III. INTERNATIONAL CRIMINAL COURT

Mandatory Compliance Powers *vis-à-vis* States by the *Ad Hoc* Tribunals and the International Criminal Court: A Comparative Analysis

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Keywords: International Criminal Court; International Criminal Tribunals for the Former Yugoslavia and Rwanda; judicial assistance; state co-operation.

Abstract: In the absence of police powers, the International Criminal Court, like the Tribunals for the former Yugoslavia and Rwanda, will depend on the co-operation of states in order to fulfil its mandate. Discussing the jurisprudence of the *ad hoc* Tribunals and the *travaux préparatoires* of the Rome treaty, the author compares the mandatory powers conferred on the respective institutions to this end. He concludes that the Security Council endowed the Tribunals with unequivocally binding powers, while under the Rome treaty regime, which resembles traditional inter-state co-operation in criminal matters, the ICC's powers are more limited and state obligations less stringent.

1. INTRODUCTION

In contrast to national criminal courts and the post World War II International Military Tribunals of Nuremberg[1] and Tokyo,[2] the *ad hoc* International Criminal Tribunals for the former Yugoslavia[3] (the ICTY) and Rwanda[4] (the ICTR) do

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1. *See* Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis (London Agreement), signed in London, August 1945, 82 UNTS 279, 59 Stat. 1544, EAS No. 472 (entered into force, 8 August 1945); Charter of the International Military Tribunal (annexed to the London Agreement).
2. *See* Charter of the International Military Tribunal for the Far East (the Tokyo Charter), Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, charter dated 19 January 1946, amended charter dated 26 April 1946, TIAS 1589, 4 Bevans 20.
3. The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, established by the UN Security Council in resolution 827 of 25 May 1993, *see* UN Doc. S/RES/827

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not have police or military forces to enforce their jurisdictions.[5] The *ad hoc* Tribunals' common Appeals Chamber, therefore, held that

> it is self-evident that the International Tribunal, in order to bring to trial persons living under the jurisdiction of sovereign States, not being endowed with enforcement agents of its own, must rely upon the cooperation of States. The International Tribunal must turn to States if it is effectively to investigate crimes, collect evidence, summon witnesses and have indictees arrested and surrendered to the International Tribunal.[6]

Notwithstanding this dependency, the *ad hoc* Tribunals' establishment on the basis of Chapter VII of the Charter of the United Nations guarantees *de jure* that all UN member states provide the Tribunals with the necessary co-operation.[7] The Tribunals' essential mandatory compliance powers *vis-à-vis*

(1993). Already on 22 February 1993, the Council had decided in principle to establish the Tribunal, *see* UN Doc S/RES/808 (1993). On the ICTY and its establishment, *see, e.g.*, V. Morris & M. Scharf, An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History & Analysis (1995).

4. The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, established by the Security Council in resolution 955 of 8 November 1994, *see* UN Doc. S/RES/955 (1994). On the ICTR and its establishment, *see, e.g.*, V. Morris & M. Scharf, The International Criminal Tribunal for Rwanda (1998). On the jurisprudence of the *ad hoc* Tribunals, *see* J.R.W.D. Jones, The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda (1998).
5. This has been determined "[t]he major stumbling block to the success of the Tribunal." *See* Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc. A/52/375 (1997) and UN Doc. S/1997/729 (1997), para. 181.
6. Prosecutor *v.* Tihomir 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-95-14-AR108 *bis*, A.Ch., 29 October 1997, para. 26. The ICTY has been compared with a giant "who has no arms and no legs. To walk and work, he needs artificial limbs. These artificial limbs are the state authorities; without their help the Tribunal cannot operate." *See Address of Antonio Cassese, President of the International Criminal Tribunal for the Former Yugoslavia to the General Assembly of the United Nations, 7 November 1995, in* ICTY Yearbook 1995, at 312. *See also* Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc. A/53/219 (1998) and UN Doc. S/1998/737 (1998), para. 226. Notwithstanding the importance of state co-operation, however, one should note the increasing assistance by international organisations. *See, e.g.*, ICTY Report 1998, para. 123. For instance, on 8 September 1999, 12 of the 31 detainees in the ICTY Detention Unit had been detained by SFOR (plus one deceased accused; another deceased accused was detained by the United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium (UNTAES). *See* ICTY Report 1997, *supra* note 5, paras. 47 and 69). One should further note that of those 31 detainees, 13 voluntarily surrendered to the ICTY.
7. Nonetheless, the ICTY has been significantly frustrated by the lack of state co-operation: on 8 September 1999, out of 66 publicly indicted accused, only 31 were detained at the UN Detention Unit (two further accused were released pending their appeals). For an overview of outstanding arrest warrants, *see* T. Henquet, *International Criminal Tribunal for the Former Yugoslavia, List of Current Legal Proceedings: Update*, 12 LJIL 437 (1999). The ICTR is in a better position: on 3 August 1999, 38 out of 48 publicly indicted accused were in the Tribunal's custody. It is noteworthy that

states, binding orders and requests, have been confirmed in the Appeals Chamber Subpoena Decision.

On 17 July 1998, a United Nations Diplomatic Conference of Plenipotentiaries concluded a five weeks session in Rome with the adoption of a Statute for an International Criminal Court (ICC, or the Court).[8] Once in existence, the Court will be the first permanent international judicial body for trying perpetrators of "the most serious crimes of concern to the international community as a whole."[9] However, notwithstanding this important task, as with the ICTY and the ICTR, the ICC will not have direct enforcement machinery at its disposal.

In the course of the establishment of the permanent Court, reference was often made to the *ad hoc* Tribunals. Notably, the President of the ICTY, Judge Gabrielle Kirk McDonald, urged the diplomats assembled at the Rome Diplomatic Conference to

> look long and hard at the experiences of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda as they have grown into adulthood. The *ad hoc* Tribunals are a repository of a wealth of information concerning the application of international humanitarian and international criminal law that should not be overlooked.[10]

The President particularly stressed the importance of including in the ICC treaty an unequivocal obligation for states party to the treaty to comply with the Court's orders.[11]

The purpose of the present article is to assess to what extent the Rome Treaty negotiators have followed President Kirk McDonald's advice. In comparison with the *ad hoc* Tribunals, what mandatory compliance powers *vis-à-vis* states will be available to the Court? An attempt will be made to shed light on the negotiation process in Rome and to explain the relevant provisions in the ICC

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most of those detainees were surrendered to the ICTR from a great variety of countries, whereas all fugitives publicly indicted by the ICTY are presumed to remain on the territory of the former Yugoslavia.

8. The Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (1998).
9. *Id.*, Preamble, para. 4.
10. *See* ICTY Report 1998, *supra* note 6, para. 241.
11. *Id.*, para. 242. The ICTY Prosecutor commented likewise. *See* Statement by Justice Louise Arbour to the Preparatory Committee on the Establishment of an International Criminal Court, 8 December 1997, at 3 (not issued as UN Doc., on file with author). Leading non-governmental organisations have voiced similar opinions. *See* Human Rights Watch Commentary for the December 1997 Preparatory Committee Meeting on the Establishment of an International Criminal Court (1997), at 5; Lawyers Committee for Human Rights, Compliance with ICC Decisions 8, International Criminal Court Briefing Series Vol. 1 No. 5 (1997), at 9; and Amnesty International, Ensuring Effective State Cooperation, The International Criminal Court: Making the Right Choices Part III (1997), at 5. *See also* Principle Seven of the Basic Principles for an Independent, Effective and Fair International Criminal Court, undersigned by members of the Steering Committee of the NGO Coalition for an International Criminal Court (on file with author).

Statute. Discussing in particular the jurisprudence of the ICTY, the article will first deal with the mandatory co-operation powers of the *ad hoc* Tribunals. Subsequent to an introduction of the Rome Statute, state co-operation under that regime is introduced generally, followed by a discussion of the various mandatory powers of the permanent Court.

2. THE MANDATORY COMPLIANCE POWERS OF THE *AD HOC* TRIBUNALS *VIS-À-VIS* STATES

2.1. The obligation of states to co-operate with and provide judicial assistance to the Tribunals

The UN Security Council, which has primary responsibility for the maintenance of international peace and security pursuant to Article 24 of the UN Charter, determined that the situations in Yugoslavia and Rwanda constituted threats to international peace and security. Consequently, it decided to establish the *ad hoc* Tribunals as measures to restore and maintain international peace and security pursuant to Article 39 and Article 41 of the UN Charter (Chapter VII).[12] According to Article 25 of the UN Charter, by becoming a member of the UN states agree to "accept and carry out" such Security Council decisions on the basis of the Charter.[13]

Security Council measures traditionally taken under these provisions are arms embargoes and economic sanctions.[14] Consequent obligations for a UN member state are relatively straightforward. They are: not engaging in economic relations with, or delivering arms to, the boycotted state and ensuring compliance with the measure by its nationals. In the case of the establishment of the International Criminal Tribunals the obligation is more complex.

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12. *See* UN Doc. S/RES/827 (1993), paras. 4-6; respectively, UN Doc. S/RES/955 (1994), paras. 5-7. Founded on Arts. 39 and 41 of the UN Charter, the Tribunals were established as subsidiary organs of the Security Council, pursuant to Art. 29 of the Charter. The legality of the basis of the ICTY was confirmed by the Tribunals' Appeals Chamber. *See* Prosecutor *v.* Duško Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, A.Ch., 2 October 1995.
13. This obligation is further underscored by Arts. 2(5), 48 and 49 of the UN Charter. It has been argued that Art. 2(6) of the UN Charter obliges non-UN member states, to comply with Security Council resolution 827. *See* Morris & Scharf, *supra* note 3, at 311-312. In this respect, Switzerland's enactment of implementing legislation for co-operation with the Tribunals has been explained by the Tribunals' Appeals Chamber as an express written acceptation of the obligations under the UN Charter *vis-à-vis* the Tribunals, in accordance with Art. 35 of the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969, 8 ILM 679 (1996), entered into force on 27 January 1980). *See* Appeals Chamber Subpoena Decision, *supra* note 6, para. 26.
14. *See, e.g.*, Security Council resolution 713 of 25 September 1991, UN Doc. S/RES/713 (1991) and resolution 757 of 30 May 1992, UN Doc. S/RES/757 (1992), respectively.

