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**THE IMPACT OF COOPERATION ON THE RIGHTS OF DEFENDANTS
BEFORE THE ICC: A CONTEXTUAL APPROACH**

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CHAPTER I

INTRODUCTION

1. Relevance of the study

In a still state-dominated international legal order, states act as the enforcement arm of international courts. Like the *ad hoc* Tribunals, the ICC depends on the cooperation of states (including through international organizations) in all phases of its activities and, above all, in arresting suspects and conducting investigations. Increasingly, cooperation issues are at the centre of the debate regarding the ICC. The Court is facing serious hurdles in getting the custody of defendants due to the lack of cooperation of certain States.

The most famous case is the one of Omar Al-Bashir, the first sitting head of State indicted by the Court on genocide charges, who keeps travelling around the world undeterred by the arrest warrants¹ issued by the Court against him. In 2014, ICC Chief Prosecutor Fatou Bensouda informed the Security Council – which had referred the situation to the Court ten years earlier – that she was ‘hibernating’ her investigations in Darfur due to the sheer obstruction and non-cooperation of the Government of Sudan, as well as the lack of support from the Security Council.² More recently, all the Kenya cases relating to the 2007/08 post election violence collapsed due to a combination of lack of cooperation from the Government of Kenya, witness tampering and poor case construction on the part of the OTP.³ This is possibly the most evident failure of the ICC so far.

In light of the recent events, global media attention and public interest have focused on urgent questions regarding the credibility of the Court, the adequacy of Prosecutorial strategies and the achievability of the Court’s mission. In the same fashion, the great part of the literature on cooperation to date is in the ‘ameliorative mode’. It analyses how the lack of cooperation on the part of certain States and international organizations impedes the ICC’s achievement of its mission, the ending of impunity for international crimes, and seeks to improve the current legal framework regulating cooperation so as to improve the effectiveness of international criminal justice.⁴

¹ On 4 March 2009 the ICC issued an arrest warrant against Bashir for crimes against humanity and war crimes. On 12 July 2010 the ICC issued an additional warrant adding 3 counts of genocide for the ethnic cleansing of the Fur, Masalit, and Zaghawa tribes.

² Mrs. Fatou Bensouda, Prosecutor of the International Criminal Court, Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005), 4. Available at: <https://www.icc-cpi.int/iccdocs/otp/stmt-20threport-darfur.pdf>.

³ See Mark Kersten, ‘Justice for Post-Election Violence in Kenya- An Obituary’, on <https://justiceinconflict.org/2016/04/08/justice-for-post-election-violence-in-kenya-an-obituary/>.

⁴ See, among others, Michele Caianiello, ‘Models of Judicial Cooperation with Ad Hoc Tribunals and with the Permanent International Criminal Court in Europe’, *Transnational Inquiries and the Protection of Fundamental Rights*

In the midst of this debate, what is often overlooked is the impact that cooperation with the Court – as well as the lack thereof – has on defendants. Traditionally, the defence side and the accused have largely been overlooked in cooperation law and practice, both transnationally and internationally.

In transnational cooperation, the relationship between the requesting and the requested State has long been conceived as a merely bilateral one, based on equality, reciprocity and the protection of the interests of the states involved. For the longest period, the individual has been considered a mere object of international legal practice. A major shift occurred in 1989, when the European Court of Human Rights (ECtHR) issued a seminal decision in the *Soering* case. Since the *Soering* judgment, the individual is no longer considered an object of the proceedings whose rights are to be determined exclusively by the States involved, but a subject of an international legal practice, entitled to independently claim certain rights guaranteed under international law.⁵

In international criminal trials, the defence side and the accused are rarely at the centre. Instead, the focus is often on victims and the ‘fight against impunity’ for heinous crimes. However, cooperation with international tribunals is vertical in nature, and based on the hierarchical and supranational relationship of international courts with national authorities. It imposes stricter obligations to States and affords them less capacity to protect their interests. Moreover, from Nuremberg on, the rights of defendants have progressively been given more importance.

This is so much true that the assumption was that many of the worries that gave rise to the horizontal model of cooperation (interference, arbitrariness, violations of human rights) would not occur at the hands of international courts, because they are independent entities with no political agenda, that are bound by the highest standards of protection of individual rights.⁶ A clear example is the obligation of States to ‘surrender’ individuals to international criminal tribunals, which is absolute and foresees no exceptions. The drafters construed surrender obligations on the basis that

in Criminal Proceedings (Springer Berlin Heidelberg 2013); Göran Sluiter, *International Criminal Adjudication and the Collection of Evidence: Obligations of States* (Intersentia 2002); Jackson Nyamuya Maogoto, ‘A Giant Without Limbs: The International Criminal Court’s State-Centric Cooperation Regime’ (Social Science Research Network 2004); Rod Rastan, ‘Testing Co-Operation: The International Criminal Court and National Authorities’ (2008) 21 *Leiden Journal of International Law*; Göran Sluiter and Bert Swart, ‘The International Criminal Court and International Criminal Cooperation’ in Herman von Hebel (ed), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (TMC Asser Press 1999).

⁵ On the topic of individual rights in transnational cooperation, see, among others: Giulio Illuminati, ‘Transnational Inquiries in Criminal Matters and Respect for Fair Trial Guarantees’ in Stefano Ruggeri (ed), *Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings* (Springer-Verlag Berlin Heidelberg 2013), 15-24; Robert J. Currie, ‘The Protection of Human Rights in the Suppression of Transnational Crime’ in Neil Boister and Robert J. Currie (eds), *Routledge Handbook of Transnational Criminal Law* (Routledge 2015) 27-40.

⁶ Frederic Megret, ‘In Search of the “Vertical”’: Towards an Institutional Theory of International Criminal Justice’s Core’ in Carsten Stahn and Larissa van den Herik (eds), *Future Perspectives on International Criminal Justice* (TMC Asser Press 2010) 219.

individuals do not have to fear violations of their rights by the tribunals, due to the importance accorded to fair trial guarantees under their founding instruments.

With specific reference to the ICC, it is undeniable that the Rome Statute represents a clear improvement in the protection of the human rights of the accused, especially in the pre-trial phase. It not only contains an overarching principle that the Statute be interpreted and applied in accordance with internationally recognized human rights (Article 21(3)), but it also imposes human rights obligations upon national authorities conducting investigations on behalf of the Court. Among others, individuals have the right not to be subject to arbitrary arrest and detention (Article 55(d)) and, once arrested on behalf of the ICC, to be brought promptly before a national judge who must verify that their rights have been respected (Article 59(2)). These norms clearly break with the law of the *ad hoc* Tribunals, where the execution of arrest warrants and the protection of persons in arrest proceedings by national authorities has traditionally received little attention.

By observing the Court's practice in more than fourteen years, however, one cannot fail to notice some worrying developments regarding cooperation and human rights. In particular, the practice of the Court has shown that human rights violations can occur both by virtue of compliance with a request for cooperation by States and by virtue of non-compliance with such requests.

When States are cooperative with the Court and welcome its intervention, the Prosecutor has often managed to obtain custody of defendants and have them transferred to the seat of the Court. This has been the case for the situations in the Democratic Republic of the Congo (DRC), the Central African Republic (CAR) and the Ivory Coast. In some of these instances, human rights issues arose due to the fact that defendants had already been in the custody of national authorities when the Prosecutor applied for an arrest warrant to the Pre-Trial Chamber against them. Upon their transfer to the Court, they complained that their initial detention by national authorities had been unlawful and motivated by political reasons. They lamented several violations of their basic rights by local authorities, such as being deprived of their liberty in the absence of an arrest warrant, without being informed of the charges against them, and being denied prompt access to a lawyer. One of them also alleged grave physical ill treatment, abuses, and torture. As a consequence, defendants requested the Court to take responsibility for the above violations and dismiss its jurisdiction.

Conversely, when States oppose the intervention of the Court, they are much less willing to allow either the Prosecutor or the Defence on their territory for the purpose of conducting investigations, let alone provide the necessary assistance to transfer the suspects to the Court. Undoubtedly, this undermines the Court's credibility and the Prosecutor's capacity to build his/her case. However, one must not forget that non-cooperation can be equally harmful for the suspect and

accused. The first example that comes to mind is that of Saif al-Islam Gaddafi, who has been detained in solitary confinement in Libya since 2011 despite an outstanding arrest warrant by the ICC. Even if the person sought by the Court is not detained by national authorities, when his/her State of nationality does not wish to engage with the Court in any way, the Defence might face enormous difficulties in conducting its investigations and locating witnesses (see Banda and Jamus's Defence in Sudan). The urgency of a study that puts fair trial and human rights of defendants at the core of the debate regarding cooperation with the Court is attested by the above examples.

2. Research questions

As Cogan has pointed out, the 'fair trial question' before international courts can be approached in two ways. First, are the substantive rights accorded to the accused adequate? This approach focuses on the rights delineated in the tribunals' statutes, rules of procedure and evidence, and case law.⁷ Within this approach, the conceptual background for discussing human rights in cooperation proceedings is that of the fragmentation of the criminal procedure over two or more jurisdictions, namely the international criminal tribunal and the relevant domestic jurisdictions. The starting point is the need to avoid loopholes in the protection of individual rights as a result of the division of labour between international courts and states authorities, as well as the claim that the requesting international criminal jurisdiction and the requested State have a shared responsibility for the rights of the suspects and accused.⁸ Therefore, the question is framed as one of the extent to which the former should bear responsibility (in the sense of providing remedies) for human rights violations occurred in the framework of its proceedings.⁹

Conversely, a second approach seeks to address the problem of fair trial from a systemic perspective. It asks whether 'international courts have the independence and coercive powers necessary to ensure fair trials, regardless of the sufficiency of the paper rights accorded the accused in the tribunals' statutes'.¹⁰ For example, some of the questions that are central to this approach are: 'can these courts make certain that the accused is able to obtain the evidence and witnesses

⁷ Jacob Katz Cogan, 'International Criminal Courts and Fair Trials: Difficulties and Prospects' (2002) 27 *Yale Journal of International Law* 111, 114.

⁸ Astrid Reisinger-Coracini, 'Cooperation from States and Other Entities' in Göran Sluiter and others (eds), *International Criminal Procedure: Principles and Rules* (Oxford University Press 2013) 111.

⁹ Göran Sluiter, 'Human Rights Protection in the ICC Pre-Trial Phase' in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill 2009) 459–474; Alexander Zahar and Göran Sluiter, *International Criminal Law: A Critical Introduction* (OUP 2007) 281.

¹⁰ Cogan (n 7) 115.

necessary for a serious defence? Or do the courts' judges have the independence necessary to withstand political pressure from the states on which they depend?'¹¹

The present research is concerned with the second approach and deals specifically with the ICC. The author believes that addressing human rights through a systemic perspective in the ICC context is particularly important, due to the symbolic and historical significance of the Court. The ICC is the most ambitious experiment in the history of international criminal justice so far, and comes as last in a series of international criminal jurisdictions. Its immediate predecessors are the *ad hoc* Criminal Tribunals for the Former Yugoslavia (ICTY) and for Rwanda (ICTR), created by the UN Security Council in response to the disaggregation of the Federal Republic of Yugoslavia and the genocide in Rwanda respectively, as a means to restore international peace and security under Chapter VII of the UN Charter.¹² The *ad hoc* Tribunals were subject to the criticism of being established – at least in part – *ex post facto*, only to save the conscience of the international community for its failure to act to stop the ethnic cleansing that had taken place in the Balkans and Rwanda.¹³ They were 'special tribunals' established by a political organ (the Security Council), as the organ's sub-body.¹⁴

Conversely, the establishment of a permanent International Criminal Court was meant to move international criminal justice onwards to new grounds, so as to avoid the criticisms that previously plagued the *ad hoc* Tribunals.¹⁵ Unlike its *ad hoc* predecessors, the ICC is not an organ of the UN Security Council and does not deal with specific conflicts in geographically limited areas. The ICC is an independent permanent Court 'in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole.'¹⁶ Its Prosecutor has *proprio motu* powers of investigation and its jurisdiction can potentially cover international crimes committed in every part of the world after 2002.¹⁷ As Gerry Simpson has argued:

¹¹ *ibid.*

¹² On 25 May 1993, the UN Security Council passed resolution 827 formally establishing the International Criminal Tribunal for the former Yugoslavia; on 8 November 1994, the UN Security Council adopted resolution 955, establishing the International Criminal Tribunal for Rwanda.

¹³ Dominic McGoldrick, 'Criminal Trials Before International Tribunals: Legality And Legitimacy' in Dominic McGoldrick, Peter J Rowe and Eric Donnelly (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (Hart Publishing 2004) 24.

¹⁴ Claus Kress, 'The International Criminal Court as a Turning Point in the History of International Criminal Justice' in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (Oxford University Press 2009) 143.

¹⁵ *ibid.*

¹⁶ See 9th paragraph of the Preamble to the Rome Statute.

¹⁷ The Rome Statute of the ICC was adopted at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998. 120 States voted in favour of the treaty, seven voted against (US, China, Libya, Iraq, Israel Qatar and Yemen) and 21 abstained.

[t]he ICC was meant to transcend the political. Correspondingly, its trials would resist the appellation, ‘political trials’. These trials would be international, impartial, non-selective, (...) ad hocery would be eliminated for good and instead there would be a permanent system of universal justice.¹⁸

Yet, without enforcement powers of its own, the ICC is entirely reliant on States’ cooperation for the implementation of its ambitious mission. Inevitably, this means that the Court’s action is- to a greater or lesser degree – influenced by the interests of States and by the much-deprecated ‘realpolitik’. In this respect, it has rightly been argued that the pertinent question does not concern the role played by politics in international criminal justice, but rather the possibility that politics, in playing its role, corrupts the integrity of the judicial process and compromises the latter’s independence.¹⁹ It is believed that a systemic approach to the fair trial issue before the ICC cannot avoid this question.

The present study locates the challenges faced by defendants during cooperation proceedings in the context of the unique structural system of the Court, and the inherent tensions and limitations that characterize the ICC’s functioning. In particular, the study seeks to answer the following research questions: *to what extent the unique structural limitations of the Court influence and shape Prosecutorial strategies regarding cooperation? What are the consequences for the accused’s right to liberty and equality of arms? Do ICC judges sufficiently engage with the structural tensions and limitations of the Court with a view of protecting the rights of suspects and accused?*

3. Structure of the study

The present research is divided into two parts. The first part sets out the institutional and jurisdictional context in which cooperation plays out at the ICC and, by so doing, it provides a background against which considerations regarding violations of defendants’ rights can be made.

Chapter II addresses the ICC dependence on cooperation from an institutional, a political and a normative dimension. It explores the salient features of the Court as an international organization founded by a treaty, and its relationship with the world in which it operates (namely, States Parties to the Rome Statute, States non-parties, and international organizations).

¹⁸ Gerry Simpson, ‘Politics, Sovereignty, Remembrance’ in Dominic McGoldrick, Peter J Rowe and Eric Donnelly (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (Hart Publishing 2004) 51; see also, Andrea Bianchi, ‘Ad-Hocism and the Rule of Law’ (2002) 13 *European Journal of International Law* 263.

¹⁹ Daphne Shraga, ‘Politics and Justice: The Role of the Security Council’ in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (Oxford University Press 2009) 168.

Subsequently, the Chapter delves into the salient features of the Court's cooperation regime. On the one hand, it considers some of the so-called 'weaknesses' of the regime, which derive from the consensual base upon which it lays. On the other hand, it addresses cooperation matters not foreseen in Part 9 of the Statute. In the last two sections, the Chapter addresses the politics of cooperation. First and foremost, it engages with the paradox of an independent Prosecutor who often finds himself/herself in the difficult position of having to investigate and prosecute the very national authorities on whose cooperation s/he depends; secondly, it addresses the means at the disposal of the Court in case of non-compliance by States, showing that compliance with requests for cooperation is ultimately tied to State political willingness and international political pressure.

Chapter III delves into the connection between cooperation and jurisdiction. The complementarity nature of the ICC implies that the Court is allowed to step in only in case national authorities remain inactive or, where there are domestic proceedings, those authorities appear unwilling or unable to genuinely prosecute international crimes themselves.²⁰ Cooperation with an international court that has a complementary jurisdiction unfolds differently, and poses unique challenges to the rights of defendants whose conduct the Prosecutor decides to investigate and charge. Complementarity is a principle that the Prosecutor has to respect while deciding whether to start an investigation and, once the investigation has been opened, in the selection of cases.²¹ On a practical level, the complementarity assessment implies communication with national authorities and a careful planning on whether and how to divide labour with them. The Chapter critically evaluates the 'positive approach' to complementarity endorsed by the OTP in order to enhance states cooperation, highlighting the consequences that this has had for the selection of cases. Moreover, it scrutinises the judges decisions on the challenges to the admissibility of the case made by some accused.

The second part of the study addresses the impact that cooperation occurring in the above-explained context has on the selected rights of defendants. It analyses the ICC's law on the right to equality of arms and the right to liberty, as well as the practice regarding allegations of violations of these rights brought forward by some defendants.

Chapter IV addresses cooperation in relation to the right to liberty of defendants. It addresses two specific components of the right to liberty: the right not to be subject to arbitrary arrest and detention (i.e., *habeas corpus* rights) and the right to interim release. With respect to the former, the Chapter assesses whether the law and practice of the Court sufficiently acknowledge the position of suspects detained by national authorities throughout part of the ICC investigation, and

²⁰ Article 17 of the Statute.

²¹ Article 53 and 17 of the Statute.

the risks to their liberty that the division of labour between the Court and States entails. The Chapter scrutinises how the Prosecutor has intended his/her responsibility toward the suspect from the opening of a preliminary examination on a situation to the request of the issuance of an arrest warrant from the Pre-Trial Chamber. Subsequently, it criticises the way in which the judges have intended their supervisory role vis-a-vis the Prosecutor and national authorities, and their responsibilities in guaranteeing the right to liberty of defendants.

With respect to interim release, the Chapter measures the advanced protection afforded to this right by the Statute against the reality that States Parties are not obliged to accept provisionally released persons on their territories. The Bemba case (as well as the cases regarding the offences against the administration of justice related to it) demonstrate that, despite the protection afforded to this right ‘on paper’, the willingness of States to accept provisionally released persons on their territory is ultimately the only factor capable of ensuring the effectiveness of the right of suspects to be freed pending trial.

Chapter V addresses cooperation in relation to the principle of equality of arms. First, it assesses the structural inequality between the Prosecution and the Defence within the institutional framework of the Court and critically analyses the features of the ICC’s support structure for the Defence. Second, the Chapter assesses whether the law and practice of the Court endows the accused with ‘adequate time and facilities’²² for the preparation of his/her defence. In particular, it scrutinises the Court’s interpretation of Article 57(3)(b) of the Statute, empowering the Pre-Trial Chamber to assist the person arrested or summoned with the preparation of his/her defence; subsequently, it addresses the difficulties encountered by the Defence in conducting on-site investigations in Sudan, in the absence of a clear legal framework of the Statute to that effect, and given the sheer non cooperation from the Government of the country.

²² Article 67(1)(b) of the Statute.

CHAPTER II

THE ICC DEPENDENCE ON COOPERATION: INSTITUTIONAL NORMATIVE AND POLITICAL DIMENSION

1. Introduction

This Chapter addresses some of the distinctive structural constraints that characterize proceedings at the ICC and, in particular, the functioning of cooperation. It is aimed at understanding in what way the unique institutional setting, normative framework and political context of the Court influence and shape cooperation before it. The overall goal of the Chapter is setting forth the background against which the selected rights of defendants (Chapter IV and V) will be assessed. Although the focus of the Chapter is on the ICC, the legal framework and experience of the *ad hoc* Tribunals will be used as terms of comparison, so as to illuminate the distinct challenges confronting the Court.

Like its *ad hoc* predecessors, the ICC depends on the cooperation of States (including through international organizations) for every aspect of its functioning, i.e., for all matters pertaining, *inter alia*, to the collection of evidence, the compelling of persons, the execution of arrests and the surrender of persons. Borrowing the words of the former President of the Court Philip Kirsch ‘[t]he Court itself is the judicial pillar...The other pillar of the ICC Statute – the enforcement pillar – has been reserved to states and, by extension, to international organizations’.¹

However, the Court distinguishes itself from its *ad hoc* predecessors in at least two structural aspects. First, the ICC is an unprecedented experiment in the history of international criminal law, in that it is a global Court that was not imposed over a particular group or society by the victors of a war or a Resolution of the UN Security Council, but was set up by an international treaty. As a consequence, its judicial authority is based on consent and binds solely the States that have accepted it. So far, 124 States have acceded to the Statute, that is, almost two thirds of the States in the world. This can be considered a great success. However, one must not forget that three of the five permanent members of the Security Council (China, Russia and the US), as well as some of the States with the worst human rights record, remain

¹ Philip Kirsch, Address to the United Nations General Assembly, 1 November 2007, available at: https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2007/Pages/icc%20president%20%20judge%20philippe%20kirsch%20%20addresses%20united%20nations%20general%20assembly.aspx

outside the Rome Statute's system. As Peskin has argued, 'what was given to the ICTY and ICTR, by virtue of their Security Council mandate that binds all UN members to support these tribunals, must be earned by the ICC through its campaign for universal ratification of the Rome Statute.'² In other words, the Court faces bigger challenges in obtaining cooperation than its *ad hoc* predecessors.

Another important distinctive feature of the Court relates to its *ex ante* nature. According to the definition given by Mahnoush Arsanjani and Michael Resiman, *ex ante* tribunals 'are established before an international security problem has been resolved or even manifested itself, or are established in the midst of the conflict in which the alleged crimes occurred'.³ Indeed, the Court's permanent mandate covers international crimes committed after 2002, and thus necessarily extends to a number of different situations, each with its own geopolitical context and various interests at stake. This also implies that the Court operates in an environment where other 'political entities' are dealing with the crisis so as to re-establish order, and that the Court's 'various options for decision may influence these political and often military actions'.⁴ In other words, the Court is exposed to politics in a new way.

It seems pertinent, thus, to contextualise cooperation proceedings within these broader institutional features. Accordingly, the first section of the Chapter explores the salient features of the Court as an international organization (relationship with the UN, international legal personality and treaty making powers, privileges and immunities). Second, the Chapter looks at the Court's relationship with the world in which it operates, namely, States Parties, States non-party, and international organizations. It begins with States Parties (section 3.1) and assesses the salient features of the Court's cooperation regime. On the one hand, the section considers some of the so-called 'weaknesses' of the regime, which derive from the consensual base upon which the Rome Statute lays. On the other hand, it addresses cooperation not foreseen in Part 9 of the Statute. Subsequently it moves on to consider States not-party (section 3.2) and international organizations (section 3.3).

Finally, the Chapter addresses the politics of cooperation in the last two sections. Section 5 engages with the paradox of an independent Prosecutor who often finds

² Victor Peskin, 'Caution and Confrontation in the International Criminal Court's Pursuit of Accountability in Uganda and Sudan' (2009) 31 Human Rights Quarterly 662.

³ Mahnoush H Arsanjani and W Michael Reisman, 'The Law-in-Action of the International Criminal Court' (2005) 99 The American Journal of International Law 385, 385. In the same article, the authors point out that both the ICTR and the ICTY are *ex post* tribunals. The former was established in November 1994 to judge persons responsible for the atrocities committed during the Rwandan Genocide, between 1 January and 31 December 1994. The latter was established in 1993 and its jurisdiction covers the crimes committed during the Balkan war from 1991.

⁴ *ibid.*

himself/herself in the difficult position of having to investigate and prosecute the very national authorities on whose cooperation s/he depends. Section 6 addresses the means at the disposal of the Court in case of non-compliance by States, showing that compliance with requests for cooperation is essentially tied to State political willingness and international political pressure.

2. The ICC as an independent international organization

Unlike the *ad hoc* Tribunals, the Court does not partake in the structure of a long-established international organization, but is itself an international organization, independent from both the States that created it and from the system of the United Nations (UN).⁵ The Assembly of States Parties (ASP) is the management oversight, legislative and political body of the Court,⁶ but it is not one of its organs⁷ and it cannot influence decisions relating to the practical execution of the Court's mandate. Equally, the ICC is not a subsidiary organ of the Security Council, nor is it an organ of the UN.

The present section addresses the significance of the nature of the Court as an international organization. In particular, it explores the relationship of the Court with the UN system and with the host State (the Netherlands). Moreover, it analyses the legal framework relating to the international legal personality and the treaty making powers, as well as the scheme of privileges and immunities of the Court.

2.1 The relationship with the UN system

Although the drafters of the Statute created the Court as a separate institution, placed outside of the UN framework and its political workings, they also realized that, to be effective, the Court would need the active support of the UN.⁸ Moreover, the ICC and the UN were expected to closely cooperate in order to reinforce the shared goal of preventing the future

⁵ Kenneth S Gallant, 'The International Criminal Court in the System of States and International Organizations' (2003) 16 *Leiden Journal of International Law* 553.

⁶ See Article 112 of the Statute. The ASP has adopted the Elements of Crimes pursuant to Article 9 of the Statute and the Rules of Procedure and Evidence pursuant to Article 51 of the Statute. It elects officials of the Court, approves its budget, and adopts amendments to the Rome Statute.

⁷ Pursuant to Article 34 of the Statute, the Court is composed of four organs: the Presidency, the Judicial Divisions, the Office of the Prosecutor, and the Registry.

⁸ War Crimes Research Office, 'The Relationship between the International Criminal Court and the United Nations' (2009), 1, available at: https://www.wcl.american.edu/warcrimes/icc/documents/WCRO_Report_on_ICC_and_UN_August2009.pdf

commission of international crimes, which obstruct the maintenance of international peace and security and, therefore, justice.⁹

Article 2 of the Statute mandates that the Court be brought into relationship with the UN through an agreement. The Negotiated Relationship Agreement with the UN (NRA) was signed on 4 October 2004 by the President of the Court Philippe Kirsch, and the UN Secretary-General Kofi Annan.¹⁰ It provides for institutional relations, cooperation and judicial assistance between the Court and the UN, establishing a ‘quasi-political’ relationship between the two organizations.¹¹

In addition to Article 2, the Rome Statute contains a number of more specific provisions relating to the relationship between the Court and the UN Security Council.¹² First, the Security Council can trigger the jurisdiction of the Court. Pursuant to Article 13(b) of the Statute, the Council may refer to the Court situations concerning crimes committed on the territory of States (including States not-party), as a measure to maintain or restore international peace and security under Chapter VII of the UN Charter. Moreover, under Article 16, the Council has the crucial power of suspending investigations and prosecutions for a period of one year if the Council believe that such suspension is necessary to restore or maintain international peace and security. Finally, the Security Council has an important role with respect to the enforcement of requests arising from referrals, which will be addressed in section 6 of this Chapter.

2.2 The Host State

Article 3(2) of the Statute mandates that the Court enters into a headquarters agreement with the State that hosts its premises, the Netherlands. The Headquarters Agreement between the Court and the Netherlands entered into force on 1 March 2008.¹³ It governs the legal status and juridical personality of the Court, its privileges and immunities, and the inviolability and

⁹ Olympia Bekou, ‘International Criminal Justice and Security’ in Mary E Footer and others (eds), *Security and International Law* (Bloomsbury Publishing 2016) 99–100.

¹⁰ Negotiated Relationship Agreement between the Court and the UN, 4 October 2004.

¹¹ Gallant (n 5) 567.

¹² See generally P Gargiulo, ‘The Relationship between the ICC and the Security Council’ in F Lattanzi and W Schabas (eds), *The International Criminal Court: Comments on the Draft Statute* (Napoli: Il Sirente 1998), 95–119; L Yee, ‘The International Criminal Court and the Security Council Articles 13(b) and 16’ in R Lee, *The International Criminal Court: The Making of the Rome Statute Issues, Negotiations, Results*, ed. Roy Lee (The Hague: Kluwer Law International 1999), 143–52; J Trahan, ‘The Relationship between the International Criminal Court and the UN Security Council’ (2013) 24 *Criminal Law Forum* 417–73.

¹³ Headquarters Agreement between the International Criminal Court and the Host State, ICC-BD/04-01-08, 1 March 2008.

protection of its premises. Chapter V of the Agreement deals with ‘cooperation between the Court and the Host State’. Among other things, it contains provisions on the issuance of visas and permits for officials of the Court and other participants in its proceedings, including witnesses, victims and experts.¹⁴ Special provisions govern the entry and legal status of accused persons, including their departure and return if granted interim release and their transfer to another State after the sentence of acquittal or conviction.¹⁵

2.3 International legal personality and treaty-making powers

Article 4(1) of the Statute endows the Court with ‘international legal personality’ and the legal capacity for the exercise of its functions and the fulfilment of its purposes. This means that the Court is a subject of international law, and States Parties are legally bound to recognize its independence and autonomy in international relations.¹⁶ This is an important distinction between the ICC and the *ad hoc* Tribunals. The latter, being organs of the UN Security Council, do not possess international legal personality, and all their international activities are attributed to the political organ that established them.¹⁷

An important consequence of the international legal personality of the Court is its capacity to enter into agreements with States (both parties and not party) and international organizations for securing their cooperation. Such capacity is divided among the constituent organs of the Court on a functional basis.¹⁸ In particular, it is possible to distinguish between agreements concluded by the Court as a whole (framework agreements), so as to regulate matters of interest to more than one of its organs, and agreements concluded by the Office of the Prosecutor (OTP) with a specific investigative purpose.

This distinction is enshrined in Regulation 107(1) of the Regulations of the Court. According to it, framework agreements with States not party and international organizations shall be negotiated and concluded under the authority of the President of the Court, whereas the agreements for investigative purposes are an exclusive competence of the OTP. In this respect, the relevant provision is Article 54(3)(d) of the Statute, which empowers the Prosecutor to ‘enter into such arrangements or agreements, not inconsistent with this Statute,

¹⁴ Section 2 of the Headquarters Agreement.

¹⁵ Articles 46-48 of the Headquarters Agreement.

¹⁶ Francesca Martines, ‘Legal Status and Powers of the Court’ in Antonio Cassese, Paola Gaeta and John RWD Jones (eds), *The Rome Statute of the International Criminal Court: a Commentary*, vol I (Oxford University Press 2002) 208.

¹⁷ *ibid* 203.

¹⁸ Gallant (n 5) 553, 567.

as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person’.

As opposed to the court-wide agreements concluded by the President on behalf of the Court, the agreements under Article 54(3)(d) are negotiated and concluded by the OTP. Consequently, the Prosecutor may enter into such arrangements also where a general framework agreement for cooperation already exists¹⁹ and is not obliged to inform the President of their conclusion for confidentiality reasons.²⁰

2.4 The Privileges and Immunities of the Court

A strong set of privileges and immunities is essential for the Court’s functional independence, so as to protect it from the interference of States in the discharging of its functions, and particularly in the course of the investigation.²¹ Indeed, privileges and immunities serve to guarantee that states’ authorities will not condition, control or hamper the activities of the OTP, for example, by denying visas to its staff for the purpose of on-site investigations, or by prosecuting victims and witnesses who agree to cooperate with the Prosecutor.²² As Cecilia Nilsson has noted, ‘these guaranties are fundamental for the Court considering the strong reliance on cooperation with a potentially large number of states that will often take place in the context of unstable situations’.²³

Unlike the ICTY and ICTR, the ICC cannot rely on the privileges and immunities of the UN, which have been established over the last seventy years of the organization’s existence.²⁴ As a consequence, a separate set of privileges and immunities has been created for the ICC.

The legal framework is set forth by Article 48 of the Statute, integrated by the Agreement on the Privileges and Immunities of the Court (APIC). The latter is a separate international treaty drafted by the Preparatory Commission for the ICC (PrepCom), and

¹⁹ Regulation 107(1) of the Regulations of the Court.

²⁰ Regulation 107(2) of the Regulations of the Court.

²¹ Lindsay Zelniker, ‘Towards a Functional International Criminal Court: An Argument in Favor of a Strong Privileges and Immunities Agreement’ (2000) 24 *Fordham Int’l LJ* 988; Stuart Beresford, ‘The Privileges and Immunities of the International Criminal Court: Are They Sufficient for the Proper Functioning of the Court or Is There Still Room for Improvement?’ (2002) 3 *San Diego International Law Journal* 83.

