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Testing Co-operation: The International Criminal Court and National Authorities

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Abstract

The ICC Statute sets up a system for enforcement whereby the Court's decisions are to be effected by domestic authorities. The article explores the implications of this institutional design in terms of the legal tools at the Court's disposal and the extent to which the ICC can adjudicate issues related to state co-operation. At the same time, it examines the responsibilities assumed by all states parties under the Statute to secure compliance, including in situations where the requested national authorities are unwilling or unable to co-operate. It suggests that to be sucessful, the co-operation regime under the ICC Statute will require a dynamic set of interactions between the individual state and the collective.

Key words

co-operation; enforcement; International Criminal Court; national authorities; Prosecutor

The ability of the International Criminal Court (ICC) to rely on effective and predictable forms of co-operation will be essential for the successful execution of the Court's mandate. As the president of the Court, Philippe Kirsch, noted in his 2006 address to the Court's Assembly of States Parties (ASP), the ICC has been established on two pillars: a judicial pillar, represented by the Court itself, and an enforcement pillar, which belongs to states.[1] In the absence of an international enforcement agent, the Court's decisions must be implemented indirectly by states, which are the proximate source of compliance. Thus the enforcement of the Rome Statute is made dependent on national support (including through international organizations) for all matters pertaining, *inter alia*, to the collection of evidence, the compelling of persons, the security of witnesses, the issuance of travel authorizations for individuals appearing before the Court, the conduct of searches and seizures, the forfeiture of assets, the execution of arrest warrants, and the surrender of persons. This article explores what impact this design will have on the fulfilment of the statute's objectives. It begins with an examination of the interaction of the ICC and national authorities through the familiar concepts of 'horizontal' versus 'vertical' powers and discusses the efficacy of measures that could be taken to enhance co-operation. This leads to a review of co-operation issues arising in ICC jurisprudence to date. The article ends by positing an alternative theory of co-operation based on the creation of a covenant between the individual state and the collective.

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1. Available at http://www.icc-cpi.int/library/organs/presidency/PK_20061123_en.pdf.

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1. Statutory forms of co-operation

Perhaps of all the provisions of the Rome Statute, Part 9, dealing with international co-operation and judicial assistance, most clearly exemplifies the differences during negotiations on the appropriate balance between national sovereignty and international authority. These debates have sometimes been framed by reference to 'horizontal' and 'vertical' powers.[2] As first employed by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY), the terms attempt to describe the consensual and reciprocal legal framework governing inter-state legal assistance in criminal matters as distinguished from the hierarchical and supranational relationship of an international court with national authorities.[3] Alternatively, Falk has distinguished between 'statist logic', representing the predominant horizontal ordering of international society since the Peace of Westphalia that is associated with the will of the territorial sovereign state, and a 'supranational logic' that aspires to a vertical ordering from above.[4] As Swart notes, in inter-state practice there is no customary rule of international law imposing a duty of states to co-operate in criminal matters beyond their treaty obligations: 'Sovereignty, equality, reciprocity, the existence or absence of mutual interests, and, to a greater or lesser extent, the need to protect individual persons against unfair treatment by the requesting state are the main determinants of inter-state co-operation.'[5] By contrast, a distinctly vertical regime is created by the ad hoc Tribunals: as emphasized by the UN Secretary-General in his Report to the Security Council on the establishment of the ICTY, 'an order by a Trial Chamber . . . shall be considered to be the application of an enforcement measure under Chapter VII of the Charter of the United Nations'.[6]

The Rome Statute, a treaty text arising from inter-state negotiations, creates a unique mixture of the horizontal and vertical regimes.[7] In some respects the International Criminal Court (ICC) follows the supra-state model of the ad hoc Tribunals. Thus surrender to the Court is distinguished from extradition and the term 'other forms of co-operation' is employed in place of mutual legal assistance. Article 86 of the Statute specifies that 'States Parties *shall*, in accordance with the provisions of this Statute, *co-operate fully* with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court' (emphasis added). The

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2. See, e.g., A. Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections', (1999) 10 EJIL 144.
3. The ICTY Appeals Chamber employed these terms in the Blaškić Subpoena Interlocutory Appeal, recalling the *amicus curiae* brief submitted by J. A. Frowein et al. for the Max Planck Institute; *Prosecutor v. Blaškić*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Case No. IT-94–14, Appeals Chamber, 29 October 1997.
4. R. Falk, 'Theoretical Foundations of Human Rights', in R. Falk (ed.), *Human Rights and State Sovereignty* (1981), 33.
5. For an elaboration of the characteristics of the horizontal vs. vertical models see A. Swart, 'General Problems', in A. Cassese, P. Gaeta, and J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002), 1591; G. Sluiter, *International Criminal Adjudication and the Collection of Evidence* (2002), 87.
6. Report of the Secretary-General, UN Doc. S/25704, para. 126. See also UN Doc. S/RES/978 (1995) and S/RES/1031(1995). The ICTY Appeals Chamber has stated, moreover, that the provisions on co-operation 'impose an obligation on Member States of the United Nations towards all other Member States or, in other words, an obligation "*erga omnes partes*"'; see Blaškić Subpoena Interlocutory Appeal, *supra* note 3, para. 26.
7. See Cassese, *supra* note 2, at 144.

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manner in which state party obligations are transposed, interpreted, and applied in domestic law will remain critical in this regard, for upon the actual incorporation and execution of these obligations at the national level will depend the ultimate enjoyment of the Court's powers.[8] As with the ad hoc Tribunals, the ICC is under no obligation of reciprocity towards states, although it may, at its discretion, respond to incoming requests for assistance.[9] The Court is also the final arbiter of disputes over the extent of co-operation owed by states, and may make a finding of non-compliance and report the matter either to the Assembly of States Parties or to the Security Council when the Council has triggered the referral of a situation.[10] The role of national bodies in relation to Court requests, moreover, is strictly confined. In arrest proceedings, for example, while the judicial authorities of the custodial state are to determine whether proper process has been served and the arrested person's rights have been respected, they may not examine the legality of the warrant itself or rule on a habeas corpus challenge. Instead, the competent authorities must notify the Court of any application for interim release in the custodial state and consider the recommendations of the Court before rendering a decision on such release.[11]

Other provisions of Part 9 appear to reflect the practice of mutual legal assistance regimes between states. Thus, in contrast to the obligations owed towards the ad hoc Tribunals, only states that have accepted the jurisdiction of the ICC are obliged to co-operate, barring Security Council intervention.[12] The Statute, moreover, in general speaks of 'requests for co-operation' rather than the language of 'obligation' and compliance with 'orders'. And although the Rome Statute does not permit reservations to the treaty,[13] co-operation is made subject to numerous qualifications, any one of which could impact on the provision of judicial assistance. In particular, a requested state may seek consultation, modification, or postponement of the co-operation sought, based on national security considerations (Art. 72); third-party interests (Arts. 73 and 93(9)(b)); competing requests for extradition from a non-party state (Art. 90) or a competing request for co-operation (Art. 93(9)); a prohibition in domestic law (Arts. 91 and 99); other requirements of its domestic law (Arts. 91 and 96); interference with an ongoing case different from that to which the request relates (Art. 94); lack of information provided, pre-existing treaty obligations with non-party state, or an inability to effect an arrest (Art. 97); or the immunity of persons or property of a third state under international law or of a national of a sending state

8. For studies on ICC implementation legislation see C. Kreß et al. (eds.), *The Rome Statute and Domestic Legal Orders Volume II: Constitutional Issues, Cooperation and Enforcement* (2005).
9. Rome Statute, Art. 93(10).
10. Ibid., Art. 87(7).
11. Ibid., Art. 59(4). The Council of Europe's advisory body on constitutional matters, the European Commission for Democracy through Law, better known as the Venice Commission, examined whether the prohibition preventing domestic courts from considering, for the purpose of interim release, whether the arrest warrant was properly issued endangered habeas corpus rights under Art. 5 of the European Convention on Human Rights (ECHR). The Commission concluded that the character of deprivation of liberty in question was not of the nature foreseen in Art. 5(1)(c) ECHR, but rather fell within the meaning of Art. 5(1)(f), which authorizes a deprivation of liberty if it is pursuant to 'the lawful arrest or detention of a person . . . against whom action is being taken with a view to deportation or extradition'; Venice Commission (2001).
12. Non-party states may co-operate either by accepting ICC jurisdiction ad hoc (Art. 12(3) and Rule 44) or by providing assistance on the basis of an arrangement, an agreement, or any other appropriate basis (Art. 87(5)).
13. Rome Statute, Art. 120.

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pursuant to an international agreement (Art. 98). The requested state may raise issues for consultations where it identifies problems which may 'impede or prevent' the execution of a request, although the object of such consultations must be to resolve the matter without delay (Art. 97). An admissibility challenge, moreover, may postpone execution of a request absent instructions from the Court to the contrary (Art. 95). Most of these provisions are reflective of the fact that the Statute only regulates the relationship between states parties and the Court; consistent with the law of treaties, it does not intend to alter the existing relationship between states more generally.

1.1. Domestic modalities

The mixture of vertical and horizontal regimes is perhaps best exemplified by the provision that requests for co-operation are to be executed in accordance with both Part 9 of the Statute and the procedures under domestic law.[14] This of course presupposes that Part 9 and a state's national laws are mutually compatible.[15] A state party, therefore, cannot be restrained by national law from rendering co-operation in ways not anticipated by the Statute. For example, a state party would violate its treaty obligations should its domestic legislation fail to properly distinguish between 'surrender' and 'extradition', to the extent that it would be unable to comply with a request from the Court because of a constitutional bar, for example, on the extradition on its own nationals.