In his report on the establishment of the ICTY the UN Secretary-General pointed out that states would be obliged to "take whatever action is required" in order to live up to the obligation to accept and carry out the decision to establish the Tribunal.[15] In the commentary to the proposed ICTY Statute the Secretary-General specified that

> [i]n practical terms, this means that all States would be under an obligation to cooperate with the International Tribunal and to assist it in all stages of the proceedings to ensure compliance with requests for assistance in the gathering of evidence, hearing of witnesses, suspects and experts, identification and location of persons and the service of documents. Effect shall also be given to orders issued by the Trial Chambers, such as warrants of arrest, search warrants, warrants for surrender or transfer of persons, and any other orders necessary for the conduct of trial.[16]

In the resolutions by which the Tribunals are established, the Security Council decided

> that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the international Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under article 29 of the Statute.[17]

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15. Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, UN Doc. S/25704, 3 May 1993 and corrigendum S/25704/Corr. 1, 30 July 1993, para. 23.
16. *Id.*, para. 125.
17. *See* S/RES/827 (1993), operative para. 4. *See also* UN Doc. S/RES/955 (1994), operative para. 2, referring to Art. 28 of the ICTR Statute, which is identical to Art. 29 of the ICTY Statute. Pursuant to Rule 2 of the ICTY Rules of Procedure and Evidence (UN Doc. IT/32/Rev. 16 (1999)) (ICTY Rules), all state obligations under the Rules extend not only to UN-member states but also to non-members and any "self-proclaimed entity de facto exercising governmental functions, whether recognised as a State or not." The Federal Republic of Yugoslavia, the Republic of Croatia, and the Republic of Bosnia and Herzegovina are obliged to co-operate with the ICTY pursuant to the General Framework Agreement for Peace in Bosnia and Herzegovina (signed in Paris on 14 December 1995, UN Doc. A/50/790-S/1995/1999) (*see, e.g.*, Art. IX). Pursuant to the annexes to the Agreement, the *de facto* states *Republika Srpska* and the Federation of Bosnia and Herzegovina are equally obliged to co-operate (*see, e.g.*, Art. X, Annex 1-A). During the negotiations in Dayton, the Federal Republic of Yugoslavia committed itself to ensure that *Republika Srpska* complies with its obligation to co-operate with the Tribunal. Consequently, the prior can be held accountable for non-compliance by the latter. *See* Prosecutor *v.* Radovan Karadžić and Ratko Mladić, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, Case No. IT-95-5-R61 and IT-95-18-R61, T.Ch. I, 11 July 1996, paras. 100-101. Likewise, with regard to the responsibility of the Republic of Croatia for the Federation of Bosnia and Herzegovina. *See* Prosecutor *v.* Ivica Rajić, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Case No. IT-95-12-R61, T.Ch. II, 13 September 1996, paras. 69-70. *See, generally,* J.R.W.D. Jones, *The Implications of the Peace Agreement for the International Criminal Tribunal for the Former Yugoslavia*, 7 EJIL 226 (1996).

Article 29 of the Statute of the ICTY (Cooperation and judicial assistance) reads as follows:[18]

> 1. States shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
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> 2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:
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> (a) the identification and location of persons;
> (b) the taking of testimony and the production of evidence;
> (c) the service of documents;
> (d) the arrest or detention of persons;
> (e) the surrender or the transfer of the accused to the International Tribunal.

As to the structure of the co-operation obligation pursuant to Article 29 of the Statute, paragraph 1 first provides a general obligation for states to provide any kind of co-operation required by the Tribunal[19] to facilitate the investigation and prosecution of alleged perpetrators of serious violations of international humanitarian law. States are required to offer their support to the Tribunal in these phases and to co-operate with the Tribunal when invited to do so.[20] In both cases, Article 29(1) serves as a legal basis for co-operation where this is, for instance, required by national law.[21] In its Subpoena Decision, the Appeals Chamber held that as a matter of sound policy the co-operative mode of assistance should be exhausted first before a Judge or a Trial Chamber should be requested to have recourse to the mandatory provisions of Article 29(2) of the Statute.[22]

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18. The obligation for states to co-operate with the Tribunal relates to the investigation and prosecution stages. On the issue of voluntary state co-operation in the enforcement of sentences pursuant to Art. 27 of the Statute, *see* D. Tolbert, *The International Tribunal for the Former Yugoslavia and the Enforcement of Sentences*, 11 LJIL 655 (1998). Art. 29 of the ICTY Statute corresponds to Art. 28 of the ICTR Statute. Hereinafter reference will be made consistently to the ICTY Statute and the ICTY Rules. However, since the relevant provisions in the Statutes and the Rules are identical, the following is also applicable *mutatis mutandis* to the ICTR.
19. According to Art. 11 of the Statute, the Tribunal consists of the Chambers, the Prosecutor and the Registry.
20. This was reiterated, for example, by the President of the ICTY in respect of information in possession of states pertaining to alleged crimes committed in Kosovo. *See* ICTY Press Release, JL/PIU/394-E, 8 April 1999: "President McDonald Writes to NATO Ministers of Foreign Affairs on Situation in Kosovo." *See also* ICTY Press Release CC/PIU/391-E, 31 March 1999: "Statement by the Prosecutor."
21. *Cf.* Morris & Scharf, *supra* note 3, at 312. For instance, such a legal basis may be required to make sensitive military intelligence information relevant to criminal investigations available to the Prosecutor.
22. *See* Appeals Chamber Subpoena Decision, *supra* note 6, para. 31. *See also* Prosecutor *v.* Radislav Krstić, Binding Order to the Republika Srpska for the Production of Documents, Case No. IT-98-33-PT, T.C. I, 12 March 1999.

Being the focus of our inquiry, the mandatory powers of the Tribunal will be discussed in more detail next.

2.2. The power to issue and the obligation of states to comply with Tribunal orders and requests

The ICTY *Blaškić* case has generated considerable jurisprudence in respect of the mandatory powers of the Tribunal.[23] Much of the Prosecution's efforts in the case have focused on proving the superior criminal responsibility of the accused pursuant to Article 7 of the Statute. In order to obtain a conviction for grave breaches of the Geneva Conventions of 1949, pursuant to Article 2 of the Statute, proof of the existence of an international armed conflict is also required.[24] To that end, the Prosecution obtained from the Presiding Judge of ICTY Trial Chamber II an order called a *subpoena duces tecum*, requiring the production of various categories of documents, addressed to the Republic of Croatia and its Defence Minister.[25] Croatia, however, contended that the Tribunal does not have the power to subpoena sovereign states and high government officials. Nonetheless, Trial Chamber II confirmed that both Croatia and its Minister were bound to comply with the order.[26] Having declared admissible pursuant to Rule 108 *bis* Croatia's request for review of the Trial Chamber Decision, the Appeals Chamber issued its often referred to Subpoena Decision pronouncing on a broad range of aspects relating to the Tribunal's mandatory powers *vis-à-vis* states.[27]

One possible source of power is a delegation from the Security Council to the Tribunal, its subsidiary body.[28] If the Council delegated the power to issue binding orders to states, which Croatia contested,[29] such power should be enshrined in the Statute. The Appeals Chamber confirmed the Trial Chamber's finding that the Tribunal has such express statutory power to order states.[30] In reply to Croatia's assertion that the Tribunal only has jurisdiction over individu-

23. For a comprehensive discussion of the various relevant decisions in the case, *see* R. Wedgewood, *International Criminal Tribunals and State Sources of Proof: The Case of Tihomir Blaškić*, 11 LJIL 635 (1998).
24. *See* Prosecutor *v.* Tihomir Blaškić, Second Amended Indictment, Case No. IT-95-14-T, 25 April 1997 (as corrected on 16 March 1999).
25. *See* Prosecutor *v.* Tihomir Blaškić, Subpoena Duces Tecum, Case No. IT-95-14-T (*sic*), Judge Gabrielle Kirk McDonald, 15 January 1997.
26. *See* Prosecutor *v.* Tihomir Blaškić, Decision on the Objection of the Republic of Croatia to the Issuance of Subpoena Duces Tecum, Case No. IT-95-14-PT, T.C. II, 18 July 1997.
27. The Judgment also deals with mandatory powers *vis-à-vis* individuals in respect of the production of evidence.
28. A judicial tribunal may also have inherent powers. *See* D. Sarooshi, *The Powers of the United Nations International Criminal Tribunals*, *in* J. Frowein & R. Wolfrum (Eds.), Max Planck Yearbook of United Nations Law 141, at 144 (1998).
29. *See* Trial Chamber Subpoena Decision, *supra* note 26, para. 25.
30. *See* Appeals Chamber Subpoena Decision, *supra* note 6, paras. 26-31.

als,[31] the Appeals Chamber found that while Article 1 of the Statute determines the Tribunal's primary jurisdiction, in order to enforce this jurisdiction the Tribunal must be able to rely on the co-operation by states. To this end, and in derogation of customary international law, "[t]he exceptional legal basis of Article 29 accounts for the novel and indeed unique power granted to the International Tribunal to issue orders to sovereign States."[32] Rather than an 'ancillary jurisdiction' over states, as had been suggested by the Prosecution, however, the Appeals Chamber considered it more appropriate to speak of the Tribunal's ancillary, or incidental, mandatory powers *vis-à-vis* states. Furthermore, in the explanation of the Appeals Chamber, Article 29 of the Statute enshrines an obligation incumbent on all UN member states. Instead of creating bilateral obligations, Article 29 posits obligations of UN member states *vis-à-vis* all other member states (obligations *erga omnes partes*) and each UN member state has an interest in its observance.