²² Cecilia Nilsson, ‘Contextualizing the Agreement on the Privileges and Immunities of the International Criminal Court’ (2004) 17 *Leiden Journal of International Law* 559, 560.

²³ *ibid.*

²⁴ Phakiso Mochochoko, ‘The Agreement on Privileges and Immunities of the International Criminal Court’ (2001) 25 *Fordham Int’l LJ* 638, 639–640.

approved in its final version by the ASP.²⁵ Interestingly, the APIC is open to accession also for States non-party.²⁶

Article 48 sets out the general framework for the privileges and immunities of the ICC, compelling States Parties to grant such privileges and immunities as are necessary for the fulfilment the Court's purposes.²⁷ The judges, the Prosecutor, the Deputy Prosecutors and the Registrar, are given privileges and immunities normally accorded to heads of diplomatic missions.²⁸ Similarly, the Deputy Registrar, the staff of the Registry and the staff of the OTP enjoy 'privileges, immunities and facilities necessary for the performance of their functions', in accordance with the APIC.²⁹ By contrast, counsel – who is equated to experts, witnesses and any other person required to be present at the seat of the Court - 'shall be accorded such treatment as is necessary for the proper functioning of the Court', in accordance with the APIC.³⁰

The imbalance in favour of the Prosecutor is clear. While the protections for the former are clearly defined under international law – by the Statute referring to international law of diplomatic protection - immunities of counsel are contained in a separate treaty that is only binding on States that have ratified it.³¹ The consequence is that, not being enshrined in the Statute, defence counsel immunity does not automatically apply to all State Parties to the Statute. At the time of writing, only 75 out of 124 States have ratified the agreement;³² among the countries that have not ratified it are also Sudan, Kenya and Ivory Coast, on whose territory ICC investigations are currently on-going. This is regrettable, as an appropriate set of privileges and immunities of counsel and his/her team is crucial for the effectiveness of defence investigations, as counsel may need to travel to countries that are hostile to their clients (with whom they are likely to be associated) and to unsafe areas (such as refugee camps) where many potential witnesses might be found.³³

²⁵ UN Doc. ICC-ASP/I/3 (2002), 215-232.

²⁶ Article 34 of the APIC provides that the APIC is open to 'all States'.

²⁷ Article 48(1) of the Statute.

²⁸ Article 48(2) of the Statute.

²⁹ Article 48(3) of the Statute.

³⁰ Article 48(4) of the Statute. It is also important to note that the Statute makes no reference to the protection of the persons assisting counsel and investigators.

³¹ Mochochoko (n 24) 654; Nilsson (n 22) 562–565.

³² See: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-13&chapter=18&lang=en

³³ Beresford (n 21) 126.

3. The relationship of the Court with the actors on whose cooperation it depends

In order to discharge its functions, the Court must establish relationships and secure the cooperation of the actors on which it depends. First and foremost, the Court needs the cooperation of the States that believed in the ICC project in the first place, those that created it and subsequently acceded to its Statute.

The Court might also need to rely on States that, for whatever reason, have decided to remain uninvolved in its system. As Kenneth Gallant has pointed out, ‘the ICC, both as an international organization and as a judicial entity, exists as an independent creation in the international legal system, which can interact with non-party States, not merely with those that have created it.’³⁴ In this respect, the relationship between the Court and States that did not accede to its Statute is far more important to the ICC than to the ICTY and ICTR. Given the quasi-universal nature of the UN Charter, the question of cooperation with states not parties was not of great significance at the *ad hoc* Tribunals.³⁵

Finally, as investigations are often carried out in the midst of on-going conflicts, the Court often operates at the same time that other actors are present on a territory and are engaged in conflict resolution activities, such as humanitarian help and peace building missions.³⁶ The relationship of the Court with other international organizations, thus, is also crucially important.

3.1 States Parties

The ICC was established by an international treaty, the Rome Statute, which binds only the States that have ratified it. Pursuant to Article 13 of the Statute, the jurisdiction of the Court may be triggered by a State Party or the Security Council referring a situation to the Court, or by the autonomous initiative of the Prosecutor, subject to the authorization of the Pre-Trial Chamber.³⁷

Owing to the fact that States non-party have no duties to cooperate with the Court, the drafters of the Statute limited the Court’s jurisdiction to situations that occur on the territories

³⁴ Gallant (n 5) 568.

³⁵ Astrid Reisinger-Coracini, ‘Cooperation from States and Other Entities’ in Göran Sluiter and others (eds), *International Criminal Procedure: Principles and Rules* (Oxford University Press 2013) 101.

³⁶ OTP, ‘Report on the Activities Performed During the First Three Years’, 32, available at: https://www.icc-cpi.int/NR/rdonlyres/D76A5D89-FB64-47A9-9821-725747378AB2/143680/OTP_3yearreport20060914_English.pdf.

³⁷ Article 15(3) of the Statute.

of States Parties or are committed by their nationals.³⁸ The only exception is contained in Article 13(b) of the Statute, which provides for jurisdiction irrespective of the ratification of the Statute when the Security Council has referred the situation to the Court.

A major part of the provisions concerning investigations is embodied in Part 5 of the Statute,³⁹ in which the rules regarding the commencement of investigations and prosecution of the suspect are set forth. Part 5 governs the internal part of investigation proceedings, addressing them from the perspective of prosecutorial powers. Part 9⁴⁰ complements it by governing the external part of the Court's procedure, that is, the obligations to cooperate incumbent on States Parties.⁴¹ Part 5 and 9 of the Statute, thus, must be read in conjunction.

Part 9 creates cooperation regime for the gathering of evidence and for the arrest and surrender of persons. According to Article 87(1)(a), the Court shall have the authority to request cooperation from State Parties. It is useful to remind that, when such cooperation is requested for the purpose of an investigation, the term 'Court' stands for 'Office of the Prosecutor'. This is because Part 9 does not attribute substantive powers to each organ of the Court, but rather attributes to each organ the capacity to request cooperation in the exercise of the powers conferred to them in other parts of the Statute.⁴² In this respect, the relevant provision of Part 5 is Article 54(3)(c), which empowers the Prosecutor to 'seek the cooperation of any State or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate'. This provision gives the Prosecutor the authority to activate the cooperation regime enshrined in Part 9. Rule 176 RPE specifies that the OTP, as an independent organ of the Court, can communicate directly with States and intergovernmental organizations.⁴³

Article 86 of the Statute obliges State Parties to cooperate fully with the Court in its investigations and prosecutions. State Parties are obliged to comply with requests for the types of assistance listed in Article 93(1), sub-paragraphs (a)-(k),⁴⁴ and with any other type of requested assistance unless it is prohibited by the law of the State Party.⁴⁵ Moreover, pursuant to Articles 89-92, they must comply with the requests for arrest and surrender of individuals.

³⁸ Article 12 of the Statute

³⁹ Articles 53 to 61 of the Statute.

⁴⁰ Articles 86 to 102 of the Statute.

⁴¹ Reisinger-Coracini (n 35) 95.

⁴² Göran Sluiter, *International Criminal Adjudication and the Collection of Evidence: Obligations of States* (Intersentia 2002).

⁴³ Rule 176(2) RPE reads: 'the OTP shall transmit the requests for cooperation made by the Prosecutor and shall receive the responses, information and documents from requested States and international organizations'. The same is true for international organizations under paragraph 4 of the same Rule.

⁴⁴ Such as the taking of witness statements, the service of documents or the execution of searches and seizures.

⁴⁵ Article 93(1)(l) of the Statute.

The obligation to cooperate also entails an obligation to adopt procedures under national law that will render such cooperation effective, giving States the means to comply with the Court's requests.⁴⁶

3.1.1 Beyond the 'horizontal' v. 'vertical' classification of the cooperation regime

As was the case with the *ad hoc* Tribunals, the ICC cooperation regime is a vertical one, in the sense that the Court is a supra-national institution in a hierarchical relationship towards national authorities.⁴⁷ In the Blaškić subpoena decision,⁴⁸ the Appeals Chamber of the ICTY clarified the distinction between the horizontal nature of inter-state cooperation and the vertical nature of cooperation with the Tribunals.

In the horizontal relationship between sovereign States, cooperation is not mandatory in the absence of a treaty to that effect. In other words, general international law does not establish an obligation on States to assist each other in international criminal matters. Conversely, the Tribunals have the power to issue binding orders to States requesting their assistance, and States have an ensuing obligation to provide it.⁴⁹ The duty of States to cooperate with the Tribunals is unconditional and absolute, as they may not invoke national interests, national law or competing obligations under international law as grounds for refusing to cooperate.⁵⁰ More broadly, the vertical cooperation scheme is defined by stricter obligations, non reciprocity, and the right of the requesting party to interpret and determine the content and scope of a request for cooperation.⁵¹

The verticality of the *ad hoc* Tribunals, however, is different from that of the ICC, and this has to do with the different source and legal base from which such verticality stems. The ICTY and ICTR cooperation regime draws upon the Tribunals' status in the United Nations system.⁵² The Tribunals were established as subsidiary organs of the Security Council under

⁴⁶ Article 88 of the Statute.

⁴⁷ Sluiter, *International Criminal Adjudication and the Collection of Evidence* (n 42) 340; Frederic Megret, 'In Search of the "Vertical": Towards an Institutional Theory of International Criminal Justice's Core' in Carsten Stahn and Larissa van den Herik (eds), *Future Perspectives on International Criminal Justice* (TMC Asser Press 2010).

⁴⁸ ICTY, Prosecutor v. Blaškić, AC Judgment on the Request of the Republic of Croatia for review of the Decision of TC II of 18 July 1997, IT-95-14AR108bis, 29 October 1997, 47.

⁴⁹ Göran Sluiter and Bert Swart, 'The International Criminal Court and International Criminal Cooperation' in Herman von Hebel (ed), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (TMC Asser Press 1999) 97–99.

⁵⁰ *ibid.*

⁵¹ Reisinger-Coracini (n 35) 96–98.

⁵² *ibid.*

Chapter VII of the UN Charter, as a means to restore international peace and security.⁵³ Decision under Chapter VII are legally binding on all members of the UN pursuant to Articles 25 and 103 of the Charter, and requests for cooperation of the Tribunals ‘shall be considered to be the application of an enforcement measure under Chapter VII of the UN Charter’.⁵⁴ In other words, the obligation to cooperate is an obligation placed, by the Security Council, on all UN members. The strictly vertical cooperation regime of the Tribunals corresponds to the general principle governing their jurisdiction, that is, the one of primacy over national courts.⁵⁵

Conversely, the ICC was established by a treaty negotiated by States and open to global accession. This means that ICC’s cooperation regime rests on a consensual basis.⁵⁶ Therefore, it is limited and opposable primarily only to States Parties to the Statute. This entails two consequences. On the one hand and consistent with the law of treaties, the Rome Statute does not create obligations for States that are not party to it.⁵⁷ On the other hand, it foresees more concessions to the sovereignty of States and contains some exceptions from the duty to cooperate fully with the Court.⁵⁸ This corresponds to the general principle that the Court is complementary to national courts, which are vested with the primary right and obligation to prosecute international crimes.

For these reasons, the ICC cooperation regime has been defined as ‘a mixture of the horizontal and the vertical’⁵⁹ or ‘a (weak) vertical cooperation regime.’⁶⁰ Indeed, much of the debate surrounding the cooperation system established at Rome has focused on the distinction between its horizontal and vertical characteristics.⁶¹

⁵³ Article 39 of the UN Charter.

⁵⁴ Report of the Secretary General to the Security Council on the establishment of the ICTY, S/25704, 126. In accordance with the Security Council resolutions establishing the Tribunals (SC Res. 827/1993 for the ICTY and SC Res. 955 /1994 for the ICTR) and with Articles 29 and 28 of the Tribunal’s Statutes, all UN member states shall cooperate fully with the Tribunals and their organs, and shall comply with requests for assistance or orders issued by a Trial Chamber.

⁵⁵ Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (2 edition, Cambridge University Press 2010) 510.

⁵⁶ Bert Swart, ‘General Problems’ in Antonio Cassese, Paola Gaeta and John RWD Jones (eds), *The Rome Statute of the International Criminal Court: a Commentary*, vol II (Oxford University Press 2002) 1594.

⁵⁷ Rod Rastan, ‘Testing Co-Operation: The International Criminal Court and National Authorities’ (2008) 21 *Leiden Journal of International Law* 434.

⁵⁸ Reisinger-Coracini (n 35) 96–98.

⁵⁹ Swart (n 56) 1594.

⁶⁰ Claus Kress, Kimberly Prost and Peter Wilkitzki, ‘Part 9. International Cooperation and Judicial Assistance: Preliminary Remarks’ in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn, Beck/Hart 2008) 1507.

⁶¹ Swart (n 56) 1591; Sluiter and Swart (n 49) 97–105; Sluiter, *International Criminal Adjudication and the Collection of Evidence* (n 42) 87.

The biggest concerns with respect to the weaknesses of the ICC cooperation regime – compared to that of the *ad hoc*s - relate to the modalities of execution of the requests of the Court through the law of States, the limited capacity to conduct on-site investigations by the Prosecutor, and the impossibility to compel witnesses to testify. These problematic aspects will be addressed thoroughly in the following paragraphs.

Distinguishing between the vertical and the horizontal features of the cooperation regime is a useful descriptive tool of the normative framework of the Court. However, it must be pointed out from the outset that the effectiveness of States' cooperation with the ICC does not depend entirely on (nor is undermined solely by) such features of the regime. It has rightly been argued that '[t]he usefulness of distinguishing between horizontal and vertical powers breaks down (...) where the requested State ceases to engage with the Tribunal or refuses to cooperate'.⁶² This is because both the vertical and the horizontal model of cooperation hinge on an indirect enforcement system, in which compliance with the cooperation obligations depends primarily upon extra-judicial factors.⁶³

As will be seen in sections 5 and 6, the effectiveness of cooperation at the ICC depends on the acceptance of its authority by the requested State and, should that fail, by the active support and political pressure of the international community.⁶⁴ In this respect, Astrid Coracini has rightly pointed out that the narrative regarding cooperation obligations 'has shifted from emphasizing the compulsory element of the statutory duty of the requested party to the notions of partnership and shared responsibility'.⁶⁵

3.1.2 Execution of requests for assistance

Contrary to the legal framework of the *ad hoc* Tribunals, which confer general power on the Tribunals to review national procedures for providing assistance and to pass judgment on the question of whether they satisfy their needs,⁶⁶ the Rome Statute leaves considerable discretion to States in determining the modalities through which requests for cooperation are carried out.

⁶² Rod Rastan, 'The Responsibility to Enforce- Connecting Justice with Unity' in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers 2009) 166.

⁶³ Cryer and others (n 55) 528; Annalisa Ciampi, 'Legal Rules, Policy Choices and Political Realities in the Functioning of the Cooperation Regime of the International Criminal Court' in Olympia Bekou and Daley Birkett (eds), *Cooperation and the International Criminal Court: Perspectives from Theory and Practice* (Brill 2016) 7–57.

⁶⁴ Rastan (n 62) 166.

⁶⁵ Reisinger-Coracini (n 35) 98.

⁶⁶ Swart (n 56) 1595.

Pursuant to Article 99(1), ‘requests for assistance shall be executed in accordance with the relevant procedure under the law of the requested State’. The ICC, thus, depends on the law of the requested state for the execution of a request for assistance.

The same provision, however, allows the Prosecutor to require specific modalities of execution, including the permission for staff of the OTP to be present and assist during the carrying out of an investigative act by national authorities (for example, the exhumation of a grave site or the questioning of a witness). The procedure outlined in the request will have to be followed by the State unless its national law explicitly prohibits doing so. According to an Expert Paper commissioned by the OTP, ‘the Prosecutor should take full advantage of this exhortation, setting out in each request the manner in which the request should be executed, including with the direct participation of his staff and, if appropriate, defence counsel.’⁶⁷

3.1.3 The limited power of the Prosecutor to conduct investigations on the territory of States

The Prosecutor needs to access the territory where the crimes occurred, as it is there that the majority of witnesses and physical evidence are located. The Prosecutor’s staff may need to conduct exhumations of mass graves, interview potential witnesses, gather DNA samples, or search public and private premises in order to seize relevant documents.

Unlike the Statutes of the *ad hoc* Tribunals, which expressly lay down the power of the Prosecutor to conduct on-site investigations,⁶⁸ the Rome Statute does not give the Prosecutor a general power to access the territory of States and collect evidence autonomously.⁶⁹ This emerges clearly from Article 54(2) of the Statute. This provision empowers the Prosecutor to conduct investigations on the territory of a State according to two procedures: first, in accordance with the provisions on cooperation under Part 9 of the Statute; second, in the circumstances of the so-called ‘failed state scenario’ under Article 57(3)(d), subject to the authorization of the Pre-Trial Chamber. As will be seen, this latter circumstance is rather exceptional, as it presupposes the total collapse of the institution of a State.

Considering the importance of on-site investigations, the scope under the Statute is

⁶⁷ Bruce Broomhall et al., ‘Informal Expert Paper: Fact-finding and Investigative Functions of the OPT, Including International Cooperation’ (2003), 55.

⁶⁸ Article 18(2) ICTY Statute and Article 17(2) ICTR Statute. According to Cryer (n 56) 525, while doing so, the Prosecutor may seek assistance from State authorities, but their consent is not required. Coercive measures may be taken, such as search and seizure. In practice, however, State permission or other involvement will often be sought and one may note that only a few domestic implementation laws authorize the Prosecutor to act independently on national territory.

⁶⁹ Amal Alamuddin, ‘Collection of Evidence’ in Karim AA Khan, Caroline Buisman and Chris Gosnell (eds), *Principles of Evidence in International Criminal Justice* (Oxford University Press 2010) 246.

very narrow and reflects the horizontal approach to cooperation; the ICC is seen as a separate entity, not an extension of the national jurisdiction, and the Court's activities on the State territory are therefore an intrusion on the sovereignty of the State.⁷⁰ As will be seen, the Prosecutor's power to access States Parties' territory is limited and always mediated by the cooperation of the national authorities, subject to the only exception of the failed state scenario. As a rule, investigations are conducted by States, who either collect evidence on behalf of the Prosecutor or assist the OTP staff in the performance of the investigative activities. Article 99(4) foresees a partial exception to this scheme, in that it empowers the prosecutor to conduct certain investigative acts on the territory of States. However, this power is confined to non-compulsory measures such as taking voluntary witness statements, and may require consultations and sometimes adherence to reasonable State-imposed conditions.

3.1.3.1 On-site investigations

The power of the Prosecutor to directly access the territory of a sovereign State and perform investigative activities therein raised several concerns from the delegations to the Rome Conference, making the adoption of Article 99(4) particularly difficult.⁷¹ As a result of the compromise reached in Rome, the power to conduct on-site investigations has been subject to many limitations. Interestingly, the Statute does not contain the term 'on-site investigations', but instead refers to the 'direct execution of a request on the territory of a State', to imply the fact that this power remains within the cooperation regime of the Court and that judicial assistance from national authorities will still be required.

Pursuant to the provision in discussion, the Prosecutor may conduct on-site investigations on the territory of States Parties only if the investigative act does not entail compulsory measures, that is, measures infringing on fundamental rights of individuals. Such non-compulsory measures may consist in voluntary interviews – that can be conducted without the presence of the national authorities if this is essential for the request to be executed - and the examination of public sites without their modification.

Interviews with people and access to sites are an important part of an investigation. As of the first, the Prosecutor may only speak to people who agree to be interviewed and the

⁷⁰ Carsten Stahn, 'Arrest and Surrender under the ICC Statute: A Contextual Reading', *Future Perspectives on International Criminal Justice* (TMC Asser Press 2010).

⁷¹ Claus Kress and Kimberly Prost, 'Article 99' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn, Beck/Hart 2008) 1622; Hans-Peter Kaul and Claus Kress, 'Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises' (1999) 2 *Yearbook of International Humanitarian Law* 143, 168–169.

exclusion of national authorities will only be possible if this is ‘essential’ for the execution of the request (i.e. most likely when a witness is intimidated by national authorities and refuses to speak in their presence).⁷² The examination without modification of a public site or consists in the mere visit to a site without the possibility of collecting material evidence and having it examined or tested. The only activities that can be carried out, therefore, are the filming or the picture taking of the site. It follows from the clear wording of Article 99(4) that in no case national authorities can be excluded from the carrying out of these operations, and in no case can the Prosecutor access private premises without the authorization of the local authorities.

Finally, Article 99(4) draws an obscure distinction between on-site investigations on the territory of the State Party where the crimes occurred (territorial State), and those on the territory of any other State Party. In the former case, if there has been a determination of admissibility of the situation or the case pursuant to Articles 18 or 19, the Prosecutor may proceed ‘following all possible consultations with the requested State Party’. In the latter case, the Prosecutor may proceed following consultations and ‘subject to any reasonable conditions or concerns raised by that State Party’. Despite the ambiguity of this language,⁷³ it is important to stress that in both cases the consent of the State is not required. Consequently, the State may not impose ‘unreasonable’ conditions and in particular those contrary to the express terms of Article 99(4) (i.e., requiring the presence of officials of the State during a witness interview).⁷⁴

In sum, on-site investigations pursuant to Article 99(4) are exceptional.⁷⁵ It is implied that the preferable way for the Prosecutor to obtain direct access to witnesses or places will be via a request for assistance under Article 93. Article 99(4) will come into play only if the Prosecutor anticipates problems with direct access under a request submitted in the normal course.⁷⁶

3.1.3.2 The failed state scenario

The only situation in which the Prosecutor may take ‘specific investigative steps’ on the territory of a State outside of the cooperation regime is the one of the ‘failed state’, that is, a

⁷² Kress and Prost, ‘Article 99’ (n 71) 1626.

⁷³ Kaul and Kress (n 71) 169.

⁷⁴ Broomhall et al., ‘Informal Expert Paper’ (n 77) 70.

⁷⁵ Kress and Prost, ‘Article 99’ (n 71) 1625, noting that the Statute underscores the exceptional character of this provision by specifying that Article 99(4) shall be applied ‘without prejudice to other articles in this Part’.

⁷⁶ Bruce Broomhall et al., ‘Informal Expert Paper: Fact-finding and Investigative Functions of the OPT, Including International Cooperation’ (2003) 14, available at: https://www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281983/state_cooperation.pdf.

State whose institutions have collapsed and has lost control over its territory. Pursuant to Article 57(3)(d), however, such investigative steps must be authorized by the Pre-Trial Chamber, which must be satisfied that the State is ‘clearly unable’ to execute a request for assistance due to the ‘unavailability of any authority or any component of its judicial system competent to execute the request’.

According to Rule 115 RPE, the Prosecutor’s request for authorization under Article 57(3)(d) shall relate to specified investigative acts (‘certain measures’). This leaves no room for the authorization of vague and unspecified investigative measures.⁷⁷ Upon receiving the request, the Pre-Trial Chamber shall, ‘whenever possible’, seek the view of the State concerned, so that it can be taken into account in arriving at its determination.⁷⁸ The Pre-Trial Chamber’s authorization takes the form of an order and may specify the procedure to be followed in carrying out the collection of evidence.⁷⁹ Notably, given the breakdown of any authority to whom a request of assistance could be directed, the sole legal basis for the execution of the measure will be the authorization of the Pre-Trial Chamber.

Regarding the type of measures that can be executed on the territory of a ‘failed state’, it appears that, as opposed to Article 99(4), the Prosecutor may carry out directly any measures that are authorized by the Pre-Trial Chamber, including compulsory measures that would normally require a judicial authorization in the requested state (i.e. searches and seizures, exhumation of mass graves, interception of communications etc.).⁸⁰ Even though a draft provision that explicitly allowed the Prosecutor to execute coercive measures in the territory of a failed state has been removed from the Statute, denying him/her such a power would seriously hamper the effectiveness of on-site investigations in these scenarios.⁸¹ As has been noted, Article 57(3)(d) represents the only exception to the principle of State consent under the Statute with respect to the enforcement of compulsory measures, which aims to remedy the void created by the absence of a domestic authority competent to authorize the measure itself.⁸² The stringent conditions imposed by Article 57(3)(d) are unlikely to manifest themselves in practice, even in the war-torn countries that capture the attention of the ICC Prosecutor.⁸³ To date, the Prosecutor has never sought the authorization of the Pre-Trial

⁷⁷ Fabricio Guariglia and Gudrun Hochmayr, ‘Article 57’ in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn, Beck/Hart 2008) 1130.

⁷⁸ Rule 115(1) and (2) RPE.

⁷⁹ Rule 115(3) RPE.

⁸⁰ Kress and Prost (n 75) 1625, footnote 5; Alamuddin (n 73) 247; Sluiter (n 48). See also Broomhall et al. (n 77) 77.

⁸¹ Sluiter, *International Criminal Adjudication and the Collection of Evidence* (n 42) 311.

⁸² Rastan (n 57) 438; Kress and Prost, ‘Article 99’ (n 71) 1625.

⁸³ See Rastan (n 57) 438, noting that this provision does not apply when a State able, but unwilling, to cooperate.

Chamber under this article.

3.1.4 The limited power of the Court to compel witnesses to testify

Until recently, scholars had been sharply divided on whether the ICC could compel witnesses to testify, due to the ambiguity of the relevant statutory provisions. Article 64(6)(b) of the Statute provides that the Trial Chamber may ‘require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States’. However, the Statute does not seem to contemplate an ensuing obligation of States to force reluctant witnesses to appear and give testimony before the Court. Article 93(1)(e) provides that States shall assist with ‘facilitating the *voluntary* appearance of persons as witnesses or experts before the Court’ [emphasis added]. Similarly, pursuant to Article 93(7)(a)(i), a person who is in custody in the requested State may be transferred to the ICC for the purpose of giving testimony only if that person freely consents to the transfer.⁸⁴ Furthermore, Article 70 on offences against the administration of justice does not include the failure of a witness to respond to a request or summons from the Court to appear.

According to many, these provisions clearly show that the Statute does not endow the Court with *subpoena* powers⁸⁵ to compel the attendance of witnesses before it.⁸⁶ This has been described as a ‘serious weakness within a system of international criminal justice wherein the Court lacks direct enforcement power, while being built upon the aspiration that the testimony of a witness at trial shall be given in person’.⁸⁷ One scholar went as far as saying that this system entails, on top of the absence of a State duty to compel a witness to appear and testify before the Court – an individual right of persons not to do so.⁸⁸ The prevailing opinion, however, seems to be that, pursuant to Article 64(6)(b) of the Statute, the

In such case the Court would only be empowered to refer the matter to the ASP or the UN Security Council.

⁸⁴ Article 93(7)(a)(i) of the Statute.

⁸⁵ The term ‘subpoena’ refers to the legal mechanism to compel testimony by a witness or production of evidence throughout the common law systems; civil law countries refer to this mechanism as ‘citation’ or ‘witness summons’.

⁸⁶ Göran Sluiter, “‘I Beg You, Please Come Testify’ —The Problematic Absence of Subpoena Powers at the ICC” (2009) 12 *New Criminal Law Review: In International and Interdisciplinary Journal* 590, 590; William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010) 768; Sylvia Ntube Ngane, ‘Witnesses before the International Criminal Court’ (2009) 8 *Law & Prac. Int’l Cts. & Tribunals* 431, 434.

⁸⁷ Claus Kress and Kimberly Prost, ‘Article 93’ in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn, Beck/Hart 2008) 1576. See also Article 69(2) of the Statute providing that the testimony of witnesses shall be given in person at the seat of the Court.

⁸⁸ Sluiter, *International Criminal Adjudication and the Collection of Evidence* (n 42) 254, 346ss.

Court can indeed create an obligation of persons to appear and testify before it, but States do not have a duty to enforce such obligation.⁸⁹

Recently, the Court intervened on the matter. On 17 April 2014, the Trial Chamber granted the Prosecutor's request to *subpoena* eight witnesses to appear before the Court in the trial of the case against Samoei William Ruto and Joshua Arap Sang (situation in Kenya).⁹⁰ According to the Prosecution, those eight witnesses were no longer cooperating or had informed the Prosecution that they were no longer willing to testify.

The Chamber motivated its decision by stating, *inter alia*, that States Parties did not intend to create a Court that is 'in terms a substance, in truth a phantom'.⁹¹ Rather, they must be presumed to have created a court with every necessary competence, power, ability and capability to exercise its functions and fulfil its mandate in an effective way. These include the power to *subpoena* witnesses.⁹² In the result, the Chamber found that the Government of Kenya had an obligation to cooperate fully with the Court: by serving the *subpoenas* to the witnesses and by assisting in compelling their attendance before the Chamber, by the use of compulsory measures as necessary.⁹³

The Appeals Chamber upheld the judgment of the Trial Chamber, however, it significantly restricted its scope.⁹⁴ It first clarified that the question on appeal was not the *general* power of the Court to compel witnesses to come before it, as the Trial Chamber had implied, but whether the Court could summon unwilling witnesses to testify sitting *in situ* within Kenya or by way of video link to the ICC's seat in the Netherlands.⁹⁵ Second, the Appeals Chamber addressed the question of whether Kenya was obligated to cooperate by serving summonses issued by the Court, and whether it was required to assist the Court through coercive powers to facilitate the witnesses' appearance *in situ* or through video link.⁹⁶

The Appeals Chamber rejected the defence argument that under Article 91(1)(e) States

⁸⁹ Kress and Prost, 'Article 93' (n 87) 1577.

⁹⁰ Prosecutor v. Ruto and Sang, TC V(A) Decision on Prosecutor's Application for Witness Summonses and Resulting Request for State Party Cooperation, ICC-01/09-01/11-1274-Corr 2, 17 April 2014 (hereinafter Trial Chamber Decision); see also Dissenting Opinion of Judge Herrera Carbuca, ICC-01/09-01/11-1274-Anx, 19 April 2014.

⁹¹ *ibid.*, Trial Chamber Decision, 124.

⁹² *ibid.*

⁹³ *ibid.*, 157ss.

⁹⁴ Prosecutor v. Ruto and Sang, AC Judgment on the Appeals of William Samoei Ruto and Mr. Joshua Arap Sang Against the Decision of Trial Chamber V(A) of 17 April 2014 Entitled "Decision on Prosecutor's Application for Witness Summonses and Resulting Request for State Party Cooperation" (hereinafter Appeal Judgment), ICC-01/09-01/11 OA 7 OA 8, 9 October 2014. See also Charles Chernor Jalloh, 'International Decision: International Criminal Court, Appeals Chamber, *Prosecutor v. William Ruto*, Case No. ICC-01/09-01/11, Appeals Judgment on Witness Summonses, October 9, 2014', FIU Legal Studies Research Paper Series, December 2015.

⁹⁵ *ibid.*, Appeal Judgment, 31. See also Jalloh (n 97) 612.

⁹⁶ *ibid.*, 114, 115. See also Jalloh (n 97) 612.

are required to abide by an ICC order only when the witness chooses to give testimony voluntarily.⁹⁷ The Chamber explained that the drafting history of that clause makes clear that the term ‘voluntary’ had been inserted to accommodate the concerns of the countries in which it was not constitutionally permissible to force witnesses to travel to another country to give testimony.⁹⁸ However, the preparatory works revealed that negotiators had discussed alternative methods, such as in-country testimony and video link, by which the ICC could receive testimony from a witness who was unwilling to engage in overseas travel.

In sum, the Court can legally compel witness evidence in the territory of the State Party or through video link to its usual seat in The Hague.⁹⁹ Consequently, States Parties are required to assist the Court by compelling the witnesses to testify *in situ* or via video link. From this it follows that the Court may not require non-cooperating persons who do not wish to travel to The Hague to offer the required testimony.

3.1.5 Cooperation not foreseen by Part 9 of the Statute

The cooperation regime of the Rome Statute leaves out some matters that are crucial to the ICC’s effective functioning and the protection of fundamental rights of persons involved in its proceedings, such as the assistance that States must provide for receiving detainees on their territory after they have been granted interim release or following a conviction, and for the relocation of witnesses, victims and acquitted persons. As a consequence, these issues are left to voluntary cooperation agreements between the Court and States.

