative of a compromise solution. The Anglo-Saxons in particular have had to accept a lot here with regard to two issues.

From the point of view of internal territorial sovereignty, they considered a 'foreign' judicial authority (that is how they *continued* to view the Prosecutor) acting *proprio motu* as an unacceptable violation of the principle of national territoriality which insists that criminal law is maintained by a national criminal authority. Senator Helms then announced that this power of *proprio motu* would mean "death on arrival" in the United States Congress.[19] But, on the other hand, once the Prose-

17. ICC Statute, *supra* note 1, Art. 15 (1). This Article reads: "1. The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the Jurisdiction of the Court."
18. ICC Statute, *supra* note 1, Art. 15 (2-3): "2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court. .3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber in accordance with the Rules of Procedure and Evidence."
19. For the critique of the ICC Statute *see* Senator Helms, *Is A United Nations International Criminal Court in the United States Interest?*, Hearing before the Subcommittee on International Organizations of the Committee on Foreign Relations of the United States Senate, 23 July 1998.

cutor has been granted a *proprio motu* power, it is in conflict with the Anglo-Saxon adversarial system, the two-party system, that the Prosecutor should have to submit cases to the Pre-Trial Chamber, over and over again. Intervention by a judge is only acceptable in a public trial. Prior to the trial, the Prosecutor needs to be as free as the proverbial bird in his role as a party. In any event, the concept of the power of *proprio motu* (one might almost refer to it as a normative principle of *proprio motu*) has not been preserved in the Chapter on legal assistance. One might think that the Prosecutor, who may investigate *proprio motu*, may subsequently also operate actively within the territory of the parties to the Statute to gather evidence. That he may not, *proprio motu*, use coercive methods nor compulsory measures is quite understandable – the assistance of national judicial authorities can be requested – but he should be able to carry out any other act in order to gather evidence for which coercive methods or the use of penal enforcement powers are not necessary. However, *that* is not the system of the Statute. The system is that within the territory of states parties, the Prosecutor has the power to do anything any normal person is allowed to do. He may ask questions, gather observations and evidence, but not under oath. Is he also allowed to take samples and – for instance – carry out excavations? No. He is only allowed to carry out *those* investigations that can be carried out without – in short – making any alterations to the material outward appearance of public places or spaces in which he finds himself.

However, experiences with the ICTY have shown that the Prosecutor particularly needs investigative powers that enable him to make alterations to the material outward appearance. Take, for instance, mass exhumations. The Prosecutor should have the power to isolate corpses in body bags and to collect bullets. In an investigation regarding poisonous gasses he should be able to take samples from fauna. That the Court should, perhaps, have the power to send an examining magistrate to secure the right of reappraisal of the – as yet absent – accused, is another issue altogether. The Statute does provide for that judicial control in the preliminary phase, yet again very much against the will of the Anglo-Saxons.[20] In the event of such an occurrence, the Prosecutor is obliged, when he anticipates that the act of gathering evidence can only be carried out in the preliminary phase, to inform the Pre-Trial Chamber. For instance, when the gradient of the ballistic trajectory – in the investigation regarding an apparent systematically given order to kill prisoners of war – can only be proven during a short period of time (because corpses perish). In the event of such an occurrence, the Prosecutor should inform the Pre-Trial Chamber thereof and request that, for the purpose of the integrity of the preliminary investigation, it takes corresponding measures, also for the purpose of the interests of the defence. Where the Prosecutor fails to do so, he must take into account that, at some point, his evidence might be found inadmissible in a public investigation. The 'exclusionary rule', the rule excluding illegally obtained evidence from the trial of

20. ICC Statute, *supra* note 1, Art. 56.

the defendant, should serve as an inducement or incentive to the Prosecutor to inform the Pre-Trial Chamber regularly and in time.

5. FUNDAMENTAL PRINCIPLES

It was obvious that the Rome Statute would have several gaps and loose ends. Within the context of the UN, attempts have been made to create such a universal Court since 1945. This development has gained momentum since 1994, also because the global balance of power (the collapse of the monolithic Eastern block, the rise of the Arab League, the isolation of China) has shifted fundamentally. If the diplomats in Rome had not reached agreement regarding a consolidated final draft of such a Statute, it would have been – in the words of the UN – a *retrograde evolution*. Compared to the trials of Nuremberg and Tokyo, we would have been back to 'square one'. In other words: we could have forgotten about the Court for the coming four decennia. That would have been disastrous for international criminal law.