Having reached these conclusions, however, the Appeals Chamber specified a number of requirements that must be met by an order for the production of documents. The Appeals Chamber also ruled on the issue of the mandatory production of documents and the protection of national security. However, as will be seen below, both issues may technically restrain the Tribunal's usage of its mandatory powers, they do not impact on a state's subjection to such powers. Finally, although the analysis is silent on the issue, in its final disposition the Appeals Chamber declared 'requests', pursuant to Article 29(2) of the Statute, equally available to the Tribunal and binding on states.[33]

Having found that the Tribunal has the power to issue orders, the Trial Chamber dealt separately with the question whether states are obliged to comply with them.[34] Croatia submitted that Article 29 of the Statute only obliges states to 'co-operate' with the Tribunal, which implies a mutual agreement by the parties involved. In this sense, a request pursuant to Article 29(2) of the Statute would be binding on a state, while a state would not be bound to comply with an order. The Trial Chamber disagreed. It considered that the term request is commonly used in treaties governing a 'horizontal' inter-state relationship. Grounds on the basis of which a state may refuse to comply with such requests are often specified in those treaties. In the case of the Tribunal, however, a 'vertical' relationship between unequal parties was established and there are no grounds on the basis of which compliance can be refused.[35] Hence, the Trial Chamber concluded that there is an obligation for states to comply with requests in the verti-

31. *Id.*, para. 26.
32. *Id.*
33. *Id.*, Disposition, para.1.
34. *See* Trial Chamber Subpoena Decision, *supra* note 26, paras. 70-86.
35. The distinction between a 'horizontal' co-operation relation, such as the one operating between states, and a 'vertical' relation, as between the Tribunal and states, was expressly upheld by the Appeals Chamber. *See* Appeals Chamber Subpoena Decision, *supra* note 6, para. 47.

cal sense. Moreover, considering Article 19(2) of the Statute and Security Council resolutions 827 (1993) and 1031 (1995), the Trial Chamber found that "[a]s there is a duty to comply with requests for assistance, so there is a duty to comply with orders of the International Tribunal, as they have the same legally binding effect."[36]

Considering, *inter alia*, Article 2(7) of the UN Charter, the Trial Chamber held that sovereign immunity may not be invoked as a justification for non-compliance. Moreover, pursuant to Article 103 of the UN Charter, the Trial Chamber held that a Charter based obligation takes precedence over conflicting obligations pursuant to any other international agreement.[37] This means, for instance, that the provisions of a bilateral extradition treaty may not be invoked as a justification for the non-surrender of an accused to the Tribunal. The Trial Chamber further held that as a general principle of law conflicting national legislation may not be argued as a justification for failure to comply with an international legal obligation.[38] Thus, even if the contention of the Federal Republic of Yugoslavia and *Republika Srpska* that their respective Constitutions forbid the transfer of nationals to the ICTY were legally correct (discussed below), this would still be an invalid argument for non-co-operation.[39] Therefore, conflicting national legislation needs to be amended or new legislation needs to be enacted. Indeed, even some of these specifically enacted national laws may have to be reconsidered since it appears that some include provisions that do not allow co-operation with the Tribunals to the full extent required.[40]

Interestingly, earlier in its Subpoena Decision the Trial Chamber concluded that, in addition to the express statutory power to issue binding orders, the Tribunal also has an 'inherent power' to compel states to produce documents.[41] The

36. *See* Trial Chamber Subpoena Decision, *supra* note 26, para. 78.
37. *Id.*, para. 81, referring to the Tadić Jurisdiction Decision, *supra* note 12, para. 56.
38. *Id.*, para. 84, footnote 136, referring to Art. 27 of the Vienna Convention. Accordingly, ICTY Rule 58 reiterates that the obligation to surrender an accused and transfer a witness to the Tribunal takes precedence over any legal impediment existing under national law or extradition treaties.
39. The President of the Tribunal has repeatedly so advised the authorities of the Federal Republic of Yugoslavia. *See* ICTY Report 1998, *supra* note 6, para. 233.
40. In this respect, the Trial Chamber held that as general principle of international law, a state may determine how it will fulfil its international obligations. However, in doing so it may not impose "conditions of form on the fulfilment of these obligations by enacting national legislation which results in derogation thereof." *See* Trial Chamber Subpoena Decision, *supra* note 26, para. 68. For an analysis of the existing implementing legislation, *see, generally,* Amnesty International, International Criminal Tribunals: Handbook for Government Cooperation (1996), and in respect of obtaining evidence for the ICTY, *see* G. Sluiter, *Obtaining Evidence for the International Criminal Tribunal for the Former Yugoslavia: an Overview and Assessment of Domestic Implementing Legislation* XLV NILR 87 (1998).
41. *See* Trial Chamber Subpoena Decision, *supra* note 26, paras. 24-41. The Max Planck Institute for Foreign and International Criminal Law, appearing as *amicus curiae* before the Appeals Chamber, presented an analysis of the principles governing the major criminal law systems and argued that as a general principle of law (within the meaning of Art. 38(1)(c) of the Statute of the International Court of Justice) an international criminal court must have compulsory powers in respect of the pro-

Trial Chamber found that the Tribunal has such a power if "necessary in order to fulfil its fundamental purposes and to achieve its effective functioning."[42] The Appeals Chamber, however, did not confirm that the Tribunal's power to order states flows from this second source and in this respect appears to rely exclusively on the Tribunal's express powers.[43]

Furthermore, the Appeals Chamber explicitly rejected the notion that the Tribunal has the inherent power to take enforcement action against states in the case of non-compliance with an order. The Appeals Chamber held that current international law only allows such (non-penal) sanctions to be taken by other states, whether individually or jointly, for example, through an intergovernmental organisation such as the United Nations.[44] For this reason, the Appeals Chamber found that the Tribunal does not have the inherent power to address a subpoena to a state. The Trial Chamber had found that the term 'subpoena' only refers to a binding order without any specific meaning in respect of enforcement, which is the case in the context of national jurisdictions.[45] By contrast, the Appeals Chamber subscribed to the interpretation that the term subpoena only refers to a compulsory order that implies the possible imposition of a penalty in the case of non-compliance. Such an order, it held, can only be addressed to individuals in their private capacity.[46]

However, the Tribunal is not completely paralysed if a state fails to observe its obligations under the Statute and the Rules of Procedure and Evidence. The Appeals Chamber ruled that the Tribunal is endowed with an inherent power to make a judicial finding to this end. Having referred to the ICJ's *Northern Cameroons* case[47] and the *Nuclear Tests* Case,[48] the Appeals Chamber explained that

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duction of evidence. *See* A. Eser & K. Ambos, *The Power of National Courts to Compel the Production of Evidence and its Limits – An Amicus Curiae Brief to the International Criminal Tribunal for the Former Yugoslavia*, 6 European Journal of Crime, Criminal Law and Criminal Justice (1998).

42. *See* Trial Chamber Subpoena Decision, *supra* note 26, para. 30.
43. *See* Sarooshi, *supra* note 28, at 153.
44. *See* Appeals Chamber Subpoena Decision, *supra* note 6, para. 25. For an opposing view, *see* Wedgewood, *supra* note 23, para. 4.3. *See also* Prosecutor *v.* Tihomir Blaškić, *Amicus Curiae* Brief Submitted by the Government of the Kingdom of The Netherlands to the International Criminal Tribunal for the Former Yugoslavia, Case No. IT-95-14-PT, 12 September 1997, para. 17.
45. *See* Appeals Chamber Subpoena Decision, *supra* note 6, para. 20, and Trial Chamber Subpoena Decision, *supra* note 26, para. 62.
46. *See* Appeals Chamber Subpoena Decision, *supra* note 6, para. 21. Overruling the Trial Chamber, the Appeals Chamber held that according to the 'act of state doctrine', the Tribunal cannot subpoena state officials. *See* Appeals Chamber Subpoena Decision, *supra* note 6, para. 38. Indeed, the Appeals Chamber found that these officials cannot be the addressees of any binding order by the Tribunal. Unlike in the case of Art. 29 with respect to binding orders to states, the Statute does not provide for a derogation of the customary international law protection of the internal organisation of a sovereign state. *See* Appeals Chamber Subpoena Decision, *supra* note 6, paras. 39-45. For a convincing opposing view, *see* Wedgewood, *supra* note 23, para. 4.4.
47. Northern Cameroon (Cameroon *v.* United Kingdom), Judgment of 2 December 1963, 1963 ICJ Rep. 15.

> the International Tribunal must possess the power to make all those judicial determinations that are necessary for the exercise of its primary jurisdiction. This inherent power inures to the benefit of the International Tribunal in order that its basic judicial function may be fully discharged and its judicial role safeguarded.[49]

The Appeals Chamber also found that, even though the Statute is silent on the issue, the Tribunal has the power to report such non-compliance to the Security Council, although it may not suggest or recommend how the situation could be addressed.[50]

In conclusion, affirming in part the Trial Chamber Subpoena Decision, the Appeals Chamber found that the Tribunals' mandatory powers are enshrined in Article 29(2) of the Statute, which provides for requests and orders that are unequivocally binding on states. The Statute and the Rules of Procedure and Evidence provide which Tribunal organ may issue requests and orders and also determine the concrete implications in the various instances of the state obligation to comply 'without undue delay'. In the comparison with the mandatory compliance powers of the ICC, some cases will be examined more closely.

As a general comment, it is submitted that it would have been clearer if only the term 'order' were included in Article 29(2) of the Statute. The term 'request' is misleading since it implies an element of discretion on the part of the state, as argued by Croatia.[51] It appears that the term was included since certain mandatory actions by the Tribunal, such as deferral of proceedings, impact so heavily on a state's sovereignty that in those cases the use of the term order would be too strong.[52] However, it is recalled that as a matter of sound policy the Appeals Chamber held that recourse should first be had to co-operative measures before invoking the provisions of Article 29(2) of the Statute. It seems, therefore, that such particularly sensitive situations could be resolved through an informal request on the basis of Article 29(1) of the Statute. By way of *ultimum remedium* only a non-co-operative state could then be the addressee of a binding order.