As will be seen in Chapter IV, the absence of an obligation on States to allow interim released persons on their territory can *de facto* impede the realisation of the right to liberty of the accused. Regrettably, to date, only Belgium has entered into an agreement on interim release with the Court.¹⁰⁰ Slightly more hopeful is the situation concerning the other forms of voluntary cooperation. To date, fifteen States have entered into witness relocation agreements and eight have signed an agreement on the enforcement of sentences with the Court.¹⁰¹ In this respect, it is important to remind that States always retain the discretion to enter into

⁹⁷ *ibid.*, 115.

⁹⁸ *ibid.*, 118-119.

⁹⁹ *ibid.*, 120.

¹⁰⁰ On 10 April 2014, Belgium has become the first country accepting to provisionally receive detainees of the Court on its territory on a temporary basis and under conditions established by the Chambers of the Court, ICC website.

¹⁰¹ ASP/14 Report of the Bureau on Cooperation, at 14 and 15.

voluntary cooperation agreements, and to make a final decision whether or not to accept a specific person (be him/her a witness, an accused or a sentenced person).

With respect of sentences of acquittal, voluntary agreements only apply to individuals who were unable to return to their home country. In such cases, the Court must find a State that would receive the acquitted individual.¹⁰² Following the acquittal of Ngudjolo Chui in late 2012, the Court indicated that it would be unsafe for him to return to the Democratic Republic of Congo, and absent a voluntary release agreement for acquitted persons, Ngudjolo Chui had to make an asylum application in the Netherlands.¹⁰³

Recently, the Court concluded a Memorandum of Understanding (MoU) with the United Nations Office on Drugs and Crime (UNODC) on Building the Capacity of States to Enforce, in accordance with the international standards on the treatment of prisoners, sentences of imprisonment pronounced by the Court.¹⁰⁴ The MoU establishes a framework for the Court and UNODC to cooperate in assisting those States Parties desiring to build their capacity to receive sentenced persons in accordance with international standards. To this end, it includes provisions on mutual consultations and exchange of information, as well as the possibility of UNODC providing technical assistance related to the treatment of prisoners and the management of facilities to States Parties.¹⁰⁵

3.2 States non-party

The law that regulates the relations between the ICC and third States is embodied in the Vienna Convention on the Law of Treaties of 1969 ('the Vienna Convention').¹⁰⁶ The general principle is that a treaty does not create either obligations or rights for a third State without its consent.¹⁰⁷ Third States, thus, are not bound by the cooperation regime in Part 9 of the Statute, in the absence of an explicit consent on their part.

The Statute, however, foresees several ways in which States non-party might become engaged with the Court.¹⁰⁸ First, Article 12(3) provides that third States may accept the jurisdiction of the Court with regard to a particular crime filing an *ad hoc* declaration to that end. In such case, they 'shall cooperate fully with the Court without undue delay or exception

¹⁰² ASP/14 Report of the Bureau on Cooperation, at 14 and 15.

¹⁰³

¹⁰⁴ ICC, Report of the Court on cooperation, 23 October 2014, ICC-ASP/13/23, 49.

¹⁰⁵ *ibid.*

¹⁰⁶ Vienna Convention on the Law of Treaties, 23 May 1969.

¹⁰⁷ Article 34 of the Vienna Convention.

¹⁰⁸ Olympia Bekou and Robert Cryer, 'The International Criminal Court and Universal Jurisdiction: A Close Encounter?' (2007) 56 *International & Comparative Law Quarterly* 49, 61.

in accordance with Part 9'. A State not party accepting the Court's jurisdiction, thus, is considered equivalent to a State Party for cooperation purposes.

Second, pursuant to Article 87(5)(a), '[t]he Court may invite any State not party to this Statute to provide assistance (...) on the basis of an *ad hoc* arrangement, an agreement with such State or any other appropriate basis'.¹⁰⁹ The word 'invite' shows that cooperation by non-party States is entirely 'voluntary' in nature.¹¹⁰ Some commentators noted that, in these cases, the third State concerned has a strong negotiation position, in that it can decide the type and the degree to which cooperation with the Court would be provided.¹¹¹ To date, there is hardly any public information available with respect to the conclusion of such agreements.¹¹²

Finally, there is one last way in which States not-parties might become engaged with the Court, and this can be without their consent. Pursuant to Articles 12(2) and 13(b) of the Statute, the Council may refer to the Court situations concerning crimes committed on the territory of every (UN member) State as a measure to maintain or restore international peace and security under Chapter VII of the UN Charter.¹¹³ To date, the Security Council has triggered the Court's jurisdiction in relation to two third States. In 2005, it referred the situation on the Darfur region of Sudan, and, in 2011, the situation in the Libyan Arab Jamahiriya.¹¹⁴

One of the problematic aspects of these referrals concerns the scope of the duties of cooperation arising out of them.¹¹⁵ Referrals are an enforcement measure of the Council under Chapter VII and thus, in principle, they are binding on all UN members.¹¹⁶ In its current practice, however, the Council has limited the obligation to cooperate with the Court only to

¹⁰⁹ An example of such agreement is the one concluded in October 2005 between the OTP and the State of Sudan for the execution of the arrest warrants against the members of the Lord Resistance Army, a rebel group believed to be the most responsible for international crimes committed in Uganda. See OTP, 'Report on the Activities Performed During the First Three Years' (2006) 36. With respect to evidence gathering, agreements with States not party may include provisions related to access to or collection of evidence on their territory. To date, there is no public information available with respect to such agreements.

¹¹⁰ Zhu Wenqi, 'On Co-Operation by States Not Party to the International Criminal Court' (2006) 88 *International Review of the Red Cross* 87, 89.

¹¹¹ Goran Sluiter, 'Surrender of War Criminals to the International Criminal Court, The' (2002) 25 *Loy. LA Int'l & Comp. L. Rev.* 605, 610; Bekou and Cryer (n 108) 62.

¹¹² In 2005 the OTP concluded an *ad hoc* agreement with Sudan regulating cooperation in the arrests of the LRA leaders in the Uganda Situation. See OTP, 'Report on the Activities Performed during the First Three Years' (2006), 36. In 2007, however, Sudan withdrew from the agreement following the first ICC arrest warrant in the Darfur cases, see Patrick S. Wegner (further, n 118).

¹¹³ Dapo Akande, *The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC*

¹¹⁴ UN Security Council Resolution 1593 (2005); UN Security Council Resolution 1970 (2011).

¹¹⁵ Deborah Ruiz Verduzco, 'The Relationship between the ICC and the United Nations Security Council' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press 2014) 42.

¹¹⁶ Pursuant to Article 25 of the UN Charter, all decisions made by the UN Security Council are binding upon all UN member States.

the States concerned by the referral. In Resolution 1593, the Council obligated the Sudanese Government ‘and all other parties to the conflict in Darfur’ to ‘cooperate fully with and provide any necessary assistance to the Court and the Prosecutor.’ Resolution 1970 obligated ‘the Libyan authorities’ to undertake the same kind of cooperation but did not include the language about ‘other parties to the conflict.’ Both resolutions are explicit that States not party have no duty to cooperate under the Statute and therefore they are merely ‘urged’ to cooperate fully.¹¹⁷

3.3 International organizations

Due to the fact that the investigations of the Court often take place in the midst or in the aftermath of a conflict,¹¹⁸ it is likely that the local institutions of a country will either be collapsed and therefore incapable of cooperating with the Prosecutor, or unwilling to do so because the perpetrators of the crimes still hold political positions or military commands.¹¹⁹ In such situations, the Court, lacking its own police force, might have no other options than turning to international forces for cooperation and assistance.

First and foremost, international forces deployed in conflict and post conflict situations - such as UN or EU peacekeeping missions, and AU troops- could be the only entities capable of enforcing arrest warrants without the involvement of States.¹²⁰ More broadly, UN missions and NGOs operating on the territories where crimes occurred are a crucial source of information and evidence for the Court. Given the constraints on its time and resources, the Prosecutor needs to build partnerships with local actors who understand the geography of the region, have access to the local networks, and are able to provide logistical support, as well as facilitate the access to evidence and witnesses.

The Court, thus, would greatly benefit from the cooperation of international or regional forces that are already deployed on the territory with peacekeeping or law enforcement functions.¹²¹ However, the normative framework of the Statute regulating the relationship between the Court and international organizations does not facilitate the

¹¹⁷ Shehzad Charania and others, ‘The ICC at a Crossroads: The Challenges of Kenya, Darfur, Libya and Islamic State’ (Chatham House - The Royal Institute of International Affairs 2015) 6.

¹¹⁸ See generally Patrick S Wegner, *The International Criminal Court in Ongoing Intrastate Conflicts* (Cambridge University Press 2015).

¹¹⁹ Han-Ru Zhou, ‘The Enforcement of Arrest Warrants by International Forces From the ICTY to the ICC’ (2006) 4 *Journal of International Criminal Justice* 202, 203.

¹²⁰ Cedric Ryngaert, *The International Prosecutor: Arrest and Detention* (Institute for International Law, Catholic University of Leuven 2009) 38.

¹²¹ Zhou (n 119) 204.

obtaining of such assistance. In this respect, it will be seen that the Rome Statute clearly departs from the *ad hoc* Tribunals' regime.

Article 29 of the ICTY Statute and Article 28 of the ICTR Statute, imposing an obligation on States to cooperate with the Tribunals, did not refer to a similar duty for international organizations. However, in *Simić*, the ICTY used its inherent powers to extend the obligation to cooperate to SFOR – the NATO-led multinational peacekeeping force deployed to Bosnia and Herzegovina after the Balkan war¹²² - and NATO.

As the judges stated: 'a purposive construction of the Statute yields the conclusion that [an order of the Tribunal] should be as applicable to collective enterprises of States as it is to individual States (...) There is no reason why Article 29 should not apply to collective enterprises undertaken by States, in the framework of international organizations and, in particular, the competent organ such as SFOR (i.e., the NATO force deployed in Bosnia Herzegovina)'.¹²³

Faced with chronic lack of cooperation and obstruction by the Serbian and Croatian authorities in the aftermath of the signature of the Dayton Peace Agreement, the ICTY had no other option than resorting to the help of NATO, the only armed force in the region capable of enforcing arrest warrants.¹²⁴ Indeed, international forces have carried out most of the arrests on behalf of the Tribunal, their cooperation proving to be indispensable.¹²⁵

3.3.1 The normative framework of the Statute

Despite the experience of the ICTY and the major role played by international organizations in the achievement of its mission, the drafters of the Rome Statute departed from the above regime. The Statute's provisions determining the relationship between the Court and international organizations are the following.¹²⁶

Pursuant to Article 15(2) and Rule 104 RPE, the Prosecutor may, even before the commencement of an investigation, seek information from 'organs of the United Nations, intergovernmental or non-governmental organizations' that will assist him in determining whether there is a reasonable basis to initiate the investigation. Once the investigation has

¹²² SFOR is the legal successor to the NATO-led Implementation Force (IFOR), which was deployed to enforce the provisions of the Dayton Peace Agreement of 14 December 1995.

¹²³ ICTY, *Prosecutor v. Simić*, TC Decision on Motion for Judicial Assistance to be Provided by SFOR and Others, IT-95-9-PT, 18 October 2000, 46-49. See also Reisinger-Coracini (n 14) 103.

¹²⁴ Zhou (n 119) 204–205.

¹²⁵ Cryer and others (n 55) 517.

¹²⁶ For a detailed overview see Zhou (n 119) 201ss.

started, Article 54, dealing with the duties and powers of Prosecutor, states that the Prosecutor may: i) seek the cooperation of any State or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate;¹²⁷ ii) enter into such arrangements or agreements, not inconsistent with the Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person.¹²⁸

The cooperation regime of the Statute, however, differentiates cooperation obligations of States from those of international organizations. Whereas Article 86 imposes upon States Parties a clear and general obligation to fully cooperate with the Court, Article 87(6) more modestly states that:

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

From this provision it follows that international organizations are not obliged to cooperate with the Court.¹²⁹ As is the case with non-party States, cooperation by international organizations is voluntary, and its terms are left to the agreements between the Court and the respective organization.¹³⁰ This is also confirmed by the fact that, whereas Article 87(7) empowers the Court to make a finding of non-compliance when States Parties do not comply with its requests and refer the matter to the ASP or the Security Council, Article 87(6) does not foreseen a similar power with respect to international organizations.¹³¹ Moreover, the cooperation and assistance that the organization provides to the Court must be explicitly envisaged in the organization's mandate.

The most important agreement between the Court and an international organization is the one concluded with the UN (see supra paragraph 2.1). Article 15 of the Agreement, entitled 'General provisions regarding cooperation between the United Nations and the Court', provides that the UN 'undertakes to cooperate with the Court and to provide to the Court such information or documents as the Court may request pursuant to Article 87(6) of the Statute'.

¹²⁷ Article 54(3)(c) of the Statute

¹²⁸ Article 54(3)(d) of the Statute.

¹²⁹ Claus Kress and Kimberly Prost, 'Article 87' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn, Beck/Hart 2008) 1526–1527.

¹³⁰ Reisinger-Coracini (n 35) 103.

¹³¹ Zhou (n 119) 212–213.

In addition to the Agreement with the UN, formal cooperation agreements have been concluded with the European Union (EU)¹³² and Interpol. The cooperation agreement with the EU marks the first time a regional organization has ever signed such an agreement with the Court. The agreement underlines a general obligation to cooperate and provide assistance to the Court through, for example, a regular exchange of information,¹³³ cooperating with and providing information to the Prosecutor,¹³⁴ the development of training and assistance for Court's officials and counsel¹³⁵ and to take the necessary measures to waive any privileges and immunities of alleged criminals responsible for a crime within the jurisdiction of the Court.¹³⁶ Further to the EU-ICC Cooperation and Assistance Agreement, a EU-ICC Implementing Arrangements was finalized in March 2008 for the exchange of classified information.¹³⁷

The OTP has also entered into a cooperation agreement with Interpol in 2004, for the exchange of police information and criminal analysis, as well as the search for fugitives and suspects¹³⁸. The agreement further gives the Prosecutor access to the Interpol telecommunications network and databases.

Since, to date, nine out of ten ICC investigations concern African States, a similar cooperation agreement with the African Union would be extremely important. The current political situation, however, does not leave much hope. Increasingly, African countries have come to be critical of the ICC because of the perceived bias that the Court focuses only on Africa and the perceived threats to their sovereignty following the issuance of arrest warrants against some African heads of States.¹³⁹ The African Union has gone so far as to ask member countries to implement a policy of non-compliance and non-cooperation with the ICC and has attempted (unsuccessfully) to withdraw from the Rome Statute.¹⁴⁰

¹³²EU-ICC Cooperation and Assistance Agreement, 10 April 2006. Available at: https://www.icc-cpi.int/NR/rdonlyres/6EB80CC1-D717-4284-9B5C-03CA028E155B/140157/ICCPRES010106_English.pdf.

¹³³ Article 7 EU-ICC Cooperation Agreement.

¹³⁴ Article 11 EU-ICC Cooperation Agreement.

¹³⁵ Article 15 EU-ICC Cooperation Agreement.

¹³⁶ Article 12 EU-ICC Cooperation Agreement.

¹³⁷ Security Arrangements for the Protection of Classified Information Exchanged Between the EU and the ICC, 15 April 2008.

¹³⁸ Cooperation Agreement OTP-INTERPOL, 22 December 2004.

¹³⁹ Max Du Plessis, Tiyanjana Maluwa and Annie O'Reilly, 'Africa and the International Criminal Court' (2013) 11 *Criminal Justice* 563, 4.

¹⁴⁰ On the relationship between the Court and the AU see generally Anton Du Plessis and Otilia Anna Maunganidze, 'The ICC and the AU' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press 2015); Du Plessis, Maluwa and O'Reilly (n 139).

3.3.2 Cooperation with peacekeeping missions in the field

The significance of the cooperation of peacekeeping missions in the field with the ICC has been described by Margherita Melillo with the following three reasons: i) first, the mandate of peacekeeping missions and the jurisdiction of the Court often overlap, as they both operate in conflict and post-conflict situations; ii) since peacekeeping missions are often requested to report on human rights violations, they possess valuable information for the Court; iii) they possess law enforcement powers which the Court does not have.¹⁴¹

Article 15(2) of the NRA stipulates that the UN or its ‘programmes, funds and offices’ may agree to provide to the Court other forms of cooperation and assistance compatible with the provisions of the Charter and the Statute. Similarly, Article 18 of the NRA, regulating the cooperation that the UN shall provide to the Prosecutor, contemplates special agreements between the latter and various programs, funds and offices of the UN.¹⁴²

These provisions have been the legal base for the conclusion of a number of subsidiary agreements, in the form of Memoranda of Understanding (MoU), between the Court and several UN peacekeeping missions operating on the territories subject to the Prosecutor’s investigations, such as MONUSCO (previously called ‘MONUC’) in the DRC¹⁴³ and the United Nations Operation in Côte d’Ivoire (UNOCI).¹⁴⁴ A Memorandum of Understanding with MINUSMA- the United Nations Multidimensional Integrated Stabilization Mission in Mali - was signed on 20 August 2014.¹⁴⁵ Since the MoU with MONUSCO is the only agreement that has been disclosed to the public, the following subparagraphs will refer to it in discussing the cooperation of peacekeeping missions in ICC investigations.¹⁴⁶

3.3.2.1 The Memorandum of Understanding with MONUSCO in the DRC

As has been seen, the power to carry out arrests or investigations on behalf of the Court must be explicitly envisaged in the UN mission’s mandate. So far, this has happened only in the context of proceedings before the Special Court of Sierra Leone (SCSL), where the Security

¹⁴¹ Margherita Melillo, ‘Cooperation between the UN Peacekeeping Operation and the ICC in the Democratic Republic of the Congo’ (2013) 11 *Journal of International Criminal Justice* 763, 765.

¹⁴² Article 18(4) NRA.

¹⁴³ MOU ICC-MONUSCO in DRC, 8 November 2005.

¹⁴⁴ ASP Report of the Court on the status of on-going cooperation between the International Criminal Court and the United Nations, including in the field, ICC-ASP/12/42, 14 October 2013, 20. The MoU between the ICC and UNOCI was concluded on 12 June 2013.

¹⁴⁵ ASP, Report on the activities of the International Criminal Court, ICC-ASP/13/37, 19 November 2014, 73.

¹⁴⁶ For a detailed overview see Melillo (n 141).

Council explicitly mandated a UN peacekeeping force to arrest a suspect of an international crime (Charles Taylor).¹⁴⁷

With respect to the ICC, the UN has been reluctant in allowing its peacekeeping missions to enforce arrest warrants and other forms of cooperation on behalf of the Court.¹⁴⁸ Due mainly to US opposition to the Court, initially, the mandate of the UN peacekeeping forces in the DRC (MONUSCO) did not refer to the ICC.¹⁴⁹ Only in 2004, the mandate of the mission was specifically revised to enable the possibility for ICC cooperation.¹⁵⁰

The MoU between the ICC and MONUSCO foresees the assistance of the Mission, *inter alia*, in tracing witnesses, preserving physical evidence, carrying out arrests, searches, seizures and securing of crime scenes.¹⁵¹ However, it does not envisage the OTP directly requesting the aid of MONUSCO, but instead, views the territorial State (DRC) to be the party with the obligation to request support to the Mission.¹⁵² In other words, the enforcement powers of MONUSCO are made available at the request of the DRC Government, rather than that of the ICC.¹⁵³

Moreover, cooperation can take place only following a request by the Court and prior written consent from the Government of the DRC, the MoU reserving ample flexibility for MONUSCO to consider such requests on a case by case basis (taking issues of security, operational priorities, consistency of the requested measure with its mandate, as well as the capacity of the DRC authorities themselves to render the assistance sought). From this it follows that cooperation between the ICC and MONUSCO is conditional, indirect and inherently limited.¹⁵⁴

In 2013, however, the Security Council revised the mandate of MONUSCO following a new escalation of violence that took place in the country in 2012. With Resolution

¹⁴⁷ UN SC Resolution 1638 (2005). See also Ryngaert (29) 40.

¹⁴⁸ Ryngaert (n 120) 43, noting that ‘undeniably, within the UN administration, there is serious political resistance against endowing UN forces with a mandate to effectuate arrests for the benefit of international criminal tribunals’.

¹⁴⁹ Cryer and others (n 55) 517.

¹⁵⁰ UNSC Resolution 1565 (2004); see also Olivia Swaak-Goldman, ‘Peacekeeping Operations and the International Criminal Court’ in Gian Luca Beruto (ed), *International humanitarian law, human rights and peace operations. 31st Round Table on Current Problems of International Humanitarian Law Sanremo, 4-6 September 2008* (International Institute of Humanitarian Law 2009) 266.

¹⁵¹ See Articles, 13, 15 and 16 of the MoU between MONUC and the ICC.

¹⁵² Submission of additional information on the status of the execution of the warrants of arrest in the situation in Uganda, 8 December 2006, ICC-02/04-01/05, 14.

¹⁵³ Swaak-Goldman (n 150) 267.

¹⁵⁴ Bekou (n 9) 112.

2008/2013, the Security Council authorised the formation of ‘Intervention Brigades’, empowered to provide more proactive assistance to the Court.¹⁵⁵ Moreover:

[it] authoris[ed] MONUSCO, through its military component [...] to take all necessary measures to [...] [s]upport and work with the Government of the DRC to arrest and bring to justice those responsible for war crimes and crimes against humanity in the country, *including through cooperation with [...] the ICC.*¹⁵⁶

As argued by Melillo, ‘this new explicit mandate sounds revolutionary’.¹⁵⁷ According to her, MONUSCO is no longer prevented from entering into direct contact with the Court without having to seek an explicit authorisation from the Government.¹⁵⁸ Although the Resolution 2098 makes clear that the creation of ‘Intervention Brigades’ in the DRC was ‘on an exceptional basis and without creating a precedent or any prejudice to the agreed principles of peacekeeping’,¹⁵⁹ in 2014, the Council established the UN Multidimensional Integrated Stabilisation Mission (MINUSCA)¹⁶⁰ in the Central African Republic (CAR). One of the ‘priority tasks of this mission is:

Support[ing] and work[ing] with the Transnational Authorities to arrest and bring to justice those responsible for war crimes and crimes against humanity in the [CAR], *including through cooperation with States of the region and the ICC* [emphasis added].¹⁶¹

This mandate, thus, significantly strengthens the UN-ICC cooperation regime in the CAR. It has been argued that this suggests an evolving pattern in the way in which the Security Council envisages the fulfilment of its obligation to cooperate with the Court under the Rome Statute and the UN-ICC NRA.¹⁶²

¹⁵⁵ UN SC Resolution 2098 (28 March 2013) UN Doc S/RES/ 2098, 9.

¹⁵⁶ UN SC Resolution 2098 (28 March 2013) UN Doc S/RES/ 2098, 12. This mandate was extended until 31 March 2015 by UNSC Res 2147 (28 March 2014) UN Doc S/RES/2147.

¹⁵⁷ Melillo (n 141) 780.

¹⁵⁸ *ibid.*

¹⁵⁹ UN SC Resolution 2098 (28 March 2013) UN Doc S/RES/ 2098, 9.

¹⁶⁰ UN Resolution 2149 (10 April 2014) UN Doc S/ Res/2149.

¹⁶¹ *ibid.*, 30(f)(i).

¹⁶² Bekou (n 9) 113.

3.4 Final Remarks

As noted by the Court in its Report to the ASP on the status of on-going cooperation with the UN, including in the field, the ability to frame and carry out broader, more proactive mandates requires a willingness to cooperate not only on the part of the UN and the ICC but also from the situation-State.¹⁶³ This system may work well in case the State is willing to cooperate, as is the case with the DRC or the CAR.

However, one can see the shortcomings of this system in situations where the UN mission is deployed against the will of local authorities, and where the government opposes the intervention of the ICC. This is the situation of Sudan. There, any links between the ICC and the international peacekeeping mission (UNAMID) have been avoided and UNAMID's mandate contains no reference to international criminal investigations or prosecutions.¹⁶⁴

As has been argued, '[i]n these situations, a direct transfer from international custody to ICC custody, without the State acting as an intermediary, appears desirable. There is no legal basis in the State-centered Statute for such a method, though. If the territorial State is indeed not willing to cooperate, a possible solution could however be for the international forces to have the arrestee first transferred to a State that is willing to cooperate. After all, persons could be surrendered to the ICC by any State on the territory of which that person may be found, arguably irrespective of how their presence on that territory was brought about'.¹⁶⁵

5. The politics of prosecutions

The independence of the Prosecutor is crucial for guaranteeing the right to a fair trial. Article 42(1) of the Statute affirms the principle of prosecutorial independence in stating that the OTP 'shall act independently as a separate organ of the Court' and that 'a member of the Office shall not seek or act on instructions from any external source'.

Prosecutorial independence, thus, relates to both the institutional division of powers within the Court (internal independence) and the relationship of the Prosecutor with States and international organizations, first and foremost, the Security Council (external

¹⁶³ ASP 12/42, 14 October 2013.

¹⁶⁴ Cryer and others (n 55) 517.

¹⁶⁵ Ryngaert (n 120) 42.

independence).¹⁶⁶ Clearly, the latter is the most delicate and difficult to safeguard, due to the very nature of international criminal prosecutions, which usually concern perpetrators who hold top-level positions in the institutional or military hierarchy of a State. In order to protect the external independence of the Prosecutor, the Statute has endowed her/him with a considerable degree of discretion.

Prosecutorial discretion has been described as ‘the cornerstone of prosecutorial independence’, in that it is indispensable for holding perpetrators accountable, irrespective of their position in the political or military hierarchy of States and regardless of the interests involved in their prosecution.¹⁶⁷ Prosecutorial discretion relates to the choice of the situations over which the investigation is commenced, and, subsequently, to the selection of persons to investigate and prosecute within the situation selected. In this respect, it must be reminded that the jurisprudence of the Court distinguishes between ‘situations,’ which may be defined in terms of temporal, territorial or personal parameters, and ‘cases,’ which comprise specific incidents within a given ‘situation’ during which one or more crimes within the jurisdiction of the Court may have been committed, and whose scope are defined by the suspect under investigation and the conduct that gives rise to criminal liability under the Statute.¹⁶⁸

Pursuant to Article 15 of the Statute, the Prosecutor has the power to initiate criminal proceedings *proprio motu*, subject to judicial authorization. In addition to a State or the Security Council referring situations to the Court, thus, the ICC intervention can be triggered by the Court itself through the decision of its Prosecutor, sanctioned by the Pre-Trial Chamber. This is an unprecedented power for an international criminal prosecutor and, undoubtedly, the most difficult compromise reached at the Rome Conference.¹⁶⁹

In practice, this provision entitles the Court to act and request cooperation from States even in situations and cases where States or the Security Council have not requested its intervention,¹⁷⁰ and thus, possibly, even when they are hostile to it. Such capacity significantly distances the Court from all the previous international criminal justice experiences, which operated in execution of a specific mandate from a political body.¹⁷¹

¹⁶⁶ Matthew R Brubacher, ‘Prosecutorial Discretion within the International Criminal Court’ (2004) 2 *Journal of International Criminal Justice* 71, 84.

¹⁶⁷ *ibid* 76.

¹⁶⁸ *The Prosecutor v. Saif al-Islam Gaddafi and Abdullah al-Senussi*, AC Judgment on the appeal of Libya against the decision of PTC I of 31 May 2013 entitled ‘Decision on the admissibility of the case against Saif Al-Islam Gaddafi’, ICC-01/11-01/11-547-Red OA4, 21 May 2014, 1.

¹⁶⁹ Morten Bergsmo, Jelena Pejić and Otto Triffterer, ‘Article 15’, *Commentary on the Rome Statute of the International Criminal Court* (2nd edn, Beck/Hart 2008).

¹⁷⁰ Rastan (n 62) 165.

¹⁷¹ As Rastan (n 118) has noted ‘the ability of the ICC to act independent of prior political sanction represents significant challenge to state-centric assumptions of world order’.

Moreover, once the investigation has commenced and irrespective of the mechanism that prompted the Court's intervention (referral or initiative of the Prosecutor), the Prosecutor has complete discretion over the temporal and geographical frame of the investigation,¹⁷² as well as the selection of persons to target for a prosecution.

In two policy papers, the OTP has set out the considerations which guide the exercise of its discretion both in the opening of investigations into situations as a whole, and in the selection of cases within a given situation.¹⁷³ Both papers stress the importance of the general principles of 'independence', 'impartiality' and 'objectivity'.

With respect to the principle of independence, the OTP made clear that '[i]ndependence goes beyond not seeking or acting on instructions: it means that decisions shall not be influenced or altered by the presumed or known wishes of any party, or in connection with efforts to secure cooperation'.¹⁷⁴ This also means that where a referral or a communication under Article 15 is accompanied by documentation that identifies potential perpetrators, 'the Office is not bound or constrained by the information contained therein when conducting investigations in order to determine whether specific persons should be charged'.¹⁷⁵ With respect to impartiality, 'the Office will examine allegations against all groups or parties within a particular situation to assess whether persons belonging to those groups or parties bear criminal responsibility'.¹⁷⁶

5.1 The dependence on cooperation

At the same time, however, this broad institutional independence of the Prosecutor relies on the same state-dominated enforcement system that determined the successes and the failures of the previous international criminal justice experiences, that is, the cooperation of States and the Security Council. The Prosecutor does not have a police force at his/her disposal to conduct the investigation and to arrest suspects, and has only limited powers to perform investigative activities on the territory of States without their consent and assistance. As a

¹⁷² Within the temporal frame set by the Statute at Article 11, i.e., after 2002.

¹⁷³ OTP, 'Policy Paper on Preliminary Examinations' (2013), and OTP, 'Draft Policy Paper on Case Selection and Prioritisation' (2016), available at: https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Policy%20Paper%20Preliminary%20Examinations%20%202013.pdf and https://www.icc-cpi.int/iccdocs/otp/29.02.16_Draft_Policy-Paper-on-Case-Selection-and-Prioritisation_ENG.pdf respectively.

¹⁷⁴ OTP, 'Policy Paper on Preliminary Examinations' (2013) 26; See also OTP, 'Draft Policy Paper on Case Selection and Prioritisation' (2016) 13, which contains a similar wording.

¹⁷⁵ OTP, 'Policy Paper on Preliminary Examinations' (2013), 27; see also OTP, 'Draft Policy Paper on Case Selection and Prioritisation' (2016) 14, which contains a similar wording.

¹⁷⁶ OTP, 'Draft Policy Paper on Case Selection and Prioritisation' (2016) 16.

consequence, investigations can only be conducted with the support of the State in which the investigation is being carried out. The ‘intractable paradox of independence and dependence’¹⁷⁷ is particularly visible in relation to the States where the crimes occurred (territorial states). Darryl Robinson explained the core of this tension very clearly:

Territorial states - from the eyes of the international prosecutor - have a duality of nature. As a matter of international law, a territorial state is the lawful authority in the territory, whose cooperation is required to carry out meaningful operations on its soil. As a matter of criminal law, those authorities are also potential targets of investigation. Combining these strands, in international criminal law, territorial states are both lawful authorities whose cooperation is valuable, and also objects of analysis and investigation.¹⁷⁸

Since the beginning of his tenure, the ICC Prosecutor acknowledged that such duality changes the notion of prosecutorial independence, as traditionally understood.¹⁷⁹ The above-described tension puts the Prosecutor in a position that is substantially different from that of national prosecutors, who may be seen to prejudice their independence if they engage with the political authorities of a State.

Conversely, the very nature of an ICC investigation demands that the Prosecutor enters into dialogue with heads of State and Governments and with agencies of a State. Particularly, the Prosecutor ‘may have to have such meetings in order to receive referrals of situations, in order to discuss the modalities of cooperation with the Court (...) and in order to discuss prospects for a State’s own authorities taking proceedings themselves.’¹⁸⁰

In the absence of strong institutional safeguards of prosecutorial independence provided elsewhere in the Statute, however, one cannot count on much more than the Prosecutor’s own assurance that s/he ‘will carry out his responsibilities in this way without jeopardizing his independence and impartiality’.¹⁸¹

¹⁷⁷ Darryl Robinson, ‘The Controversy over Territorial State Referrals and Reflections on ICL Discourse’ (2011) 9 *Journal of International Criminal Justice* 355, 368.

¹⁷⁸ *ibid.*

¹⁷⁹ OTP, ‘Annex to the Paper on Some Policy Issues’ (2003) 5.