Many provisions of Part 9, however, leave open the exact balance to be achieved between the requirements of the Court and the observance of domestic procedures. The Statute does not determine, for example, whether the gathering of evidence should be led by the Prosecutor and assisted, where necessary, by national authorities or whether states should be in charge of request execution.[16] The solution arrived at in the Statute with respect to these two sources of law (the Statute and national legislation) is to stipulate that requests are to be executed 'in accordance with the relevant procedure under the law of the requested state and, unless prohibited by such law, in the manner specified in the request.' Accordingly, a state party cannot argue that the manner specified cannot be observed because of an absence of domestic provisions, because it departs from normal domestic practice or is otherwise cumbersome: it must show a specific prohibition in law.[17] This also means that the Prosecutor may regulate aspects of the investigative measure undertaken on a state's territory. For example, while the assistance of national authorities may be requested in the identification and location of persons, the Prosecutor may request that their questioning be undertaken by ICC investigators, including without the presence of national officials, unless this is prohibited by national law.[18] Had the

14. Ibid., Arts. 89 and 93.
15. B. Broomhall, 'The International Criminal Court: A Checklist for National Implementation', in C. Bassiouni (ed.), *ICC Ratification and National Implementing Legislation*, 13 *Nouvelles Études Pénales* (1999), 131.
16. See Cassese, *supra* note 2, at 165.
17. Informal expert paper: Fact-finding and investigative functions of the Office of the Prosecutor, including international co-operation (ICC-OTP 2003), para. 55.
18. In certain circumstances, for example, a witness may feel intimidated by the presence of domestic officials during questioning; there may be concerns regarding the confidentiality of the interview; or there may

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Statute granted states an absolute right to control the execution of ICC requests, this could have undermined the effectiveness of the investigative process and would have rendered the obligation to co-operate only as effective as the national laws and procedures of each state.[19] This is all the more relevant given that the Court's investigations are undertaken predominantly on the territory of conflict or post-conflict states.[20]

1.2. The Court's power to compel

The clearest demonstration of vertical authority is the power of an international court to compel the rendering of co-operation under pain of sanction. In the case of the ICC, to whom can the Court issue an order? Are its powers to compel limited to participants in its proceedings, or can it issue subpoenas and/or binding orders to national authorities and other persons?

In the *Blaškić Subpoena Interlocutory Appeal*, the ICTY Appeals Chamber held that its jurisdiction to issue a subpoena, in the sense of a binding order issued under threat of penalty (i.e. contempt of court), extends only to individuals acting in a private capacity.[21] By contrast, the Appeals Chamber determined that the Tribunal was not empowered to issue subpoenas to states or to state officials (as a consequence of functional immunity), since the Tribunal cannot take enforcement measures against states.[22] It could, however, issue binding 'orders' or 'requests' pursuant to Article 29 of the ICTY Statute, which in turn derives its legal basis from the Chapter VII resolution establishing the Tribunal.[23] In relation to private individuals, the Appeals Chamber affirmed the authority of the Tribunal to address itself directly to such individuals where this is authorized by the legislation of the state concerned or otherwise where the state has refused to comply with an order from the Tribunal.[24]

While Part 9 of the Rome Statute appears to avoid some of the above problems by generally adopting the language of 'requests' rather than 'orders', there remain a number of areas where the scope of the Court's powers appear unclear. In particular, a cluster of provisions refer to the competence of the ICC judges to issue orders or require the execution of certain compulsory measures. In the main, these are directed to participants in proceedings against whom the Court can directly impose a penalty for misconduct, namely the parties to the proceedings, victims' representatives, the

be fears over national authorities creating a separate, possibly inconsistent, record of the interview. See discussion on Art. 99(1) *infra*.

19. As Arbour and Bergsmo have noted, '[b]ased on the experience of the two ad hoc Tribunals, merely allowing Tribunal investigators to be present at and assist in the execution process would fall far short of the requirements of effective international investigation and prosecution. How can cases be prepared effectively if the Prosecutor cannot control the gathering of evidence?'; L. Arbour and M. Bergsmo, 'Conspicuous Absence of Jurisdictional Overreach', in H. von Hebel, J. Lammers, and J. Schukking (eds.), *Reflections on the International Criminal Court* (1999), 137. See also C. Bassiouni, 'Observations Concerning the 1997–98 Preparatory Committee's Work', 1997 (13) *Nouvelles Études Pénales* 20.
20. See also *infra* section 1.3.
21. Blaškić Subpoena Interlocutory Appeal, *supra* note 3, para. 21.
22. By contrast, state officials acting in their private capacity would lose their claim to functional immunity before the Tribunal; ibid., paras. 38–51.
23. Ibid., paras. 25–28.
24. Ibid., para. 55.

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Registrar and other Court officials, and persons appearing before the Court.[25] In the case of a person who is not before the Court, however, Article 64(6)(b) provides that the Trial Chamber may 'require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute'. The authority of the Court to issue compulsory orders against a person not physically before it therefore appears to rest on whether the domestic legislation of the state concerned enables the ICC to do so, or otherwise prohibits the Court from asking.

An ICC request to a state asking its national authorities to compel the appearance of a witness or the production of evidence would be transmitted on the basis of Article 93(1)(l), which enables the Court to request 'any other assistance which is not prohibited by the law of the requested State'.[26] It would also be subject to any objections that may be raised on the basis of national security.[27] In this sense, the request would broadly mirror the practice in mutual legal assistance instruments where a territorial state is requested to exercise certain compulsory measures on behalf of a requesting state. But could the ICC go one step further and, as with the ad hoc Tribunals, enter into direct contact with private individuals to order their appearance or the production of evidence? The phrasing of Article 64(6)(b) – 'by obtaining, *if necessary*, the assistance of States as provided in this Statute' (emphasis added) – appears to indicate that it can. That is, domestic legislation may recognize the ability of the ICC to issue orders or subpoenas directly to individuals on its territory, thereby bypassing the need to channel a request through its national authorities. In such a case the assistance of the state concerned would not be 'necessary'.[28]

There remain, nonetheless, some notable differences from the regime of the ad hoc Tribunals. The Rome Statute does not authorize the issuance of orders or subpoenas to private individuals in the absence of enabling domestic legislation where a state has obstructed co-operation. Moreover, the ICC cannot issue binding orders to states: it can only request their co-operation.[29] The authority of the Tribunals to do so in both instances rests on the exercise of delegated Chapter VII powers, which serves as an exception to the principle under customary international law that a sovereign state cannot be ordered by another state or international organization (see discussion

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25. See, e.g., Rome Statute, Arts. 56(2)–(3), 57(3), 61(3), 64(6), 68, 72(7)(b).
26. Unavailable for this purpose would be Art. 93(1)(a), with respect to the voluntary appearance of persons as witnesses, and Art. 93(7), dealing with the temporary transfer of a person in custody with his or her informed consent. Modalities for the provision of assistance under Art. 93(1)(l) may also be regulated by supplementary agreement – see *infra* section 2.1
27. Rome Statute, Arts. 72 and 93(4).
28. While a private individual may be under a direct obligation to comply with an ICC summons, the national authorities may still be required to supervise the actual service of such judicial notice or to facilitate its execution. See, e.g., Section 5 of the Finnish implementing legislation, which provides, 'A witness, on whom a summons to appear issued by the International Criminal Court has been served in Finland, for the purpose of hearing before the Court, shall be under an obligation to comply with the summons'; Act No. 1284/2000 (28 December 2000) [Finland]. See also R. Eerola and A. Välimaa, 'Finland', in Kreß et al., *supra* note 8, at 87.
29. The same considerations would apply in the case of an international organization or its officials (who may enjoy functional immunity).

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below on whether this is modified in the case of a Security Council referral to the ICC).[30]

1.3. Direct execution of investigative measures

Although the ICC cannot issue orders to states, two provisions of the Statute empower the ICC to conduct activities on the territory of a state party without requiring its consent. In doing so, they constitute a significant divergence from the traditional inter-state legal assistance regimes.

Article 99(4) authorizes the Prosecutor, if it is necessary for the successful execution of a request, to execute such a request directly on the territory of a state party without having secured its consent and, if essential for its execution, without the presence of the national authorities, where the request can be executed without any compulsory measures.[31] This includes specifically the interviews of witnesses on a voluntary basis or the examination without 'modification' of a public site or place (such as a mass grave), but may extend to other non-compulsory measures not listed.[32] It is worth noting that the implementing legislation of a number of state parties either expressly excludes the operation of Article 99(4) as stipulated by requiring the presence of national authorities during voluntary witness interviews, or otherwise remains silent on the recognition and implementation of the provision under domestic law. One could question whether this brings into doubt the compliance by state parties with their obligation under Article 88 to ensure that there are 'procedures available under their national law for all of the forms of co-operation which are specified under this Part [Part 9]'. The procedures regulated by Article 99, however, are not, strictly speaking, distinct forms of co-operation, but rather modalities for the execution of requests. As such, the critical issue for state parties is that they do not exclude the functioning of those procedures expressly envisaged under Article 99(4), even if they do not regulate them.