It is further submitted that the compulsory power should be restricted to the Tribunals' Judges and should not accrue to the Prosecutor. The Rules of Procedure and Evidence limit such prosecutorial power to only one instance, the pro-

48. Nuclear Tests (Australia *v.* France), Judgment of 20 December 1974, 1974 ICJ Rep. 253. Nuclear Tests (New Zealand *v.* France), Judgment of 20 December 1974, 1974 ICJ Rep. 457.
49. *See* Appeals Chamber Subpoena Decision, *supra* note 6, para. 33.
50. *Id.*, paras. 33 and 36.
51. Adding to the confusion is the international arrest warrant for Slobodan Milošević *c.s.* which was sent also to Switzerland. However, it was explicitly not suggested that that state would be bound to comply and the warrant should "therefore be expressed in terms of a request for assistance rather than an order." *See* Prosecutor *v.* Slobodan Milošević, Milan Milutinović, Nikola Sainović, Dragoljub Ojdanić and Vlajko Stojiljković, Decision on Review of Indictment and Application for Consequential Orders, Case No. IT-99-37-I, Judge David Hunt, 24 May 1999, para. 23.
52. *See* Morris & Scharf, *supra* note 3, at 131.

visional arrest of a suspect pursuant to Rule 40.[53] While it is argued that international human rights law binds the Prosecutor, like the Tribunal as a whole, only independent and impartial judicial review will guarantee that the individuals' rights are indeed respected.[54]

3. THE MANDATORY COMPLIANCE POWERS OF THE ICC *VIS-À-VIS* STATES

3.1. Introduction

Considering the legal basis for the ICTY the UN Secretary-General held that in the normal course of events an International Tribunal would be established by treaty. This procedure would have the advantage of allowing all participating states to fully exercise their sovereign will in a detailed examination and elaboration of all relevant issues, and to decide whether or not to become parties. In the case of the ICTY, the proposed Chapter VII basis was exceptionally accepted for its expediency and its mandatory implications.[55]

However, not long after the establishment of the ICTY and the ICTR, lengthy and meticulous negotiations on a treaty for a permanent Court accelerated at rather high speed.[56] The International Law Commission's 1994 Draft Statute for an International Criminal Court[57] was the basis for deliberations that started in an *ad hoc* Committee in 1995[58] and continued in a Preparatory Com-

53. However, Gallant suggests that the Prosecutor's powers under ICTY Rule 39 also could be considered binding requests. *See* K. Gallant, *Securing the Presence of Defendants Before the International Tribunal for the Former Yugoslavia: Breaking with Extradition*, 5 Criminal Law Forum 557, at 574 (1994).

54. *Id.*, at 584. That the Tribunal is to be considered bound by international human rights law can for instance be argued on the basis of Art. 1(3) of the UN Charter, according to which one of the purposes and principles of the UN is "[t]o achieve international co-operation [...] in promoting and encouraging respect for human rights and for fundamental freedoms." A request for provisional arrest pursuant to Rule 40 may, therefore, not compromise the suspect's right to appear 'promptly' before a judicial authority and to a trial within a reasonable time or to release, pursuant to Art. 9(3) of the International Covenant on Civil and Political Rights. In the absence of any role for national authorities in this respect, it is argued that, as a minimum, the Rules should provide for the possibility to challenge before a Trial Chamber a Prosecutor's request for provisional arrest, *e.g.* on the ground of the length of the time period. In this respect, it is noted that ICTY Rule 108 *bis* allows an interested state to seek review only of a *Trial Chamber* decision.

55. *See* Secretary-General's Report, *supra* note 15, paras. 18-30.

56. Efforts by the International Law Commission and the UN General Assembly in respect of the establishment of an international criminal court date back to as early as the beginning of the 1950s. For an overview, *see, e.g.*, B. Ferencz, *An International Criminal Code and Court: Where They Stand and Where They're Going*, 30 Columbia Journal of Transnational Law 375 (1992).

57. *See* Report of the International Law Commission on the Work of its Forty-Sixth Session, 2 May-22 July 1994, GA 49th Sess., Supp. No. 10, UN Doc. A/49/10 (1994).

58. *See* Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court, GA 50th Sess., Supp. No. 22, UN Doc. A/50/22 (1995).

mittee, meeting six times between 1996 and 1998 at United Nations Headquarters in New York.[59] To the surprise of many, on 17 July 1998, the main part of the ICC's establishment process was concluded with the adoption of the Rome Statute.[60]

The Rome Statute is a multilateral treaty[61] which in accordance with Article 126 will enter into force after the 60th instrument of ratification or accession has been deposited with the UN Secretary General.[62] Importantly, and a contentious issue until the end of the Rome Conference, reservations to the ICC Statute are not allowed pursuant to Article 120. In accordance with Article 121, amendments to the Statute may be proposed only after seven years from its entry into force, when to this end a review conference will be convened by the UN Secretary-General pursuant to Article 123.[63] Except for in the case of withdrawal further to the entry into force of an unacceptable amendment pursuant to Article 121(6), Article 127 provides that a state's withdrawal from the Statute takes effect only one year after such notification. However, in both cases, Article 127(2) provides that withdrawal from the Statute does not discharge the state from its statutory obligations prior to its withdrawal. These obligations specifically include

> any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective.

As anticipated by the UN Secretary-General, of course, the ICC Statute only imposes obligations on those states that are parties to it,[64] which agree to perform

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59. *See* Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/Conf.183/2/Add.1 (1998).
60. The Rome Statute was adopted by an unrecorded vote, requested by the United States, of 120 in favour, 7 against and 21 abstentions. Annexed to the Statute's Final Act is a resolution establishing a Preparatory Commission tasked with ensuring the coming into operation of the Court and making the necessary practical arrangements, including drafting the Court's Rules of Procedure and Evidence.
61. *Cf.* Arts. 1, 2(1)(a) and 5 of the Vienna Convention. While the Vienna Convention as such is only binding on ratifying or acceding states, it may also provide an important indication of customary international law. *See* I. Brownlie, Principles of Public International law 608 (1998).
62. On 12 August 1999, 84 States had signed the treaty, while four had deposited their instruments of ratification. *See* the UN web-site at http://www.un.org/icc.
63. A high threshold was established for amending the Statute. Pursuant to Art. 121 of the ICC Statute, amendments need to be adopted by two-thirds of the members of the states parties, while they only enter into force after ratification or accession by seven-eighths of the states parties (except for those dealing with the subject-matter jurisdiction).
64. The concept of *pacta tertiis nec nocent*, *cf.* Arts. 34 and 35 of the Vienna Convention. US Ambassador-at-Large for War Crimes Issues, David Scheffer, seems to suggest that Art. 12 of the ICC treaty contrasts with this "fundamental principle of international treaty law." *See* D. Scheffer, Deterrence of War Crimes in the 21st Century, Twelfth Annual U.S. Pacific Command, International Military Operations and Law Conference, Honolulu, Hawaii, 23 February 1999 (*see* the web-site of the US State Department at http://www.state.gov). In fact, however, Art. 12 of the ICC Statute does nothing

the treaty in good faith.[65] Lastly, mention is made of another fundamental principle of treaty law, according to which states parties may not invoke provisions of their national law as a justification for non-compliance with the terms of the treaty.[66]

3.2. The obligation of states to co-operate with and provide judicial assistance to the ICC

As discussed, in the *Blaškić* case both Trial Chamber II and the Appeals Chamber distinguished two co-operation systems. First, by virtue of their Chapter VII basis the *ad hoc* Tribunals were placed in a superior position to national jurisdictions: not only were they granted primacy over such jurisdictions, states also became obliged to be of full assistance to them and to comply with Tribunal orders and requests. Hence, a vertical co-operation regime was established. By contrast, traditional inter-state co-operation in criminal matters, often arranged in bi- or multilateral treaties,[67] is based on the equality of the partners. It is a horizontal co-operation paradigm. A typical feature of the latter is a unilateral discretionary power on the part of a requested state to decide whether and how to provide the assistance to the requesting state.

Notwithstanding the different legal basis of the Tribunals and the permanent Court, the drafters of the Statute of the latter could, of course, have decided to integrally adopt the 'Chapter VII regime' as applicable between states parties.[68] Instead, however, they engaged in a search for a middle ground between the vertical and the horizontal systems, which was essentially an attempt to reach a compromise between sovereignty concerns and a genuine commitment to international justice. That search commenced in the *ad hoc* Committee and in some cases continued to the very end of the Rome Treaty Conference.[69]

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more than granting the ICC jurisdiction over individuals possibly without the agreement of their state of nationality: this is in accordance with the principle of universal criminal jurisdiction over the particularly grave crimes at stake. Neither Art. 12 nor any other provision in the Statute imposes obligations of any form on that state if it is not a party to the Statute.

65. *Cf.* Art. 26. Art. 31(1) of the Vienna Convention further provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."
66. *Cf.* Art. 27 of the Vienna Convention. *See also* note 40, *supra*.
67. *E.g.*, European Convention on Extradition (ETS No. 24), opened for signature 13 December 1957, entered into force 18 April 1960 (ECEx), on 20 August 1999 ratified or acceded to by 38 states; and the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30), opened for signature 20 April 1959, entered into force 12 June 1962 (ECMA), on 11 August 1999 ratified or acceded to by 35 states. *See* web-site of the Council of Europe at http://www.coe.fr/index.asp.
68. Notwithstanding that, in contrast to the ICTY, the ICC's jurisdiction is 'complementary' to national jurisdictions: the Court may exercise its jurisdiction only if states are unwilling or unable to exercise theirs. *See* Art. 17 of the ICC Statute.
69. *See Ad Hoc* Committee Report, *supra* note 58, paras. 205-236, mentioning the suggestion for the concurrent operation of two separate surrender systems, discussed in J.L. Bleich, *Cooperation with National Systems*, *in* M.C. Bassiouni (Ed.), The International Criminal Court: Observations and Is-

A fundamental difference between the *ad hoc* Tribunals and the ICC co-operation system is the degree of detail in the respective Statutes. As demonstrated above, with only one general statutory provision, the *ad hoc* Tribunals' co-operation regime is largely Judge-made. In contrast, the whole Part 9 of the ICC Statute (Articles 86 to 102) regulates the topic with great precision. A similarity between the two systems is the general obligation, pursuant to Article 29(1) of the ICTY Statute and Article 86 of the ICC Statute, to co-operate with the Tribunal and the ICC in the investigation and prosecution of crimes. The latter provision specifies that it concerns co-operation "in accordance with the provisions of this Statute."[70] This general provision is of great importance in light of the obligation for states parties to perform the treaty in good faith. As in the *ad hoc* Tribunals' system, it appears to require states to be pro-active in providing support, and to co-operate further to a non-mandatory request, in which cases it also provides a legal basis for co-operation.

However, a generic mandatory provision like Article 29(2) of the ICTY Statute was not included in the ICC Statute.[71] Moreover, in spite of the many arguments for granting the Court the explicit power to issue binding 'orders' to states, neither the ILC Draft Statute nor the final Draft Statute provided for such an option. Since no formal proposals in this respect were submitted at the Rome Conference, binding orders to states are not provided for in Part 9 of the ICC Statute. Like Article 29(2) of the ICTY Statute, however, the ICC Statute provides for requests for assistance, although not in a single mandatory provision. Instead, resembling the traditional inter-state practice of distinguishing between extradition and mutual assistance, the ICC Statute provides for two clusters: requests regarding arrest and surrender of persons to the Court and requests regarding other forms of co-operation. These clusters will be discussed in turn below.