¹⁸⁰ *ibid.* The latter form of interaction with national authorities is typical of the ICC, which does not have primacy over national jurisdictions but is complementary to them. The relationship between complementarity and cooperation will be thoroughly explored in Chapter III. However, here it is important to point out that, in the context of a Court with a complementary jurisdiction, as the Prosecutor must provide a greater degree of deference to national laws and jurisdictional claims.

¹⁸¹ *ibid.* See also Brubacher (n 115) 85, noting that ‘Article 42(1) affirms the independence of the Prosecutor but phrases that affirmation as ‘the Prosecutor shall act independently’, making the responsibility of remaining independent a duty of the Prosecutor him or herself’, and Giulio Turone, ‘Powers and Duties of the Prosecutor’

5.2 The Prosecutor as a political strategist

Referring to the role of the Prosecutor at the *ad hoc* Tribunals, Victor Peskin said that the Prosecutor is not only ‘the trial lawyer who marshals evidence to convict war crimes suspects’, but is also ‘the political strategist who manoeuvres through the relatively uncharted shoals of the trials of cooperation to obtain state compliance for his or her courtroom mission to convict.’¹⁸²

The ‘trials of cooperation’ are the political interactions between the international tribunal’s Prosecutor, States and the international community over such matters as ‘whether and how many nationals or members of a particular ethnic group will be indicted; how far up the political and military hierarchy will such indictments reach; and how many nationals of enemy nations or opposing ethnic or political groups will face indictment and prosecution’.¹⁸³ Ultimately, these virtual trials will determine the level of cooperation that the Tribunals will receive from States and, consequently, the outcome of the trials of the accused.¹⁸⁴

This is even more true for the ICC Prosecutor, who, due to Court’s forward-looking jurisdiction, must often intervene in the midst or in the aftermath of armed conflicts, impacting on very complex political processes. The word ‘politics’ is often met with suspicion and disapproval when associated to international criminal justice. International lawyers conceptualize politics as the antithesis of justice, arguing that the Prosecutor should base her/his decisions solely on the norms of the Statute. Indeed, it has rightly been pointed out that Article 53 of the Statute, governing the commencement of the investigation, ‘does not leave room for the OTP to consider pragmatic issues of state cooperation - an inherently political issue - which may hinder its ability to conduct an investigation or prosecution’.¹⁸⁵

Undoubtedly, a Prosecutor who intended her/his role as a means to foster a particular political agenda would be ad odds with the ICC’s mission of delivering independent and impartial justice. However, this is only one possible definition of ‘politics’. Allen Weiner has endorsed a different definition of the term ‘political’, which could also mean ‘showing sensitivity to promoting the institutional well-being of the court in light of the prevailing geopolitical context’. According to him, international prosecutors should develop political

in Antonio Cassese, Paola Gaeta and John RWD Jones (eds), *The Rome Statute of the International Criminal Court: a Commentary*, vol II (Oxford University Press 2002) 1144.

¹⁸² Victor Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation* (Cambridge University Press 2009) 238.

¹⁸³ *ibid* 9.

¹⁸⁴ *ibid*.

¹⁸⁵ Cale Davis, ‘Political Considerations in Prosecutorial Discretion at the International Criminal Court’ (2015) 15 *International Criminal Law Review* 170, 172.

strategies that ‘include an evaluation of what will enhance the international status, legitimacy, and effectiveness of their tribunal in the international system’.¹⁸⁶

Paragraph 5.1 has shown that the OTP has been very clear in stressing that political considerations and cooperation issues play no role in its strategy for the selection of situations and cases. At the same time, however, the 2016 Policy Paper on Case Selection introduces the concept of ‘prioritisation’, pursuant to which the OTP will give precedence to ‘those cases in which it appears that it can conduct an effective and successful investigation leading to a prosecution with a reasonable prospect of conviction’.¹⁸⁷

Interestingly, among the criteria for prioritizing a certain case are: (i) the security situation on the ground ‘or where the persons cooperating with the Office reside’,¹⁸⁸ (ii) the ‘international cooperation and judicial assistance to support the Office’s activities’¹⁸⁹ and (iii) ‘the impact and the ability of the Office to pursue cases involving opposing parties to a conflict in parallel, weighed against the impact and the ability of the Office to do so on a sequential basis’.¹⁹⁰

These criteria, and the latter in particular, are clearly the result of fourteen years of prosecutorial experience in the above-mentioned ‘trials of cooperation’ with states authorities conceptualized by Peskin. In other words, the Prosecutor seems to be developing a framework for prosecutorial discretion that accommodates both legal and policy considerations.

5.3 The Prosecutor’s investigations so far

As has been seen, the willingness of States to engage with the OTP is essential for the success of the investigation. In the early years of the ICC’s functioning, some scholars predicted that matters of cooperation would influence the Prosecutor’s discretion whether to open an investigation. As Cale Davis put it:

[i]t seems unlikely that the Prosecutor would open an investigation into a situation where they knew, due to a lack of state cooperation, that no meaningful investigation could be

¹⁸⁶ Allen Weiner, ‘Prudent Politics: The International Criminal Court, International Relations, and Prosecutorial Independence’ (2013) 12 Washington University Global Studies Law Review 545, 549.

¹⁸⁷ OTP, ‘Policy Paper on Case Selection and Prioritisation’ (2016), 46.

¹⁸⁸ *ibid.*, 47 lett. d)

¹⁸⁹ *ibid.*, 47 lett. e)

¹⁹⁰ *ibid.*, 47 lett. h)

performed. Opening an investigation in such circumstances would only re-enforce the argument the Court is incapable of fulfilling its mandate.¹⁹¹

Indeed, the early years of the Court's functioning seemed to confirm this prediction. Fourteen years into the Court's existence, however, it is interesting to look at how the paradox of independence/ dependence has played out in the investigations that the Prosecutor has commenced.

5.3.1 Self-referrals

At the beginning, the Prosecutor was cautious in using his *proprio motu* power. Instead, he entered into negotiations with some governments over potential self-referrals. The Prosecutor publicly declared his 'interest' for the events occurring in some countries, encouraging their government to refer the situation to the Court, and threatening to resort to his *proprio motu* powers in case they failed to do so.¹⁹²

The Prosecutor explicitly admitted that this strategy was aimed at facilitating cooperation.¹⁹³ Between 2003 and 2004, three States followed the Prosecutor's suggestion, namely, the Democratic Republic of Congo (DRC), Uganda, and the Central African Republic (CAR).¹⁹⁴ By self-referring the situation on their territory, these countries welcomed the ICC's intervention and promised their full cooperation with the OTP.

Indeed, cooperation from these countries has been forthcoming. On 20 July 2004, Uganda signed the 'Agreement on Cooperation and Assistance' and an agreement on protective measures towards witnesses with the OTP,¹⁹⁵ which enabled the OTP staff to conduct over 50 missions to the field.¹⁹⁶ The government of the DRC has been the most cooperative. The Prosecutor reported that members of its staff have been deployed in the Ituri region of the country since shortly after the start of the investigation, and have conducted more than 70 missions inside and outside of the DRC. A Judicial Cooperation Agreement between the Office and the DRC was signed on 6 October 2004 to facilitate the missions, and

¹⁹¹ Davis (n 183) 173.

¹⁹² Report of the Prosecutor of the ICC to the Second Assembly of States Parties, 8 September 2003, available at http://www.icc-cpi.int/library/organs/otp/LMO_20030908_En.pdf.

¹⁹³ See generally, Informal Expert Paper: The Principle of Complementarity in Practice (2003).

¹⁹⁴ Uganda in December 2003, DRC in March 2004, and CAR in December 2004.

¹⁹⁵ Situation in Uganda, Prosecutor's Submission of Authorities Relied Upon at Hearing Held on 16 June 2005, ICC-02/04, 17 June 2005, 3-5.

¹⁹⁶ Cooperation with Uganda was troubled.

joint field offices with the Registry were established in Kinshasa and Bunia.¹⁹⁷ Similarly, the CAR entered into a cooperation agreement with the OTP on 18 December 2007.¹⁹⁸ More recently, other two African states (Mali and Ivory Coast), referred their situation to the Court and promptly entered into a cooperation agreement with the OTP.¹⁹⁹

In each of the above situations, the Prosecution has focused the investigation exclusively on non-state actors (i.e. rebels) and the referring government's adversaries. Not once has the OTP targeted a leader or government official from any of these States. As Mark Karsten put it on his blog: 'whom prosecutors target is largely determined by the cooperation of states. Put simply, states cooperate in order to implicate their adversaries while those actors that the court depends on for such cooperation tend to be shield from prosecution'.²⁰⁰

At an event held by the Coalition for the International Criminal Court (CICC), newly appointed ICC Deputy Prosecutor James Stewart, commented on the OTP's choice of charging only the opponents of the government in power in Ivory Coast, assuring that the Prosecutor's intention has always been to target all sides of the conflict. However, he added, 'sometimes you just can't do everything at once. You have to make a choice between action and paralysis and between pragmatism and ideals'.²⁰¹

5.3.2 Security Council referrals

The opposite can be seen in the context of referrals of situations from the Security Council. So far, the Council has twice referred situations to the ICC: in March 2005, the Darfur region of Sudan, and in February 2011, the situation in Libya.

In the Darfur conflict of 2003, Janjaweed militias backed by the Sudanese government began a murderous campaign against the African tribes in the Darfur region, which has left thousands of people dead, and at least one million people displaced from their homes. The international community remained largely inactive to the horrors in Darfur until March 2005,

¹⁹⁷ Report on the Activities Performed during the First three Years, 14.

¹⁹⁸ The cooperation agreement was amended on 31 October 2014 so as to guarantee continued cooperation with respect to a new investigation opened in the Country on 24 September 2014. See https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/pages/pr1058.aspx

¹⁹⁹ Mali signed the cooperation agreement on 13 February 2013, <https://www.icc-cpi.int/iccdocs/otp/wb/OTP-Briefing-29-January-28-February-2013-136.pdf>; Ivory Coast signed

²⁰⁰ Mark Karsten, Why is the ICC Stepping Out of Africa and into Georgia, at <http://justiceinconflict.org/2016/02/06/why-is-the-international-criminal-court-stepping-out-of-africa-and-into-georgia/#more-6459>.

²⁰¹ Mark Kartsten, In the ICC's Interest: Between Pragmatism and Ideals, at <https://justiceinconflict.org/2013/07/16/in-the-iccs-interest-between-pragmatism-and-idealism/>

when the Security Council referred the situation to the Court.²⁰² The ICC investigation revealed that many high-ranking Sudanese officials were involved in the crimes committed in Darfur. In 2007, the Pre Trial Chamber issued arrest warrants against several leaders of the Sudanese government, among which, President Omar Al-Bashir, the first sitting head of States to face charges before the ICC.²⁰³

In February 2011, in the wake of the violence waged by the regime of Muammar Gaddafi against protesters, the UN Security Council referred the situation in Libya to the ICC. The OTP responded with unprecedented speed. Just days after the Security Council Resolution was passed, the OTP opened an official investigation and made clear that it was targeting senior figure of Gaddafi's regime. Within three months, the Court had issued arrest warrants against Gaddafi,²⁰⁴ his son Saif and his intelligence and security chief, Abdullah al-Senussi.²⁰⁵

Acting on behalf of the Security Council, the OTP has focused almost exclusively on government actors and the Security Council's enemies.²⁰⁶ Not surprisingly, cooperation from these countries, which are not party to the Rome Statute, has been nothing short of disastrous. Sudan has refused to recognize the jurisdiction of the Court, and has committed never to surrender any citizens to The Hague. It has called the Court a neo-colonial plot aimed at overthrowing the regime. Not only the arrest warrants against government members and pro-government militia leaders have not been executed, but Sudan has mounted a campaign to discredit the Court, discouraging international support for the ICC and pressing African States Parties to the Rome Statute to withdraw from it.²⁰⁷

Libyan authorities have rejected the ICC's demands to hand over Saif Gaddafi and Abdullah al-Senussi,²⁰⁸ claiming they were willing and able of trying them in Libya. Curiously, the non-cooperation of Libyan and Sudanese authorities is due to opposite reasons. In one case (Sudan), the ICC investigation targets the regime in power, which not surprisingly

²⁰² United Nations Security Council Resolution 1593 (2005).

²⁰³ The Darfur investigation, however, has targeted both sides of the conflict. In 2010, the Pre-Trial Chamber unsealed summons to appear for three rebel commanders, allegedly responsible for attacks on African Union peacekeepers: Abu Garda, Banda and Jerbo.

²⁰⁴ The ICC case against Gaddafi was terminated following his death on October 20, 2011. Pre-Trial Chamber I, "Decision to Terminate the Case Against Muammar Mohammed Abu Minyar Gaddafi", 22 November 2011, ICC-01/11-01/11-28

²⁰⁵ Prosecutor v. Saif Al-Islam Gaddafi, PTCI Warrant of Arrest for Saif Al-Islam Gaddafi, ICC-01/11-1, 27 June 2011; Prosecutor v. Abdullah Al-Senussi Warrant of Arrest for Abdullah Al-Senussi, ICC-01/11-15, 27 June 2011.

²⁰⁶ See exception in Darfur.

²⁰⁷ In July 2009, the African Union announced that it would not cooperate with the ICC in arresting al-Bashir.

²⁰⁸ Proceedings against Abdullah Al-Senussi came to an end on 24 July 2014 when the Appeals Chamber confirmed Pre-Trial Chamber I's decision declaring the case inadmissible before the ICC.

refuses to be judged by an international court; in the other case (Libya), the newly established government is eager to prosecute and try the exponents of the former regime without interferences from the international community. Be that as it may, the first years of the ICC operations, have been marked by the perception that the Court is an institution that only delivers selective justice and that would ‘always side with governments and the Security Council in their political missions to discredit, delegitimize and dismiss their opponents.’²⁰⁹

5.3.3 *Proprio motu* investigations

It is probably (also) for tackling this perception that, in 2010, the Prosecutor decided to use his *proprio motu* powers for the first time, in relation to the violence that sprung after the disputed Presidential elections of 27 December 2007 in Kenya.²¹⁰ In the investigation that followed, the Prosecutor targeted both sides of the conflict, and, on 23 January 2012, obtained the confirmation of the charges for two members of the opposition party at the time of the elections (Ruto and Sang), as well as for two members of the then incumbent party (Muthaura and Kenyatta).²¹¹ The four accused were allowed to remain at liberty pending trial.

The ICC’s intervention in Kenya has helped to shape political alliances ahead of the Presidential elections of March 2013. Kenyatta and Ruto were in opposing camps in the 2007 elections, but, following the confirmation of charges against them, they joined hands to form an alliance for the subsequent elections, in a clever anti-ICC political move.²¹² Kenyatta won the elections and became President of the country, with Ruto as his deputy. Kenyatta became the first sitting head of State to appear voluntarily before the Court pursuant to a summons. However, the experience of Sudan has shown that prosecuting a sitting head of State and his entourage is fraught with all kinds of obstacles. The Kenya cases were all terminated prior to sentence due to witness intimidation, political interference and lack of cooperation from the Government.

On 11 March 2013, the Prosecutor announced the dropping of all charges against Muthaura, due to the loss of a key witness who had recanted testimony and claimed to have received bribes from defendants in the case and a lack of cooperation from the Kenyan

²⁰⁹ Mark Karsten on The Justice Hub: <https://justicehub.org/article/lesson-icc-shouldnt-learn-wake-kenyatta>

²¹⁰ On 31 March 2010, Pre-Trial Chamber II issued a decision authorizing the Prosecutor to open an investigation pursuant to Article 15(3) of the Statute.

²¹¹ Prosecutor v. Ruto and Sang, PTC Warrant of Arrest; Prosecutor v. Muthaura and Kenyatta, PTC Warrant of Arrest.

²¹² Are Uhuru Kenyatta and William Ruto really sworn enemies? at <http://www.ijmonitor.org/2012/12/are-uhuru-kenyatta-and-william-ruto-really-sworn-enemies/>; Kenyan election alliance between bitter enemies united by ICC charges, <http://www.theguardian.com/world/2012/dec/04/kenya-election-alliance-rival>

government in gathering testimony.²¹³ On 5 December 2014, the Prosecutor announced it was withdrawing all charges against Kenyatta. In the withdrawal notice, the Prosecutor cited a lack of cooperation from the Kenyan government in handing over documental evidence vital to the case as part of the reason for dropping the charges.²¹⁴ On 5 April 2016, Trial Chamber terminated the case against Ruto and Sang in deciding on a ‘no case to answer’ application of the Defence.²¹⁵ This decision came after the Appeals Chamber forbid the use of prior recorded testimony by the Prosecutor, that is, it denied permission to use the initial declarations of a number of witnesses who later recanted their testimony under pressure.²¹⁶ The collapse of the Kenyan cases marked a huge setback for the Court and proved the impossibility of prosecuting State officials while depending on their cooperation, in the absence of a strong international support.

On 27 January 2016, the Pre-Trial Chamber authorized the Prosecutor to investigate war crimes and crimes against humanity allegedly committed in South Ossetia in 2008 during the armed conflict between Georgia and Russia.

5.4 Final remarks

The present section has shown how the OTP has tried to reconcile the duality between its duty to act independently and the political realities within which its investigations and prosecutions take place. The vital need of cooperation from States has influenced the way in which the OTP has conceptualised and exercised its prosecutorial discretion.

In particular, the section has shown that the main influence on the Prosecutor’s decision to commence an investigation into a situation and to target specific individuals is exercised by the actors who trigger the jurisdiction of the Court, especially when they are self-referring States or the Security Council.

6 Addressing non-compliance: a political process

Like its *ad hoc* predecessors, the ICC is unable to issue sanctions on persons or States in case of non-cooperation, but must, instead, rely on political bodies to enforce the administration of justice. In the Blaškić case at the ICTY, where the Croatian government refused to comply

²¹³ Prosecutor announcement of the dropping of all charges against Muthaura, 11 March 2013.

²¹⁴ *ibid.*

²¹⁵ Termination of the case against Ruto and Sang, 5 April 2016.

²¹⁶ Appeals Chamber decision.

with the Tribunal's order to turn over documents, the Appeals Chamber denied the existence of an inherent power of the Tribunal to issue a *subpoena* to States and state officials.²¹⁷ However, it acknowledged an 'inherent power to make a judicial finding concerning a State's failure to observe the provisions of the Statute or the Rules' and 'the power to report this judicial finding to the Security Council'.²¹⁸

Similarly, pursuant to Article 87(7) of the ICC Statute, where a State Party fails to comply with a request to cooperate by the Court, the latter may make a finding to that effect and refer the matter to the ASP or, where the Security Council referred the matter to the Court, to the Security Council. The two addressees of the Court's information or finding of non-compliance, the ASP and the Security Council, disclose the link of the judiciary to the political body, which holds the primary responsibility for enabling the Court to work effectively.

Pursuant to Article 87(5)(b), the same regime applies to States not parties which have entered into an *ad hoc* arrangement or agreement with the Court, and to States not parties that have lodged a declaration in accordance with Article 12(3) of the Statute, which provides that 'the accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9'. No similar powers are available in relation to the non-cooperation of international organizations.²¹⁹

The Court has given a very restrictive interpretation of the scope of Article 87(5) and (7) of the Statute. According to it, referral to the ASP or the Security Council is not an automatic consequence of a Chamber's finding of a failure to comply with a request for cooperation. Rather, that Chamber has the discretion to determine whether it is necessary to refer the State concerned to the ASP (or to the Council).²²⁰

6.1 The Assembly of States Parties

The ASP is not empowered in the Statute with specific sanctioning powers, and must only 'consider (...) any question relating to non-cooperation' pursuant to Article 112(2)(f). The Statute is silent regarding the scope of the ASP's consideration and potential consequences.

²¹⁷ ICTY, Prosecutor v. Blaškić, AC Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, 25, 38.

²¹⁸ *ibid.*, 33.

²¹⁹ Article 87(6) of the Statute.

²²⁰ Prosecutor v. Kenyatta, AC Judgment on the Prosecutor's appeal against Trial Chamber V(B)'s "Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute", ICC-01/09-02/11-1032, 19 August 2015.

As Sluiter has noted, ‘this calls into question the effectiveness of the Assembly’s responses to violations of the duty to cooperate’.²²¹

At its tenth session, the ASP adopted the ‘Assembly procedures relating to non-cooperation’, which provide for informal and formal diplomatic and political measures to respond to situations of non-cooperation referred to the Assembly in accordance with Article 87(5) and (7) of the Statute.²²² The procedures includes the holding of an emergency meeting of the Bureau of the Assembly; an open letter from the President of the Assembly to the State concerned requesting a written response; consultations with the State concerned at the ambassadorial level; a public meeting at the Assembly; the issuing of recommendations as a result of the dialogue with the State concerned; and the adoption of a resolution by the Assembly with the concrete recommendations.²²³ They also provide that, exceptionally, the ASP may act informally without a referral from the ICC when ‘there are reasons to believe that a specific and serious incident of non cooperation in respect of a request for arrest and surrender of a person is about to occur or is currently on-going and urgent action by the Assembly may help bring about cooperation’.²²⁴

In the two years after the procedures were established, the Court referred to the ASP and the Security Council the non-compliance of Malawi and Chad, which, on separate occasions, had failed to cooperate with the arrest and surrender of Sudan’s president Al-Bashir during his visits to their territories.²²⁵ A fourth referral on non-cooperation was made following Bashir’s visit to the DRC in February 2014.²²⁶ The ASP acted on these referrals mainly by exercising diplomatic pressure on the States concerned, obtaining different outcomes. While Malawi denied to Sudan’s President access to its territory, Chad reacted negatively to diplomatic pressure granting immunity to Al-Bashir.²²⁷

²²¹ Göran Sluiter, ‘The Surrender of War Criminals to the International Criminal Court’ (2003) 25 *Loyola of Los Angeles International and Comparative Law Review* 605, 616.

²²² Annex to Resolution ASP-ICC/10/Res 5, 21 December 2011

²²³ *ibid.*, 14; Ruiz Verduzco (n 115) 49.

²²⁴ *Ibid* (n 217), para 7b.

²²⁵ Decision Pursuant to Art 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, *Al Bashir, Situation in Darfur, Sudan*, ICC-02/05-01/09-139, PTC I, ICC, 12 December 2011; Decision pursuant to Art 87(7) of the Rome Statute on the Refusal of the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, *Al Bashir, Situation in Darfur, Sudan*, ICC- 02/05-01/09-140, PTC I, ICC, 13 December 2011; Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir, *Al Bashir, Situation in Darfur, Sudan*, ICC-02/05-01/09, PTC II, ICC, 26 March 2013.

²²⁶ PTC II, Decision on the Cooperation of the Democratic Republic of the Congo regarding Omar Al-Bashir’s Arrest and Surrender to the Court, Al-Bashir, ICC-02/05-01/09-195, 9 April 2014.

²²⁷ Jonathan O’Donohue, ‘The ICC and the ASP’ in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP Oxford 2015) 131–133.

6.2 The Security Council

To ensure compliance, the Security Council has full discretion to make recommendations or decide upon appropriate measures available under Chapter VII. Although the Security Council has an array of coercive and non-coercive measures at its disposal, it has a poor record of enforcing international court orders and arrest warrants.²²⁸ The experience of the *ad hoc* Tribunals shows the absence of any political will on the part of the Council to enforce compliance with the Tribunals' requests by means of Chapter VII.²²⁹ Although, following judicial findings by the ICTY, the Security Council adopted a number of decisions reiterating the duty to cooperate, the Council never imposed sanctions on the Serbian and Croatian authorities.²³⁰

In this respect, one commentator noted that 'reliance on this mechanism (...) has been unpredictable, unduly time-consuming and often ineffective'.²³¹ This is because 'submitting the matter before the Security Council transforms a legal finding of non-compliance by the Tribunal into a political question and the resolution of such questions, if any, is complex and time-consuming'.²³²

So far, the Council has maintained a similar disappointing inaction towards the ICC's denunciations of non-compliance. As has been seen, decisions by the Council to refer a situation to the Court are mostly made without the consent of the territorial state involved, which is often a State not-party to the Rome Statute.²³³ Not surprisingly, therefore, the cases arising out of the two Security Council's-referred situations of Sudan and Libya have been extremely contentious, and have proven that only a decisive action by the Council would ensure the effectiveness of investigations and prosecutions.²³⁴

The ICC's findings of non-compliance,²³⁵ however, have fallen on deaf ears. Despite the Council's experience in using financial, travel and diplomatic sanctions as part of its post

²²⁸ Brubacher (n 164) 91, 92.

²²⁹ Daphne Shraga, 'Politics and Justice: The Role of the Security Council' in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (Oxford University Press 2009) 173.

²³⁰ Reisinger-Coracini (n 35) 109 quoting the annual Report of the ICTY to the UN General Assembly and Security Council, which identifies 'a pattern of non-compliance' in the Former Republic of Yugoslavia and Croatia's 'persistent failure to comply' with requests, UN Doc A/54/187, 25 August 1999, 91-105; Shraga (n 230) 173; Mark B Harmon and Fergal Gaynor, 'Prosecuting Massive Crimes with Primitive Tools: Three Difficulties Encountered by Prosecutors in International Criminal Proceedings' [2004] *Journal of International Criminal Justice* 403-426.

²³¹ Harmon and Gaynor (n 230) 419.

²³² *ibid.*

²³³ Ruiz Verduzco (n 115) 45.

²³⁴ *ibid.*

²³⁵ PTC I, Decision on the non-compliance by Libya with requests for cooperation by the Court and referring the

9/11 counterterrorism strategy, it has never done so in the context of crimes under the Rome Statute. This is regrettable, as these measures have, next to their practical aim of limiting individuals' ability to escape ICC's proceedings, also an important symbolic value.²³⁶

In sum, the Security Council has taken no action to support the Court in accomplishing the judicial mandate that it had triggered. As has been noted, '[t]his inaction is driven by the Council's political imperatives and divides with regard to the ICC's investigations. This 'on again, off again' support makes the ICC seem like an instrument for achieving political ends through judicial means.'²³⁷

6.3 The support of the international community

There is a crucial difference in the practice of enforcement of cooperation at the *ad hoc* Tribunals and at the ICC, i.e., the role played by the international community outside the framework of the Security Council.

The *ad hoc* Tribunals faced serious hurdles in obtaining cooperation from territorial States. For example, Serbia and Republika Srpska have a long history of refusing to execute arrest warrants by the ICTY.²³⁸ Despite the inaction of the Security Council, however, compliance with the Tribunal's request for cooperation was prompted by powerful international actors, such as the United States, the European Union and NATO, who exercised a great deal of political pressure by diplomatic and economic means, outside the framework of the Security Council. For example, the United States and the European Union conditioned their financial aid to Belgrade and the prospect of EU membership to the surrender of Slobodan Milošević to the ICTY.²³⁹ More broadly, it is widely agreed that, at the ICTY, successful compliance was secured 'because of a common, unified position adopted by the international community with regard to the values represented by the Tribunal'.²⁴⁰

matter to the United Nations Security Council, ICC-01/11-01/11-577, 10 December 2014; PTC II, Decision on the Prosecutor's Request for a Finding of Non-Compliance Against the Republic of the Sudan, ICC-02/05-01/09-227, 9 March 2015.

²³⁶ David Kaye and others, 'The Council and the Court | Developing a Strategy to Build UN Security Council Support for the International Criminal Court' (University of California, Irvine - School of Law 2013) 20–21 <<http://councilandcourt.org/>>.

²³⁷ Richard Dicker, 'As ICC Caseload Expands, UN Security Council's Support Lags Far Behind' (*International Criminal Justice Today*, 10 December 2015) <<https://www.international-criminal-justice-today.org/arguendo/as-icc-caseload-expands-un-security-councils-support-lags-far-behind/>> accessed 23 May 2016.

²³⁸ The challenges faced by the ICTY in obtaining the arrest and transfer of Slobodan Milošević, Radovan Karadzic and Radko Mladic are well known.

²³⁹ Shraga (n 230) 173–174.

²⁴⁰ Charania and others (n 117) 2, noting that compliance was secured 'through issue-linkage strategies employed by the EU through its Stabilisation and Association Process and by NATO's Partnership for Peace

By contrast, in the case of many of the situations before the ICC, the interests of the international community and the state concerned are typically far more disparate.²⁴¹ Due to the ICC's open-ended jurisdiction, the constant support of the international community is much more difficult to obtain. Whenever the Court seeks to prosecute individuals without the consent of the State on whose territory the crimes have been committed (and/or against whose nationals arrest warrants have been issued), it is very unlikely that the government will cooperate with the Court (as the situations of Sudan, Libya, and Kenya clearly demonstrate). Lacking the means to enforce the arrest warrants at its own initiative, and lacking any credible threat mechanism, the OTP will necessarily turn to other powerful actors: other States and international organizations, or, put differently, 'the international community'.²⁴²

The early practice of the ICC, however, has demonstrated that, if the interests of the Prosecutor in having certain alleged perpetrators arrested are not in line with those of the international community, cooperation from the latter will hardly be forthcoming. Peskin has explained this situation very clearly with respect to the situation in Sudan, comparing the political context surrounding the indictment of Prime Minister al-Bashir with the one surrounding the indictment of Milošević at the ICTY:

the Milošević indictment had a greater prospect of international support, since it came during the NATO assault to reverse Serbia's military gains in Kosovo and the mass expulsions of Kosovar Albanian refugees that followed the beginning of the NATO air war. In contrast, Moreno-Ocampo's bid to prosecute Bashir has not occurred in the context of military intervention or substantial international pressure against Sudan's president to reverse the situation in Darfur.²⁴³

Peskin outlines that the international community – despite publicly portraying the Bashir government as a criminal and violent regime – 'has engaged [it] in a long-running effort to find a negotiated solution to the Darfur crisis'. Similarly, the EU has been reluctant to press the Khartoum government to hand over suspects, due to its 'interest in persuading the

programme, as well as by means of World Bank and other bilateral donor efforts that linked cooperation with the ICTY to other areas of economic, political and military activity, which changed the strategic national interest calculations for the states concerned'.

²⁴¹ *ibid.*

²⁴² Ryngaert (n 120) 17–18.

²⁴³ Peskin (n 2) 675.

government to allow an expanded peacekeeping force into Darfur and bring a resolution to the conflict'.²⁴⁴

This makes it extremely difficult for the Prosecutor to obtain a constant and effective pressure on the Sudanese government and, thus, seriously undermines its efforts to bring Sudanese crimes suspects to trial. Generally speaking, it is a fact that the political priorities of the international community are often shifting. Its willingness to enforce the Court's cooperation requests, therefore, will be informed by political calculations and its pressure will ultimately be selective.²⁴⁵

7. Conclusion

This Chapter addressed some of the distinctive structural and normative constraints that characterize cooperation at the ICC, setting out the context for a proper understanding of the challenges that cooperation poses to the rights of defendants. As the *ad hoc* Tribunals, the ICC relies on an indirect enforcement system and is dependent on the cooperation of States (both party to the Statute and not-party) and international organizations (first and foremost, the UN and its peacekeeping missions in the field) for conducting investigations and arresting suspects. Therefore, just like its predecessors, the ICC is bound to be faced – and in fact, on several occasions, has been faced - with instances of non-cooperation.

Unlike the *ad hoc* Tribunals, however, the Court is an independent international organization that does not have the backing of the UN Security Council. Its jurisdiction is not related to one geographically limited area/conflict, but can potentially cover crimes committed in every part of the world. Moreover and most often, the ICC intervenes in the midst of a conflict, where many other political actors are involved and conflicting interests are at stake.

Having been established by a treaty, its regime is based on and legitimised by the 'consent' of sovereign States who have accepted its jurisdiction and its cooperation norms by adhering to the Rome Statute. States not-party are not obliged to cooperate with the Court, unless they explicitly consent to do so or the Security Council triggers the Court's jurisdiction on their territory. Similarly, international organizations remain outside of the reach of the Court's cooperation regime. Their cooperation is entirely voluntary in nature and its terms are left to the agreements between the Court and the respective organization.

²⁴⁴ *ibid* 663.

²⁴⁵ Ryngaert (n 120) 17, 21.

From a normative perspective, the ICC cooperation regime is ‘weaker’ than that of the *ad hoc* Tribunals. The Prosecutor has more limited powers to access the territory of States and the Court has no power to compel witnesses to testify before it. Moreover, the cooperation regime of the Court leaves out very important matters, such as the obligation of States to allow interim released persons on their territory.