Under a different scenario, the Pre-Trial Chamber may authorize the Prosecutor to take specific investigative steps within the territory of a state party without having secured its consent under Part 9 where it determines that the requested state is 'clearly unable to execute a request for co-operation due to the unavailability

30. See Blaškić Subpoena Interlocutory Appeal, *supra* note 3, para. 26. Other provisions enabling the ICC to issue compulsory measures include, *inter alia*, those related to the issuance of orders against a convicted person for fines, forfeitures, or reparations to which state parties have agreed to give automatic and compulsory effect; Rome Statute, Arts. 75 and 109; ICC RPE, Rules 219–220.

31. Execution of such a request may proceed following 'all possible consultations' in the case of a state where the crime is alleged to have occurred, and subject to consultations and 'any reasonable conditions or concerns' in the case of third states.

32. As the OTP commissioned 'informal expert paper' notes, while the requested state may seek consultations, it is unable to raise concerns and propose conditions that are unreasonable and contrary to the express terms of Art. 99(4), such as by requiring the presence of domestic authorities during the execution of the measure. Moreover, since notice of an intention to undertake non-compulsory measures is distinguished from routine requests under Art. 93, the Prosecutor is relieved from providing such supporting information as is required for a request for assistance (Art. 96) and may withhold, as appropriate, the identity of witnesses or the location of sites to be visited; 'Fact-Finding and Investigative Functions of the Office of the Prosecutor, Including International Co-operation' (ICC-OTP 2003), para. 70. See also K. Prost and A. Schlunck, 'Article 99', in O. Triffterer (ed.), *Commentary on the Rome Statute* (1999), 1141; H. Kaul and C. Kreß, 'Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises', 1999 (2) *Yearbook of International Humanitarian Law*, 169. See also Regulations of the Court, Reg. 108,.

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of any authority or any component of its judicial system competent to execute the request for co-operation'. The threshold for the application of the provision is high, requiring the satisfaction of the stipulated requisite factors.[33] Nonetheless, the provision grants significant powers to the Court by enabling the authorization of compulsory measures, such as the execution of searches and seizures. As such, Article 57(3)(d) represents the only exception to the principle of state consent under the Statute with respect to the enforcement of compulsory measures. The provision aims to remedy the void created by the absence of a domestic authority competent to authorize the measure itself – that is, the 'failed state' scenario.[34] Conversely, the provision does not apply where the state is able, but unwilling, to co-operate. In the latter case the ICC would only be empowered to make a finding of non-compliance and refer the matter to the Assembly of States Parties (ASP) or the Security Council, as appropriate.

1.4. Political support

Another important aspect bearing on considerations of co-operation are the coercive or incentive-generating measures that may be applied by authorities other than the ICC. In the case of the ICTY and the International Criminal Tribunal for Rwanda (ICTR), despite enjoying delegated authority via Chapter VII of the UN Charter, the Tribunals have experienced considerable resistance and obstruction, including from third states not party to the conflicts. Notwithstanding repeated notification by the presidency of the failure of certain states to comply with the Tribunals, the Security Council has failed to take action to remedy these deficiencies beyond deploring and condemning non-co-operation.[35]

Faced with the unavailability of judicial powers to compel state co-operation under threat of penalty, the ICTY, for example, has come to rely less on binding orders in the realization that, ultimately, the Tribunals, much like national authorities in traditional mutual legal assistance, must rely on states acting in good faith.[36] In its place, the one principal tool that has served to promote co-operation has been the political leverage exercised by actors other than the Tribunal itself. In the context of the Balkans, this has taken the form of policy linkages between ICTY co-operation and the participation of candidate countries in the European Union's Stabilization and Association Process and NATO's Partnership for Peace programme. Similarly, the lifting of economic sanctions and the rendering of multilateral and bilateral assistance, notably by the World Bank and the United States, has in several instances been made conditional on substantive progress on ICTY co-operation. Thus

33. See F. Guariglia and K. Harris, 'Article 57', in Triffterer, *supra* note 31, at 751.
34. Authorization takes the form of a PTC order, and may include specific procedures to be followed; ICC RPE, Rule 115.
35. Former ICTY President Meron has stated, '[v]erbal admonitions, even made under Chapter VII, not accompanied by credible sanctions or threats of use of force have not proved adequate to force compliance. The need to back up international criminal tribunals with power, power of enforcement, has been demonstrated once again.' T. Meron, 'Comments in the ILA Panel on the ICTY', 1999 (5) *ILSA Journal of International and Comparative Law* 347.
36. See M. Harmon and F. Gaynor, 'Prosecuting Massive Crimes with Primitive Tools: Three Difficulties Encountered by Prosecutors in International Criminal Proceedings', (2004) 2 *Journal of International Criminal Justice*, at 403.

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while notifications and reports of non-compliance have not led to the adoption of enforcement measures by the Security Council itself, they have exercised considerable influence on other multi- and bilateral processes affecting the states of the former Yugoslavia. This division of judicial and enforcement competencies recalls the two-pillar analogy described in the introduction above.

The ICC has similarly engaged states and international organizations to secure support for the execution of its mandate. In his 2007 address to the ASP, for example, the ICC Prosecutor, Luis Moreno-Ocampo, called for diplomatic and public support by states in their bilateral and multilateral activities to ensure respect for the Court's decisions; for the public marginalization of individuals sought by the Court, including through the interruption of related supply and support activities and financial assistance stemming from the territory of states parties; for their assistance in tracing the whereabouts of persons; and in the planning and execution of arrest operations.[37] As the Prosecutor emphasized, the lack of such political support may often critically undermine the work of the Court by casting into doubt the commitment of the international community to the execution of the ICC's warrants, thereby emboldening persons sought by the Court and their supporters. [38] Relevant in this context is the report on co-operation by the Bureau of the ASP, which refers to the need to strengthen the ability of states parties to 'express political support for the Court in regional and international fora in a consistent manner, inter alia with regards to facilitating arrest and surrender', and the Assembly's endorsement of the recommendation that 'states parties should whenever possible express support for the Court and promote its general and situation-specific activities in their bilateral contacts'.[39]

As noted above, while the ICC may issue requests and make orders for the compulsory attendance of witnesses, for the surrender of accused persons, or for the freezing of assets, it also has no direct sanctioning capacity beyond the threat of reporting non-compliance. The effectiveness of external processes to facilitate co-operation will therefore rely in large part on the linkage of state co-operation to the threat of exclusion from other areas of international life. Such multilateral support for the work of the Court, however, is, by its nature, both unpredictable and

37. Statement by Luis Moreno-Ocampo, Prosecutor of the ICC (ASP, 30 November 2007), available at http://www.icc-cpi.int/library/asp/Statement_Prosecutor_en_30Nov2007.pdf. For calls for situation-specific support related to the DRC, Uganda, Central African Republic, and Darfur see also statement by Luis Moreno-Ocampo, Prosecutor of the ICC, Eleventh Diplomatic Briefing (10 October 2007), available at http://www.icc-cpi.int/library/organs/otp/ICC-DB11-ST-LMO-ENG.pdf.

38. See Prosecutor's statement to the Eleventh Diplomatic Briefing, ibid.: 'Silence is undermining us . . .'; 'I explained to my interlocutors that the Court needed first and foremost words expressing their political support. Their silence could be interpreted as a weakening resolve of the international community on the enforcement of the arrest warrants'; and in reference to northern Uganda, 'The four criminals have threatened to resume violence if the arrest warrants are not withdrawn; they are setting conditions; it is blackmail; the international community has to ensure protection for those exposed to those threats.'

39. See Section B, Report of the Bureau on co-operation, ICC-ASP/6/21 (19 October 2007), in conjunction with para. 40, ASP Omnibus Resolution ICC-ASP/6/Res.2 (14 December 2007). As the report highlights, 'such support encompasses a range of issues such as: (a) Promoting the signing, ratification and implementation of the Rome Statute; (b) Supporting the Court's general activities, including public support; (c) Promoting respect for the Court's independence; (d) Supporting situation-specific activities of the Court, including arrest and surrender of wanted persons'.

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subject to competing priorities. Successful enforcement will therefore depend on the convergence of a number of policy considerations for each state.[40]

2. Enhanced co-operation

While Part 9 of the Statute stipulates the minimum obligations on state parties to provide judicial assistance, there are a number of ways in which co-operation could be enhanced.

2.1. Additional forms of co-operation

The forms of co-operation listed in Part 9 are not exhaustive. As discussed above, pursuant to Article 93(1)(l), the Court may request states to provide 'any other type of assistance which is not prohibited by the law of the requested State'. Article 93(3) provides that any applicable domestic bar must be 'on the basis of an existing fundamental legal principle of general application'. Thus the prohibition must be pre-existing and not adopted after the ratification of the Rome Statute; it must offend a fundamental principle, which may be evidenced by other domestic statutory or constitutional provisions; and it must apply generally to other situations under domestic law and not just to ICC proceedings. Where the requested measure of assistance is prohibited under domestic law, the state concerned must 'promptly consult with the Court to try to resolve the matter'. In particular, the requested state may propose to provide the assistance sought 'in another manner or subject to conditions'. If, after consultations, the matter cannot be resolved, it is for the Court to modify the request as necessary.

Additional assistance could take the form of the intercept of communications; the provision of forensic, DNA, or other specialist expertise; or the provision of logistical and other assistance to facilitate the work of the Court practically, such as for the transportation of suspects, the extraction of threatened witnesses, or the emergency evacuation of staff. While these measures may, of course, be limited by practical and resource constraints, the Statute, nonetheless, places a good-faith obligation on state parties to assist the Court with its requests for additional forms of co-operation. Of note, the Court has already utilized Article 93(1)(l) to seek forms of co-operation not prohibited by domestic law.[41]

To facilitate requests under Article 93(1)(l), states may explicitly regulate the provision of certain additional types of assistance or facilitated modes of execution in their implementing legislation. This could include enactment of modalities that are precise enough to enable compliance with specific requests, including at short

40. Related issues bearing on state support are the budgetary priorities and strategic expectations set by state parties as expressed through their annual financial commitment to the process, which will perforce dictate much of the institutional capacity of the ICC.