First, however, mention is made of Article 87 of the ICC Statute, which entails general provisions in respect of requests for assistance. While the ICTY is free to decide how to channel communication with state authorities,[72] Article 87(1) of the ICC Statute provides that the appropriate channels for requests are to be designated by states. As a general rule, inter-state co-operation uses diplo-

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sues Before the 1997-98 Preparatory Committee; and *Administrative and Financial Implications*, 13 Nouvelles Études Pénales 249-254 (1997); Report of the Preparatory Committee on the Establishment of an International Criminal Court, GA 51st Sess., Supp. No. 22, UN Doc. A/51/22 (1996), paras. 310-348.

70. At the Rome Conference, the broader reference to "the Statute" was chosen over "this part" without much discussion. For a full record of observations at the Rome Conference such as those mentioned hereafter, *see* Coalition for an International Criminal Court, The Construction of Justice (forthcoming).

71. Art. 51(2) of the ILC Draft Statute generally provided for ICC requests for co-operation and judicial assistance to which states that accepted the Court's jurisdiction, pursuant to Art. 51(3), should respond "without undue delay."

72. *See* Trial Chamber Subpoena Decision, *supra* note 26, para. 68.

matic channels or runs from government to government, but it has been commented that communication between courts or investigative authorities may save time and bureaucracy.[73] It is suggested that states should bear this in mind in respect of co-operation with the ICC.

ICTY requests for assistance are drafted in one of the working languages of the Tribunal, English or French.[74] In contrast, Article 87(2) of the ICC Statute provides that each state party may indicate whether it requires that a request for assistance be made in, or translated into, one of its official languages or in one of the working languages of the Court, that is, English or French, pursuant to Article 50(2) of the ICC Statute.[75] For purposes of efficiency, it is submitted that states should be encouraged to opt for one of the working languages.

One uncontroversial issue at Rome was the provision in Article 87(3) of the ICC Statute, according to which a state is obliged to keep a request for cooperation confidential except to the extent this is required for the execution of the request. Article 87(4) of the ICC Statute grants the Court the power to take any measures in relation to a request under Part 9 of the ICC Statute as may be necessary to ensure "the safety or physical or psychological well-being of any victims, potential witnesses and their families."

Article 87(5) of the ICC Statute deals with co-operation by non-states parties. Accordingly, a non-state party may be invited to co-operate with the Court on the basis of an *ad hoc* arrangement, an agreement or "any other appropriate basis." If such a state fails to comply with a request in breach of an *ad hoc* arrangement or agreement, the Court may inform the Assembly of States Parties or the Security Council if this organ triggered the ICC's jurisdiction. The possibility of informing the Security Council was only agreed in the final version of the Statute, once the text of Article 13(b) of the ICC Statute (Exercise of Jurisdiction) had been agreed upon. It is submitted that the Court might well have been empowered to inform the Security Council of any instance of non-co-operation that may amount to a breach of international peace and security. The same goes for non-compliance with a co-operation request by a state party, provided for in Article 87(7). By requiring that the Court be prevented from exercising its statutory functions and powers, the latter provision presents a slightly higher threshold for a finding and referral of non-co-operation than in the case of non-co-operation by a non-state party, where a similar proposal was not accepted.

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73. *Cf.* Arts. 12 ECEx and 15(1) ECMA. *See* P. Gully-Hart, *Loss of Time Through Formal and Procedural Requirements in International Co-operation*, *in* A. Eser & O. Lagodney (Eds.), Principles and Procedures for a New Transnational Criminal Law 245, at 252 (1992).
74. *Cf.* Art. 33 of the ICTY Statute. However, there is no provision in the Statute or the Rules that precludes the simultaneous communication of a translation into the language of the requested state.
75. *Cf.* Art. 23 ECEx and Art. 16 ECMA.

3.3. The power to issue and the obligation of states to comply with ICC requests

3.3.1. Requests for the arrest and surrender of persons

Pursuant to Article 89 of the ICC Statute, the Court, that is, a Pre-Trial Chamber acting pursuant to Article 58 of the ICC Statute, may address a request for arrest and surrender of a person to any state on the territory of which that person may be found. Much as it had already been proposed in Article 53 of the ILC Draft Statute, pursuant to Article 89(1) of the ICC Statute, states parties are obliged to comply ("shall comply") with requests for arrest and surrender in accordance with Part 9 of the ICC Statute.

At the Rome Conference, interestingly it was Croatia that proposed that the surrender obligation for states parties be absolute. According to its proposal, it should not be possible for a state party to invoke any legal impediment under national law or extradition treaties in justification of non-compliance. Croatia reasoned that

> [t]he Security Council has established this standard for the efficient functioning of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda. There is no reason to apply different practices to the International Criminal Court.[76]

As discussed above, this is indeed the case with the *ad hoc* Tribunals.

Nonetheless, resembling inter-state practice, the Draft Statute included numerous references to national law, some of which were retained in the ICC Statute. First, the Rome Conference agreed that a state party must comply with a surrender request in accordance with the procedures under its national law. Reflecting inter-state practice,[77] this provision was part of an important compromise that allowed for the deletion of two grounds for refusal to comply with requests in the case of co-operation requests under Article 93 of the ICC Statute, discussed below. An important element of the compromise was also the inclusion of Article 88, according to which states parties are obliged to ensure the availability of such national procedures. The procedures will have to allow for implementation of the obligations in respect of the arrest proceedings provided for in Article 59 of the ICC Statute and the surrender obligations in Part 9. Although the requirement to comply "without undue delay", included as an option in the Draft Statute and similar to Article 29 of the ICTY Statute, was dropped, in light of the obligation to implement the treaty in good faith the national procedures will have to facilitate prompt compliance.

76. *See* UN Doc. A/CONF.183/C.1/WGIC/L.9, 29 June 1998.
77. *Cf.* Art. 22 ECEx.

Under Article 59 of the ICC Statute, further to a request pursuant to Article 89, a state party must "immediately take steps to arrest the person in question in accordance with its laws and the provisions of Part 9." This resembles ICTY Rule 56, which obliges a state to "act promptly and with all due diligence" to ensure the execution of the warrant of arrest. In the case of the ICTY, the next step for the state is to arrange for the surrender of the person without a national court proceeding "without national court proceedings".[78] In contrast, Article 59(2) of the ICC Statute provides that a person is to be brought before a competent national judicial authority. In accordance with its national law, that authority is to confirm the person's identity and determine that the person was duly arrested and that his rights were respected. Another important difference is provisional release, which pursuant to Rule 65 is a matter for an ICTY Trial Chamber only. Pursuant to Article 59 of the ICC Statute, under the ICC regime it is for a national judicial authority to decide on such an application, although recommendations of an ICC Pre-Trial Chamber must be given "full consideration." The grounds for the ICC arrest warrant, however, may not be reviewed. Pursuant to Article 59(7), the custodial state is to deliver the person to the ICC when so "ordered." This is confusing because, as discussed above, the term 'order' does not feature in Part 9 of the ICC Statute. Perhaps this is the result of the speedy and somewhat isolated negotiations of the Working Group on International Co-operation and Judicial Assistance, and the Working Group on Procedural Matters at the Rome Conference. Whatever the nomenclature, however, pursuant to Article 86 of the Statute, states parties will be obliged to co-operate.

While the role of the 'procedures under national law' is prominent, the importance of substantive national law has been diminished with the deletion of a provision in the Draft Statute according to which national law would govern the conditions for surrender. This would open the door for any state legitimately to enact national legislation preventing it from surrendering a person by virtue of, for instance, his or her nationality or official position.

A very controversial issue at the Rome Conference was the terminology for the act of delivering a person to the ICC: 'surrender', 'transfer' or 'extradition'. The first term was only agreed at the very end of the Conference. While support for 'extradition' was growing among in particular Arab states, states members of the 'like-minded group' successfully argued that using this term would seriously hamper the effective functioning of the Court.[79] Choosing 'extradition' would imply incorporating the Court into existing frameworks of inter-state co-operation, and national (constitutional) requirements with regard to extradition would become applicable.

78. *See* Morris & Scharf, *supra* note 3, at 228.
79. The 'like-minded' group consisted of an increasing number of states supporting a set of key principles for an effective and independent Court.

As discussed, grounds for refusal of whatever nature are inapplicable in the case of orders and requests by the *ad hoc* Tribunals.[80] Nevertheless, the practice of both the ICTR and the ICTY has demonstrated how troublesome application of extradition law is in the case of co-operation with international Tribunals.[81] First, the US Government has been embarrassed by the refusal of a US Magistrate Judge to surrender an accused, Elizaphan Ntakirutimana, to the ICTR.[82] In attempting to implement its obligation *vis-à-vis* the Tribunals, the US Government amended and declared applicable its extradition legislation. That legislation requires the existence of an extradition treaty, which according to the US Constitution is to be ratified by the Senate. The Judge held that the conclusion of a surrender agreement with the ICTR implemented by Congress through enabling legislation did not live up to that, in the case of the Tribunals, practically impossible requirement.[83] He consequently refused the surrender of the accused.[84] Second, in clear violation of the law and "attempting to give a legal twist to what is essentially a matter of political will,"[85] both the Federal Republic of Yugoslavia and *Republika Srpska* have argued that their respective Constitutions prohibit 'extradition' of their indicted nationals to the ICTY.[86]

In addition to the refusal to extradite nationals, examples of other traditional grounds for refusal in extradition practice are the double criminality require-

80. ICTY Trial Chamber II specifically held that "there are no specified grounds on which a State may refuse to comply with an order or request from the International Tribunal, as there are in treaties or bi- or multilateral agreements." *See* Trial Chamber Subpoena Decision, *supra* note 26, para. 77; confirmed in Appeals Chamber Subpoena Decision, *supra* note 6, para. 63.

81. In actual fact, according to implementing legislation, most states adhere to extradition procedures for co-operation with the Tribunals. *See* G. Sluiter, *To Cooperate or Not to Cooperate?: The Case of the Failed Transfer of Ntakirutimana to the Rwanda Tribunal* 11 LJIL 383, at 386-387 (1998).