However, the Chapter has endeavoured to demonstrate that the real weakness of the ICC cooperation system lies elsewhere.²⁴⁶ Regardless of the norms enshrined in the Statute, the effectiveness of the ICC is largely dependent on whether the broader interests of the requested State coincide with those of the Court, and, should that fail, on the support of the international community.

Accordingly, the Chapter has explored the paradox of an independent Prosecutor who often finds himself/herself in the difficult position of prosecuting the States’ authorities on whose cooperation s/he depends, and the role of the power politics at play in influencing the discretion of the Prosecutor in the selection of cases. When the government in power is supportive of the ICC’s intervention, the Prosecutor has opted for targeting persons that are hostile to the government, so as not to put cooperation at risk. In such situations, the effectuation of arrest is selective, and this inevitably casts a shadow over the universal, blind justice that the Court is supposed to administer.²⁴⁷

When the government in power opposes the ICC’s investigation, it will not cooperate. States’ hostility to the Court can be due to a number of reasons. Sudan and Kenya are not cooperating with the Court because warrants of arrests have been issued against the highest exponents of their government. Conversely, Libya is not executing the request of surrendering Saif-Gaddafi because the newly established regime is eager to prosecute the members of the former government without any interference from the outside.

The Chapter has thus analysed the role played by the ASP, the Security Council and the broader international community in case of non-compliance with requests of the Court. It concludes that, in a state-dominated enforcement system, ICC investigations and prosecutions remain tied to a political process that is, by nature, selective and mostly inefficient. As has been argued, such process ‘pays little or no heed to the imperatives of a pending investigation, trial or to international standards relating to the rights of an accused.’²⁴⁸

²⁴⁶ For a similar conclusion see Ciampi (n 63) 7–57.

²⁴⁷ Ryngaert (n 120) 9–10.

²⁴⁸ Harmon and Gaynor (n 230) 421.

CHAPTER III

COOPERATION WITH A COMPLEMENTARY COURT: A HUMAN RIGHTS PERSPECTIVE

1. Introduction

Chapter II has explored the relationship of the ICC with the world in which it operates from a systemic perspective. It has addressed the law on cooperation in the context of the ICC's unique institutional design and the political realities that inevitably condition its functioning. It is now time to explore the relationship between cooperation and the jurisdictional regime of the Court, in that its significance is often underappreciated.

Traditionally, manuals of international criminal procedure address the cooperation regime in connection with the law of the investigation, as international criminal tribunals do not have enforcement means of their own, but depend on the assistance of states for gathering evidence and arresting suspects. Rarely, the analysis of cooperation is associated to that of the jurisdiction of the international tribunal in question. This is regrettable, as together these two regimes profoundly impact on individual rights (as well as on State sovereignty), and they are critical to the fairness and the expeditiousness of international trials. Recently, the 'ontological need' for cooperation of international courts and the jurisdictional regime were defined as 'the two fundamental pillars of international criminal justice that bolster the entire edifice of international criminal procedure.'¹

Part 2 of the Statute – on 'Jurisdiction, Admissibility and Applicable law' – and Part 9 on cooperation are closely inter-related. The rules on cooperation are shaped by and mirror the fundamental choices of the Statute in terms of jurisdiction. Early on, scholars recognized that jurisdiction and cooperation are linked at the level of 'fundamental legal principles', in that their analysis 'offers guidance to what degree the Statute is directly individual-related instead of constituting a purely inter-state instrument'.² In other words, it is in light of the rules on cooperation and jurisdiction that a determination can be made as to whether, in the

¹ Salvatore Zappalà, 'Summary and Conclusion' in Göran Sluiter and others (eds), *International Criminal Procedure: Principles and Rules* (OUP 2013) 129.

² Hans-Peter Kaul and Claus Kress, 'Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises' (1999) 2 *Yearbook of International Humanitarian Law* 143, 144.

development of international criminal law, ‘a state-sovereignty oriented approach has been gradually supplanted by a human-being oriented approach’.³

The present Chapter investigates the relationship between these two regimes, and explains how the cooperation of states occurring within the complementary system of the Court affects the rights of defendants. The ICC is complementary to domestic courts, in the sense that, as a rule, genuine national investigations and prosecutions have priority. Therefore, unlike the ICTY and ICTR,⁴ the Court is precluded from requesting a state to defer on-going criminal investigations, but can step in only if states remain inactive, or if they show unwillingness or inability to genuinely deal with international crimes on their territory.⁵

It seems pertinent to start with a brief enquiry on the nature of complementarity, highlighting the distinction between complementarity intended as the overarching principle governing the relationship between the Court and states, and complementarity as an admissibility rule codified in Articles 17 et seq. of the Statute. Moreover, it is important to distinguish between the concepts of admissibility and jurisdiction, as defendants are entitled to challenge them both under Article 19(2)(a) and, by so doing, they are offered an avenue to denounce violations of their rights occurred in cooperation proceedings. This discussion will also include a reflection on the overall position of defendants’ rights in the complementarity structure of the Court, so as to frame them in the context of a triangular relationship between States, individuals and the Court.

Second, the Chapter describes the ways in which complementarity shapes the nature and procedure of the investigation. Due to complementarity, ICC investigations are not only concerned with building a case against an individual, but also with an assessment of the ‘job’ that national authorities are doing. This implies a peculiar proximity between the Prosecutor and national authorities (circumstance that is absent in any other international tribunal), which has inevitable repercussions on the position of defendants.

Third, the Chapter examines the influence that complementarity has on the obligation of States to cooperate with the Court. The priority of national criminal prosecutions demands a particular regulation of issues such as simultaneous proceedings in the requested State, competing requests of assistance from other States, and, most importantly, cooperation duties pending admissibility challenges. Although, as rule, a decision of the Court on admissibility is decisive of the matter of whether States have to comply with requests for cooperation, the

³ *ibid.*

⁴ Rule 11*bis* ICTY and ICTR RPE.

⁵ Article 17 of the Statute.

Libya situation demonstrates that, when a State opposes the intervention of the Court, it is very unlikely to cooperate with it, both before and after the Court's determination on admissibility. As the Gaddafi and Al-Senussi cases demonstrate, this might entail serious consequences for ICC suspects who are detained by national authorities in violation of their obligation to cooperate and surrender persons to the Court.

Finally, the Chapter critically evaluates the interpretation of complementarity adopted by the organs of the Court in their practice. It concludes that the 'positive approach' to complementarity endorsed by the OTP in order to enhance States cooperation has resulted in investigations that have targeted persons disfavoured by their government, and whose rights had been violated in the context of national proceedings. The judges, for their part, have refused to engage with the structural tensions and limitations of the Court with a view of protecting the rights of suspects and accused. Rather, they have given narrow/legalistic answers to broader policy questions.

2. The nature of complementarity

2.1 Preliminary remarks: complementarity v. primacy

As was the case with the *ad hoc* Tribunals, the ICC's jurisdiction is concurrent to that of domestic courts,⁶ meaning that the ICC and States have jurisdiction over the same crimes. However, unlike the ICTY and ICTR, which enjoyed primacy over national courts, the ICC's jurisdiction is complementary to them.⁷

Primacy and complementarity are different allocation mechanisms adopted by the founding instruments of international courts for determining which jurisdiction shall prevail in a given case. Pursuant to the former, the Tribunals can request States to defer a criminal investigation to their competence under Rule 9 of their Rules of Procedure and Evidence. Conversely, under complementarity, the Court may take up a certain case only if States fail in

⁶ An international jurisdiction may be exclusive or concurrent. When it is exclusive, states will not have jurisdiction over crimes that fall under the international court's jurisdiction. Thus, there is no collision of jurisdictions. When the international jurisdiction is concurrent with national jurisdictions, however, the international court and states have jurisdiction over the same crimes. An allocation mechanism is needed for determining which jurisdiction shall prevail in a given case. See: Jo Stigen, *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (Brill/Nijhoff 2008) 7.

⁷ The question of allocation of trials between national and international courts has been answered on an ad hoc basis in relation to each of the instances in which States have decided to establish international or internationalized criminal courts. See: Jann K Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (International Courts and Tribunals Series 2008) 57.

carrying out their duty to prosecute international crimes committed on their territory.⁸ Complementarity, thus, entails a conditional primacy of national courts, in the sense that States have to meet certain criteria in order to pre-empt the Court's intervention.⁹ Such criteria are set forth by Article 17 of the Statute, which prescribes that the Court may step in only if States remain inactive, or their proceedings show 'unwillingness' or 'inability' to genuinely prosecute international crimes. Article 17 will be discussed in more details below, at paragraph 2.3.

2.2 Complementarity in the intentions of the drafters and the 'complementarity paradox'

Despite being often referred to as the 'cornerstone' of the Rome Statute, the principle of complementarity does not find a definition therein, besides a reference in the tenth paragraph of the Preamble and in Article 1 of the Statute, according to which the ICC 'shall be complementary to national criminal jurisdictions'. The difficulty of pinning down the concept of complementarity can be explained by the fact that such principle has no precedent in the jurisdictions of international criminal tribunals, but it was defined and shaped for the first time during the negotiations of the Statute of the ICC.

The term 'complementarity' was introduced in the ILC discussions, where it was acknowledged that this notion was not a 'established legal principle'.¹⁰ Frequently, however, States discussed complementarity referring to the entire set of norms governing the complementary relationship between the ICC and national jurisdictions.¹¹ In particular, the drafters intended complementarity mainly as an instrument to regulate potential conflicts between the primary jurisdiction of national courts and the residual jurisdiction of the ICC, and they viewed it primarily as a means to overcome sovereignty fears against the intervention of the Court.¹² By granting priority to genuine domestic proceedings, complementarity was meant to strike a balance between the necessity of effective prosecution of international crimes and the safeguard the sovereign right of States to prosecute their own nationals without external interference.¹³

⁸ Article 17 of the Statute.

⁹ Stigen (n 6) 5.

¹⁰ *ibid* 24.

¹¹ *ibid.*, 187-188; Markus Benzing, 'The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity' in Armin von Bogdandy and Rüdiger Wolfrum (eds), *Max Planck Yearbook of United Nations Law*, vol 7 (Koninklijke Brill NV 2003) 592.

¹² Carsten Stahn, 'Complementarity: A Tale of Two Notions' (2007) 19 *Criminal Law Forum* 87, 88.

¹³ Stigen (n 6) 12-13.

According to many scholars, this understanding implies an antagonistic relationship between states and the Court, with the latter threatening to intervene if the former fail to carry out their duty to prosecute.¹⁴ At the same time, however, one cannot forget that the Court depends on the support and cooperation of States – in particular, of those States on whose territory the crimes are committed – for all the crucial activities of the investigation. The ICC, in fact, does not have autonomous powers to contact suspects, witnesses and victims, and to gather material evidence. Nor does it have the coercive powers necessary in order to enforce such activities.¹⁵

In brief, by acceding to the Rome Statute, States Parties have agreed to delegate their sovereign right to prosecute international crimes to the ICC, should they not be willing and able to do so. At the same time, they have also agreed to undertake obligations of cooperation and assistance without which the Court would be utterly impotent.¹⁶ It has rightly been observed that, conceptually, this amounts to a paradox, by which the Court depends on the cooperation of States that do not have the will or the ability to prosecute international crimes themselves. Early on, Paolo Benvenuti summarized this tension in a rhetorical question:

[w]hy would these States [on whose territories crimes have been committed], genuinely unwilling to carry out investigation or the prosecution, be subsequently cooperative with the Court? Similarly the reasons that make a State unable to carry out investigation and prosecution may make the same State, in some cases, unable to cooperate with the court.¹⁷

As will be seen in paragraph 5, this tension had to be resolved in the practice of the organs of the Court, first and foremost, the Office of the Prosecutor (OTP).

¹⁴ William Schabas, ‘Complementarity in Practice: Creative Solutions or a Trap for the Court?’ in Mauro Politi and Federica Gioia (eds), *The International Criminal Court and National Jurisdictions* (Ashgate 2008) 25; Robert Cryer, ‘Darfur: Complementarity as the Drafters Intended?’ in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity: from theory to practice*, vol II (CUP 2011) 1097; Stahn (n 13) 89.

¹⁵ Flavia Lattanzi, ‘The Rome Statute and State Sovereignty. ICC Competence, Jurisdictional Links, Trigger Mechanism’ in William Schabas and Flavia Lattanzi (eds), *Essays on the Rome Statute of the International Criminal Court*, vol I (il Sirente, 1999) 57.

¹⁶ Michael Newton, ‘The Complementarity Conundrum: Are We Watching Evolution or Evisceration?’ (2010) 8 Santa Clara Journal of International Law 115, 126.

¹⁷ Paolo Benvenuti, ‘Complementarity of the International Criminal Court to National Criminal Jurisdictions’ in Flavia Lattanzi and William Schabas (eds), *Essays on the Rome Statute of the International Criminal Court*, vol I (1999) 50.

2.3 The legal framework: admissibility v. jurisdiction

Although it can be argued that complementarity was intended more as a synonym of ‘sovereignty’, rather than a defined normative concept with an inherent meaning,¹⁸ the Statute does provide for a codification of this principle in Article 17, a provision regulating the admissibility of cases before the Court. Complementarity, thus, is also a legal norm, which operates as an admissibility rule determining when the Court may intervene with the investigation or prosecution of a case within its jurisdiction. The first paragraph of Article 17, titled ‘Issues of admissibility’, reads as follows:

Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

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

Article 17(1) lett. a) and b) embody the complementarity principle *stricto sensu*. They make clear that the ICC is not supposed to replace national judicial systems, but its intervention should be viewed as a ‘last resort’, only stepping in when States remain inactive or, when their proceedings show an ‘unwillingness’ or ‘inability’ to genuinely investigate or prosecute. Interestingly, the wording of this article suggests that the complementarity regime protects the sovereignty of any State with jurisdiction over a case, including States that are not party to the Rome Statute.¹⁹ Article 17(1) lett. c) envisages the situation where a person has been tried by another domestic court and makes a *bis in idem* a cause for inadmissibility. Finally, Article 17(1)(c) enshrines the criterion of gravity. This is distinct from the other criteria, as it applies

¹⁸ Robert Cryer, ‘Darfur: Complementarity as the Drafters Intended?’ in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity: from theory to practice*, vol II (CUP 2011) 1100–1101.

¹⁹ See also Article 19(2)(b)-(c) of the Statute.

to all cases that are brought before the Court, not just those with respect to which national authorities have already taken action.²⁰

While Article 17 addresses the substantive conditions for admissibility, Article 19 deals with the procedural aspects related to both jurisdiction and admissibility of a case, instituting a forum to litigate and adjudicate disputes over them. Before addressing such procedural framework, it is important to highlight the distinction between admissibility and jurisdiction.

Complementarity/admissibility does not relate to the existence of jurisdiction, but regulates when the latter may be exercised by the Court. The admissibility criteria of Article 17 embody the conditions for the *exercise* of the Court's jurisdiction in specific cases. As such, they must be distinguished from the conditions of *existence* of the ICC's jurisdiction, which are a pre-requisite for the Court to act²¹ and consist in limitations *ratione materiae*, *ratione temporis* and *ratione personae*.²²

The drafting history reveals that States debated on whether challenges should apply to both admissibility and jurisdictional matters.²³ With regard to jurisdiction, it was widely accepted that it is Court's duty to satisfy itself that it has jurisdiction over a case 'throughout all stages of the proceedings'. As for admissibility challenges, the prevailing view was that admissibility 'was less the duty of the Court to establish than a bar to the Court's consideration of a case'.²⁴ As a result, Article 19(1) provides that the Court '*shall* satisfy itself that it has jurisdiction in any case brought before it [emphasis added]' and that it '*may*, on its own motion, determine the admissibility of a case in accordance with article 17 [emphasis added]'. This provision is compounded by Rule 58(4) RPE, according to which 'the Court shall rule on any challenge or question of jurisdiction first and then on any challenge or question of admissibility'. A determination of jurisdiction by the Court is thus always mandatory in any case brought before it, and preliminary to the assessment on admissibility. Conversely, with respect to the latter, the wording of Article 19(1) – 'may' instead of 'shall'–

²⁰ Benzing (n 11) 619; Bruce Broomhall, 'The International Criminal Court: A Checklist for National Implementation' [1999] *Nouvelles études pénales* 144.

²¹ Benzing (n 11) 594.

²² Pursuant to Article 24(1) of the Statute, the competence of the Court is limited to those crimes listed in Article 5 of the Statute, committed after the entry into force of the latter in 2002. Pursuant to Article 12(2) and (3), outside of the hypotheses of referral from the Security Council, the Court does not have jurisdiction unless either the State in which the crime was committed (territorial state) or the State of which the accused is a national (State of nationality) is a party to the Statute or has accepted the jurisdiction of the Court with an *ad hoc* declaration.

²³ John T Holmes, 'The Principle of Complementarity' in Roy SK Lee (ed), *The International Criminal Court: the making of the Rome Statute : issues, negotiations and results* (Martinus Nijhoff Publishers 1999) 61.

²⁴ *ibid.*

suggests that, in the absence of a challenge, the Court has the discretion to make a finding on admissibility.

Finally, it is important to stress that Article 19(1) endows the Court with the exclusive authority to determine disputes on jurisdiction and admissibility. According to the judges, the Court's obligation to satisfy itself that it has jurisdiction over the case and that the latter is admissible is an essential element in the exercise of its functions, and is derived from the well-recognised principle of the *kompetenz-kompetenz* of any judicial body.²⁵

2.4 The nature of the admissibility assessment

Complementarity implies a determination by the Court on whether and how national authorities are conducting proceedings in respect of international crimes, so as to determine which forum is the most appropriate for the prosecution of certain cases. Here, it is argued, lies one of the most interesting features of ICC investigations, namely, the fact that they are not only concerned with building a case against an individual, but they also comprise an evaluation of the 'job' that national authorities are doing in dealing with international crimes on their territory.

Although it is formally part of the criminal process, the complementarity assessment does not concern the guilt or innocence of a person, but the admissibility before a particular forum.²⁶ As a consequence, it involves aspect of inter-state litigation and systemic considerations relating to the objectives of the Court, including the appropriate balance between its role as a watchdog and its function as gentle incentivizer of domestic proceedings.²⁷

The OTP Informal Expert Paper on Complementarity in Practice gives some interesting insights as to the specific characteristics of this enquiry. For example, it distinguishes the active monitoring (conducting interviews, sending observers) and the passive monitoring (receiving reports, transcripts, media) of national proceedings by the Office, and highlights the importance of acquiring information from a multiplicity of sources,

²⁵ See, among others, Prosecutor v. Jean-Pierre Bemba, PTC II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, 15 June 2009, 23; Prosecutor v. Joseph Kony et al., PTC Decision on the admissibility of the case under article 19(1) of the Statute, ICC-02/04-01/05-377, 10 March 2009, 45.

²⁶ OTP, Informal Expert Paper: The Principle of Complementarity in Practice (2003) 51-52.

²⁷ Carsten Stahn, 'Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified Deference?' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP 2015) 231.

namely, the prosecuting State, other actors (media, NGOs, experts, other States, international organizations), and the OTP itself.²⁸

As of the ‘evidence’²⁹ required for this type of assessment, the Expert Paper mentions official documents (such as legislation and judgments) and non-official documents (such as reports of observers, monitors and expert opinions on the political and legal system of the country concerned, or on the handling of the relevant case or cases).³⁰

2.5 The rights of defendants in the complementarity system

Complementarity can be invoked not only by States, but also by defendants. Article 19(2)(a) endows an accused or a person for whom an arrest warrant or a summons to appear has been issued with the procedural right to challenge admissibility pursuant to Article 17(1)(a)-(d). As can be seen, this right attaches at the point where the person’s liberty is at stake, through, for example, a summoning to a foreign court,³¹ and even before s/he has been arrested and transferred to the ICC.³² However, it is not unlimited. It can be exercised only once and prior to the initiation of trial, unless leave of the Court is granted and the challenge is based on a double jeopardy claim.³³

The procedural right of suspects and accused persons raises fundamental questions about the rationale of complementarity and the very nature of admissibility as a legal construct.³⁴ Mainly, it shows the complexity of the complementarity architecture, which could arguably be seen not only as a means to protect States sovereignty and a basic limitation to the power of the Court, but also as a personal right of defendants.³⁵ This vision is premised on the idea that the accused has a right to be prosecuted by domestic authorities and tried by his/her home court, where such a court is able and willing to do so.³⁶

As compelling as this perspective might be, the truth is that it could hardly be sustained. Burke-White and Kaplan have rightly observed that, in a variety of occasions,

²⁸ OTP, Informal Expert Paper (n 26) 37.

²⁹ They are not really ‘evidence’ in the traditional sense.

³⁰ OTP, Informal Expert Paper (n 26) 36.

³¹ William W Burke-White and Scott Kaplan, ‘Shaping the Contours of Domestic Justice: The International Criminal Court and an Admissibility Challenge in the Uganda Situation’ in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers 2009) 93.

³² Situation in the DRC, AC Judgment on the Prosecutor’s Appeal against the Decision of the PTC I entitled “Decision of the Prosecutor’s Application for a Warrant of Arrest, Article 58”, ICC 01-04, 13 July 2006, 51.

³³ Article 19(4) of the Statute.

³⁴ Burke-White and Kaplan (n 31) 86, 91.

³⁵ *ibid.*

³⁶ Benzing (n 11) 598; Burke-White and Kaplan (n 31) 92–94.

States have waived their sovereign right to exercise jurisdiction in favour of other States or other judicial bodies. Moreover, pursuant to the principle of universal jurisdiction, international crimes offend humanity as a whole, and, therefore, any State has a right to try the perpetrators. Hence, since States Parties to the Rome Statute have transferred their territorial or national jurisdiction to the Court, ‘there is no reason for the accused to expect to be tried by his home court’.³⁷ To the contrary, ‘the Rome Statute must be viewed as conferring new rights or supplementing existing rights of the accused with respect to the appropriate forum for prosecution’.³⁸

Along these lines, it has also been argued that the accused right to challenge admissibility under Article 17(1)(a) and (b) – as opposed to a challenge based on the *ne bis in idem* principle embodied in Article 17(1)(c) and 20(3) – does not amount to a right of an individual, but merely provides an individual with a ‘standing to raise an issue that relates to State sovereignty’.³⁹

Another important question is whether human rights of defendants can be invoked as a ground to challenge admissibility pursuant to complementarity, that is, whether a State could be considered ‘unwilling’ or ‘unable’ to genuinely prosecute because, instead of shielding perpetrators of international crimes from justice, it fervently and overzealously prosecutes them disregarding their fair trial rights. Some scholars have endorsed this view based on the wording of Article 17, according to which, in determining whether a State is unwilling to prosecute, the court shall have regard to the ‘principles of due process recognized by international law’.⁴⁰

In a recent decision, however, the Appeals Chamber sanctioned the opposite view according to which the determination under Article 17(1)(2) does not involve an assessment of whether the due process rights of a suspect have been breached *per se*.⁴¹ In particular, the

³⁷ Burke-White and Kaplan (n 31) 94.

³⁸ *ibid.*

³⁹ Jann K Kleffner, ‘Auto-Referrals and the Complementary Nature of the ICC’ in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers 2009) 52; Benzing (n 11) 599.

⁴⁰ Kevin Jon Heller, ‘The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process’ (2006) 17 *Criminal Law Forum* 255; Federica Gioia, ‘State Sovereignty, Jurisdiction, and International Law: The Principle of Complementarity in the International Criminal Court’ (2006) 19 *Leiden Journal of International Law* 1095; for a contrary opinion see Enrique Carnero Rojo, ‘The Role of Fair Trial Considerations in the Complementarity Regime of the International Criminal Court: From to ?’ (2005) 18 *Leiden Journal of International Law* 829; see also Elinor Fry, ‘Between Show Trials and Sham Prosecutions: The Rome Statute’s Potential Effect on Domestic Due Process Protections’ (2012) 23 35.

⁴¹ Prosecutor v. Abdullah Al-Senussi, AC Judgment on the Appeal of Mr Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled ‘Decision on the admissibility of the case against Abdullah Al-Senussi’, ICC-OI/II-OI/II OA 6, 24 July 2014.

concept of proceedings ‘being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice’ should generally be understood as referring to proceedings designed to make a defendant more difficult to convict, that is, sham proceedings aimed at protecting the person so that s/he can evade justice.⁴² In other words, ‘in the context of admissibility proceedings, the Court is not primarily called upon to decide whether in domestic proceedings certain requirements of human rights law or domestic law are being violated’; instead, ‘what is at issue is whether the State is willing genuinely to investigate or prosecute.’⁴³ Doing otherwise would amount to consider the ICC as a human rights court, sitting in judgment over domestic legal systems to ensure that they are compliant with international standards of human rights, a role which is clearly not envisaged by the Rome Statute.⁴⁴

However, the Chamber acknowledged that in some circumstances, depending on the facts of the individual case, ‘violations of the rights of the suspect are so egregious that the proceedings can no longer be regarded as being capable of providing any genuine form of justice to the suspect so that they should be deemed, in those circumstances, to be ‘inconsistent with an intent to bring the person to justice’.⁴⁵

More generally, the types of complaints set forth by Article 17(1)(a) and (b) do not apparently relate to the cooperation of States during the investigation. Rather, they have to do with the division of labour between the Court and States. Usually, admissibility criteria are conceptualized as an *a priori* set of conditions for the initiation of the investigation. The Rome Statute addresses them in its Part II regarding ‘jurisdiction, admissibility and applicable law’; manuals of international criminal procedure analyse them in their static and substantial dimension, before tackling the procedure of the investigation and cooperation.⁴⁶

The following paragraphs seek to address admissibility in its dynamic aspect. They contextualize admissibility criteria in the procedure of the investigation and, by so doing, they demonstrate that the division of labour between the Court and States is closely connected to cooperation, in that it influences the extent and the modalities in which the latter plays out in the course of the investigation.

⁴² *ibid.*, 218-221.

⁴³ *ibid.*

⁴⁴ *ibid.*, 219.

⁴⁵ *ibid.*, 230.

⁴⁶ Alexander Zahar and Göran Sluiter, *International Criminal Law: A Critical Introduction* (OUP 2007); Christoph Safferling, *International Criminal Procedure* (OUP 2012); Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (2 edition, Cambridge University Press 2010).

3. Cooperation for the purpose of the admissibility assessment in the course of the investigation

3.1 The phases of the investigation: preliminary examination

The Statute mandates the Prosecutor and the judges to carry out the complementarity assessment in different moments at the two phases of the investigation: the ‘preliminary examination’ of the information related to the crimes, and the actual investigation. Under the Statute, there is a clear demarcation between a preliminary examination and the formal investigation. They are different in purpose, investigative methods, as well as duties and powers of the parties involved.

The Prosecutor may receive *notitia criminis* through a referral of a situation from any State Party or from the United Nations Security Council.⁴⁷ In addition, individuals or groups, States and international organizations may submit ‘communications’ to the OTP containing information on crimes within the jurisdiction of the Court.⁴⁸ Upon receipt of a referral or a communication regarding the commission of crimes, the Prosecutor starts a ‘preliminary examination’ of the information received in order to determine whether a ‘reasonable basis’ to open an investigation exists.⁴⁹ To this end, s/he is mandated to determine - in addition to the existence of the ICC’s jurisdiction and the interest of justice in the situation concerned - whether ‘the case is or would be admissible under Article 17’.⁵⁰

It is important to note that at this very early stage the Prosecutor has not yet developed a case against a specific individual. Thus, the assessment of national efforts is done ‘with respect to potential cases (...) that would likely arise from an investigation into the situation’.⁵¹ Moreover, since the investigation has not yet formally started, the Prosecutor does not enjoy the powers that Article 54 sets forth for the ‘investigation’.⁵²

The Prosecutor, thus, has only limited means of fact finding. According to Article 15(2) and Rule 104 RPE, s/he may seek additional information on the alleged crimes from States, organs of the ^{United} Nations, intergovernmental and non-governmental organizations

⁴⁷ Article 13(a) and (b) of the Statute.

⁴⁸ Article 15(1) of the Statute.

⁴⁹ Article 53(1) of the Statute.

⁵⁰ *ibid*; Article 15(3) of the Statute and Rule 48 RPE.

⁵¹ OTP, Policy Paper on Preliminary Examinations (2013) 43; See also PTC II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09, 31 March 2010, 48; PTC III, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Côte d'Ivoire, ICC-02/11, 3 October 2011, 191.

⁵² OTP, Policy Paper on Preliminary Examinations (2013) 85.

and other reliable sources, and may receive testimony at the seat of the Court. At this stage, thus, the OTP relies heavily on information from outside sources rather than its own investigators (i.e., UN inquiries, media reports and NGOs analysis).⁵³ For the same reason, the cooperation regime under Part 9 seems not to be available yet. According to the Informal Expert Paper:

it is only once a reasonable basis has been found by the Prosecutor under Article 53(1) or the Pre-Trial Chamber under Article 15(4), that an investigation would commence, and at that point Part 9 would become available to the Prosecutor (...) with the resulting obligations for the States Parties under Articles 86 and 93. Consequently, the measures taken during a preliminary examination are not measures within a formal 'investigation'.⁵⁴

The OTP has endorsed this view and, in its Policy Paper on Preliminary Examinations of 2013 confirmed that 'at the preliminary examination stage, the Office does not enjoy investigative powers, other than for the purpose of receiving testimony at the seat of the Court, and cannot invoke the forms of cooperation specified in Part 9 of the Statute from States.'⁵⁵

In light of the above, one might have the impression that the preliminary examination is a static evaluation phase, which occurs mainly in The Hague behind the Prosecution staff's desks, involving not much more than a careful study of the materials submitted with the referral and the reports published by the media and NGOs. It is submitted that this is often a misconception. Since the engagement of the Prosecutor into a situation, the Prosecution and states authorities work in close connection. In addition to collecting information regarding the commission of crimes, the Prosecutor has to verify whether genuine investigations and prosecutions have been or are being conducted in the State concerned. Moreover, it is during the preliminary examination that the Prosecutor endeavours to ensure the cooperation of States that will be so essential in the future, should an investigation commence.

⁵³ The OTP Expert Paper on Complementarity makes clear that 'as a practical matter, it is expected that States Parties and other supportive States will choose to co-operate voluntarily with the OTP, and will likely respond to reasonable requests for information. Co-operation might also be further encouraged by courteously making States aware of the possibility that reasonable inferences might of necessity be drawn if information cannot be collected because of non-co-operation', see OTP, Informal Expert Paper (n 26) 30.

⁵⁴ Bruce Broomhall et al., Informal Expert Paper: Fact-finding and Investigative Functions of the Office of the Prosecutor, Including International Co-operation (2003) 23, 25–29.

⁵⁵ OTP, Policy Paper on Preliminary Examinations (2013) at 85.

Inevitably, this implies a certain degree of interaction and diplomatic efforts between the Office of the Prosecutor (OTP) and national authorities; the OTP Policy Paper on Preliminary Examinations explicitly envisages the possibility for the OTP to ‘undertake field missions to the territory concerned in order to consult with the competent national authorities, the affected communities and other relevant stakeholders, such as civil society organizations’.⁵⁶ On their side, States will have to allow the deployment of such missions on their territory, provide information to OTP officials regarding their judicial system and the proceedings that they might be conducting, as well as confirming their willingness to assist the possible investigation.

It is submitted that, although it does not take the form of a formal cooperation envisaged by Part 9 of the Statute, the interaction between the OTP and national authorities in the pre-investigative stage implies a peculiar relationship between the Court and States which is absent in any other international tribunal. This relationship is significant for the rights of suspects. In this respect, it is important to underscore the fact that the Statute does not impose a deadline on the Prosecutor for completing the preliminary examination,⁵⁷ nor does it foresee the involvement of the Pre-Trial Chamber in supervising the Prosecutor’s activities. This means that unsupervised negotiations between the Prosecutor and States can go on for years without a meaningful involvement of the judges in the situation of suspects until the issuance of an arrest warrant. As will be seen, this is especially problematic for those ICC suspects who are also subject to national proceedings at the time of the Prosecutor’s investigation.