41. See, e.g., the Office of the Prosecutor's request to the Netherlands Forensics Institute of the Dutch Ministry of Justice to conduct certain DNA examinations, *Prosecutor v. Kony et al.*, Decision to Terminate the Proceedings against Raska Lukwiya, ICC-02/04–01/05–248, 11 July 2007; or the military air transport provided by the French authorities for the surrender of Thomas Lubanga, 'First Arrest for the International Criminal Court', ICC-CPI-20060302–125-En (17 March 2006).

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notice. States may also provide for simplified procedures for ICC-related requests taking into account the distinct nature of the Court.

2.2. Agreements or arrangements

Articles 87(5) and 87(6) enable the Court to invite any non-party state or any intergovernmental organization to co-operate with the Court, while Article 54(3)(d) empowers the Prosecutor to enter into such arrangements or agreements not inconsistent with the Statute as may be necessary to facilitate the co-operation of a state, intergovernmental organization, or person.[42] For non-party states and international organizations such agreements may form the sole legal basis for rendering co-operation.[43] An agreement may also serve as a substitute for domestic implementing legislation on an interim basis for a state party where there has been a delay in its adoption, or it may regulate in more detail practical arrangements which would normally not be covered by primary legislation. It may set out procedures, for example, for the exchange of information in accordance with domestic law, or the types of information required under domestic law for the provision of assistance under Articles 91(2)(c) or 96(2)(e). The Prosecutor may also enter into arrangements for the protection of classified information by agreeing not to disclose, at any stage of the proceedings, documents or information that he obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the information provider consents.[44] For territorial states where the ICC will conduct its investigative activities, an agreement may clarify other legal and practical issues such as the provision of security, modalities for witness and victim protection, and the provision of administrative services and logistical assistance.

The degree to which an agreement between a state and the ICC is self-executing at the domestic level or requires separate incorporation may, nonetheless, undercut the utility of ad hoc agreements as stop gap measures to remedy a lack of adequate implementing legislation. At the same time, a poorly constructed agreement may result in the downgrading of assistance by enshrining in text restrictive modalities and interpretations on the scope of co-operation owed. For state parties, the conclusion of an arrangement or agreement can never become a prerequisite for the rendering of co-operation, since they are already bound in accordance with Part 9 to provide all the forms of co-operation specified therein. The ASP has, moreover, recalled the fundamental importance for state parties to adopt sufficiently comprehensive and qualitatively effective implementing legislation.[45]

2.3. The Security Council

The most obvious way in which the Security Council can enhance co-operation is to refer a situation to the Court. In particular, as part of the resolution referring a situation, the Security Council, acting under Chapter VII of the UN Charter, may

42. See also Rome Statute, Art. 87(6).
43. A non-party state may be obliged to render co-operation to the ICC under Art. 25 of the UN Charter by virtue of a Security Council Chapter VII resolution.
44. Rome Statute, Art. 54(3)(e); see also ICTY/ICTR, Rule 70.
45. Section A, Report of the Bureau on Co-operation (2007).

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impose a binding obligation on states (or certain states) to co-operate fully with the ICC. This duty would apply irrespective of whether the states so directed are parties to the Rome Statute. Instead, the legal basis for the duty to co-operate would derive from Article 25 of the UN Charter, whereby member states agree to accept and carry out the decisions of the Security Council. In such a situation, therefore, a state not party to the Rome Statute will be obliged to co-operate with the ICC on the basis of the Security Council resolution, not the Rome Statute. The legal basis for the ICC to interact with a non-party state will, perforce, derive from Article 87(5) of the Rome Statute, which provides that the Court may invite any state not party to the Statute to provide assistance under Part 9 on the basis of an ad hoc arrangement, an agreement or 'any other appropriate basis'. In the case of a Security Council referral, the Chapter VII resolution directing a state to co-operate with the ICC would form the relevant 'appropriate basis' for the Court to issue its requests – that is, the conclusion of an ad hoc agreement or arrangement with the non-party state would not be a prerequisite. Accordingly, the ICC may transmit requests to a state not party to the Statute for any of the forms of co-operation specified under Part 9 pursuant to the obligation imposed upon that state in the pertinent Security Council resolution to co-operate fully with the Court.[46]

A different question is whether the Security Council could alter and enhance the statutory co-operation regime to enable the Prosecutor to circumvent the co-operation provisions laid down in Part 9. The Security Council cannot authorize the ICC to act beyond the powers conferred upon it under the Statute. Unlike the ad hoc Tribunals, the ICC is not a subsidiary organ of the Council in the sense that the principal organ possesses the competence to determine the membership, structure, mandate, and duration of existence of its subsidiary organ.[47] The ICC, as an international organization with a distinct legal personality, cannot be bound by the decisions of the Security Council. Furthermore, the principle of attribution holds that an international organization cannot act beyond the powers attributed to it by its constituent treaty.[48] As Sarooshi points out, the Security Council cannot expand the subject-matter jurisdiction or temporal scope of the Court beyond the provisions of the Statute, since the ICC would then be acting *ultra vires* its own Statute.[49] Similarly, the Council cannot enable the Court to circumvent the complementarity provisions

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46. It has been suggested that, according to Art. 4(2) of the Rome Statute, the ICC can only seek co-operation from a state not party to the Statute 'by special agreement' with that state; *Situation in Darfur, (Defence) Conclusions aux fins d'exception d'incompétence et d'irrecevabilité* (9 October 2006), ICC-02/05–20, at16. This, however, misapplies the scope of Art. 4, which relates to the recognition of the ICC's legal personality on a state's territory, and not the exercise of the Court's jurisdiction or the issuance of co-operation requests. Moreover, the provision refers to those functions and powers the Court may exercise 'as provided in this Statute', consistent with the principle of consent under the law of treaties. As Kreß and Prost point out, the principle of consent under the Rome Statute 'is without prejudice to legal consequences that may stem from other legal sources', see Triffterer, *supra* note 31, at 1061. As noted above, one such source would be a Chapter VII resolution from the Security Council.
47. D. Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* (1999), 130.
48. H. Schermers and N. Blokker, *International Institutional Law: Unity within Diversity* (2003), 155.
49. D. Sarooshi, 'The Peace and Justice Paradox', in D. McGoldrick, P. Rowe, and E. Donnelly (eds.), *The Permanent International Criminal Court: Legal and Policy Issues* (2004), 106–7.

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of the Statute, such as the admissibility and challenge regime of Articles 17 and 19, or to bypass the state co-operation regime of Part 9.

The Security Council can, however, place a binding obligation on UN member states that has the effect of modifying their treaty obligations under the Rome Statute, by virtue of Article 103 of the UN Charter. For example, the Council could require UN member states to render specific forms of co-operation to the ICC, including measures additional to those foreseen in the Statute. Moreover, recalling Article 48 of the UN Charter, the Council could theoretically direct those UN member states that are a party to the ICC to amend the Rome Statute via the procedure foreseen in Part 13 of the Statute or otherwise conclude an ad hoc agreement with the UN so as to enable the ICC to fulfil the objective desired by the Security Council, although the Council would be limited in its ability to enforce actual compliance with its decision by the ASP.[50] The Security Council could also adopt a resolution under Chapter VII requiring UN member states to lift or disregard the state or diplomatic immunity of a person named in a particular warrant of arrest issued by the Court, thereby overriding any pre-existing obligations of states under international law.[51] More controversially, the Council could trump the obligations of ICC state parties to require them to act in a manner that would be inconsistent with provisions of the Rome Statute. It could, for example, require states to desist from entering a challenge to the jurisdiction or admissibility of a case under Article 19; to co-operate irrespective of the rights enjoyed by third states under the Statute; or to require the prioritization of ICC requests for surrender over competing requests for extradition from non-party states. By the same token, the Council could oblige states in a manner that would diminish support for the Court by, for example, demanding the non-surrender of nationals of a state not party to the Rome Statute without that state's consent.[52]

In the case of non-compliance by states with a Security-Council-referred situation, the Court may make a finding to that effect and refer the matter to the Council. As noted earlier, Security Council practice in the area of non-compliance with Chapter VII resolutions, however, is not encouraging. Repeated ICTY notification of non-compliance by states of the former Yugoslavia has led to little more than verbal admonition.[53] As with the Tribunals, notification to the Council or the ASP could, nonetheless, trigger customary and emerging international norms on

50. 'Such decisions [of the Security Council for the maintenance of international peace and security] shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members'; see Art. 48 of the UN Charter.

51. Since Art. 98 serves to ensure that the Rome Statute does not affect the rights under existing treaty law of states not party to the Statute, where an ICC surrender request conflicts with an immunity claim belonging to such a third state, the Court will only be able to proceed with the consent of that state. This may have significant impact on the ability of the Court to secure the arrest and surrender of accused persons, particularly since the declared policy focus of the Prosecutor on 'persons most responsible' may well result in the targeting of individuals in senior office. In such circumstances, unless the ICC is able to secure co-operation from the accused's state of nationality or is otherwise able to rely on a Chapter VII resolution imposing compulsory co-operation on UN member states, a fugitive abroad may be able to take shield under the cloak of sovereign immunities.