Currently, the Statute is a global beacon, wherein three fundamental principles are codified. Firstly, the principle that an individual may be directly criminally liable or responsible under international law, in which case his national law, insofar as it provides grounds for exclusion of prosecution, is of no importance. Secondly, it is of no importance whether a person was a public official of the state at the time of committing the serious offence under international law. Again, the *Pinochet* case serves as an illustration: the Statute already played a role in the House of Lords as codification of international law regarding that issue.[21] Thirdly, the accused cannot, in respect thereof, rely upon an official order issued by a competent authority or a binding legal requirement, neither as a ground for justification nor as a ground for exclusion of criminal liability. The fact that the Statute has also recodified mandatory international law in this area, is broadly accepted. Even Lord Slynn of Hadley who, as is evident from his dissenting opinion in the *Pinochet* case, has a conservative view, recognizes that new parameters have been created by way of the Statute of Rome which ought to apply universally.[22] But that is not all. Stated above was the most significant weakening of the *ne bis in idem* principle in the Statute itself, in which a certain abuse of fake trails is denounced. In the *Bouterse* case[23] this was invoked by numerous parties. After all, the scope of the criminal and procedural

21. *See* Lord Slynn of Hadley in Regina v. Bartle and the Commissioner of Police for the Metropolis and others *ex parte* Pinochet, Regina v. Evans and another and the Commissioner of Police for the Metropolis and others *ex parte* Pinochet, 25 November 1998, at internet http://www.parliament.the-stationary-office.co.uk/pa/ld199697/ldjudgmt/ldjudgmt.htm.
22. *Id.*
23. In early 1999, a criminal trial started before a Dutch criminal court against former Head of State of Surinam, Desi Bouterse. In this case the question has arisen whether Surinam prosecution can protect Bouterse unconditionally from parallel Dutch prosecution.

principles of the Statute is not confined to the offences which are actually brought before the Court. In conjunction with the above three principles, it provides a rephrasing of substantive standards of criminal law.

6. PERSPECTIVES

The Statute is typically an interim instrument. Many inconsistencies should, in time – perhaps by way of the case law developed by the Court – be removed, many voids should be filled. Articles 121 to 123 provide for the possibility of amending and reviewing the Statute within seven years after it has been in force. If so, the possibilities provided here are also suitable in getting the Americans on board as yet. Because the universal scope of the Court remains doubtful, as long as its jurisdiction is not recognized by the most important military force.[24] Especially the powers of the Public Prosecutor to carry out investigative acts outside the jurisdiction of the Court will have to be better regulated in the future. Dutch experiences with the ICTY – coveted by the US – will prove to be of great importance. The obligation of the states parties to the Statute to enforce final judgments has not been regulated well as yet. The rules of equitable burden-sharing to share the penitentiary burden still have to be worked out. Delegates began work on this in February 1999. The Netherlands must take the lead here, because, as host country, it has a direct, practical interest in working out additional rules. In cases where the Court is unable to designate the enforcement of the sentence to another state party to the Statute, the Netherlands must act as warden of the universal legal order and enforce the sentence of imprisonment. However, Article 103, third paragraph, preamble and sub a of the Statute have been phrased in such a manner that the Statute cannot function without further details regarding burden-sharing. The phrasing of the article shows that such an elaboration *must* be included in the criminal-law appendix.[25] The other states parties to the Statute are therefore in no position to lean back and wait to see what the Netherlands come up with. It will not be an easy task, espe-

24. Also consider that the US often is the decisive factor in the Security Council, which in the Rome Statute, may initiate proceedings before the Court, but also suspend them. In addition, experiences with the ICTY Tribunal have shown that the supranational criminal judge needs a police force present at the location where the preliminary investigation must be completed for practical purposes, because the regular authority of the State has either crumbled and is incompetent or is outright hostile towards the investigation. Furthermore, the UN will subsidize the Court, and without the co-operation of the US, which also operate outside the UN as financier of the international administration of justice, that will be most difficult.

25. ICC Statute, *supra* note 1, Art. 103 (1) reads as follows: "1. (a) A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons." The third paragraph continues: "3. In exercising its discretion to make a designation under paragraph 1, the Court shall take into account the following: (a) The principle that States Parties should share the responsibility for enforcing sentences of imprisonment, in accordance with the principles of equitable distribution, as provided in the Rules of Procedure and Evidence;" (etc). By using the past tense ('as provided') the obligation to provide for such rules is included.

cially as the Statute assumes that the state in which the sentence will be enforced, complies with high penitentiary standards, as laid down in various treaties. Experiences with the ICTY, currently more or less 'peddling' with convicts who should serve their sentences of imprisonment outside the Netherlands, are revealing in this context.[26] It is conceivable that various countries will use the statutory reference to penitentiary standards as a backdoor to evade the obligations resulting from the rules regarding equal burden-sharing. The fact that enforcement in the Netherlands is extremely costly in the eyes of these countries – particularly on account of labour costs – might, on the other hand, also be a reason that these countries will, grudgingly, carry their share.

26. *See* D. Tolbert, *The International Tribunal for the former Yugoslavia and the Enforcement of Sentences*, 11 LJIL 655 (1998).