3.2 The ‘formal’ investigation

Upon the conclusion of the preliminary examination, should the Prosecutor find the existence of a reasonable basis to proceed, s/he will open a formal investigation.⁵⁸ It must be remembered, however, that in the absence of a referral from a State or the UN Security Council, the investigation has to be authorized by the Pre-Trial Chamber.⁵⁹ It is from now on that the Prosecutor can make use of the powers set forth in Article 54, among which is the power to request cooperation and enter into agreements,⁶⁰ and that States have the obligation

⁵⁶ OTP, Policy Paper on Preliminary Examinations, 2013, 85.

⁵⁷ Some preliminary examinations, including those in Afghanistan, Colombia, and Georgia, have gone on for years without a decision either to close the examination or open a full investigation.

⁵⁸ Article 53(1)(2) of the Statute.

⁵⁹ Article 15(3)(4) of the Statute.

⁶⁰ Article 54(3)(c) and (d) of the Statute.

to cooperate fully with the Court in the investigation and prosecution of crimes.⁶¹ Moreover, it is during this phase that the Prosecutor gathers allegations against one or more identified individuals and, when the evidence acquired satisfy the requirements under Article 58, applies to the Pre-Trial Chamber for an arrest warrant. The issuance of an arrest warrant marks the passage from the ‘situation’ to the ‘case’ stage of the investigation.⁶²

It is important to underscore the fact that the Statute does not provide a deadline for the Prosecutor to apply the Pre-Trial Chamber for an arrest warrant. ICC investigations, thus, can be ended explicitly or implicitly, by deciding not to prosecute.⁶³ The Chamber may review an explicit decision of the Prosecutor not to prosecute, but cannot to compel him/her to prosecute.⁶⁴

Once the investigation has commenced, facts relevant for determination of admissibility form part of the investigation.⁶⁵ The importance of cooperation for the purpose of the complementarity assessment is reflected in the organization of the OTP, which comprises a specialized unit – the ‘Jurisdiction, Complementarity and Cooperation Division’ (JCCD), composed by experts advising on both issues.⁶⁶ This unit has the functions to: i) analyse the information received with the communications or the referrals; ii) provide the factual and legal analysis to enable decisions on whether initiating an investigation; iii) encourage and assist national proceedings (where possible), and verify that national proceedings are genuine; iv) establish networks of international cooperation by ensuring that necessary agreements and arrangements are in place to secure the cooperation of States and international organizations⁶⁷ and, throughout an investigation, maintain contact with relevant authorities to facilitate on-going cooperation.⁶⁸

The OTP Expert Paper on Fact-Finding and Investigations has rightly observed that ‘the relationship with the State exercising jurisdiction under complementarity is critical to facilitating the admissibility determination by the Prosecutor’ and that ‘the degree to which

⁶¹ Article 86 of the Statute.

⁶² According to the Pre-Trial Chamber, ‘situations are generally defined in terms of temporal, territorial and in some cases personal parameters’ and ‘entail the proceedings envisaged in the Statute to determine whether a particular situation should give rise to a criminal investigation as well as the investigation as such’. Cases, on the other hand, ‘comprise specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects’ and ‘entail proceedings that take place after the issuance of a warrant of arrest or a summons to appear’, see Situation in the DRC, PTC I Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-101-tEN-Corr, 17 January 2006, 65.

⁶³ Sarah Nouwen, *Complementarity in the Line of Fire* (CUP 2013) 78.

⁶⁴ Article 53(2)(c) and (3)(a)(b) of the Statute.

⁶⁵ OTP, Informal Expert Paper (n 26) 32.

⁶⁶ OTP, Annex to the Paper on Some Policy Issues before the Office of the Prosecutor (2003) 6.

⁶⁷ Article 54(3)(d) of the Statute.

⁶⁸ OTP, Annex to the Paper on Some Policy Issues (n 66) 6.

there is a cooperative arrangement established may determine how successful the Prosecutor is in discharging his responsibilities'.⁶⁹ In this respect, the experts acknowledged that, although the standards set forth by Article 17 are of an unambiguously legal nature, 'there may be need to be political discussions and arrangements undertaken in order to facilitate decisions based on those legal standards.'⁷⁰

3.3 Admissibility as an issue of litigation and judicial determination

During the situation and the case stage of the investigation, admissibility can become an issue of litigation and judicial determination. Whereas Article 19 of the Statute permits a State to challenge admissibility after a case has been initiated before the ICC, the process delineated in Article 18 permits a State to block the Court's exercise of jurisdiction over potential cases in a pre-emptive manner, if the State in question is investigating or has investigated these potential cases.

3.3.1 Admissibility at the situation stage

Article 18 of the Statute governs challenges to the initiation of an investigation into a situation as a whole.⁷¹ It provides that, following the notification of the commencement of the investigation from the Prosecutor, a State may seek a deferral of the investigation by informing the Court that it is investigating or it has investigated the crimes concerned. The Appeals Chamber has clarified that the wording 'crimes concerned' should be interpreted relatively broadly, particularly as '[o]ften, no individual suspects will have been identified at this stage, nor will the exact conduct nor its legal classification be clear.'⁷²

This Procedure is only available when the Prosecutor decides to open an investigation *proprio motu* or after a referral of a situation by a State, but not if the situation was referred by the Security Council.⁷³ It is apparent from the wording of Article 18 that its regime also applies to investigations conducted by States not party. This Article, thus, evinces a broad

⁶⁹ Broomhall et al. (n 54) 35.

⁷⁰ *ibid.*

⁷¹ William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010) 365.

⁷² Prosecutor v. William Ruto, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", ICC-01/09-01/11-307, 30 August 2011, 39.

⁷³ Article 18(1) of the Statute.

recognition that the Court should only intervene where domestic jurisdictions are either unwilling or unable to do so.⁷⁴

The Prosecutor shall comply with the State's request to defer the investigation, unless the investigation is authorized by the Pre-Trial Chamber.⁷⁵ Pursuant to Rule 53 RPE, the State seeking deferral will have to provide information concerning its investigation, and the additional information requested by the Prosecutor. Moreover, nothing prevents the Prosecutor from seeking information from other sources, such as NGO's court monitors.⁷⁶ In case of a deferral, the Prosecutor will follow up the national development of the case in question and the State may be asked to submit periodical information on its progress pursuant to Article 18(5) of the Statute.

As can be seen, notwithstanding the overarching presumption that national courts have priority over the crimes within the jurisdiction of the Court, the procedural requirements delineated in the Article in discussion place a relatively strict burden on States to assert their right to prosecute in a diligent and expeditious manner. As enunciated by the Appeals Chamber:

[t]he complementarity principle, as enshrined in the Statute, strikes a balance between safeguarding the primacy of domestic proceedings vis-à-vis the International Criminal Court on the one hand, and the goal of the Rome Statute to put an end to impunity on the other hand. If States do not or cannot investigate and, where necessary, prosecute, the International Criminal Court must be able to step in.⁷⁷

Whereas States have a very limited window through which to assert their primacy over a situation, the Appeals Chamber has nonetheless suggested that, outside of the framework of admissibility proceedings, the Prosecution should use its discretion to enter into dialogue with States concerning the division of labour between them:

The Appeals Chamber accepts that there may be national legislation in existence or other impediments to a State being able to either disclose to the Court the progress of its

⁷⁴ Melinda Taylor, 'Article 18' on Case Matrix Network: <https://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-2-articles-11-21/>

⁷⁵ Article 18(2) Statute.

⁷⁶ Broomhall et al. (n 54) 35, 41.

⁷⁷ Prosecutor v. Germain Katanga and Mathieu Ngudjolo, AC Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/4-01/07-1497, 25 September 2009, 85; see also Melinda Taylor (n 73).

investigations, or to take all the necessary steps to investigate. In this case, Libya has asserted, *inter alia*, that it is a State in transition; it also asserts that it was prevented from disclosing to the Court evidence as to the investigations it was undertaking as a result of article 59 of its Code of Criminal Procedure, which it submits required it to maintain information as to investigations confidential; and it asserts that the appointment of a new Prosecutor-General was significant, therefore justifying more time. While accepting the reality that these situations can arise, the Appeals Chamber nevertheless considers that a State cannot expect that such issues will automatically affect admissibility proceedings; on the contrary, such issues should in principle be raised with the Prosecutor directly (prior to instigating admissibility proceedings), with a view to advising her as to the steps the State is taking, any impediments to those steps and allowing her to reach sensible decisions as to whether or not, in the circumstances, it is appropriate for her, at that time, to pursue a case, pending the progress of investigations by the State. It is, in principle, not the place for such issues to be raised with a Chamber in the context of admissibility proceedings.⁷⁸

To date, Article 18 has never been applied. Ambiguities thus remain as to whether the procedure enables States to invoke the article in an effective manner, how the Court will interpret the notion of a ‘potential case’, and where the burden of proof will lie.

3.3.2 Admissibility at the cage stage of the investigation

When a case against a suspect has been developed, that is, when the Prosecutor requests the issuance of an arrest warrant or a summons to appear, challenges to the admissibility of cases (as well as to the jurisdiction of the Court) can be made by several actors under Article 19(2) of the Statute. First, pursuant to Article 19(2)(a), the right to challenge the admissibility is granted to the accused⁷⁹ and to any person in respect of whom the ICC has issued a warrant of arrest or a summons to appear. Second, Article 19(2)(b) and (c) afford the same right to ‘a State which has jurisdiction over a case’ and ‘a State from which acceptance of jurisdiction is required under Article 12’ respectively. In this case, the Prosecutor shall suspend the

⁷⁸ Prosecutor v. Saif Gaddafi, AC Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled “Decision on the admissibility of the case against Saif Al-Islam Gaddafi”, ICC-01/11-01/11-547-red, 21 May 2014, 165.

⁷⁹ This status is acquired after the confirmation of the charges under Article 61 of the Statute.

investigation pending the determination of the challenge by the Court⁸⁰ (albeit orders and warrants ordered by the Court prior to the challenge continue to be valid)⁸¹. Third, pursuant to Article 19(3), the Prosecutor may seek a ruling from the Court regarding a question of admissibility (or jurisdiction). Finally, Article 19(1) provides that the Court ‘may’, on its own motion, determine the admissibility of a case in accordance with Article 17.⁸²

So far, the Pre-Trial Chamber has mainly used this prerogative at the moment of the issuance of an arrest warrant.⁸³ The Appeals Chamber, however, has criticized this approach, in that a determination of admissibility at such an early stage may jeopardize the right of the suspect to challenge admissibility of his/her case pursuant to Article 19(2)(a). This is especially true when the Prosecutor’s application for a warrant of arrest has been made on a confidential and *ex parte* basis. The Appeals Chamber, therefore, has cautioned the Pre-Trial Chamber to exercise its discretion under Article 19(1) only when it is appropriate in the circumstances of the case – such as, for example, when a ‘ostensible cause’ or a ‘self-evident factor’ impels the exercise of such discretion - bearing in mind the interests of the suspect.⁸⁴

Pursuant to Article 19(5), the State challenging the admissibility of a case shall make the challenge at ‘the earliest opportunity’. The Court clarified that this means that a State must file the challenge ‘as soon as possible’ once it is in a position to actually assert that it is investigating the same case.⁸⁵

Under article 19(10), the prosecutor may submit a request for the review of the admissibility decision after being satisfied ‘that new facts have risen which negate the basis on which the case had previously been found inadmissible under article 17 by the Court’. The Appeals Chamber held that the inclusion of article 19(10) clarifies that any admissibility assessment must take into consideration the change of circumstances over time. It explained that ‘the admissibility of a case under article 17 (1)(a), (b) and (c) of the Statute depends primarily on the investigative and prosecutorial activities of the States having jurisdiction.

⁸⁰ Article 19(7) of the Statute.

⁸¹ See Article 19(9) of the Statute, according to which, ‘the making of a challenge shall not affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Court prior to the making of the challenge.’

⁸² The same article provides that the Court ‘shall satisfy itself that it has jurisdiction in any case brought before it’.

⁸³ See: Prosecutor v. Thomas Lubanga, PTC I Decision on the Prosecutor’s Application for a Warrant of Arrest, ICC-01/04-01/06, 10 February 2006; PTC III, Prosecutor v Bemba, Decision on the Prosecutor’s Application for a Warrant of Arrest, ICC-01/05-01/08, 23 May 2008, 21-22.

⁸⁴ *ibid.*, 52-53.

⁸⁵ Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, AC Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”, ICC-01/09-02/11-274, 30 August 2011, 45.

These activities may change over time'⁸⁶ Thus, a case that was originally admissible may be rendered inadmissible by a change of circumstances in the concerned States and vice versa'.

3.3.3 Provisional investigative measures

In case of a deferral to a State's investigation (or pending a ruling by the Pre-Trial Chamber) under Article 18, or a challenge to the jurisdiction or the admissibility according to Article 19, the Prosecutor may seek authorization from the Pre-Trial Chamber for provisional investigative measures 'for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not subsequently be available.'⁸⁷

In case of a challenge under Article 19, the available measures are more extensive, and also include the taking of a statement or testimony from a witness, completing the collection of evidence already initiated, and preventing the absconding of persons subject to an arrest warrant in cooperation with the States concerned.⁸⁸ Cooperation under Part 9 is available for the measures authorized by the Chamber.⁸⁹

4. The influence of the principle of complementarity on States' obligation to cooperate with the Court

The principles governing jurisdiction and admissibility have a great influence on the rules on cooperation. It is essential, thus, that the provisions on jurisdiction and admissibility in Part 2 of the Statute are coherent with those on cooperation in Part 9. As has been stated, 'in so far as a legal problem of cooperation arises that is directly interrelated with issues covered in Parts 2 and 5 and that is not specifically dealt with in Part 9, it appears advisable to resort to a systematical interpretation that guarantees the coherency between the solution found in Part 9 and the relevant rule(s) in Parts 2 and/or 5.'⁹⁰

⁸⁶ Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Appeal Chamber Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1479 OA 8, 25 September 2009, 56.

⁸⁷ Article 18(6) and 19(8) Statute.

⁸⁸ Article 19(8) of the Statute.

⁸⁹ Broomhall et al. (n 54) 46-47.

⁹⁰ Claus Kress, Kimberly Prost and Peter Wilkitzki, 'Part 9. International Cooperation and Judicial Assistance: Preliminary Remarks' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn, Beck/Hart 2008) 1506.

Under complementarity, genuine domestic investigations and prosecutions have priority; at the same time, however, pursuant to the principle of *kompetenz-kompetenz* of the Court enshrined in Article 19(1) of the Statute, it is exclusively up to it to determine whether it has jurisdiction on a given case and whether a case is admissible. As a consequence, the provisions of Part 9 provide that a refusal to cooperate with the Court can never be based on the requested State's unilateral assessment that the Court has no jurisdiction or that a case is inadmissible.⁹¹ In other words, a decision of the Court on admissibility is determinative of the issue of whether states parties have an obligation to cooperate with it.

The interplay between jurisdiction and cooperation is especially reflected in the regulation of States' obligations to cooperate in case of simultaneous domestic proceedings and competing requests for surrender or judicial assistance by other States.⁹² Consequently, Articles 95 and 89(2) that are about to be addressed, reflect the scheme of Articles 17 *et seq.*⁹³

4.1 The postponement of the execution under Article 95

It has been seen that a complementarity challenge by a State under Articles 18 and 19 of the Statute has the effect that the Prosecutor must suspend the investigation,⁹⁴ but the making of such a challenge does not affect the validity of any previous act performed by the Prosecutor, or any previous order or warrant issued by the Court.⁹⁵

Article 95 reflects the consequences of such suspension of the investigation for cooperation. It provides that a State may temporarily postpone the execution of any request under Part 9 while the Court is considering an admissibility challenge pursuant to Articles 18 and 19, with the only exception of cooperation requests related to the provisional investigative measures that the Court has specifically ordered under Article 18(6) or 19(8). As the Pre-Trial Chamber has noted 'it would be untenable for the Court to insist on compliance with a request (...), even at the risk of hampering the national proceedings, while its own investigation is suspended [due to an admissibility challenge].'⁹⁶

It is important to emphasize, however, that the suspension of the execution of the request is only temporary, and can only last until such time that a determination on

⁹¹ Kaul and Kress (n 2) 144; Kress, Prost and Wilkitzki (n 90) 1506.

⁹² Cryer and others (n 46) 519.

⁹³ Kress, Prost and Wilkitzki (n 90) 1506.

⁹⁴ Article 18(2) and 19(8) of the Statute; Cryer and others (n 46) 519.

⁹⁵ Article 19(9) of the Statute.

⁹⁶ Prosecutor v. Saif Gaddafi and Abdullah Al-Seniussi, PTC I, Decision on the postponement of the execution of the request for surrender of Gaddafi pursuant to Article 95 of the Statute, ICC-01/11-01/11, 1 June 2012, 36.

admissibility is made by the Court. Moreover, the request for cooperation remains valid in accordance with Article 19(9), and, during the postponement, the State must take all necessary measures in order to ensure an immediate execution of the request should the case be found admissible.⁹⁷ As will be seen, Article 95 is consistent with Article 89(2),⁹⁸ which regulates cooperation duties in case a suspect brings a *ne bis in idem* challenge before a national court.

4.1.1 Application of Article 95 of the Statute in the situation in Libya: impact on the rights of suspects

Libya was the first State to notify the Court its intention to make use of Article 95. It is worth taking a closer look at the situation in Libya and at the jurisprudence that originated from its decision to postpone a request for cooperation, as it provides a good example on how the rights of defendants risk to be ‘trapped’ and sacrificed by the interplay of cooperation and complementarity in the practice of the Court.

In February 2011, a massive civil uprising and anti-government protests in Libya were met with brutal violence and repression from the 41-years regime of leader Muammar Gaddafi. In the midst of the upheaval, an interim opposition government, the National Transitional Council (NTC), was established, and eventually came to be universally accepted as the new governing body of the country.

The ICC investigation in Libya, a State not party to the Statute, was opened on 3 March 2011, following the UN Security Council Resolution 1970 (2011),⁹⁹ which referred the situation to the Court.¹⁰⁰ On 27 June 2011, the Pre-Trial Chamber I issued warrants of arrest for Colonel Muammar Gaddafi, his son Saif Al-Islam Gaddafi, Libyan government spokesman, and Abdullah Al-Senussi, Director of Military Intelligence, for alleged crimes against humanity committed against the civilian population.¹⁰¹ Contrary to the majority of the

⁹⁷ *ibid.*, 40.

⁹⁸ See further para. 4.2.

⁹⁹ United Nations Security Council Resolution 1970, S/RES/1970 (2011), UN Doc. S/RES/1970, 26 February 2011.

¹⁰⁰ The SC referral was part of the international community’s response to the Libyan humanitarian crisis, along with a range of economic, political, and military measures aimed at isolating and defeating the Gaddafi regime.

¹⁰¹ Situation in the Libyan Arab Jamahiriya, PTC I, Decision on the Prosecutor’s Application pursuant to Article 58 as to Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, ICC-01/11-12, 27 June 2011. On 22 November 2011, PTC I decided to terminate the case against Muammar Gaddafi following his death on 20 October 2011 by hands of the NTC forces in the battle of Sirte, see Prosecutor v. Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, PTC I, Decision to Terminate the Case Against Muammar Gaddafi, ICC-01/11-01/11-28, 22 November 2011.

situations that are currently before the Court, in Libya the State of nationality of the suspects antagonizes the ICC, as the new government in power is very keen to prosecute the most high-ranking members of the old regime. Conversely, the Defence wishes to see them tried before the Court, as it is very unlikely that they would receive a fair trial in Libya.

On 19 November 2011, Saif Gaddafi was arrested in the Libyan region of Zintan by rebel forces. On 17 March 2012, Al-Senussi was arrested in Mauritania and extradited to Libya on 5 September 2012. It was immediately clear that the suspects were not arrested on account of the ICC warrant, and that the new government did not intend to turn them over to the Court. Shortly after the arrest of Saif Gaddafi, on 23 November, the NTC wrote a letter to the Court stating that: ‘the National Transitional Council wishes to affirm that, in accordance with the Rome Statute, the Libyan judiciary has primary jurisdiction to try Saif al-Islam Gaddafi and that the Libyan State is willing and able to try him in accordance with Libyan law’.¹⁰² Subsequently, similar affirmations were made by Libya’s Foreign Minister with respect to Al-Senussi.¹⁰³

Not surprisingly, thus, Libya never complied with its obligation to surrender Gaddafi and Al-Senussi to the Court. Moreover, it challenged the admissibility of the cases and simultaneously invoked Article 95 in order to postpone surrender pending the decision on the admissibility challenge.¹⁰⁴ The Defence vehemently opposed such request, arguing that Libya was not entitled to hold the suspects while it challenged admissibility, but had to surrender them to the Court. The delay in the implementation of the surrender was seriously hampering the right of suspects to a fair trial, in particular, their right to be tried within a reasonable time and to be present and participate in the proceedings under Article 67(1)(c) and (d) of the Statute.¹⁰⁵

Al-Senussi’s Defence submitted that Senussi’s presence at the seat of the Court was required in order to ‘advance proceedings on admissibility and because it is the only way to give effect to his rights under the Court’s Statute and Rules’.¹⁰⁶ More specifically, the

¹⁰² The official English translation of this letter is available at: <http://www.icc-cpi.int/iccdocs/doc/doc1278136.pdf>

¹⁰³ See Prosecutor v. Abdullah Al-Senussi, Defence Response to the Submission of the Government of Libya for Postponement of the Surrender Request for Mr Al-Senussi, ICC-01/11-01/11, 24 April 2013, 48.

¹⁰⁴ Prosecutor v. Saif Gaddafi and Abdullah Al-Senussi, Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute, ICC-01/11-01/11, 1 May 2012, and Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute, ICC-01/11-01/11, 2 April 2013.

¹⁰⁵ Prosecutor v. Saif Gaddafi, OPCD, Public Redacted Version of the ‘Response to the Request to Postpone the Surrender of Mr. Saif Al Islam Gaddafi Pursuant to Article 95 of the Statute’, ICC-01/11-01/11-141-Red, 11 May 2012; Prosecutor v. Abdullah Al-Senussi, Defence Response (n 103).

¹⁰⁶ Prosecutor v. Abdullah Al-Senussi, Defence Response (n 103) 3(b), 58.

Defence averred that only if Al-Senussi is transferred to the Court, will he be in a position to, inter alia, provide instructions to his counsel, discuss with him factual issues relevant to the admissibility of the case, receive a copy of the warrant of arrest issued by the Chamber against him as well as of the admissibility filings, and attend the confirmation of charges hearing.¹⁰⁷

In the Gaddafi case, the admissibility challenge filed by the Libya's Government came after 6 months from the initial arrest of Gaddafi by Libyan authorities; in the Senussi case, after more than one year.¹⁰⁸ Throughout this period, suspects were held in isolation without the possibility to communicate with counsel, and were not brought before a judge,¹⁰⁹ contrary to Articles 55 and 59 of the Statute. As a consequence, suspects were not able to effectively participate in admissibility proceedings, instruct counsel on a regular basis and attend court hearings.¹¹⁰ The Senussi's Defence thoroughly explained how these violations resulted from Libya's non-cooperation combined with the misuse of its prerogatives under the complementarity regime.¹¹¹ In particular, the Defence pointed out that Libya, despite its own admission¹¹² that it could have challenged admissibility already on 1 May 2012, waited nearly a year before it actually did so on 2 April 2013, contravening to Article 19(5), which requires States to challenge admissibility 'at the earliest opportunity'.¹¹³

Moreover, the Defence stressed that Libya had obtained custody of Al-Senussi from Mauritania in violation of Security Council resolution 1970 and the requests of the ICC for surrender. As a consequence, granting Libya the possibility to postpone the surrender of Al-Senussi would amount to sanction its non cooperation, and allow it to benefit from its flouting of the Court's requests.¹¹⁴ Finally, both the Defence of Gaddafi and of Senussi reported

¹⁰⁷ *ibid.*, 58.

¹⁰⁸ In Gaddafi, Libya challenged admissibility on 1 May 2012; in Al-Senussi, Libya challenged admissibility on 2 April 2013. In Al-Senussi, the Prosecutor supported Libya's argument in favour of national prosecution. In Gaddafi, however, the Prosecutor opposed Libya's challenge.

¹⁰⁹ Prosecutor v. Saif Gaddafi, OPCD Response to the Government of Libya's Appeal Against the 'Decision Regarding the Second Request for Postponement of the Surrender of Saif Al-Islam Gaddafi', ICC-01/11-01/11, 12 April 2012, 33-34; Prosecutor v. Abdullah Al-Senussi, Defence Response (n 103) 54-55.

¹¹⁰ Prosecutor v. Saif Gaddafi, OPCD Response (n 109) 17; Prosecutor v. Abdullah Al-Senussi, Defence Response (n 103) 51-58.

¹¹¹ Prosecutor v. Abdullah Al-Senussi, Defence Response (n 103).

¹¹² Prosecutor v. Abdullah Al-Senussi, Defence Appeal on behalf of Mr Al-Senussi against the 'Decision on Libya's postponement of the execution of the request pursuant to article 95 and related Defence request to refer Libya to the UN Security Council', 9 September 2013, 15: 'in its Application of 1 May 2012, Libya stated that at that time its "national judicial system is actively investigating Mr Gaddafi and Mr Al-Senussi for their alleged (...) crimes against humanity." Libya explained in its filing of 1 May 2012 that the investigation had been going on for many months, that the two men were to be tried together and it was in a position to challenge the admissibility of Mr. Al-Senussi's case as well as Mr Gaddafi's.'

¹¹³ Prosecutor v. Abdullah Al-Senussi, Defence Response (n 103) 35; Prosecutor v. Abdullah Al-Senussi, Defence Appeal (n 112) 15.

¹¹⁴ Prosecutor v. Abdullah Al-Senussi, Defence Response (n 103) 39-43.

statements of high-level Libyan authorities to the effect that Libya had no intention to surrender the suspects to the ICC, irrespective of the merits of their admissibility challenge.¹¹⁵

4.1.2 Article 95 of the Statute in the rulings of the Court

The Court refused to give weight to the Defence arguments in favour of a contextual reading of Article 95, but rigidly stuck to a literal interpretation of this provision. According to it, the only consideration that the Pre-Trial Chamber is called upon to make in deciding on a State's request to postpone surrender is whether the admissibility challenge 'has been properly made pursuant to Article 19(2) of the Statute and Rule 58(1)'.¹¹⁶ In both Gaddafi and Senussi, the Court found that this had been the case, and agreed to the postponement of the request for arrest and surrender of the suspects.¹¹⁷ It is worth taking a closer look to the Chamber's decisions, as the Al-Senussi and Gaddafi cases had different admissibility outcomes.

4.1.2.1 The Al-Senussi decision

In Al-Senussi, the judges rejected *in toto* the arguments advanced by the Defence relating to the inapplicability of Article 95. However, they did not give any satisfactory reason in support of their findings. As of the timeliness of the challenge, the Pre-Trial Chamber simply stated that the mere chronology outlined by the Defence did not persuade it to consider the challenge tardy or abusive, and that the information before it did not 'appear to indicate that Libya, despite being in a position to properly and timely challenge the admissibility of the case against Al-Senussi, unduly failed to do so in violation of Article 19(5) of the Statute.'¹¹⁸

Moreover, the Chamber considered 'immaterial', for the limited purposes of Article 95, a determination of whether Libya obtained and/or maintained custody of Al-Senussi in non-compliance with the Court's request for his arrest and surrender. The purpose of the Court's evaluation of the applicability of Article 95 'is not to determine whether or not the State has previously fulfilled its obligation to cooperate with the Court, but is rather limited to

¹¹⁵ Prosecutor v. Saif Gaddafi, OPCD Response (n 109) 31.

¹¹⁶ Prosecutor v. Saif Gaddafi, PTC I Decision on the postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to Article 95 of the Statute, ICC-01/11-01/11, 1 June 2012, 37; Prosecutor v. Abdullah Al-Senussi, PTC I, Decision on Libya's postponement of the execution of the request for arrest and surrender of Abdullah Al-Senussi pursuant to Article 95 of the Statute and related Defence request to refer Libya to the UN Security Council, ICC-01/11-01/11, 14 June 2013, 34.

¹¹⁷ PTC I, Gaddafi Decision (n 116) 38; PTC I, Al-Senussi Decision (n 116) 33.

¹¹⁸ *ibid.*, 32

preventing an abusive filing of an admissibility challenge automatically resulting in the illegitimate postponement of the execution of a cooperation request.¹¹⁹

Equally, the fact that domestic proceedings against Al-Senussi had not been terminated and that several statements by Libyan officials indicated Libya's intention to try Al-Senussi domestically irrespective of the outcome of the challenge, did not persuade the Chamber. In this respect, it observed that 'these mere facts do not, per se, amount to a violation of Libya's obligation to cooperate with the Court, insofar as Libya must ensure that its on-going criminal proceedings do not hinder or delay Al-Senussi's surrender to the Court should the case eventually be declared admissible'.¹²⁰

The most unsatisfactory answer, however, was given to the Defence's complaint that the postponement of surrender would *de facto* deprive the accused of his rights under the Statute and the Rules. The Chamber 'noted' this argument. However, it held that 'such argument, even if upheld, would not negate Libya's entitlement to postpone the execution of the Surrender Request in the presence of an admissibility challenge that has been properly made consistently with the terms of the relevant statutory provisions'.¹²¹ It did not give further explanations.

Nevertheless, the Chamber emphasizes that the postponement in no way affects Libya's continuing obligation to cooperate with the Court, as decided by the Security Council. Accordingly, Libya remains under the duty to provide all assistance required by the Court in particular in order to ensure the full and effective exercise of Al-Senussi's rights and to facilitate a timely determination of the admissibility challenge.¹²² The Chamber, thus, warned Libya to refrain from taking any action which could hamper the prompt execution of the surrender request should the case be found admissible.¹²³

The Defence appeal against this decision was dismissed after the Appeals Chamber confirmed the Pre-Trial Chamber's finding that Al-Senussi's case is inadmissible.¹²⁴ Despite this finding, the Chamber observed that the Prosecutor may still submit a request for review of the decision in accordance with article 19(10).¹²⁵

¹¹⁹ *ibid.*, 35.

¹²⁰ *ibid.* 36.

¹²¹ PTC I, Al-Senussi Decision (n 116) 37.

¹²² *ibid.*

¹²³ *ibid.*, 40.

¹²⁴ Prosecutor v. Abdullah Al-Senussi, AC Decision on the Appeal of Mr Al-Senussi against the Pre-Trial Chamber's 'Decision on Libya's postponement of the execution of the request for arrest and surrender of Abdullah Al-Senussi pursuant to Article 95 of the Statute and related Defence request to refer Libya to the UN Security Council', ICC-01/11-01/11 OA 5, 11 September 2014, 13.

¹²⁵ Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, PTC I Decision on the admissibility of the case against Abdullah Al-Senussi, ICC-01/11-01/11-466-Red, 11 October 2013, 312.

On 28 July 2015, the Tripoli Court of Assize convicted and sentenced Al-Senussi to death along with several other co-accused for their roles during Libya's 2011 uprising.¹²⁶ In its latest report to the UN Security Council, the OTP stated that '[t]he Office continues to collect and analyse relevant information in relation to Al-Senussi's case within the framework of article 19(10) of the Rome Statute'. However, as of now, it 'is not fully satisfied that new facts have arisen which negate the basis on which Pre-Trial Chamber I found Al-Senussi's case inadmissible'.¹²⁷ The Office recalled the Appeals Chamber's finding that, for due process violations in a domestic trial to lead to a case being deemed admissible before the ICC, the violations must be 'so egregious that the proceedings can no longer be regarded as being capable of providing any genuine form of justice to the accused.'¹²⁸

4.1.2.2 The Saif Gaddafi decision

In Gaddafi, the Pre-Trial Chamber used similar arguments. It is, however, worth quoting the central reasoning by which the judges rejected the reading of Article 95 proposed by the Defence, in that it is particularly revealing of the Court's tendency to entrench itself behind the literal interpretation of the Statute. To the objection that the delay in the implementation of the surrender was seriously hampering the right of Gaddafi to a fair trial, the judges replied that:

the Court must fulfil its mandate in accordance with its legal framework and that the complementarity principle is a central aspect thereof and a key feature of the institution. The suspension of the [Court's] investigation and the corresponding postponement of the cooperation requests is one major consequence of this principle. It would be untenable for the Court to insist on compliance with a request for arrest and surrender, even at the risk of hampering the national proceedings, while its own investigation is suspended.¹²⁹

It is interesting to note that the Court failed to engage with the thorny issue of individuals' rights in complementarity/cooperation proceedings. The non-stated assumption behind the above quoted passage, however, is that individuals' rights are not a counter-weight to the

¹²⁶ See <http://www.aljazeera.com/news/2015/07/gaddafi-son-saif-al-islam-libya-sentenced-death-150728084429303.html>

¹²⁷ 11th Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1970 (2011), 6-7.