52. See, e.g., the Darfur referral in relation to personnel attached to UN or African Union (AU) operations; UN Doc. S/RES/1593 (2005), para. 6.

53. G. Bass, Stay the Hand of Vengeance: The Politics of War Crimes Tribunals (2000), 223.

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state responsibility.[54] This could lead to the imposition of bilateral or collective enforcement action, or the adoption of regional and bilateral sanctions such as the imposition of trade and aid conditionality measures, travel bans, and the freezing of assets. Resort by the ICC to the Security Council, moreover, need not be limited to infractions of previous Council referrals. The Security Council could enhance co-operation at any time at the Court's request.[55] Thus the ICC could call for the Council's assistance to obligate non-party states (or certain non-party states) to render co-operation in relation to a situation not referred by the Council, or to mandate a peacekeeping operation to provide co-operation in the gathering of evidence, the protection of victims and witnesses, or the arrest and surrender of suspects.[56]

2.4. International organizations

While questions of enforcement will normally fall to individual states, the Court may also turn to states acting collectively through international organizations. In many of the situations before the ICC, field missions of international organizations or peacekeeping or peace-enforcement operations may have unique access to a particular territory. Securing their co-operation could become vital for the Court. As noted above, under Article 54 the Prosecutor may seek the co-operation of any intergovernmental organization or 'arrangement' (a term adopted to refer, *inter alia*, to peacekeeping operations)[57] and may enter into specific agreements, while Article 87(6) enables the Court to ask any intergovernmental organization to provide information or documents, or other forms of co-operation that are consistent with its mandate.[58] The manner and modalities for the operation of such forms of co-operation fall outside the regime established by Part 9 which deals with the state party obligations, and are therefore subject to separate agreement. Outside the forms of co-operation voluntarily agreed upon, international organizations are under no legal obligation to co-operate with the Court. An international organization, for example, cannot be compelled to co-operate in the absence of such consent even when the ICC is acting pursuant to a Security Council referral.[59] An international organization may, nonetheless, be found to be in breach of its international obligations should there be a failure to render the forms of co-operation to which it has agreed.

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54. See ILC Commentary on Draft Articles on the Responsibility of States for Internationally Wrongful Acts, A/56/10 (2001).
55. Rome Statute, Art. 87(6): 'The Court may ask any intergovernmental organization to provide . . . forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate.'
56. See informal expert paper on co-operation (2003), para. 95. Of course, the Council could act also at its own initiative in the absence of a request; D. Sarooshi, 'Aspects of the Relationship between the International Criminal Court and the United Nations', 2001 *Netherlands Yearbook of International Law* 32, at 36.
57. Rome Statute, Art. 54(3)(c); see C. Kreß and K. Prost, 'Article 87', in Triffterer, *supra* note 31, 1065.
58. Where the Security Council did not refer a situation, there is nothing preventing the Court from asking for the co-operation and assistance of the Council pursuant to Art. 87(6) of the Rome Statue and Art. 15 of the UN-ICC Relationship Agreement, ICC-ASP/3/Res.1.
59. It is Security Council practice to 'call upon' international organizations to implement its resolutions rather than requiring them to do so; see J. Frowein and N. Krisch, 'Chapter VII: Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression', in B. Simma (ed.), *Commentary on the Charter of the United Nations* (2002), 715.

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The experience of the ICTY with the NATO-led peace-enforcement operation in Bosnia and Herzegovina, SFOR, has shown that the conclusion of such agreements will be particularly important where an international organization is exercising military or law enforcement powers in the territory subject to the Prosecutor's investigations. In the case of the UN Mission in the Democratic Republic of the Congo (DRC), known by its French acronym 'MONUC', the mandate of the mission was specifically revised to enable the possibility for ICC co-operation. After lengthy Council discussions resulting in the deletion of explicit reference to the ICC, the Security Council adopted a provision in Resolution 1565(2004) which authorizes MONUC to 'co-operate with efforts to ensure that those responsible for serious violations of human rights and international humanitarian law are brought to justice, while working closely with the relevant agencies of the United Nations'. As a result of compromise discussions, however, the provision was excluded from the categories of tasks in respect of which the use of force is permitted.[60] Therefore it could not be relied upon for ICC requests that would require the exercise of enforcement powers. The Memorandum of Understanding between the ICC and the UN on co-operation from MONUC ('MONUC MoU') arrives at a creative solution to this restriction by cross-referencing other provisions of MONUC's mandate where use of force is permitted. Paragraph 4 of Resolution 1565, for example, authorizes MONUC to use all means necessary under a broad heading enabling assistance to the DRC authorities in order to promote the re-establishment of confidence and to discourage violence, in particular by deterring the use of force to threaten the political process. Also of relevance, paragraph 5(c) authorizes the use of force for the disarming of 'foreign combatants'. Moreover, Security Council Resolution 1493(2003) '[a]uthorizes MONUC to use all necessary means to fulfil its mandate in the Ituri district and, as it deems it within its capabilities, in North and South Kivu'. MONUC had already implemented such provisions to assist the DRC authorities in the arrest and detention of combatants and militia leaders located in its areas of deployment. In similar vein, therefore, the MONUC MoU provides that MONUC may agree to a request from the DRC government to carry out the arrest of persons sought by the Court in the areas where it is deployed and where this would be consistent with its mandate.[61] Other enforcement powers made available under similar arrangements include MONUC's preparedness to assist in search and seizure operations, the securing of crime scenes, the transportation of suspects, security support, and emergency temporary refuge for ICC staff and witnesses. At the same time the MoU reserves ample flexibility for MONUC to consider such requests on a case-by-case basis, taking into consideration issues of security, operational priorities, and consistency of the requested measure with its mandate and rules of engagement, as well as the capacity of the DRC authorities themselves to render the assistance sought. The enforcement

60. UN Doc. S/RES/1565 (2005), para. 5(g), but see para. 6. See also interpretative statements on adoption, S/PV5048.

61. Memorandum of Understanding between the United Nations and the International Criminal Court Concerning Co-operation between the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) and the International Criminal Court (8 November 2005), available at http://www.icc-cpi.int.

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powers of MONUC are thus made available at the request of the DRC government, rather than that of the ICC.

3. Co-operation in jurisprudence

Despite the relatively early stage of proceedings, a number of co-operation issues have arisen in the context of situations and cases before the ICC.

3.1. Protection of confidential information

One issue that can have considerable impact on the provision of co-operation is the assurance of confidentiality that the Prosecutor and the Court in general can offer to information providers. In many instances, without such guarantees co-operation will simply not be forthcoming. Clearly, since the Court is guided by principles of transparency and procedural fairness,[62] the presumption is that information obtained during the course of an investigation will be gathered for its potential use as evidence in open court. There may be compelling circumstances, however, in which an information provider, whether a state, an intergovernmental organization, an NGO, or an individual, may fear that the disclosure of information it has provided could endanger the personal safety of staff or other individuals. In certain circumstances, disclosure or even the fact that co-operation has been rendered could compromise the security and proper conduct of the operations and activities on the ground of the source. It may, moreover, violate a duty of confidentiality owed by the information provider to a third party. Accordingly, Article 54(3)(e), much like its predecessor, Rule 70 under the ICTY/R Rules of Procedure and Evidence, grants the Prosecutor the power to accept documents or information, either in whole or in part, on the condition of confidentiality and subject to non-disclosure without the consent of the information provider. Materials so obtained are to be used solely for the purpose of generating new evidence, and therefore cannot be admitted before Chambers as evidence per se without the provider's prior consent.[63] Rule 82, also borrowing from ICTY/R Rule 70, deals with the situation where an information provider lifts the restrictions on materials that have been previously provided under Article 54(3)(e). In order to instil confidence and to encourage co-operation from providers to assist in-court proceedings, the provision clarifies that the Chamber is barred from inquiring into the materials presented beyond the scope which the information provider has agreed to disclose. In the context of confirmation proceedings in the *Lubanga* case, for instance, the Pre-Trial Chamber has confirmed that a witness invoking 'grounds of confidentiality' under Rule 82(3) is entitled not to answer any questions posed by the defence and the Chamber. It clarified, nonetheless,

62. Rome Statute, Art. 67; Regulations of the Court, Reg. 20.
63. The condition that materials are to be obtained 'solely for the purpose of generating new evidence' does not circumscribe the *nature* of the documents or information that may be received under the provision, but only the *use* to which they may be put. In other words, the Prosecutor is not restricted in receiving material of potential evidentiary value under Art. 54(3)(e), but he can only use that material to generate new leads or evidence, or, where that is not possible, he must seek the provider's consent before directly introducing it as evidence in court. The introduction into evidence of materials previously obtained under conditions of confidentiality is also foreseen in Art. 93(8) and Rule 82.