82. *See* In the Matter of Surrender of Elizaphan Ntakirutimana. Misc. No. L-96-5, United States District Court for the Southern District of Texas, Laredo Division, 1997 US Dist. LEXIS 20714, December 17, 1997, Decided, December 17, 1997, Entered.

83. *See, generally,* R. Kushen & K.J. Harris, *Surrender of Fugitives by the United States to the War Crimes Tribunals for Yugoslavia and Rwanda*, 90 AJIL 513 (1996). Sluiter notes ICTY Trial Chamber II's Decision on the Motion for Release by the Accused Slavko Dokmanović, Case No. IT-95-13a-PT, T.C. II, 22 October 1997, para. 67, in which it is explained that since the Tribunal is not a state, it does not have the power to conclude extradition treaties. As a solution to the frustrated surrender from the US to the ICTR, Sluiter suggests that new legislation be enacted establishing a *sui generis* regime for surrender to the Tribunal. *See* Sluiter, *supra* note 81, at 393.

84. However, on 6 August 1998, on a further application by the US Government the same District Court certified the surrender of the accused to the ICTR. *See* In the Matter of the Surrender of Elizaphan Ntakirutimana, Civil Action No. L-98-43, United States District Court for the Southern District of Texas, Laredo Division, 1998 US Dist. LEXIS 22173, August 6, 1998, Entered. The United States Court of Appeals for the Fifth Circuit subsequently affirmed an order of the District Court denying Ntakirutimana's petition for a writ of habeas corpus and lifting stay of his 'extradition'. *See* Elizaphan Ntakirutimana, Petitioner-Appellant, versus Janet Reno, Attorney General of the United States; Madeleine Albright, Secretary of State of the United States; Juan Garza, Sheriff of Webb County, Texas, Respondents-Appellees, No. 98-41597, United States Court of Appeals for the Fifth Circuit, 1999 US App. LEXIS 18253, August 5, 1999, Decided.

85. *See* Sluiter, *supra* note 81, at 384.

86. *See* ICTY Report 1997, *supra* note 5, para. 189.

ment, the political offence exception, and the concurrent jurisdiction and *ne* (or, *non*) *bis in idem* requirements.[87] The compromise provision in Article 102 of the ICC Statute, providing definitions of surrender and extradition for the purpose of the Statute, prevented incorporation of such provisions.

However, the Draft Statute included several proposed explicit grounds for refusal which in most cases were drawn from extradition practice. A first ground for refusal to surrender to the ICC was the non-surrender of nationals, a provision which, as discussed above, would have seriously undermined the effectiveness of the Court. According to a compromise proposal presented by Denmark, Norway, Sweden and Switzerland, surrender of a national might be made conditional, with the agreement of the Court, upon the return of the person for the purpose of serving the sentence.[88] The proposal was not further discussed and, as in the case of the terminology, only at the very end of the Rome Conference agreement was reached to delete the ground for refusal from the Statute. However, in a footnote to the Report of the Working Group on International Cooperation and Judicial Assistance to the Committee of the Whole some states expressed strong reservations to the deletion of the provision because of a perceived incompatibility with constitutional and other domestic legislation.

A second ground for refusal, the *ne bis in idem* exception, was also deleted. The compromise, based on a proposal by Canada, is enshrined in Article 89(2) of the ICC Statute. It is for the Court to decide whether it should hear a case after a trial before a national court. In doing so, the Court must determine, pursuant to Article 17 of the ICC Statute, whether the case is admissible on the basis of the principle of 'complementarity'. The grounds on the basis of which the Court may so decide are among those on the basis of which the *ad hoc* Tribunals may invoke their primacy over national courts, namely, if national procedures were aimed at shielding the person from criminal responsibility or if they were not independent or impartial.[89]

As stated by ICTY Trial Chamber II, pursuant to Article 103 of the UN Charter, (surrender) orders of the *ad hoc* Tribunals take precedence over other international agreements. This is different in the case of the ICC. An option in the Draft Statute entailed a further ground for refusal to comply with a surrender request if such compliance would result in a breach of a pre-existing international legal obligation. Rather than a state's ground for refusal, the compromise in Article 98 of the ICC Statute restricts the Court in proceeding with a request for surrender or assistance if it would require the requested state to breach an international legal obligation. The provision deals both with international law regarding the state or immunity of a person or property of a third state, and international agreements requiring a third sending state to consent to the surrender

87. *Cf.* Arts. 6, 2, 3, 8 and 9 ECEx.
88. *See* UN Doc. A/CONF/183/C.1/WGIC/L.18, 13 July 1998.
89. *Cf.* Art. 9(2) ICTY Statute and ICTY Rules 9 and 10.

of a person to the Court. An exception to the Court's restriction to proceed with a request is where it obtains the co-operation of the third state for the waiver of immunity or consent to surrender. Unlike the provision on competing requests which is discussed next, however, Article 98 does not distinguish between third states that are parties to the ICC treaty and those that are not. Nevertheless, by virtue of Article 86 of the ICC Statute, if so requested by the Court any third state party will be obliged to waive immunity or consent to surrender.

A similar matter is the competition between surrender and extradition requests. The debate on the issue, which in the Draft Statute had not been treated as a ground for refusal as such, was of a technical rather than a political nature and was concluded near the end of the Rome Conference. The provision finally agreed in Article 90 of the ICC Statute distinguishes between competing requests for surrender and extradition for the same conduct and for different conduct.

In the first case, a requested state party must give priority to the Court's request over a competing extradition request by another state party if the Court has determined the admissibility of the case. If it concerns a competing request by a non-state party, the surrender request must be complied with if there is no existing legal obligation to extradite (*e.g.* on the basis of an extradition treaty). If there is such an obligation, then the requested state must choose whether to surrender or extradite bearing in mind a number of factors, such as the respective dates of the requests, nationality of the persons involved and the possibility for subsequent surrender. These factors seem to have been drawn from inter-state practice.[90] In the second case, where different conduct underlying the competing requests is at stake, the provision in Article 90(7) of the ICC Statute does not distinguish between requests by states parties and non-states parties. Where there is no existing legal obligation to extradite, a requested state party must prioritise the Court's surrender request. Where there is such an obligation, however, it is for the requested state to make a decision. So, here the Statute does not impose on a state party the obligation to give priority to a surrender request over a legally binding extradition request by another state party. Although the solution of an admissibility ruling was not possible here, the Statute could have provided that in any case the surrender request should be complied with. Nevertheless, when making its decision whether to surrender or extradite, under Article 90(7)(b) of the ICC Statute the requested state must bear in mind *inter alia* the factors referred to above, but must give special consideration to "the relative nature and gravity of the conduct in question." In this respect, it has been argued that a surrender request concerning a crime for which there exists under general international law an obligation to punish, such as in the case of genocide, must be prioritised over an extradition request for another crime which is not subject

90. *Cf.* Art. 17 ECEx.

to that obligation.[91] Finally, according to Article 97 of the ICC Statute, which is applicable to all problems in the execution of requests under Part 9, a requested state must consult with the Court if compliance with a request would result in the breach of a pre-existing treaty obligation with a third state.

The Draft Statute provision dealing with delayed or temporary surrender in the case of ongoing national proceedings or execution of a sentence for an offence different from that for which surrender to the Court is sought, seems to have been modelled directly after Article 19 of the ECEx. A US amendment proposed at the Rome Conference suggested that the requested state

> [h]aving fully taken into account the views of the Court, [may] postpone the surrender of the person until such time as the proceedings against the person have been completed and any other legal impediment to his surrender or temporary surrender no longer exists.[92]

If accepted, the proposal would, of course, have seriously undermined the effectiveness of the Court.

After a troublesome discussion, Article 89(4) of the ICC Statute now provides that in the case of ongoing national proceedings or execution of a sentence

> for a crime different from that for which surrender to the Court is sought, the requested State, after making its decision to grant the request, shall consult with the Court.

This provision merits discussion. The admissibility provisions in Articles 17 and 18 are concerned with competing investigations or prosecutions in the same "case" or "criminal acts which may constitute crimes referred to in Article 5" (*i.e.* crimes within the jurisdiction of the Court), respectively. In this light, rather than clinging to any specific legal classification, the "crime different from that for which surrender to the Court is sought," referred to in Article 89(4), is probably to be interpreted as 'different conduct'. Hence, the case where the Court requests surrender on genocide charges, while the suspect is being proceeded against or is serving a sentence for the 'ordinary crime' of murder, but on the basis of the same conduct, does not fall within the scope of Article 89(4). Instead, it is an issue of admissibility. Furthermore, the language of Article 89(4) is ambiguous since it suggests that a requested state has a discretion to decide whether or not to grant a surrender request. Moreover, notwithstanding the consultations between the requested state and the Court, the provision should preferably have provided for the Court's final say in the issue. Its current formulation insufficiently takes away the risk of mock national proceedings for dif-

91. *See* A. Zimmermann, *The Creation of a Permanent International Criminal Court*, *in* J. Frowein & R. Wolfrum (Eds.), Max Planck Yearbook of United Nations Law 169, at 227 (1998).
92. *See* UN Doc. A/CONF.183/C.1/WGIC/L.17, 12 July 1998.

ferent conduct herewith effectively providing the suspect with impunity for crimes within the jurisdiction of the Court.[93]

Article 89(3) of the ICC Statute is not a particularly controversial provision, according to which a state party shall comply, in accordance with its national procedural law, with an ICC request for transit through its territory of a person being surrendered to the Court.[94]

Article 91 of the ICC Statute provides for the contents of an arrest and surrender request. Article 91(2)(c) requires the submission of supporting information that may be required to satisfy the surrender process in the requested state. Such national requirements may, however, not be more burdensome than those applicable in extradition agreements and should if possible be less demanding. According to a subsequent provision in the Draft Statute, if the information provided to the requested state might be considered insufficient, the state must require the submission of additional information within a fixed time-limit, failing which the accused may be released. The latter addition was reformulated: Article 91(4) now provides that further to the request of the Court, consultations shall take place regarding any of the requirements under the national law of the requested state. In the Report of the Working Group on International Cooperation and Judicial Assistance, some delegations stated that they would only accept Articles 91(2)(c) and 91(4) on the condition that the submission of insufficient supporting information be deleted as a ground for refusal to comply with a surrender request.[95] The Decision not to surrender the accused Ntakirutimana from the US to the ICTR has illustrated how troublesome the satisfaction of national requirements can be. Since, apart from declaring Congress' legislative efforts unconstitutional, the US Judge deciding on the surrender request held that the affidavit submitted by the Tribunal "is remarkable more for what it does not say than what it does say." He consequently held that a 'probable cause' that the accused had committed the alleged crimes, required by the Fourth Amendment to the US Constitution,[96] had not been established.[97]