¹²⁸ See *supra* n 41.

¹²⁹ Prosecutor v. Saif Gaddafi, PTC I Decision (116) 36.

distortions caused by the ‘legal framework’ (of cooperation) within the given ‘key feature’ (complementarity) of the institution.

Just like in *Senussi*, the Pre-Trial Chamber remarked that the arrest warrant remained valid in accordance with Article 19(9) of the Statute, and that Libya must ensure that ‘all necessary measures are taken during the postponement in order to ensure the possibility of an immediate execution of the Surrender Request should the case be found admissible’.¹³⁰ Unlike the case of *Senussi*, however, the Court has eventually found the *Gaddafi* case to be admissible. Despite this finding, however, Libya has failed to comply with the request of the Court and, to date, has not surrendered *Gaddafi* to its seat. On 10 December 2014, Pre-Trial Chamber I made a finding of non-compliance by Libya and transmitted it to the Security Council, which so far has taken no action.¹³¹

On 28 July 2015, the Tripoli Court of Appeal sentenced *Gaddafi* to death along with *Senussi*.¹³² The Prosecutor, thus, immediately requested that the Court ordered Libya to refrain from executing *Gaddafi* and surrender him to the Court.¹³³ In its response to this request, Libya submitted that ‘Mr *Gaddafi* continues to be in custody in Zintan and is presently ‘unavailable’ to the Libyan State.’¹³⁴ In its latest report to the UN Security Council, the Prosecutor stated that, in view of the fact that Libya remains unable to surrender *Gaddafi* to the Court, the OTP has been exploring ‘other avenues’ through which *Gaddafi* could be surrendered to the Court. The Prosecutor has confirmed that *Gaddafi* continues to be detained in Zintan where he is in the custody of the Abu-Bakr al-Siddiq Battalion commanded by Mr al-‘Ajami al-‘Atiri.¹³⁵ On 26 April 2016, thus, the Prosecutor filed a request with Pre-Trial Chamber I for an order directing the Registry to transmit the request for surrender directly to Mr al-‘Atiri.¹³⁶ The Pre-Trial Chamber has not issued a decision on the request at the time of writing. In the event that Mr al-‘Atiri and the Battalion decide not to cooperate, however, the Prosecutor encouraged the Security Council to impose sanctions on them.¹³⁷

¹³⁰ *ibid.*, 40.

¹³¹ Prosecutor v. Saif *Gaddafi*, PTC I Decision on the non-compliance by Libya with requests for cooperation by the Court and referring the matter to the United Nations Security Council, ICC-01/11-01/11-577, 10 December 2014.

¹³² See *supra* n 126.

¹³³ Prosecutor v. Saif *Gaddafi*, Prosecution Request for an Order to Libya to Refrain from Executing Saif Al-Islam *Gaddafi*, Immediately Surrender Him to the Court, and Report His Death Sentence to the United Nations Security Council, ICC-01/11-01/11, 30 July 2015.

¹³⁴ 11th Report of the Prosecutor (n 127) 3.

¹³⁵ *ibid.*

¹³⁶ Prosecutor v. Saif *Gaddafi*, OTP Request for an order directing the Registrar to transmit the request for arrest and surrender to Mr al-‘Ajami AL-‘ATIRI, Commander of the Abu-Bakr al-Siddiq Battalion in Zintan, Libya, ICC-01/11-01/11, 26 April 2016.

¹³⁷ 11th Report of the Prosecutor (n 127) 3.

4.2 Simultaneous national proceedings

The provisions of the Statute regulating the impact of the obligation to cooperate with the Court on national proceedings are Article 89 and 94 of the Statute. The former is concerned with requests for arrest and surrender, whereas the latter is concerned with other forms of assistance, such as those envisaged by Article 93 of the Statute.¹³⁸

Article 89(2) and (4) regulate the hypotheses in which domestic investigations or prosecutions are underway with respect to the same person targeted by the Prosecutor. Article 89(2) deals with the case of national proceedings that concern the same crime(s). It stipulates that, if the person sought for surrender by the Court brings a challenge before a national court¹³⁹ based on the principle of *ne bis in idem* under Article 20 of the Statute, the requested State shall immediately consult with the Court to determine if there has been a relevant ruling on admissibility. If an admissibility ruling is pending, the requested State may postpone the execution of the request until the Court makes its determination. However, if and when the case is found admissible, the state shall proceed with the surrender of the person. As can be seen, Article 89(2) brings the obligation to surrender in line with the principle of *ne bis in idem* enshrined in Article 20, and the related possibility of an admissibility challenge pursuant to Article 17(1)(c) of the Statute.¹⁴⁰

Article 89(4) is concerned with national proceedings that deal with a different case.¹⁴¹ It provides that the requested State, ‘after making its decision to grant the request, shall consult with the Court.’ This language is rather ambiguous. On the one hand, it seems to rule out the possibility to exploit domestic proceedings for a different case as a ground for refusal, making it clear that the obligation to surrender the person the Court prevails. On the other hand, though, it suggests that there is a decision to be made by the requested State to grant the

¹³⁸ As has been seen in Chapter II, this provision empowers the Court to requests assistance to States with respect to, among others, the identification of persons or the location of items, the taking and the production of evidence, the examination of places (including the exhumation and examination of grave sites) and the execution of searches and seizures.

¹³⁹ As Kress and Prost pointed out: ‘this is not intended to recognize national courts jurisdiction over the issue, as it is only for the Court to decide the admissibility of the case. Rather, Article 89(2) acknowledges the necessity that, since individuals cannot be prevented from bringing *ne bis in idem* applications before domestic courts, there be consultations between local authorities and the Court to determine whether there has been an admissibility ruling already’, Claus Kress and Kimberly Prost, ‘Article 89’ in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn, Beck/Hart 2008) 1543.

¹⁴⁰ *ibid* 1540.

¹⁴¹ ‘Different case’ does not pertain to the legal qualification of the offence with which the person is charged under national law, but has to be understood as ‘different crime’, Kress and Prost (n 139) 1547. See also Article 94(1) of the Statute.

request.¹⁴² The Pre-Trial Chamber, however, clarified that Article 89(4) does not provide a basis for postponing surrender. Rather, it ‘requires the requested State to grant the request and *then* consult with the Court [emphasis added]’.¹⁴³ Moreover, it has been suggested that the conflict is only apparent, as Article 89(4) must be interpreted in accordance with the general clause enshrined in Article 86, by which States Parties shall ‘cooperate fully’ with the Court in the investigation and prosecution of crimes. The decision to grant the request thus must be taken in accordance with this interpretative guideline.¹⁴⁴

Article 89(4) is complemented by Rule 183 RPE, according to which, following the consultations with the Court, the requested State may temporarily surrender the person sought. During his/her presence before the Court the person shall be kept in custody and shall be transferred to the requested State once his or her presence before the Court is no longer required.

Finally, Article 94 deals with requests *other* than requests for surrender interfering with national proceedings relating to a different case.¹⁴⁵ It provides that the requested State may postpone the execution of the request for a period of time agreed upon with the Court. However, the postponement shall be no longer than is necessary to complete the relevant investigation or prosecution in the requested State. Moreover, the State should also consider granting the request immediately subject to certain conditions. During the postponement period, the Prosecutor may seek measures to preserve evidence, pursuant to Article 93(1)(j) of the Statute.

4.3 Competing request of another State

The principle of complementarity also influences the relationship between cooperation duties that States Parties have towards the Court and obligations that they have towards other States under international law.

As of the competing request to surrender a person of another State, Article 90 sets different regimes depending on: (i) whether the requesting State is a member to the Rome

¹⁴² *ibid* 1548, where they also say that ‘this is attributable to the fact that while the issue was resolved in the late stages of the negotiation, the question of inclusion of grounds for refusal [with respect to surrender in general, ndr] was not resolved until the very final stage’.

¹⁴³ Prosecutor v. Saif Gaddafi, PTC I Decision on Libya’s submission regarding the arrest of Gaddafi, ICC-01/11-01/11-72, 7 March 2012, 15.

¹⁴⁴ Claus Kress and Kimberly Prost, ‘Article 86’ in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn, Beck/Hart 2008) 1515.

¹⁴⁵ On the distinction between Article 89(4) and Article 94(1) see Prosecutor v. Saif Gaddafi, PTC I Decision on Libya’s submission regarding the arrest of Gaddafi (n 143), 15.

Statute, (ii) whether the requesting State (regardless of it being a party to the Statute) seeks the extradition of the person for a different conduct than that selected by the ICC Prosecutor.

4.3.1 The requesting State is (or is not) a party to the Statute

If the requesting State is a party to the Statute, the requested State may postpone the execution of the request until the Court has decided on the admissibility of the case. If the Court decides that the case is admissible, though, the state has to surrender the person to the Court.¹⁴⁶

Conversely, if the requesting State is not a party to the Statute and the requested State is under an international obligation to extradite the person to that State, it is the requested State's discretion to determine which of the two obligations shall prevail.¹⁴⁷ In making this decision, it shall consider all the relevant factors, such as, for example, the respective dates of the requests, the interests of the requesting State (including, where relevant, whether the crime was committed in its territory and the nationality of the victims and of the person sought), and the possibility of subsequent surrender between the Court and the requesting State.¹⁴⁸

If, however, the requested State is not under an international obligation to surrender the person to the requesting State, it shall give priority to the request from the Court if the latter has determined that the case is admissible;¹⁴⁹ in case the Court has determined that the case is inadmissible, though, the requested State has the discretion to deal with the request for extradition from the requesting State.¹⁵⁰

4.3.2 Competing request of another State for a different conduct

If any State requests a State party the extradition of a person for a different conduct than that for which the person is sought by the Court, the requested State shall give priority to the request from the Court if it is not under an international obligation to extradite the person to the requesting State.¹⁵¹ Conversely, if such international obligation exists, the requested State has discretion to determine whether to surrender the person to the Court or to extradite the person to the requesting State.¹⁵² In making its decision, the requested State shall consider all

¹⁴⁶ Article 90(2)(a) and (b) of the Statute.

¹⁴⁷ Article 90(4) and (6) of the Statute.

¹⁴⁸ Article 90(6) of the Statute.

¹⁴⁹ Article 90(4) of the Statute.

¹⁵⁰ Article 90(5) of the Statute.

¹⁵¹ Article 90(7)(a) of the Statute.

¹⁵² Article 90(7)(b) of the Statute.

the relevant factors, and give special consideration to the relative nature and gravity of the conduct in question.¹⁵³

4.4. Competing request to provide other forms of assistance from another State

Article 90 deals exclusively with competing requests for arrest and surrender. The situation of a competing request to provide other forms of judicial assistance by another State is regulated by Article 93(9)(a). According to it, the State shall endeavour to satisfy both requests. However, if this is not possible, the principles of Article 90 shall apply.

5. Complementarity and cooperation in the practice of the organs of the Court

Since the beginning of its functioning in 2001, the Court (and *in primis*, the Prosecutor) was confronted with the ‘terrible disadvantage’ referred to by Paolo Benvenuti,¹⁵⁴ namely, the fact that ICC investigations depend on the cooperation of territorial States that are unwilling or unable to prosecute international crimes. Inevitably, this tension had to be reconciled in the practice of its organs. Therefore, it is now time to critically analyse the interpretation of complementarity adopted by the OTP and the Chambers.

Paragraph 2.2 has shown that, at the Rome Conference, ‘complementarity’ was not a completely determinate concept. As Robert Cryer has pointed out, ‘the negotiations there perhaps worked on the basis that an incompletely theorized agreement could be reached amongst the various delegations about the use of the term.’¹⁵⁵ This resulted in a fragmented legal framework and vague criteria that leave great interpretative leeway in determining the parameters of the concept. As a consequence, the practice of the various organs of the Court is decisive in giving content to this principle.¹⁵⁶

As the following paragraphs will show, contrary to what was anticipated by early scholars and commentators, in the practical application of the principle of complementarity the Court did not struggle so much with the ambiguous concepts of ‘genuineness’, ‘unwillingness’ or ‘inability’, but rather with the question of ‘inactivity’ of States, and on what constitutes a ‘case’ for the purpose of the Rome Statute. Curiously, these concepts -

¹⁵³ Article 90(7)(b) of the Statute.

¹⁵⁴ Benvenuti (n 17) 50.

¹⁵⁵ Cryer (n 18) 1099.

¹⁵⁶ *ibid.*

which had been quite neglected during the drafting process - have come to shape and dominate the current debate on complementarity.¹⁵⁷

5.1 'Positive complementarity' as a prosecutorial strategy to enhance cooperation

Twelve years ago, at the beginning of his tenure, the first Chief Prosecutor Luis Moreno-Ocampo made clear that: 'as a consequence of complementarity, the number of cases that reach the Court should not be a measure of its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.'¹⁵⁸ This statement conveyed the idea that the complementarity system is aimed at establishing an international order wherein national institutions respond effectively to international crimes, thereby obviating the need for trials before the ICC.

Over the years, the OTP elaborated on this understanding and developed its strategy on complementarity in several policy and expert papers. In the Paper on Some Policy Issues before the OTP released in 2003, the Office emphasized that, according to the Statute, national States have the primary responsibility for preventing and punishing atrocities in their own territories. In this design, intervention by the Office must be exceptional.¹⁵⁹ Accordingly, in what appears to be a message of reassurance to States, the Paper explained that, 'as a general rule, (...) the policy of the Office in the initial phase of its operations will be to take action only where there is a clear case of failure to take national action'.¹⁶⁰ Within this understanding, the OTP envisaged a twofold approach in the fight against impunity. On the one hand, it would initiate prosecutions of the leaders who bear most responsibility for international crimes and, on the other hand, it would encourage national prosecutions for the lower-ranking perpetrators.¹⁶¹

Later that year, the OTP commissioned an expert study on complementarity in practice, so as to seek advice on the legal, policy and management challenges entailed by the complementarity regime. Shortly thereafter, the expert group, coordinated by Darryl Robinson, submitted the Informal Expert Paper on Complementarity in Practice.¹⁶² This paper promotes quite a different conception of complementarity, whose purpose is coming to terms

¹⁵⁷ Nouwen (n 63).

¹⁵⁸ Statement by Mr. Luis Moreno-Ocampo, June 16, 2003 Ceremony for the Solemn Undertaking of the Chief Prosecutor.

¹⁵⁹ OTP, Paper on Some Policy Issues before the Office of the Prosecutor (2003) 4.

¹⁶⁰ *ibid.*, 5.

¹⁶¹ *ibid.*, 3.

¹⁶² OTP, Informal Expert Paper on Complementarity in Practice (n 26).

with the environment in which the Court operates and with the structural constraints that characterize its functioning, first and foremost, the need for States cooperation.

In the experts' opinion, 'the complementarity regime serves as a mechanism to encourage and facilitate the compliance of States with their primary responsibility to investigate and prosecute core crimes'.¹⁶³ Accordingly, the Paper introduced (albeit without defining it as such) what has become known as 'positive complementarity'.¹⁶⁴ Pursuant to this approach, the Prosecutor's objective is not to 'compete' with States for jurisdiction, but to help ensure that the most serious international crimes do not go unpunished.¹⁶⁵

The concept of 'partnership' with States, therefore, became a key aspect of the prosecutorial strategy.¹⁶⁶ In brief, 'partnership' with States entails a positive and constructive relationship with national authorities that are genuinely investigating and prosecuting, by which the Prosecutor may encourage the latter to take action with respect to international crimes, help develop cooperative anti-impunity strategies, and even provide them with direct assistance and advice.¹⁶⁷

Undeniably, positive complementarity is based on a particular understanding of the relationship between the ICC and national jurisdictions, a relationship that is 'uncompetitive'¹⁶⁸ and presupposes the 'interdependency between two *fora* rather than the complete independence of the ICC from domestic courts'.¹⁶⁹ This approach welcomes a 'consensual division of labour' between the OTP and States, and claims that, in some circumstances, this might be the most appropriate course of action.

In particular, there may be situations where a State expressly acknowledges that it is not carrying out an investigation or prosecution, so as to render the case admissible before the Court (uncontested admissibility scenario). This is perfectly consistent with a literal reading of Article 17, which clearly (albeit implicitly) provides that a case is admissible where no

¹⁶³ OTP, Informal Expert Paper (n 26) 3.

¹⁶⁴ In 2006, the positive approach to complementarity was officially formulated as a policy principle in the report of the OTP on Prosecutorial Strategy. According to the definition contained therein, 'the OTP encourages genuine national proceedings where possible; relies on national and international networks; and participates in a system of international cooperation. OTP, Report on Prosecutorial Strategy (2006) 5.

¹⁶⁵ OTP, Informal Expert Paper (n 26) 3.

¹⁶⁶ 'Vigilance marks the converse principle that, at the same time, the ICC must diligently carry out its responsibilities under the Statute. The Prosecutor must be able to gather information in order to verify that national procedures are carried out genuinely. Cooperative States should generally benefit from a presumption of bona fides and baseline levels of scrutiny, but where there are indicia that a national process is not genuine, the Prosecutor must be poised to take follow-up steps, leading if necessary to an exercise of jurisdiction', OTP, Informal Expert Paper (n 26) 4.

¹⁶⁷ OTP, Informal Expert Paper (n 26) 4.

¹⁶⁸ Nouwen (n 63) 341.

¹⁶⁹ Hitomi Takemura, 'A Critical Analysis of Positive Complementarity' in Stefano Manacorda (ed), *Criminal law between war and peace* (Cuenca : Ed de la Universidad de Castilla-La Mancha 2009) 602.

State has initiated any investigation. In such cases there will be no question of ‘unwillingness’ or ‘inability’¹⁷⁰ and the express acknowledgement of the State merely simplifies the factual determination of admissibility.¹⁷¹

The Expert Paper clarifies that a consensual division of labour between the Court and a state does not remove the procedural right of the accused to raise challenges to admissibility. However, in the clear absence of any investigation or prosecution by a State, an admissibility challenge on the grounds of complementarity would have to be dismissed. Therefore, the accused would be left with the possibility of challenging admissibility only on the grounds of *ne bis in idem* and gravity.¹⁷²

Finally, it is important to remark that agreements between the Court and States regarding the most appropriate forum of adjudication will often go hand in hand with agreements on cooperation. The Expert Paper advises the OTP to develop ‘a form wherein the State acknowledges non-exercise of jurisdiction in favour of ICC jurisdiction and pledges its co-operation with the ICC investigation and prosecution’.¹⁷³ This is especially important when the state concerned is not a party to the Statute and, therefore, does not have an obligation to cooperate arising from it. However, such arrangements may be equally useful with states parties, as they can ‘effectively bolster or make more effective compliance with obligations of Part 9.’ As has been seen in Chapter II, to date, the OTP has signed cooperation agreements with states that have referred situations on their territories.¹⁷⁴

The Expert Paper also suggests that these arrangements could be coupled with a referral of the situation to the ICC. In this respect, it is interesting to note that the OTP’s policy of encouraging states to refer situations on their territories – rather than using its *proprio motu* powers to open an investigation- is one of the most important practical expressions of the positive approach to complementarity. As early as 2003, the Prosecutor acknowledged that: ‘where the Prosecutor receives a referral from the State in which a crime has been committed, the Prosecutor has the advantage to knowing that that State has the political will to provide his Office with all the cooperation within the country that it is required to give under the Statute.’¹⁷⁵ So far, five out of nine situations investigated by the

¹⁷⁰ OTP, Paper on Some Policy Issues, (n 159) 2; OTP, Informal Expert Paper (n 26) 18, 59-66.

¹⁷¹ Appropriate circumstances for burden-sharing with the Court may occur, for example, when a State is incapacitated by mass crimes, or where opposing factions refuse national prosecutions for fear of biased proceedings, and yet agree to be tried before an external body which they perceive as impartial.

¹⁷² OTP, Informal Expert Paper (n 26) 64.

¹⁷³ OTP, Informal Expert Paper (n 26) 66.

¹⁷⁴ See Chapter II, para 5.3.1.

¹⁷⁵ OTP, Annex to the Paper on Some Policy Issues (n 66) I.D.

Court result from self-referrals, namely, the situations in the Democratic Republic of the Congo (DRC), Uganda, Central African Republic (CAR), Ivory Coast¹⁷⁶ and Mali.

The consistency of the practice of self-referrals with the letter and purpose of the Rome Statute has been debated at length among scholars,¹⁷⁷ and goes beyond the scope of this Chapter. However, it is submitted that this practice is a fundamental contextual element that has to be kept in mind when discussing rights of defendants in cooperation proceedings. It is now time to assess the impact that states cooperation obtained through the above-seen strategy has had on the rights of the suspects who have been targeted by the Prosecutor's investigation.

5.2 The ICC's case law on admissibility

In the Katanga case the Appeals Chamber set forth the authoritative interpretation of the admissibility-test under Article 17, and, *the facto*, sanctioned the positive approach to complementarity of the OTP.

According to the Appeals Chamber, when a State having jurisdiction remains *inactive* with respect to a case (that is, it is not investigating or prosecuting, or has not done so), the latter is admissible, and the question of unwillingness or inability does not arise.¹⁷⁸ As a consequence, unwillingness and inability have to be considered only a) when there are domestic investigations or prosecutions that could render the case inadmissible before the Court, b) when there have been such investigations and the State having jurisdiction has decided not to prosecute the person concerned.¹⁷⁹

Despite the fact that some form of national proceedings was on-going before national courts, in its decisions on admissibility so far the Court has found cases to be admissible due to the inaction of the relevant state, and has not inquired on the issues of unwillingness and

¹⁷⁶ The investigation into the situation in Ivory Coast was technically opened at the Prosecutor's initiative under Article 15 in 2011; however, the engagement of the Court in the country was prompted by a declaration accepting its jurisdiction under Article 12(3) by the government of Ivory Coast in 2003. This situation, thus, is *de facto* a self-referral.

¹⁷⁷ Paola Gaeta, 'Is the Practice of "Self-Referrals" a Sound Start for the ICC?' (2004) 2 Journal of International Criminal Justice 949; Claus Kress, 'Self-Referrals and Waivers of Complementarity - Some Considerations in Law and Policy' (2004) 2 Journal of International Criminal Justice 944; Payam Akhavan, 'Self-Referrals Before the International Criminal Court: Are States the Villains or the Victims of Atrocities?' (2010) 21 Criminal Law Forum 103; Andreas Th Müller and Ignaz Stegmüller, 'Self-Referrals on Trial From Panacea to Patient' (2010) 8 Journal of International Criminal Justice 1267; Darryl Robinson, 'The Controversy over Territorial State Referrals and Reflections on ICL Discourse' (2011) 9 Journal of International Criminal Justice 355.

¹⁷⁸ Prosecutor v. Germain Katanga, AC Judgment on the Appeal of Mr. Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07 OA 8, 25 September 2009, 75-79.

¹⁷⁹ *ibid.*, 78.

inability.¹⁸⁰ These findings of inactivity are based on two reasons, which will be examined below.

5.2.1 A narrow interpretation of the word ‘case’ under Article 17 of the Statute

In the decision issuing an arrest warrant against the first defendant of the Court, Thomas Lubanga Dyilo, the Pre-Trial Chamber held that ‘it is a *conditio sine qua non* for a case arising from the investigation of a situation to be inadmissible that national proceedings encompass both the person and the conduct which is the subject of the case before the Court’ (same conduct test).¹⁸¹

The DRC authorities were prosecuting Lubanga for very serious charges, such as genocide and crimes against humanity; however, they did not include the one and only charge selected by the ICC Prosecutor, namely, the enlistment and conscription of child soldiers. Applying the ‘same conduct test’, the Pre-Trial Chamber considered that the DRC was ‘inactive’ in relation to the Prosecutor's case and, as a consequence the latter was admissible before the Court. This standard has been applied in many subsequent decisions on arrest warrants (among others, the one against Katanga)¹⁸², as well as in judgments on challenges to admissibility raised by states.¹⁸³

5.2.2 A decision of the State to close its national proceedings to the benefit of the Court.

In its decision on the challenge to the admissibility of the case raised by Katanga’s Defence, the Court ruled that, if a state decides to relinquish its jurisdiction in favour of the ICC, the case is admissible regardless of the state’s willingness or ability to prosecute it.¹⁸⁴

The Appeals Chamber considered that, at the time of the challenge,¹⁸⁵ no investigation regarding Katanga was taking place in the DRC, as the latter had closed any investigation that

¹⁸⁰ Nouwen (n 63) 45.

¹⁸¹ Prosecutor v. Thomas Lubanga, PTC I Decision on the Prosecutor’s Application for a Warrant of Arrest, ICC-01/04-01/06, 10 February 2006, 31.

¹⁸² Prosecutor v. Germain Katanga, PTC I Urgent Warrant of Arrest for Katanga, ICC-01/04-01/07, 2 July 2007.

¹⁸³ See, for example, Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, AC Judgment on the Appeal of the Republic of Kenya against the decision of PTC II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’, ICC-01/09-02/11 OA, 30 August 2011.

¹⁸⁴ Prosecutor v. Germain Katanga (n 178) 80.

¹⁸⁵ Contrary to what the Defence had claimed, the Appeals Chamber found that the admissibility of a case must be determined on the basis of the facts as they exist *at the time of the admissibility challenge*, and not at the time of the issuance of the warrant of arrest.

may have been on-going when it decided to surrender Katanga to the Court in October 2007. There was no same conduct test to apply because there were simply no proceedings, and the DRC had to be considered inactive in relation to any investigations or prosecutions of any crime allegedly committed by Katanga.¹⁸⁶

The decision to end the national investigations did not constitute a decision not to prosecute under Article 17(1)(b) either, as its thrust was not that ‘the Appellant should not be prosecuted, but that he should be prosecuted, albeit before the International Criminal Court’.¹⁸⁷ In the view of the Chamber: ‘if the decision of a State to close an investigation because of the suspect's surrender to the Court were considered to be a decision not to prosecute, the peculiar, if not absurd, result would be that because of the surrender of a suspect to the Court, the case would become inadmissible. In such scenario, neither the State nor the ICC would exercise jurisdiction over the alleged crimes, defeating the purpose of the Rome Statute.’¹⁸⁸

Finally, the judges acknowledged that, depending on the circumstances of each case, the decision of a State to relinquish its jurisdiction in favour of the Court may not be inconsistent with the duty to exercise its criminal jurisdiction under the sixth paragraph of the Preamble.¹⁸⁹

This reasoning has been applied for dismissing every challenge to admissibility brought up by accused persons so far. For example, in its decision on the admissibility challenge raised by Bemba, the Trial Chamber III expressly acknowledged that the CAR authorities were investigating the accused for the same case as the ICC Prosecutor’s.¹⁹⁰ However, on 16 December 2004 the Bangui Court of Appeal ordered the transfer of the case to the Court, which made the CAR inactive with respect to that case at the time of the admissibility challenge (2010).¹⁹¹

In its document in support of the appeal, the Defence of Katanga made interesting observations concerning the impact that such conception of admissibility might have on the rights of the accused. According to it, the latter should be entitled to challenge consensual burden sharing when his/her rights are violated as a result of this or when the national ‘waiver

¹⁸⁶ Prosecutor v. Germain Katanga (n 178) 80.

¹⁸⁷ *ibid.*, 82.

¹⁸⁸ *ibid.*, 83.

¹⁸⁹ *Ibid.*, 85.

¹⁹⁰ Prosecutor v. Jean-Pierre Bemba, TC III Decision on Admissibility and Abuse of Process Challenges, ICC-01/05-01/08, 24 June 2010, 218.

¹⁹¹ *ibid.*, 224, 238-242.

of prosecution' would be unduly prejudicial.¹⁹² It rightly pointed out that 'if the Court informs States that it will not inquire into the reason why the State is unwilling to investigate or prosecute, it will have the effect of encouraging the current practice of the DRC to simply keep detainees in detention indefinitely until the ICC decides whether or not it wants to prosecute them.'¹⁹³

6. Conclusion

This Chapter has shown how the Prosecution and the judges have dealt with the structural paradox that the principle of complementarity entails, and has pointed out the consequences that this has had on the rights of suspect and accused persons. Inevitably, the tension by which the Court depends on the cooperation of states that either remain inactive towards international crimes or are unwilling or unable to prosecute them, had to be reconciled in the practice of its organs.

The Prosecution has interpreted the complementarity principle in a 'positive' way, seeking the partnership of states and agreeing on a division of labour with them. It has encouraged states to refer the situations on their territories so as to enhance their cooperation. The latter, however, has come to the price of directing the investigation towards persons disfavoured by their government, whose rights had been violated in the context of national proceedings against them.

Defendants, for their part, have denounced the violations of their rights occurred in the division of labour with the Court and their state of nationality by challenging the jurisdiction of the Court and the admissibility of their case. This Chapter has exclusively dealt with the latter. It has shown that, although admissibility challenges were largely conceived as a safeguard for the protection of the sovereignty of states, in the cases where governments entertain a cooperative relationship with the Court, proceedings under Article 19 have been used primarily as an instrument of protection of defendants' rights.¹⁹⁴

In addressing the merits of these challenges, ICC Judges have not engaged with the structural tensions and limitations of the Court with a view of protecting the accused. Rather, they have given narrow/legalistic answers to broader policy questions. Although the case law

¹⁹² Prosecutor v Katanga, Defence Document in Support of Appeal of the Defence for Mr. Katanga against the Decision of the Trial Chamber '*Motifs de la décision orale relative à l'exception d'irrecevabilité de l'affaire*' ICC-01/04-01/07, 8 July 2009, 99.

¹⁹³ *ibid.*, 100.

¹⁹⁴ Stahn (n 27) 229.

on the challenges to jurisdiction and admissibility examined above is consistent with the letter of the Statute, these decisions are nonetheless problematic from a human rights perspective. The ICC Judges have adopted an interpretation of admissibility that is extremely obsequious towards the interests of states. By so doing, they have *de facto* sanctioned the policy of positive complementarity of the Prosecutor and have refrained from questioning the most problematic aspects of the practice of consensual burden sharing between the OTP and national authorities.

CHAPTER IV
THE IMPACT OF STATE COOPERATION ON THE RIGHT TO LIBERTY
OF SUSPECTS AND ACCUSED

1. Introduction

This Chapter aims at understanding the challenges that State cooperation poses to the right to liberty of suspects and accused in connection with the structural features of the ICC. It addresses two specific components of the right to liberty: the right not to be subject to arbitrary arrest and detention (i.e., *habeas corpus* rights) and the right to interim release.

With respect to the former, the Chapter assesses whether the cooperation law and practice of the Court sufficiently acknowledge the position of suspects detained by national authorities throughout part of the ICC investigation, and the risks to their liberty that the division of labor between the Court and States entails. To this end, the Chapter starts by assessing the position of internationally recognised human rights in the legal framework of the Court and the Statute's protection of the right to liberty of defendants. Second, it addresses the steps that lead the Prosecutor to focus on a specific person as the subject of the investigation, noting that they are largely unregulated. Third, the Chapter addresses the right of suspects and accused to challenge their detention before the Court; this right is not expressly provided, but defendants contest their detention through challenges to the jurisdiction of the Court and the admissibility of their case.¹ The Chapter will focus on the challenges to the jurisdiction raised by three accused: Thomas Lubanga, Germain Katanga and Laurent Gbagbo, as they provide the clearest example of the problems that States' cooperation with the Court in arresting suspects raises with respect of the right to liberty of the latter. Finally, the Chapter assesses the arguments used by the Court in its decisions concerning these challenges, as they are a clear indicator on how the judges have intended their supervisory role vis-a-vis the Prosecutor and national authorities, and their responsibilities in guaranteeing the right to liberty of defendants.