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that the entitlement of a witness not to answer such questions shall be taken into account by the Chamber as part of its evaluation on probative value and relevance when deciding on the admissibility, in whole or in part, of the testimony of the witness.[64]

Perhaps the most complex issue related to the promotion of co-operation under the promise of confidentiality is how this interest should be balanced vis-à-vis the rights of the accused and, in particular, the duty of the Prosecutor to provide prompt disclosure of potentially exonerating information. As the Rome Statute is silent on where the balance lies, future rulings by chambers may address the issue in the context of a particular case. In the ad hoc Tribunals, after considerable litigation and divergent jurisprudence, the matter was finally resolved by amendment of the rules on 28 July 2004 to clarify that Rule 68 (on exculpatory disclosure) is 'subject to the provisions of Rule 70' – that is, the duty of the Prosecutor to disclose exonerating evidence cannot override an agreement on non-disclosure. This amendment came too late to influence the drafting of the ICC Statute and Rules, which otherwise are modelled closely on the Tribunals' provisions. Moreover, there is nothing to prevent the ICC judges from weighing the duties of the Prosecutor in unique terms.[65] Nonetheless, it is worth noting that in the system of disclosure established to date in the *Lubanga* case, although the Pre-Trial Chamber did not explicitly pronounce whether one provision trumped another, it recognized that the duty of the Prosecutor to disclose exonerating evidence may become delayed because of the need to obtain the consent of the information provider for materials provided under Article 54(3)(e).[66]

3.2. The organ responsible for the transmission of requests for co-operation

The Court has to date issued publicly ten warrants of arrest with respect to cases arising out of the situations in northern Uganda, the DRC, and Darfur (Sudan). An issue that has been contested before Pre-Trial Chamber has been interpretation of Rule 176(2), which provides that the Registrar shall transmit any requests for co-operation made by the Chambers, while the Office of the Prosecutor shall transmit requests for co-operation made by the Prosecutor. In the first warrant applications, in the *Kony et al.* case, the prosecution requested, because of a number of factors that, it stated, placed it in a unique position to ensure the most timely and effective transmission of the then sealed arrest warrant to the national authorities concerned, that it be determined the competent organ best placed to prepare and transmit the accompanying request for arrest and surrender.[67] In doing so, the prosecution differentiated between the arrest warrant document itself, which must of necessity be issued by the Pre-Trial Chamber, and the request for

64. *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Motion by the Defence to Exclude Anonymous Hearsay Testimony of the Prosecution Witness, ICC-01/04–01/06–693-Anx 1, at 7, 8 November 2006.
65. See in particular Rome Statute, Art. 54(1)(a).
66. *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Final System of Disclosure and the Establishment of a Timetable, ICC-01/04–01/06, at 8, 15 May 2006.
67. For a list of factors stipulated by the Prosecutor see *Prosecutor v. Joseph Kony et al.*, Decision on Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58, ICC-02/04–01/05, at 7–8, 19 August 2005.

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co-operation document to which the warrant forms an attachment (Art. 91), which, it contended, could be transmitted by any organ of 'the Court' so designated by the Chamber, citing also ICTY practice in this regard. Pre-Trial Chamber II, dealing with the situation in Uganda, held that according to Rule 176(2), any request for co-operation issued pursuant to a warrant made by chambers must, ordinarily, be considered to have also been 'made by the Chamber' within the meaning of the rule, and hence subject to the competence of the Registrar for its discharge.[68] In doing so, the Chamber noted that, unlike ICTY Rule 55(D), ICC Rule 176(2) does not explicitly grant discretion to the Chamber regarding the organ to be entrusted with the transmission of requests for co-operation and the receipt of the responses thereto. It did not exclude, however, the possibility of allocating the transmission of a particular request for co-operation to the Prosecutor 'under specific and compelling circumstances', the standard for which, it held, had not been established.[69] Pre-Trial Chamber I, dealing with the situation in the DRC, narrowed the scope of the rule further by holding that the Chamber, assisted by the Registry in accordance with Rule 176(2) and Rule 184, must be considered as 'the only organ of the Court competent to make and transmit a co-operation request for arrest and surrender'.[70]

This narrow reading of transmission responsibilities under Rule 176(2) may have several important consequences for the role of the Office of the Prosecutor in lending its ongoing investigative capacities to the identification of the whereabouts of suspects and in its interactions with relevant authorities to facilitate the successful execution of the warrants, as exemplified by the practice of the ICTY. The Prosecutor's ability to share relevant intelligence with the Registrar for this purpose, moreover, will necessarily be curtailed by his duty to protect the confidentiality of information obtained under Article 54(3)(e). Beyond the specific question of the transmission of requests for arrest and surrender, however, to the extent that these early decisions signal that all requests for co-operation issued by the Chamber on the application of the parties must ordinarily be handled in this manner, the Registrar may increasingly be tasked with the responsibility for seeking co-operation from states on behalf of measures requested by both the prosecution and the defence.[71]

If a strict approach has been taken to Rule 176(2), Pre-Trial Chamber II, dealing with the situation in Darfur, has given a broad construction to Article 89, which

68. The Pre-Trial Chamber also relied on Rule 184 and on Reg. 111 of the Regulations of the Court, which stipulate the Registrar's competence to conclude arrangements with the custodial state once the person is ready for surrender; although arguably the arrangements of such modalities once a person has been arrested do not affect the possibility of another organ being responsible for handling the actual notification of the warrants and the seeking of the necessary co-operation to effect the person's arrest. *Prosecutor v. Joseph Kony et al.*, Decision on the Prosecutor's Application for Warrants of Arrest under Article 58, ICC-02/04–01/05, at 5, 8 July 2005.

69. Ibid., at 6. See also Decision on Prosecutor's Application for Leave to Appeal, *supra* note 66.

70. *Prosecutor v. Thomas Lubanga Dyilo*, Decision Concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo, ICC-01/04–01/06, at 54, 24 February 2006. The Chamber did also recall the 'specific and compelling circumstances' test established by PTC II, but noted that no such circumstances existed. See also *Prosecutor v. Ahmad Harun and Ali Kushayb*, Decision on the Prosecution Application under Article 58(7) of the Statute, ICC-02/05–01/07, at 56, 27 April 2007.

71. See Rome Statute, Arts. 56 and 57(3).

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provides that the Court may transmit a request for arrest and surrender 'to any State on the territory of which that person may be found'. Whereas in the cases against Kony et al., Lubanga, Katanga and Ngudjolo the respective Pre-Trial Chambers tasked the Registrar to transmit requests for co-operation only to those states where the person sought by the Court was suspected of being located, in the *Harun and Kushayb* case the Chamber directed the Registrar to transmit the request for arrest and surrender to a broad category of states, including (i) all state parties, (ii) all members of the Security Council, and (iii) the four remaining neighbouring states not covered by the first two categories. In addition, it granted the Registrar competence to issue additional requests for arrest and surrender to any other state not covered by the above and to otherwise transmit to any state a request for provisional arrest.[72] Given that the information made available to the Chamber at the time indicated the accused's presence in Sudan, it is uncertain whether it was necessary or in strict conformity with Article 89 to transmit co-operation requests to the majority of the world's states.[73] Following the prior practice of the Court, it may have sufficed to transmit the request only to those states where the accused was suspected of being located, coupled with the delegation of ancillary competence for the transmission of such requests for provisional arrest as may be necessary.[74]

3.3. Supervision of a request execution

Irrespective of the type of obligation owed under Part 9, a request will only be effective if it is complied with in the manner requested by the Court. In the domestic setting the judiciary may supervise the observance of criminal procedure to guarantee the integrity of the process and the admissibility of evidence. In the case of the ICC, the judges will be guided by Part 9 and by Article 69, which holds that

> [e]vidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if: (a) The violation casts substantial doubt on the reliability of the evidence; or (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.

Moreover, the admissibility criteria of unwillingness and inability will enable the Court to exercise its supervisory functions over the adequacy of national criminal

72. *Prosecutor v. Ahmad Harun and Ali Kushayb*, Decision on the Prosecution Application under Article 58(7) of the Statute, ICC-02/05–01/07, at 56–7, 27 April 2007.
73. See also Art. 96(2)(b), which requires that requests for co-operation be supported by 'as much detailed information as possible about the location or identification of any person that must be found or identified in order for the assistance sought to be provided'. On a practical level, one may anticipate the uncertainty created for states in receiving a request for judicial assistance in the abstract.
74. Note also notification of the warrants on Interpol's Red Notice system; see http://www.interpol.int/Public/Wanted/Search/SearchWantedBy.asp?WANTEDBY=ICC. Similar considerations arise from the decision of the same Chamber, in the *Lubanga* case, to direct the Registrar to transmit requests for co-operation to all state parties for the freezing of assets of Thomas Lubanga for the purpose enabling the early enforcement of future reparation awards to victims, pursuant to Arts. 57(3)(e) and 93(1)(k), without the support of such specific information as is required by Art. 96(2); *Prosecutor v. Thomas Lubanga Dyilo*, Decision Concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, ICC-01/04–01/06, at 64, 24 February 2006.

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jurisdictions.[75] There are nonetheless limits to the extent to which the ICC Chambers may examine, regulate, or supervise the execution of Court requests by domestic authorities. In particular, Article 67(8) provides that the Court 'shall not rule on the application of the State's national law' when deciding on the relevance or admissibility of evidence.