Lastly, pursuant to Article 101 of the ICC Statute, a surrendered person may not be the subject of proceedings, punishment or detention for conduct different than the conduct on the basis of which he or she has been surrendered. Article 101 further provides that a state party surrendering the person has the authority and must endeavour to waive the limitation, if necessary further to the provi-

93. With respect to the surrender of Mladen Naletilić from Croatia to the ICTY, the Prosecutor made it clear that national proceedings may not be invoked as an excuse for the non-execution of a surrender order. *See* ICTY Press Release CC/PIS/427-E, 9 August 1999: "Vinko Martinović ("Štela") Surrendered to ICTY by the Republic of Croatia."
94. *Cf.* Art. 30(4) of the ICTY Statute.
95. *See* UN Doc. A/CONF.183/C.1/WGIC/L.8/Rev.1/Corr.2, 2 July 1998.
96. *See* Kushen & Harris, *supra* note 83, at 517.
97. However, both the District Court and the Court of Appeals later held to the contrary. *See* note 84, *supra*.

dence of additional information. This restrictive 'rule of speciality' is common to extradition practice,[98] but it is alien to the law and practice of the ICTY.[99] Fortunately, the Draft Statute provision declaring the rule of speciality applicable also to the use of evidence provided to the Court was not retained in Article 101 of the ICC Statute.

3.3.2. Requests for other forms of co-operation

In addition to apprehending individuals suspected of responsibility for crimes within the jurisdiction of the Court, the gathering of evidence during an investigation and prosecution will require substantial co-operation by states. As Article 18(2) of the ICTY Statute and ICTY Rule 39, pursuant to Article 54(3) of the ICC Statute, during the investigation the Prosecutor may seek the co-operation of states and request the presence of persons under investigation, victims and witnesses. The Prosecutor may also request "that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence." Further to a request by the Prosecutor, pursuant to Article 57 of the Statute, an ICC Pre-Trial Chamber has the power to issue "such orders and warrants as may be required for the purposes of an investigation." The Pre-Trial Chamber has the same powers upon request of an indicted person preparing his or her defence. Subsequent to the confirmation of charges, these powers accrue to a Trial Chamber, pursuant to Article 64(6) of the ICC Statute.

It is recalled that pursuant to Article 86 of the ICC Statute, state parties are generally obliged to co-operate in the investigations and prosecutions of the Court, which, according to Article 34 of the Statute, includes the Office of the Prosecutor. As already noted, however, Part 9 of the Statute only provides for a state party's obligation to comply with 'requests' and not with 'orders' or 'warrants'. As in the case of an 'arrest order', discussed above, what is at issue here is perhaps due to miscommunication between various drafters. It seems logical to interpret 'orders' and 'warrants' *vis-à-vis* states whenever mentioned in the Statute as 'requests'.

Pursuant to Article 93(1) of the ICC Statute, state parties "shall comply" with such requests for co-operation in relation to investigations and prosecutions other than for the arrest and surrender of persons. Article 93(1) specifies eleven particular forms of such co-operation, including those on which the *ad hoc* Tribunals rely regularly, such as the production of documents, and further includes a general provision in Article 93(1)(l) referring to "any other type of assistance."

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98. *Cf.* Art. 14 ECEx.
99. Pursuant to ICTY Rule 50, the Prosecutor may add new charges to an indictment, subject to confirmation by a Judge. Such new charges may be based on expanded factual allegations. *See, e.g.*, Prosecutor *v.* Milan Kovačević, Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998, Case. No. IT-97-24-AR73, A.Ch., 2 July 1998 (although it is noted that the accused Kovačević was arrested by SFOR, and not surrendered to the Tribunal by a state).

As with requests for surrender, the negotiations mainly dealt with the role of national law and related grounds for refusal. As in Article 89 of the ICC Statute, Article 93(1) provides that compliance shall be in accordance with the provisions in Part 9 of the ICC Statute and under the procedures of national law. Pursuant to Article 99(1) of the ICC Statute, execution of a co-operation request shall also be in accordance with the manner specified in the request, unless the national procedures so forbid. As mentioned above, this reference to the procedure under national law, and the inclusion of Article 88 of the ICC Statute, obliging the availability of such procedures, was part of a compromise which allowed for the elimination of two proposed grounds for refusal as such. The first ground allowed a state to deny the requested assistance if its national laws would prohibit compliance. According to the second ground, a request for assistance might be denied if it would prejudice a state's *ordre public* or other essential interests.[100]

However, with regard to the first deleted ground, a compromise was struck according to which national law actually still serves as a *de facto* ground for refusal. First, a state party must comply with a request for a non-enumerated type of assistance under Article 93(1)(l) of the ICC Statute only insofar as its law does not prohibit this. Article 93(3) further deals with the case where a "fundamental legal principle of general application" prohibits a state from executing any request for assistance under Article 93(1). Consultations between the state and the Court must address whether the co-operation cannot be provided differently or subject to conditions. Pursuant to Article 93(5), if the Court or the Prosecutor accept such conditions they shall bind them. However, if those consultations are unsuccessful, then the Court must modify its request as necessary. Hence, similar to the case of a surrender request that would require a state to violate its international law obligations pursuant to Article 98, discussed above, the solution reached here was not a relaxing of the state's obligation to comply with the request, but a limitation of the Court's powers. By comparison, the power of the ICTY to issue orders to states is not limited by any particular requirement by the state addressed. However, further to its basic conclusions on the power of the Tribunal to issue such binding orders, in its Subpoena Decision the Appeals Chamber determined that Tribunal orders for the production of documents must meet certain requirements. Such orders must refer to specific documents that are relevant to the trial, may not be unduly burdensome for the state and must give the state sufficient time for compliance.[101]

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100. *Cf.* Art. 1(2)(b) of the ECMA.

101. Appeals Chamber Subpoena Decision, *supra* note 6, para. 32. These requirements have been consistently applied by various Trial Chambers. *See, e.g.*, Prosecutor *v.* Tihomir Blaškić, Order to the Republic of Croatia for the Production of Documents, Case No. IT-95-14-T, T.C. I, 21 July 1998, at 3; and Prosecutor *v.* Dario Kordić and Mario Čerkez, Order to the Republic of Croatia for the Production of Documents, Case No. IT-95-14/2-PT, T.C. III, 4 February 1999, at 2. The Appeals Chamber has granted leave to Croatia to appeal the latter Decision. In its appellate brief, Croatia

The only remaining ground for refusal in Article 93(4) of the ICC Statute relates to the protection of national security, a highly contentious issue at the Rome Conference. In its Subpoena Decision, the ICTY Appeals Chamber had already pronounced on the issue, rejecting Croatia's contention that it would not be for the Tribunal to assess national security concerns.[102] First, Croatia's reliance on the ICJ *Corfu Channel* case[103] was dismissed since that case concerned a non-mandatory request for information. Other cases reviewed by the Appeals Chamber further revealed that states have actually produced sensitive or confidential documents to judicial bodies, such as the European Commission on Human Rights and the Inter-American Court on Human Rights. Second, Article 29 of the Statute envisages no exceptions whatsoever to the obligation to comply with requests and orders. That provision is a clear derogation from the customary international law protection of the domestic jurisdiction, pursuant to Article 2(7) of the UN Charter. Third, the Appeals Chamber agreed with the Prosecution that a unilateral right for states to withhold documents for security purposes that may be crucial for deciding on the guilt or innocence of the accused would jeopardise the Tribunal's very purpose. The Appeals Chamber held, therefore, that while national security claims may be legitimate, it is for the Tribunal's Judges to scrutinise them; that is, to balance them against the relevance of the documents to the proceedings.[104] If the Judges find that the national security concerns outweighed the relevance of particular documents to the trial, they may withdraw the order for their production.

The Appeals Chamber held that while the principle of good faith on the part of states should be born in mind at all times, modalities may be made for reviewing a state's concerns, if need be in consultation with that state. The modalities suggested include submitting the required documents to a single Judge during *in camera* and *ex parte* proceedings of which no transcripts are made,[105] or providing certified translations of documents so as to obviate the need for translation by the Tribunal's services. One suggestion relates to the exceptional case where a highly delicate document is not provided to the Judge but the re-

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contends that the Trial Chamber's Order does not meet the Appeals Chamber's requirements and that, as a matter of due process of law, a state has a right to be heard before an order for the production of documents is issued. *See* Prosecutor *v.* Dario Kordić and Mario Čerkez, Merits Brief of the Republic of Croatia on State Request for Review of Order to the Republic of Croatia for the Production of Documents, Case No. IT-95-14/2-AR108*bis*, A.C., 9 April 1999.

102. *See* Appeals Chamber Subpoena Decision, *supra* note 6, paras. 61-66.

103. Corfu Channel Case (United Kingdom *v.* Albania), Merits, Judgment of 9 April 1949, 1949 ICJ Rep. 4.

104. The Max Planck Institute for Foreign and International Criminal Law argued that in the context of international criminal justice national security concerns should not be given the same weight before an international criminal court as before a national court. *See* Eser & Ambos, *supra* note 41, at 19.

105. However, one member of the Appeals Chamber, Judge Karibi-Whyte, could not accept a review by a single Judge. *See* Prosecutor *v.* Tihomir Blaškić, Separate Opinion of Judge Adolphus G. Karibi-Whyte, Case No. IT-95-14-AR 108 *bis*, A.Ch., 29 October 1997.

sponsible government minister submits an affidavit arguing the case for withholding the document. In order finally to balance the interests involved, the Judge may require an oral explanation during *in camera* and *ex parte* proceedings.[106]

At the Rome conference, it was Croatia that proposed that the Appeals Chamber's ruling be followed in the case of the ICC. Accordingly, it proposed that

> States cannot claim national defence or security interests for withholding documents or evidentiary materials unless the legitimacy of their concerns has been established by a Pre-Trial Chamber or Trial Chamber.[107]

The United Kingdom submitted a more refined proposal.[108] The UK first of all proposed that if in the opinion of a state its national security interests are prejudiced it should first attempt to resolve the matter with the Court through co-operative steps. Those steps could include modification or clarification of the request, or agreement on the conditions under which the assistance could be provided, such as *in camera* and *ex parte* proceedings. If those co-operative procedures fail, then a hearing may be held for the purpose of hearing the state's arguments on non-disclosure. That hearing may take place subject to protective measures such as those determined in the ICTY Appeals Chamber Subpoena Decision. After that, the Court may only maintain its disclosure request under exceptional circumstances, namely, if it finds that the state was not acting in good faith, that the requested information was relevant to an issue before the Court and necessary for the efficiency and fairness of proceedings, and that the state's claim was "on its face, manifestly unfounded."