The issue of judicial supervision arose in the context of surrender proceedings in the *Lubanga* case, where the accused brought a challenge to the jurisdiction of the Court premised on an abuse of process complaint, to the effect that the Court should set aside its jurisdiction on the basis of his initial unlawful detention by the DRC authorities and the tainted benefit consciously accrued therefrom by the prosecution. On appeal, after concluding that 'the Statute does not provide for stay of proceedings for abuse of process as such', the Appeals Chamber proceeded to deal with the complaint in the light of Article 21(3) of the Statute, which provides that the application and interpretation of applicable law (including the exercise of jurisdiction) must be consistent with internationally recognized human rights.[76] As the Appeals Chamber declared,

> Where the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his rights, no fair trial can take place and the proceedings can be stayed . . . In those circumstances, the interest of the world community to put persons accused of the most heinous crimes against humanity on trial, great as it is, is outweighed by the need to sustain the efficacy of the judicial process as the potent agent of justice.[77]

On examination of the merits, the Appeals Chamber held, first, that the ICC does not sit on appeal in judgment as a court of appeal on the identificatory decision of the Congolese judicial authority under Article 59 of the Statute. Rather, it held that the Court's role is limited to see that the process envisaged by national law was duly followed and that the rights of the arrestee were properly respected in accordance with the requirements of Article 59. It held, in this regard, that there was nothing to indicate a violation of the accused's rights by the DRC authorities. Moreover, the Appeals Chamber upheld the finding of the Pre-Trial Chamber that there was no evidence of 'concerted action', as alleged by the accused, between the DRC authorities and the Prosecutor in support of his unlawful detention by

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75. J. Kleffner, 'The Impact of Complementarity on National Implementation of Substantive International Criminal Law', (2003) 1 *Journal of International Criminal Justice* 87.

76. Cf. the ICTR Appeals Chamber decision in *Barayagwiza*, wherein it emphasized the competence of the Tribunal to exercise supervisory powers to review assistance rendered by national authorities pursuant to a request for co-operation, and so supervise action attributable to non-Tribunal organs with regard to all pre-trial actions that occur in the context of its proceedings: '[t]he use of such supervisory powers serves three functions: to provide a remedy for the violation of the accused's rights; to deter future misconduct; and to enhance the integrity of the judicial process'; *Prosecutor v. Barayagwiza*, Decision, ICTR-97–19, paras. 56, 61, 3 November 1999. See also *Prosecutor v. Nikolić*, Decision on Interlocutory Appeal Concerning Legality of Arrest, Case No. IT-94–2, AC, para. 28, 5 June 2003; *Prosecutor v. Mrksić et al.*, Decision on the Motion for Release by the Accused Slavko Dokmanović, Case No. IT-95–13/1, para. 57, 22 October 1997; *Prosecutor v. Simić et al.*, Decision Stating Reasons for Trial Chamber's Order of 4 March 1999 on Defence Motion for Evidentiary Hearing on the Arrest of the Accused Todorović, Case No. IT-95–9, TC, 25 March 1999.

77. *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19(2)(a) of the Statute of 3 October 2006, ICC-01/04–01/06, para. 39, 14 December 2006.

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the national authorities for the benefit of proceedings before the ICC. Thus the Court deemed itself competent to examine a complaint by a surrendered individual relating to the failure of the state concerned to observe certain domestic procedural requirements stipulated by the Statute.[78] In considering the appropriate remedy for the alleged breach, moreover, the Court stated that it would be guided by a balancing of factors in order to determine whether the breach is sufficiently grave to set aside jurisdiction, particularly where the conduct is attributable to the Court.[79]

In the same case the Pre-Trial Chamber was asked to rule on the admissibility of certain evidentiary items that the defence claimed were obtained unlawfully and contrary to Article 69(7) during a search and seizure operation conducted by the DRC authorities. In its support, the defence relied on a finding by a local Court of Appeals that the seized items had been collected in breach of the Congolese criminal procedure code. In dismissing the complaint, the Pre-Trial Chamber stated that it was not bound by the decisions of national courts on evidentiary matters and went on to deem itself competent to rule on the manner of evidence collection. In doing so, it distinguished its task as one of determining whether there had been a violation of internationally recognized human rights as opposed to 'merely an infringement of domestic rules of procedure'.[80] The decision is significant to the extent that it offers an indication of the way in which the Court will balance its need to examine the manner by which evidence is collected by domestic authorities with a view to assessing alleged violations of the Statute and internationally recognized human rights pursuant to Article 69(7), or indeed the relevance or admissibility of evidence under Article 69(4), set against the limitation in Article 69(8) that the Court shall not rule on the application of a state's national law when deciding on the relevance or admissibility of evidence collected by that state.

There are a host of areas where the Court may be asked to examine the manner of request execution and evidence gathering in the light of Article 69(7) that may emerge in future litigation. In the case of *Mucić et al.*, for example, the ICTY trial chamber determined that implementation of a request for assistance by non-Tribunal organs must be compatible not only with international human rights standards but also with the Tribunals' own Rules, even where they may not strictly offend such standards. The law on the Tribunal was held thus to apply to the entire criminal procedure.[81] In a later decision in the same case, the trial chamber

78. A failure to observe these procedures may arise also because of the absence of Rome Statute implementing legislation in the custodial state, which may mean that the ICC has no legal personality under domestic law for the purpose of a national judicial hearing to effect surrender.

79. Cf. *Prosecutor v. Nikolić*, *supra* note 75, para. 28.

80. *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the confirmation of charges, ICC-01/04–01/06, para. 73, 29 January 2007.

81. *Prosecutor v. Mucić et al.*, Decision on Zdravko Mucić's Motion for the Exclusion of Evidence, Case No. IT-96–21, TC, 2 September 1997. The motion was brought under ICTY Rule 95, which provides for the exclusion of evidence obtained by means contrary to internationally protected human rights, to exclude statements of the accused before the Austrian police without the presence of counsel, prior to his transfer. Although Austrian procedural rules precluding the right of a suspect to counsel until after questioning was deemed to be not necessarily at odds with the scope of 'legal assistance' under Art. 6(3) ECHR, this conditional right was held to be inconsistent with the unfettered right to counsel under Art. 18(3) ICTY Statute and Rule 42(A)(i). As such, the correct standard to be applied was not only ICTY Rule 95, but also the law of the Tribunal governing the admissibility of evidence.

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determined that procedural irregularities by the requested state in the implementation of a Tribunal request did not foreclose admissibility. Relying on ICTY Rule 89, the Chamber determined that the deviations by the Austrian police from their own criminal procedure during a search was outweighed by the relevance and probative value of the evidence tendered. Since the breach was minor in nature, the means by which the evidence had been obtained did not cast substantial doubt on its reliability, and the admissibility of the evidence collected would not be antithetical to, or seriously damage, the integrity of the proceedings.[82]

With the benefit of the experiences of the ad hoc Tribunals, the Rome Statute is clearer than their Statutes and Rules in a number of areas. Article 69(7) of the Rome Statute, partly based on ICTY Rule 95, explicitly provides for the exclusion of evidence obtained by means of a violation of either internationally recognized human rights or the Statute. Thus the requested state cannot obtain evidence in a manner that, while it may accord with domestic law and internationally recognized human rights, offends the Rome Statute. The exclusion, nonetheless, is conditional: as with ICTY Rule 95, the violation must be of sufficient gravity before it triggers inadmissibility, as set out in the provision.

At the same time, the limitation in Article 67(8) of the Rome Statute that the Court 'shall not rule on the application of the state's national law' when deciding on the relevance or admissibility of evidence, will prevent the kind of review undertaken by the ICTY trial chambers on the observance of domestic procedures by national law-enforcement agencies or on the validity of national decisions. Nonetheless, while the Court may not rule on the application of national law, it will need to examine the execution of domestic procedures as a necessary function of its factual inquiry when entering an assessment as to the application of exclusionary rules under Articles 69(4) or 69(7).[83] Moreover, as shown above in the context of surrender, one area in which the Court will particularly deem it necessary to review the application of domestic law is in relation to those national proceedings that are directly stipulated under the Statute as part of the ICC process. Article 69(8) should therefore be seen

82. The decision relied in part on the absence of applicable procedural rules in the ICTY Statute and Rules, and partly on the assumption of competence by the Chamber to review the consistency of the requested state's conduct with its domestic law; ICTY Rules 89(D) and 95. *Prosecutor v. Mucić et al.*, Decision on the Tendering of Prosecution Exhibits 104–108, Case No. IT-96–21, TC, paras. 18–20, 9 February 1998. Compare ICTR Trial Chamber II, which has repeatedly declined to exercise review competence over the legality of searches, seizures, and arrests by domestic authorities: *Prosecutor v. Ngirumpatse*, Decision on the Defence Motion challenging the Lawfulness of the Arrest and Detention and Seeking Return or Inspection of Seized Items, ICTR-97–28, para. 56, 10 December 1999; *Prosecutor v. Kajelijeli*, Decision on the Defence Motion Concerning the Arbitrary Arrest and Illegal Detention of the Accused and on the Defence Notice of Urgent Motion to Expand and Supplement the Record of 8 December 1999 Hearing, ICTR-98–44A, para. 34, 8 May 2000; *Prosecutor v. Karemera*, Decision on the Defence Motion for the Restitution of Documents and other Personal or Family Belongings Seized (Rule 40 (C) of the Rules of Procedure and Evidence), and the Exclusion of Such Evidence which May Be Used by the Prosecutor in Preparing an Indictment against the Applicant, ICTR-97–24, para. 4.3.1, 10 December 1999; *Prosecutor v. Nzirorera*, Decision on the Defence Motion challenging the Legality of the Arrest and Detention of the Accused and requesting the Return of Personal Items Seized, ICTR-98–38, para. 27, 7 September 2000; *Prosecutor v. Nyiramasuhuko*, Decision on the Defence Motion for Exclusion of Evidence and Restitution of Property Seized, ICTR-97–21, para. 26, 12 October 2000.

83. As noted above, the provision also affects the scope of inquiry with respect to decisions on the relevance or admissibility of evidence under Art. 69(4).

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as a threshold-setting provision that serves to circumscribe the scope of the Court's inquiry.

As with the ICTY and ICTR Statutes, the Rome Statute attempts to strike a balance between undue intrusion into the sovereign domestic domain and the need to ensure the integrity of proceedings. In so doing, it seeks to harmonize the numerous values represented by the Statute, such as respect for state sovereignty, respect for the rights of the accused, the protection of victims and witnesses, and the need for effective punishment.[84] While the ICC judges will be independent in their determination of how these competing values will be assessed, the Statute suggests that they will be more restricted than their Tribunal counterparts in appraising national law, and will thus represent a lower level of intrusiveness. The case law of the Tribunals, nonetheless, demonstrates the need for the Court to promote compliance with the ICC Statute and Rules, and to supervise to the extent possible national execution of its requests. Such competence, moreover, must be considered inherent to the exercise of the Court's power to make a finding of non-compliance.[85]

4. Conclusion

The Rome Statute sets up a system for the enforcement of international criminal law through the close and co-ordinated interaction of the ICC with competent authorities at the domestic level. In this system, the complementarity regime serves to encourage the assumption of investigative and prosecution capacities at the domestic level in order to avert the need for ICC intervention. Where the Court does proceed, the Statute refers responsibility for the provision of evidence and the arrest and surrender of suspects back to the national authorities themselves. Without the co-operation of national authorities the ICC will be unable to act, while, conversely, without the catalytic presence of the ICC it is unlikely that national authorities would be willing to act.

In creating this system, the Statute draws on the principles of consent and good faith expressed in mutual assistance regimes by basing co-operation on the issuance of requests. Should good faith not be apparent on the part of the addressed authorities, the Statute holds out the prospect of the matter being reverted to the collective community of states through its non-compliance procedure. Enforcement of the Court's decisions in both respects is thus conducted by proxy. Arguably, it is the interplay of this relationship – between the state and the international community – that will be decisive for the effectiveness of the ICC's co-operation regime. Much like the preventive principle expressed under the responsibility to protect, or the threat of united reprisal action under collective security arrangements, the system

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84. K. Trapp and C. Lonsdale, 'Excluding Evidence: The Timing of a Remedy', unpublished ms., Faculty of Law, McGill University, Canada, 1998, cited in D. Piragoff, 'Evidence', in Triffterer, *supra* note 32, at 915.

85. See e.g. in Pre-Trial Chamber examination of state co-operation with regard to the execution of its warrants of arrest: *Prosecutor v. Joseph Kony et al.*, Order to the Prosecutor for the submission of additional information on the status of the execution of the warrants of arrest in the situation in Uganda, ICC-02/04–01/05, 30 November 2006.

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is predicated on the successful operation of a covenant of undertakings between the individual and the collective.[86] In the context of the ICC, such a covenant is formed between the states that are party to the Rome Statute and may, in the case of a Security Council referral, be extended to embrace all UN member states as a result of their duties under the UN Charter.[87] Thus if the non-compliance procedure is genuinely to influence state behaviour, the support for justice must be matched by concerted and unified action by the international community under a notional *responsibility to enforce*. At the conceptual level, it is the principles of justice and unity that form the twin inseparable elements of this duty. Should a state fail to co-operate, without an effective international response, the entire system will be undermined.[88]

The Statute appears to address the situation where a state is clearly unable to co-operate in a relatively satisfactory manner, by enabling the Court to authorize the Prosecutor to take specific investigative steps, including those of a compulsory nature, on that state's territory without first obtaining its consent. Inability at the stage of arrest and surrender, where the state concerned is unable to execute an arrest operation on its own territory, appears less clear-cut. The 'unable' state could invite capable states or an international peacekeeping presence on its territory to assist it in fulfilling its duties towards the Court.[89] Moreover, although the Court's non-compliance procedure is normally discussed with reference to a state's 'unwillingness' to co-operate, the Court could possibly treat 'inability' also as a failure to comply with a co-operation request. Rather than indicating the international wrongfulness of non-co-operation, the purpose of such a finding would be to invite the ASP or the Security Council, as appropriate, to consider the matter with a view to promoting co-operation. Such considerations may, for example, take the form of the Security Council modifying the mandate of relevant peacekeeping operations to enable regional co-operation and co-ordination with a territorial state that is willing but otherwise unable to perform arrest and surrender operations, or may lead to the exertion of political pressure through issue-linkage to secure co-operation from a hitherto 'unwilling' state.

The consequences of non-co-operation are more complex where a state is clearly able, but unwilling, to co-operate. Part of the problem lies in the inevitable limits to

86. See 2005 World Summit Outcome, UN Doc. A/RES/60/1(24 October 2005), paras.138–9; Security Council debate S/PV5319 (9 December 2005). The linkage of these crimes to the United Nations' collective security regime in its maintenance of international peace and security is made explicit in the preamble to the Statute: '*Recognizing* that such grave crimes threaten the peace, security and well-being of the world'; preamble citation 3, Rome Statute. See also the address by Luis Moreno-Ocampo, Prosecutor of the ICC, 'Building a Future on Peace and Justice' (Nuremberg, 26 June 2007), http://www.icc-cpi.int.

87. See also C. Kreß and K. Prost for the view that the duty to *ensure* respect of international humanitarian law as contained in Common Article 1 of the 1949 Geneva Conventions, and as recalled and supplemented in Arts. 1 and 89 of the First Additional Protocol thereto, has become part of customary international law, suggesting that the duty to co-operate with respect to war crimes prosecutions has taken on an obligatory character under customary law; although this would appear to be limited to the crimes expressly regulated by those Conventions; 'Article 87' in Triffterer, *supra* note 31, at 1062–3.

88. 'For the ultimate efficiency and credibility of the Court you created, arrests are required. The Court can contribute to galvanize international efforts, and support coalitions of those willing to proceed with such arrests. But ultimately, the decision to uphold the law will be the decision of States Parties. If States Parties do not actively support the Court, in this area as in others, then they are actively undermining it.' See Moreno-Ocampo, *supra* note 85.

89. See discussion on MONUC MoU *supra*.

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the incentive structures built into the Court's complementarity regime. If domestic compliance is predicated on the avoidance of ICC intervention, the incentive for good behaviour will arguably disappear where a state loses an admissibility challenge. Moreover, where a state has been deemed 'unwilling' under Article 17, the Court could be placed in the paradoxical situation of having to depend upon the same institutional and procedural weaknesses that were deemed incapable of supporting domestic investigations and prosecutions. Here, a non-compliance referral to the ASP or Security Council will likely be the Court's only available recourse. Therefore, unless a state acts in good faith, the ICC must perforce rely on the effectiveness of the collective international response to cajole or coerce compliance.

As demonstrated by the lacklustre co-operation enjoyed by the ad hoc Tribunals despite their delegated Chapter VII powers, the promotion of predictability in this area may have little to do with discussions over horizontal or vertical powers. While these concepts have made an important contribution in describing the normative framework, they have only marginal relevance for explaining actual rates of enforcement by recalcitrant states. Rather, gaps in compliance can be said to be inherent to the structural design of such courts, due to the rejection of a direct enforcement model in favour of an indirect one. The separation of judicial and enforcement functions between international and national authorities arguably reflects current consensus regarding supra-national institution building. Yet this limitation raises inevitable concerns over the scope for the impartial observance of the rule of law. Because an international court cannot compel states to render routine enforcement or directly impose penalties in the face of non-compliance, the performance of the system will continue to be influenced by factors unrelated to the judicial process. This may include issues of national interests at a given time, feasibility and resources, and the availability of effective procedures involving relevant interlocutors. For the reasons discussed above, such underlying considerations will remain unaffected by the referral of a situation to the Prosecutor by the Security Council.

What recourse has the ICC? Part of the answer lies in the fact that what an international court may lack in coercive powers it can make up for, in part, by the pull of its legitimacy and moral authority. To the extent that this enjoys broad recognition, the Court is more likely to operate in an enabling environment. In some situations, third states, civil society, or the media may be able to influence the incentive structures for domestic bodies in order to promote compliance. Where issue-linkage can be instituted across a spectrum of international activity, co-ordinated leverage tools may seek to heighten the reputational risk attached to non-compliance by offering concrete tools to reward satisfactory performance and punish transgressions. Nonetheless, as displayed above, such factors will be unrelated to the judicial functions of the ICC itself and are several steps removed from the operational context of judicial bodies in the domestic setting. Yet because of issues of structural design, the confluence of such external processes will remain critical for the enforcement of the ICC's decisions and the fulfilment of its mandate. As the Prosecutor has observed,

> [t]he Rome Treaty consolidates the 'duty of every state to exercise its criminal jurisdiction over those responsible for international crimes' but also to support a permanent International Criminal Court whenever and wherever the Court decides to intervene.

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> They have to 'guarantee lasting respect for and the enforcement of international justice'. They have to seriously address the issue of arrest.[90]

The successful closing of gaps in compliance under the Rome Statute will be dependent, therefore, on two main factors. In the first instance, the twin-pillar system will require the close and effective interaction of the ICC and national authorities in support of each other's judicial and enforcement mandates. Within the enforcement pillar, in turn, the statutory scheme must be implemented for the shouldering of responsibility by the collective international community, should an individual state fail in its duties to co-operate with the Court. Unless the duty of states to co-operate in the fight against impunity is matched by the necessary degree of unity and support from the international community, the enforcement pillar simply will not hold. For, ultimately, the treaty signed in Rome should be viewed not merely as the creation of a court, but rather as the establishment of a system, a global system comprising a network of powers and duties between the ICC and nation-states.

90. Prosecutor's statement at the Eleventh Diplomatic Briefing (2007), citing the preamble to the Rome Statute.

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