By contrast, France and the United States introduced a proposal which, according to the explanation by the US Delegation in the Working Group on Procedural Matters, was based on the persuasion that judges are only competent in law and that they are not suitably placed to handle sensitive security information.[109] Like the UK, France and the US proposed that recourse should first be had to co-operative measures. Where, however, such measures are unsuccessful, the requested state may refuse to comply with the request. Where the state is found to have taken that decision in bad faith, the state's representations may be heard on the issue of non-disclosure, if so requested, under the protective measures proposed in the UK's proposal. If after that the Court concludes that the state did not act in conformity with its obligations under the Statute, it may refer

106. *See* Appeals Chamber Subpoena Decision, *supra* note 6, paras. 67-69. *See also* Prosecutor *v.* Tihomir Blaškić, Third Additional Order for a Witness to Appear, Case No. IT-95-14-T, T.Ch. I, 12 April 1999.
107. *See* UN Doc. A/CONF.183/C.1/WGPM/L.32, 29 June 1998.
108. *See* UN Doc. A/CONF.183/C.1/WGPM/L.12, 25 June 1998.
109. *See* UN Doc. A/CONF.183/C.1/WGPM/L.39, 1 July 1998.

the matter to the Assembly of States Parties. However, the threshold set for determining whether a state acted in bad faith was very high. It would require, *inter alia*, that the state has engaged in a "pattern of not acting in good faith towards the Court."

Since this would leave the final word with the Court, in principle the UK proposal was certainly preferable to the US proposal. However, because of the high threshold for maintaining a request, in certain cases that provision might turn out to be a dead letter. For instance, the Court would not be allowed to maintain its request for the production of the required materials where a state would not be acting in good faith but at the same time presenting a not manifestly unfounded claim. The situation where the state would be in good faith, but with a manifestly unfounded claim would be similarly problematic. In the Working Group on Procedural Matters, such concerns were presented by the Canadian delegation that went on to introduce a new option in a consolidated working paper.[110] The proposal was based on the US/France proposal but left out the high threshold for making a referral to the Assembly of States Parties. Only on the last day of the Conference was the proposal accepted with some modifications. Article 72 of the ICC Statute now provides that, after further hearing the state's representations under conditions of confidentiality, the state may invoke the ground for refusal in Article 93(4) of the ICC Statute. However, in derogation from the general scheme in the ICC Statute, if the Court considers that by doing so the state is not acting in conformity with its obligations under the Statute, it may refer the matter in accordance with Article 87(7).

According to Article 73 of the ICC Statute, which is based on a proposal by the UK, Belgium and Italy,[111] if information was confidentially provided to the requested state, much like Article 98, the issue must be settled between the Court and the third state. If the third state is a party to the ICC treaty, the provisions of Article 72 are applicable.

All other proposed grounds for refusal as such were deleted. Rather than a refusal, pursuant to Article 94 of the ICC Statute, interference with an ongoing national investigation or prosecution may lead to the postponement of the execution of an ICC request, which may be no longer than a period agreed with the Court. The postponement is without prejudice to the Prosecutor seeking measures to preserve evidence pursuant to Article 93(1)(J) of the ICC Statute. Prior to postponing, however, the requested state must consider whether the assistance may be provided immediately under certain conditions.

In the case of a request for assistance by the Court and a competing request under an international agreement, Article 93(9) of the ICC Statute provides for consultations between the requested state, and the Court and the third state in an attempt to meet both requests, even by postponing or complying conditionally.

110. *See* UN Doc. A/CONF.183/C.1/WGPM/L.76, 13 July 1998.
111. *See* UN Doc. A/CONF.183/C.1/WGPM/L.70, 10 July 1998.

If unsuccessful, Article 90, discussed above, applies *mutatis mutandis*. With regard to "property or persons which are subject to the control of a third state or an international organization by virtue of an international agreement", Article 93(9)(b) provides basically the same as Article 98(1), as was pointed out during the negotiations.

The provision in Article 93(10) provides for assistance by the Court to a state party or a non-party that is investigating or prosecuting a crime within the Court's jurisdiction or a serious crime under its national law. The provision is clearly inspired by inter-state co-operation practice where mutuality of assistance obligations is a prominent feature. However, as opposed to the proposal in the Draft Statute, the assistance of the Court, which includes, *inter alia*, the transmission of documents, is not mandatory. Furthermore, pursuant to Article 93(10)(b)(ii)(1), if a state has assisted the Court in obtaining evidence, that state's consent is required before the Court may make the material available to a requesting state. Since the general co-operation obligation for states in Article 86 concerns co-operation with the Court in its investigation and prosecution, it seems that a state is not bound to give its consent under Article 93(10).

There is no provision in the ICTY Statute concerning assistance by the Tribunal to states. Pursuant to Article 9(1) of the ICTY Statute, however, national courts and the Tribunal have concurrent jurisdiction and where the latter does not invoke its primacy, there is no legal impediment to assist the national courts. Of course, measures will need to be taken to protect the safety of witnesses and victims, and to safeguard any legitimate security concerns by states or international organisations.

Much like Article 91, Article 96 of the ICC Statute specifies the requisite contents for a request for other forms of co-operation under Article 93. Like Article 91(2)(c), Article 96(2)(e) requires the Court to provide any information as may be required by the law of the requested state. That provision as such was initially omitted from a rolling text,[112] but later re-inserted in the ICC Statute at the insistence of a number of delegations.

Lastly, pursuant to Article 95 of the ICC Statute, pending the Court's consideration of an admissibility challenge under Articles 18 or 19, a state party may postpone compliance with a request under Part 9, unless the Prosecutor has obtained a Court order allowing him or her to pursue the collection of evidence. Furthermore, Article 19(8) provides that the Prosecutor may seek authority from the Court "[i]n cooperation with the relevant States, to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest under article 58". Such co-operation is mandatory pursuant to Article 86 of the ICC Statute.

112. *See* UN Doc. A/CONF.183/C.1/WGIC/L.8, 27 June 1998.

3.3.3. The power to issue and the obligation of states to comply with ICC requests in the case of a Security Council referral

Establishing the permanent Court the drafters of its Statute sought to obviate the need for future *ad hoc* tribunals established by the Security Council. Therefore, Article 13(b) of the ICC Statute includes the possibility for referral of a situation to the Prosecutor by the Security Council acting under Chapter VII of the UN Charter. However, while a number of provisions in the ICC Statute anticipate such a referral, *e.g.* Article 12(2) regarding preconditions to jurisdiction and Article 18 regarding preliminary admissibility rulings, Part 9 of the ICC Statute is silent on the issue.

State co-operation according to Part 9 of the ICC Treaty is first limited to states parties to the treaty. Moreover, as may be concluded, the regime it establishes in respect of states parties is weaker than the one in the case of the *ad hoc* Tribunals. Hence, the question arises how to empower the Court on a level equal to its Chapter VII counterparts. It would have been preferable if the drafters of the ICC Statute had made adequate arrangements in Part 9 of the ICC Statute. Under the present circumstances, in its referral resolution the Security Council will have to specifically sideline Part 9 and replace it with alternative provisions equivalent to Article 29 and other relevant provisions of the ICTY Statute and Rules.[113] Pursuant to Article 103 of the UN Charter, the provisions in such a resolution would take precedence over the ICC Statute.[114] A practical solution would be for the Preparatory Commission to set out the appropriate regime in its draft of the Rules of Procedure and Evidence which could be triggered by a single provision in the Security Council's resolution.[115]

Given the demanding preconditions to the exercise of ICC jurisdiction under Article 12 of the Statute, it may be assumed that in particular in the initial phase the ICC will primarily be a 'permanent *ad hoc* tribunal'. The issue of state co-operation with the Court in the case of a Security Council referral therefore requires urgent attention.

4. CONCLUSION

In spite of attempts by (like-minded) states seriously committed to creating an effective ICC, ICTY President Kirk McDonald's advice to endow the Court with unequivocally binding enforcement powers is only partially reflected in the Rome Statute. Indeed, the oft-limited powers of the Court and the possible ex-

113. Likewise, *see* Zimmermann, *supra* note 91, at 216.
114. However, it is noted that, pursuant to Art. 25 of the UN Charter, a Security Council decision only binds UN member states and not the Court, which is not subjected to the Council's authority.
115. At the time of writing, no such proposals had been officially introduced.

ceptions to the obligation for states parties to comply with its requests for assistance resemble a horizontal rather than a vertical co-operation paradigm.

Ideally, the weakest provisions would be buttressed by amendment as soon as possible. However, the troublesome negotiations in New York and Rome do not give much hope that the requirements for amending the Statute will easily be met, at least not before the initial distrust for the Court has been overcome.

States parties will have to acknowledge that they are bound to comply with the obligations pursuant to the ICC treaty in good faith and in light of its context and its object and purpose, namely, to bring to justice those responsible for the most heinous crimes known to by mankind. In this respect, state parties commit themselves in general terms to co-operate with the ICC in its investigations and prosecutions. Good faith will further require states to interpret the specific mandatory co-operation provisions as if the treaty were to provide for a vertical co-operation regime. Whenever this is problematic, consultation efforts ought to be a genuine attempt to provide assistance.

Drawing on the practice of the *ad hoc* Tribunals, the Court will have to explore its powers fully. The Court will further have to apply the prescribed consultation procedures first in an attempt to obtain the required assistance one way or another and, given the potential exploitation of the statutory loopholes, furthermore, to determine whether a state party attempts to co-operate with it in good faith. Ultimately the Court's effectiveness will depend on its referral to and any subsequent action by the Assembly of State Parties.