With respect to the right to interim release, the Chapter weights the practice of the ICC against the advanced substantive protection that the Statute affords 'on paper' to this right. As

¹ The relationship between challenges to admissibility and defendants' rights has been discussed in Chapter III.

will be seen, the Court has endorsed a policy by which the identification of a State willing to accept the person concerned is an essential prerequisite to granting conditional release. Regrettably, thus, the right of defendants to be freed pending trial is subject to the voluble and unpredictable inclinations of States.

2. The right to liberty of defendants in the pre-trial phase

2.1 The overarching principle in Article 21(3)

The Rome Statute contains significant innovations in the codification of human rights, in particular during the pre-trial phase of the Court's proceedings. At the outset, Article 21 must be mentioned. This provision is located in Part II of the Statute and follows the provisions governing the jurisdiction and the admissibility of the Court. It lists the sources of law applicable by the Court, establishing a clear hierarchy between them.²

According to Article 21(3), such legal instruments (*in primis*, the Rome Statute) must be interpreted and applied in accordance with internationally recognized human rights. It follows from this provision that human rights law is set as a review mechanism for all the dispositions of the Statute. This is a significant innovation if compared to the law of the ICTY and ICTR, where no such hierarchy among the sources of law existed, and where the position of the Tribunals with respect to human rights norms was much more ambiguous.³

One commentator noted that Article 21(3) has the potential to trigger a paradigm-shift in the interaction between human rights law and international criminal proceedings. In this respect, it is useful to recall that much of the debate before the ICTY and ICTR hinged on the question of whether the exceptional context and circumstances in which the tribunals operate justified a re-interpretation of the existing corpus of internationally recognized human rights.⁴ It goes without saying that such a re-interpretation would often result in a reduction of protection for the accused, to the benefit of the Prosecution. Conversely, the existence of the

² Article 21(1) of the Statute reads as follows: 'The Court shall apply: (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence; (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict; (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.'

³ Göran Sluiter, 'Human Rights Protection in the ICC Pre-Trial Phase' in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Nijhoff 2009) 460.

⁴ Krit Zeegers, *International Criminal Tribunals and Human Rights Law: Adherence and Contextualization*, vol 5 (TMC Asser Press 2016).

overarching principle enshrined in Article 21(3) would prevent a similar jurisprudence to form at the ICC, in that:

‘internationally recognized human rights’ are applicable fully, and thus need not be ‘re-interpreted’ in light of the unique mandate and context of the ICC. More concretely, the mandatory and specific content of Article 21(3) of the Statute appears to prevent Judges from adjusting the content of human rights law to the unique ICC-context.⁵

As will be seen, although the debate on re-contextualization of human rights law did not gain much traction at the ICC, this has not prevented the Court to adopt an interpretation of the Statute that, on occasions, has weakened the protection that internationally recognized human rights grant to the defendant.

2.2 The right not to be subject to arbitrary arrest and detention

Other provisions of the Statute protecting the right to liberty of suspects and accused are located in Part V of the Statute, dealing with the investigation and prosecution. Article 55 contains an explicit codification of the rights of persons in the course of the investigation.⁶ Along with other rights concerning mainly the questioning procedures, the second paragraph of this provision states that, ‘in respect of an investigation under this Statute, a person (...) shall not be subjected to arbitrary arrest and detention, and shall not be deprived of his/her liberty except on such grounds and in accordance with such procedures as established in the Statute.’⁷ This provision must be read in conjunction with Article 85(1), which provides that anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

2.3 Arrest proceedings in the custodial State

In the ICC Statute, the responsibilities of States in deprivation of liberty and the corresponding rights of detained individuals were given much more thought than was the case

⁵ Sluiter (n 3) 463.

⁶ Salvatore Zappalà, ‘Rights of Persons during an Investigation’ in A. Cassese and J. Jones (eds), *The Rome Statute of the International Criminal Court: a Commentary*, vol II (OUP 2002).

⁷ Article 55(1)(d) of the Statute.

at the *ad hoc* Tribunals, where the arrest and surrender of suspects by States were mainly conceived as obligations of result.⁸

The relevant provision is Article 59, regulating arrest and surrender proceedings in the custodial State. It provides that the latter immediately take steps to arrest the person in question in accordance with its laws and the ICC Statute.⁹ The arrested person ‘shall be brought promptly before the competent judicial authority in the custodial state which shall determine, in accordance with the law of that state that a) the warrant applies to that person, b) the person has been arrested in accordance with the proper process, c) the person’s rights have been respected.’¹⁰ Moreover, it regulates interim release at the national level.¹¹

As has been noted, in this way national judges become ‘guardians’ of the lawfulness of the arrest.¹² Importantly, however, Article 59(4) forbids them to rule on whether the warrant of arrest was properly issued under Article 58 of the Statute. This means that national judges cannot determine whether or not the detainee has committed a crime within the jurisdiction of the Court, neither can they establish that the detention of the person is necessary to ensure his/her presence at trial, or to prevent the person to obstruct ongoing investigations and proceedings, or to impede him/her from leaving this matter in the exclusive competence of the Court. Rule 117(3) RPE complement this provision by providing that the arrested person shall bring any challenge as to the issuance of the warrant directly to the Pre-Trial Chamber.

There are two main questions that this regime leaves unanswered. The first one relates to the role and powers of national judges in case they determine that a State has failed to comply with Article 59(2). For example, if they establish a manifest violation of the person’s rights in the execution of the arrest or an illegality in the detention. What are the remedies that national judges can provide to the suspect? Can they permanently release him/her? So far this issue has not arisen in the practice of the Court. Scholars, however, tend to respond in the

⁸ Karel De Meester and others, ‘Chapter 3. Investigation, Coercive Measures, Arrest, and Surrender’ in Göran Sluiter and others (eds), *International Criminal Procedure: Principles and Rules* (Oxford University Press 2013) 329; William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010) 717.

⁹ Article 59(2) of the Statute.

¹⁰ Rule 117(2) RPE reads: ‘at any time after arrest, the person may make a request to the Pre-Trial Chamber for the appointment of counsel to assist with proceedings before the Court and the Pre-Trial Chamber shall take a decision on such request’.

¹¹ Article 59(3), see further.

¹² Carsten Stahn, ‘Arrest and Surrender under the ICC Statute: A Contextual Reading’, *Future Perspectives on International Criminal Justice* (TMC Asser Press 2010).

negative, stressing that the obligation to surrender the person to the Court must prevail and be fulfilled pursuant to Article 59(4).¹³

This brings us to the second question, concerning the role of the Court with respect to violations committed by national authorities executing arrest warrants on its behalf. When national judicial authorities fail to rule on such violations, an arrested person may bring up the issue before the Court. Therefore, the question arises as to whether the ICC is competent to address and provide a remedy for such violations.¹⁴ This matter will be addressed thoroughly in section 4 of the present Chapter.

Before delving into the Court's practice, however, it is useful to make some final considerations on the Statute's regime concerning the right to liberty. The protection of this right afforded by the Statute is premised on a clear distinction between proceedings before national authorities and proceedings before the Court. The right of persons not to be subject to arbitrary arrest and detention enshrined in Article 55 is specifically circumscribed to 'an investigation under this Statute'. However, this framework does not take into account the possibility that a suspect may also have been subject to an investigation under national proceedings, which may or may not be related to that of the Court. ICC investigations do not take place in a vacuum, and the activities of the Court cannot always be separated from those of the States. More often than not, the ICC is involved in situations of ongoing conflict where crimes continue to be committed while local authorities are taking measures to deal with them. In some of the situations before the Court (DRC, CAR, Ivory Coast) the opening of an ICC investigation took place in the context of ongoing national criminal proceedings, which had to do with incidents falling within the broader situation investigated by the Court.

Along the same line, in endowing States with the task of ensuring the lawfulness of the arrest, Article 59(2) appears to have been drafted on the assumption that suspects would be at large. All the guarantees enshrined therein apply from the moment in which the person is apprehended and arrested by local authorities *on behalf* of the Court, and are aimed to make sure that States respect the basic human rights of suspects while executing the request of the Court. The early practice of the ICC has proved that this is only one of the possible scenarios. As we will see in the following paragraph, in the situation in the DRC and Ivory Coast, some

¹³ De Meester and others (n 8) 329; Sluiter (n 3) 469; Christopher K Hall, 'Article 59' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn, Beck/Hart 2008) 1152; contra see Mohamed M El Zeidy, 'Critical Thoughts on Article 59 (2) of the ICC Statute' (2006) 4 *Journal of International Criminal Justice* 448, 455, according to whom 'a violation of the person's right may sometimes result in a decision by the competent authorities to release the person in question'.

¹⁴ El Zeidy (n 13) 457; see generally Sluiter (n 3).

defendants had already been in detention due to national proceedings when the Prosecutor requested their arrest on behalf of the Court.

3. From the investigation of a ‘situation’, to the development of a ‘case’ against a ‘suspect’

3.1 From the preliminary examination to the investigation: Prosecutorial discretion

Chapter III has described the two stages of the Court’s investigation, the preliminary examination and the actual investigation.¹⁵ A brief recap is in order here. As has been seen, upon the receipt of a referral by a State or the UN Security Council, a declaration under Article 12(3), or a communication pursuant to Article 15 of the Statute, the Prosecutor starts a ‘preliminary examination’ of the situation at hand in order to determine whether there is a ‘reasonable basis’ to open an investigation. To this end, pursuant to Article 53(1) of the Statute, s/he must consider whether the alleged crimes fall within the jurisdiction of the Court, whether the possible cases arising from the investigation would be admissible under Article 17, and whether an investigation would serve the interests of justice. Upon the conclusion of the preliminary examination, should the Prosecutor find the existence of a reasonable basis to proceed, s/he will open a formal investigation (with the authorization of the Pre-Trial Chamber when necessary¹⁶).

At the preliminary examination stage, the Prosecutor has no formal investigative powers, and consequently, no duty of care about the individuals that will be targeted by the investigation. At the same time, there is no involvement of the Pre-Trial Chamber in supervising the Prosecutor’s activities or safeguarding the rights of those people who might become future suspects. There is no time limit for a preliminary examination and the Prosecutor can keep evaluating the situation and the relevant national proceedings for years.¹⁷

With the commencement of the investigation, duties and powers of the Prosecutor are (to a certain extent) clearly defined by Article 54 of the Statute. Paragraph 1, letter c) of Article 54 imposes upon the Prosecutor the duty to respect the rights of persons arising under

¹⁵ See paragraph 3.2 of Chapter III.

¹⁶ Article 15(3) of the Statute.

¹⁷ This was the case of the preliminary examination of the situation in the Central African Republic (CAR), which went on for over two years. The CAR government referred the situation on its territory in December 2004 but the investigation did not commence until May 2007. Similarly, Ivory Coast made a declaration pursuant to Article 12(3) of the Statute in 2003, but the Prosecutor requested authorization from the Pre-Trial Chamber to start an investigation only in 2011, see <https://www.icc-cpi.int/pages/preliminary-examinations.aspx>.

the Statute. As far as suspects are concerned, the protection of their fair trial guarantees is enshrined in a number of Articles contained in Part V of the Statute, headed ‘Investigation and prosecution’. The most prominent provisions in this respect are Articles 55 (‘Rights of persons during an investigation’) and 59 (‘Arrest proceedings in the custodial State’), which have been analysed in section 2 of the present Chapter.

At any time after the initiation of the investigation the Prosecutor may apply to a Pre-Trial Chamber for a warrant of arrest or a summons to appear against an individual.¹⁸ It is important to note that the Statute does not impose a time limit on the Prosecutor for the completion of the investigation and for approaching the Pre-Trial Chamber with a request for an arrest warrant. As has been noted, this system ‘leaves wide discretion and has the advantage to permit an investigation without any ‘obstacles’, especially the intervention by a defense lawyer’.¹⁹ In the situation in the Democratic Republic of Congo (DRC), the first arrest warrant against Thomas Lubanga was issued after two years from the commencement of the investigation in June 2004.²⁰

3.2 The supervisory role of the Pre-Trial Chamber: Article 57(3)(c) of the Statute

The Rome Statute endows the Pre-Trial Chamber with a certain role in supervising the activities of the investigation.²¹ It has been observed that ‘[t]he interplay between the Prosecutor and the Pre-Trial Chamber at the early stages of the proceedings constitutes one of the more striking examples of the uniqueness of the ICC’s procedural law’.²²

Pursuant to Article 57(3)(c) of the Statute the Pre-Trial Chamber has the power to ‘provide for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and

¹⁸ Article 58 of the Statute.

¹⁹ Kai Ambos, ‘The Structure of International Criminal Procedure: “Adversarial”, “Inquisitorial” or Mixed?’ in Michael Bohlander (ed), *International Criminal Justice: A Critical Analysis of Institutions and Procedures* (Cameron May 2007) 444.

²⁰ See <https://www.icc-cpi.int/drc/lubanga>

²¹ Olivier Fourmy, ‘The Powers of the Pre-Trial Chambers’ in Antonio Cassese, Paola Gaeta and John RWD Jones (eds), *The Rome Statute of the International Criminal Court: a Commentary*, vol II (Oxford University Press 2002); Fabricio Guariglia and Gudrun Hochmayr, ‘Article 57’ in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn, Beck/Hart 2008); Christopher K Hall, ‘Article 58’ in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn, Beck/Hart 2008); Guariglia F. and Hochmayr G., ‘Article 56’ in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn, Beck/Hart 2008); Morten Bergsmo, Jelena Pejić and Otto Triffterer, ‘Article 15’, *Commentary on the Rome Statute of the International Criminal Court* (2nd edn, Beck/Hart 2008); Morten Bergsmo and Paul? Kruger, ‘Article 53’ in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn, Beck/Hart 2008).

²² Claus Kress, ‘The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise’ (2007) 5 *Journal of International Criminal Justice* 537, 606.

the protection of national security information'. According to Michela Miraglia, this provision 'envisions very general *proprio motu* powers that the Pre-Trial Chamber can exercise over the course of the pre-trial phase, paving the way for a more active and 'interventionist' attitude, beyond the minimum limits specified by the other provisions of the Statute'.²³

Interestingly, the first ever decision of the Court was prompted by the necessity of the judges to control the unfettered prosecutorial discretion mentioned in the previous paragraph.²⁴ After the investigation in the Democratic Republic of Congo (DRC) had been initiated,²⁵ but before the request for an arrest warrant had been submitted, a controversy between the Prosecution and the Pre-Trial Chamber arose.²⁶ On 9 November 2004, the Chamber held a meeting with representatives of the Office of the Prosecutor (OTP) to discuss the progress of the investigation. Since the OTP refused to transmit certain confidential documents, the Pre-Trial Chamber issued a decision to convene a status conference pursuant to Article 57(3)(c) of the Statute in order 'to provide *inter alia* for the protection of victims and witnesses and the preservation of evidence'.²⁷ The Prosecutor vehemently opposed such decision, arguing that the status conference was unauthorized by the legal framework of the Court. Admittedly, neither the Statute nor the ICC RPE directly envisage the holding of a status conference at such an early stage of the proceedings. On the contrary, the Rules allow for this procedural mechanism to be resorted to prior to the confirmation hearing and the trial.²⁸ More broadly, the Prosecution argued that the Pre-Trial Chamber had overstepped its powers:

It is submitted that the interplay between Pre-Trial Chamber and Prosecution is a sensitive matter that lies at the heart of the compromises reached in Rome between different legal traditions and values, and must be approached with the utmost caution. In relation to the investigative activities undertaken by the Court, this compromise between different legal cultures is represented by two main features of the Statute: the independence and autonomy of the Prosecutor in conducting investigations, always under strict application of the principle of objectivity enshrined in Article 54 (1)(a), and the specific supervisory powers of the Pre-Trial Chamber. The system enshrined in the

²³ Michela Miraglia, 'The First Decision of the ICC Pre-Trial Chamber International Criminal Procedure Under Construction' (2006) 4 *Journal of International Criminal Justice* 188, 191.

²⁴ Miraglia (n 23).

²⁵ The investigation into the situation in the DRC started in June 2004.

²⁶ Miraglia (n 23); William A Schabas, *An Introduction to the International Criminal Court* (4 edition, Cambridge University Press 2011) 270–272; Ambos (n 19) 443–444.

²⁷ Situation in the DRC, PTC I Decision to Convene a Status Conference, ICC-01/ 04, 17 February 2005.

²⁸ See Rules 121 and 132 RPE.

Statute is one where the investigation is not performed or shared with a judicial body, but rather entrusted to the Prosecution, as expressly provided for in Article 42 (1) of the Statute: the Office of the Prosecutor “shall be responsible for conducting investigations [...] before the Court”. At the same time, the system also includes a closed number of provisions empowering the Pre-Trial Chamber to engage in specific instances of judicial supervision over the Prosecution’s investigative activities. The Prosecution submits that this delicate balance between both organs must be preserved at all times in order to honour the Statute, and to enable the Court to function in a fair and efficient manner.²⁹

The Chamber dismissed the Prosecutor’s objections on merely procedural grounds and confirmed the status conference.³⁰ The firm stance taken by the Court is commendable. Seventh months into the investigation without any known result, the judges gave a broad interpretation to Article 57(3)(c) of the Statute in order to ‘exercise a general control over the work of the Prosecutor’³¹, speed up the investigation and, by so doing, protect the interests of future suspects.³²

3.2 Situations and cases

In order to make considerations about the responsibility of the Prosecutor towards an individual, it is important to clarify the steps that lead the Prosecutor to focus on a specific person as the subject of the investigation. In this respect, it is essential to distinguish between the notion of a ‘situation’ brought to the attention of the OTP with a referral or a communication, and that of a ‘case’ against an individual developed by the Prosecutor in the course of the investigation.

Albeit the Statute does not define these concepts, they have assumed great importance in the practice of the Court. The Pre-Trial Chamber clarified the distinction in the following terms. According to the judges, situations ‘are generally defined in terms of temporal, territorial and in some cases personal parameters’ (...) and ‘entail the proceedings envisaged in the Statute to determine whether a particular situation should give rise to a criminal investigation as well as the investigation as such’. Cases, on the other hand, ‘comprise

²⁹ Situation in the DRC, Prosecutor’s Position on Pre-Trial Chamber I’s 17 February 2005 Decision to Convene a Status Conference, ICC-01/04, 8 March 2005, 4.

³⁰ Situation in the DRC, Decision on the Prosecutor’s Position on Pre-Trial Chamber I’s 17 February 2005 Decision to Convene a Status Conference, ICC-01/04, 9 March 2005.

³¹ Miraglia (n 23) 192.

³² Ambos (n 19) 444.

specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects’ and ‘entail proceedings that take place after the issuance of a warrant of arrest or a summons to appear’.³³

From these definitions emerges that, in the view of the Chamber, situations encompass both the preliminary examination and the formal investigation until the issuance of a warrant of arrest or a summons to appear pursuant to Article 58, and that a case exists only after a warrant or a summons have been issued.

It is submitted that the definition of a case given by the Court is in some way artificial. This is because, in practice, the OTP will most likely focus on individuals long before a legal case in the sense of Article 58 exists.³⁴ The regulations of the OTP clarify that allegations against one or more specific individuals are bundled during the course of the investigation. Under Regulation 34 of the Regulations of the Court, a joint team of the OTP will review the information and evidence collected during the investigation and will ‘determine a provisional case hypothesis (or hypotheses) identifying the incidents to be investigated and the person or persons who appear to be the most responsible’. Such case hypothesis will include ‘a tentative indication of possible charges, forms of individual criminal responsibility and potentially exonerating circumstances’.

In its recent Draft Policy Paper on Case Selection and Prioritisation, the OTP clarified that, following the decision to open an investigation into a situation or a judicial authorization to that effect:

[t]he Office will develop a Case Selection Plan which identifies in broad terms the potential cases within the situation. Initially, the Plan will be based on the conclusions from the preliminary examination stage, including the potential cases identified therein. As investigations within a situation proceed, the Office will gradually develop one or more provisional case hypotheses that meet the criteria set out in this policy paper.³⁵

It must be noted, however, that the Statute does not require the Prosecutor to formalize the moment in which a person becomes a suspect (for instance by filing a document or notification to the Registry or Defense counsel). As a result, ‘practices on designating

³³ Situation in the DRC, PTC I Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-101-tEN-Corr, 17 January 2006, 65.

³⁴ Kai Ambos, ‘Preliminary Considerations: The Object of Reference of the Complementarity Test (Situation–Case–Conduct)’, *The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court* (Springer Berlin Heidelberg 2010) 38.

³⁵ OTP, Draft Policy Paper on Case Selection and Prioritisation (2016) 7.

suspects are a matter of unpublished internal policy, that involves neither the defense nor the Court'.³⁶ As a matter of fact, the Statute does not even use the word 'suspect'³⁷, but only that of 'accused' at Article 61(9).

The designation of suspects by the Prosecutor, therefore, remains unknown by the judges until the Prosecutor approaches the Pre-Trial Chamber requesting the issuance of an arrest warrant or a summons against an individual. Equally, the latter has no way of discovering whether s/he is being investigated until the warrant or summons has been issued. The only exception arises in case the Prosecutor proceeds to the interrogation of the suspect in the course of the investigation. According to Article 55(2), the interrogation of suspects - carried out either by the OTP staff or national authorities - requires certain guarantees, among which the right to have legal assistance of the person's choosing and be questioned in the presence of counsel.

In sum, it is useful to distinguish between a case in a strict legal sense, which arises after the issuance of an arrest warrant or a summons by the Pre-Trial Chamber, and a case in a broader sense, which commences at the moment the Prosecutor directs her/his investigative efforts towards a specific individual.³⁸ Early on, the Court clarified that the 'the principle of a fair trial applies not only to the case phase – on issuance of a warrant of arrest or a summons to appear – but also prior to the case phase', where 'there is no defendant as such, given that no individual has been issued with a warrant of arrest or a summons to appear'.³⁹

4. The right to challenge one's detention before the ICC

It is important to clarify from the outset the distinction between the possibility to challenge one's detention and the possibility to ask for interim release. The latter is expressly provided and can be done either before national authorities at the moment of the arrest under Article 59(3), or before the Court after the suspect has been transferred there pursuant to Article 60(2). The challenges that cooperation poses to this right will be discussed later.

In the present paragraph the focus is on the defendant's right to challenge the lawfulness of his/her detention. This is not explicitly provided for by the Statute. As has been

³⁶ Amal Alamuddin, 'Collection of Evidence' in Karim AA Khan, Caroline Buisman and Chris Gosnell (eds), *Principles of Evidence in International Criminal Justice* (Oxford University Press 2010) 271.

³⁷ Zappalà (n 6) 1182 (footnote 3).

³⁸ Ambos (n 34) 38.

³⁹ Situation in the DRC, PTC I, Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04, 31 March 2006, 35-36.

seen, national authorities are not allowed to review the warrant of arrest issued by the Pre-Trial Chamber and under Rule 117(3) RPE prescribes that the arrested person shall bring any challenge as to the issuance of the warrant directly to the Pre-Trial Chamber. The Statute does not elaborate further. This is also true for the *ad hoc* Tribunals. As a matter of fact, neither the Statute nor the Rules of Procedure and Evidence of any of the international criminal courts and tribunals mention *habeas corpus*. However, international criminal defendants usually complain about violations of their *habeas corpus* rights by making challenges to the jurisdiction of the tribunal. At the ICC this faculty is envisaged by Article 19, which grants an accused or a person for whom a warrant of arrest or a summons to appear has been issued the possibility to challenge the jurisdiction of the Court. Interestingly, such challenges do not relate to human rights, but to the restrictions that the Statute imposes on the jurisdiction of the Court (i.e., the limitations *ratione materiae*, *ratione temporis*, *ratione personae* and *ratione loci*). In the Lubanga case, the Appeals Chamber has noted the *sui generis* character of jurisdictional challenges based on human rights grounds:

Abuse of process or gross violations of fundamental rights of the suspect of the accused are not identified as such as grounds for which the Court may refrain from embarking upon the exercise of its jurisdiction (...). Notwithstanding the label attached to it, the application of Mr. Lubanga Dyilo does not challenge the jurisdiction of the Court (...) What the appellant sought was that the Court should refrain from exercising its jurisdiction in the matter in hand. Its true characterization may be identified as a *sui generis* application, an atypical motion, seeking the stay of the proceedings, acceptance of which would entail the release of Mr. Lubanga Dyilo.⁴⁰

Notwithstanding the fact that this type of *habeas corpus* challenge is not envisaged by the Statute, the Chamber considered that the overarching principle enshrined in Article 21(3), according to which the ICC Statute must be interpreted as well as applied in accordance with internationally recognized human rights, offers the proper legal basis for the Court to decide on the merits of such challenges, and relinquish its jurisdiction when it is just to do so.

⁴⁰ Prosecutor v. Thomas Lubanga, AC Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Art. 19(2)(a) of the Statute of 3 October 2006, Prosecutor v. Lubanga ICC-01/04-01-06 (OA4), 14 December 2006, 24; Amir Cengic, 'Commentary' in in André Klip and Göran Sluiter (eds), *Annotated Leading Cases of International Criminal Tribunals*, Vol. XXIII, 182–184.

By linking the exercise of the Court's jurisdiction to internationally recognized human rights, the Lubanga decision has a great potential from a Defense perspective. As will be seen, however, when the Court examined the merits of the challenge, it did not live up to the expectations that it raised. Before moving on to this discussion, one last remark has to be made regarding a strictly procedural aspect that passed somehow unnoticed at the moment of the issuance of the Lubanga decision, but which then revealed to be of considerable importance for the outcome of subsequent jurisdictional challenges.

Drawing on the Lubanga jurisprudence, the Appeals Chamber in Gbagbo clarified that a decision of the PTC addressing a request for a stay of proceedings based on allegations of violations of a suspect's fundamental rights is not jurisdictional in nature.⁴¹ Thus, it cannot be appealed under Article 82(1)(a) of the Statute. The correct legal basis for appealing such decisions is Article 82(1)(d), which requires the leave of the Pre-Trial Chamber.⁴² Since Gbagbo had not requested the leave of the Pre-Trial Chamber, his challenge has been found inadmissible and its merits were not considered.

The following subparagraphs will examine the challenges to the jurisdiction of the Court submitted by some accused, as they provide the clearest example of the problems that states' cooperation in arresting suspects raises with respect of the right to liberty. These examples are interesting because they bring up issues regarding the responsibility of the Prosecutor toward the accused from the opening of a preliminary examination on a situation to the request of the issuance of an arrest warrant from the Pre-Trial Chamber. Subsequently, in paragraph 4, the arguments used by the Court in its decisions concerning these challenges will be assessed, as they indicate how the ICC judges have intended their role and responsibilities in guaranteeing the right to liberty of defendants.

4.1 Challenges to the jurisdiction of the Court

So far, three defendants have challenged the jurisdiction of the Court alleging violations of their *habeas corpus* rights: Thomas Lubanga⁴³ and Germain Katanga⁴⁴ in the situation in the

⁴¹ Prosecutor v. Laurent Gbagbo, AC Judgment on the Appeal of Mr. Laurent Koudou Gbagbo against the Decision of Pre-Trial Chamber I on Jurisdiction and Stay of the Proceedings, Prosecutor v. Gbagbo ICC-02/11-01/11 (OA2), 12 December 2012, 101.

⁴² *ibid* at 102.

⁴³ Prosecutor v. Lubanga, Defence Application for Release, ICC-01/04-01/06, 23 May 2006.

⁴⁴ Prosecutor v. Germain Katanga, Defence Motion for a Declaration on Unlawful Detention and Stay of Proceedings, ICC-01/04-01/07, 2 July 2009.

Democratic Republic of the Congo (DRC), and Laurent Gbagbo⁴⁵ in the situation in Ivory Coast. Both of these situations were referred to the Court by the accused's state of nationality, that is, the very State that was supposed to exercise its jurisdiction over the persons in question. The situation in the DRC was referred on 3 March 2004 by President Joseph Kabila, whose government at the time was threatened by the presence of rebel militias in the northeastern region of Ituri. The investigation into the situation in Ivory Coast was technically opened at the Prosecutor's initiative under Article 15 in 2011; however, the engagement of the Court in the country was prompted by a declaration accepting its jurisdiction under Article 12(3) by the government of Ivory Coast in 2003 (government which, curiously, was then presided by Laurent Gbagbo). In December 2010, the newly elected President Alassane Ouattara confirmed the previous declaration and, in a subsequent letter dated May 2011, extended the declaration to cover the serious crisis that had followed the presidential elections of 31 October–28 November 2010, which had brought him to power. As can be seen, therefore, this case is *de facto* a state self-referral, comparable to that of the DRC.

Moreover, the above-mentioned defendants are all political opponents of the government that submitted the referral to the Court. Lubanga and Katanga are warlords and commanders of militias that Kabila's government was fighting at the time of the referral, and Laurent Gbagbo is the former president of Ivory Coast who has been defeated in the elections of 2010.

The consistency of the practice of self-referrals with the letter and purpose of the Rome Statute has been discussed at length among scholars,⁴⁶ and goes beyond the scope of this Chapter. However, when addressing *habeas corpus* rights of defendants, it is important to keep in mind the 'friendly' relationship between the Court and the referring State.

Finally, in the cases in question, defendants had already been in the custody of national authorities when the Prosecutor applied for an arrest warrant to the Pre-Trial Chamber. Both Lubanga and Katanga had been initially arrested in relation to the killing of 9

⁴⁵ Prosecutor v. Laurent Gbagbo, Defence, Corrigendum of the Challenge to the Jurisdiction of the International Criminal Court on the Basis of Art. 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute, ICC-02/11-01/11, 29 May 2012.

⁴⁶ See generally Paola Gaeta, 'Is the Practice of "Self-Referrals" a Sound Start for the ICC?' (2004) 2 *Journal of International Criminal Justice* 949; Claus Kress, 'Self-Referrals and Waivers of Complementarity - Some Considerations in Law and Policy' (2004) 2 *Journal of International Criminal Justice* 944; Payam Akhavan, 'Self-Referrals Before the International Criminal Court: Are States the Villains or the Victims of Atrocities?' (2010) 21 *Criminal Law Forum* 103; Andreas Th Müller and Ignaz Stegmüller, 'Self-Referrals on Trial From Panacea to Patient' (2010) 8 *Journal of International Criminal Justice* 1267; Darryl Robinson, 'The Controversy over Territorial State Referrals and Reflections on ICL Discourse' (2011) 9 *Journal of International Criminal Justice* 355.

MONUC peacekeepers on 25 February 2005.⁴⁷ Katanga was arrested by Congolese authorities the very day after the incident, on 26 February 2005,⁴⁸ whereas Lubanga was captured nearly one month later on 19 March 2005. Following their apprehension, both had been kept in detention and subsequently charged with additional and very serious crimes such as genocide and crimes against humanity. The Prosecutor's request for arrest on behalf of the Court, therefore, came after ten and seventeen months of detention in national prisons respectively. Similarly, Gbagbo was arrested by forces loyal to the newly elected president Ouattara in April 2011 and detained in various locations before the issuance of an arrest warrant by the PTC on 23 November 2011 and his transfer to the Court one week later.⁴⁹

Defendants complained that their initial detention by national authorities had been completely unlawful and motivated by political reasons. They lamented several violations of their basic rights by local authorities, such as being deprived of their liberty in the absence of an arrest warrant, without being informed of the charges against them, and being denied prompt access to a lawyer. Gbagbo's Defense also alleged grave physical ill-treatment, abuses, and torture.⁵⁰ As a consequence, defendants requested the Court to take responsibility for the above violations and dismiss its jurisdiction.⁵¹ This request was based on two arguments, which will be considered below.

4.1.1 Prosecutorial misconduct

Defendants complained of the Prosecutor's violation of the statutory duty of care about the suspect because, by the time they became target of the ICC investigation, the Prosecutor must have been aware of the violations characterizing their detention before national authorities, but did nothing to stop them. Quite the contrary: s/he took advantage of them for her/his own investigations.

The core argument of defendants' submissions is that, once the accused becomes a principal suspect in the case and therefore a target of the activities of the Prosecutor, a duty of

⁴⁷ Prosecutor v. Thomas Lubanga, Prosecution's Submission of Further Information and Materials, ICC-01/04-01/06, 25 January 2006, 8–10.

⁴⁸ Prosecutor v. Germain Katanga (n 44) 12.

⁴⁹ Prosecutor v. Laurent Gbagbo (n 45), 8, 30 and 41.

⁵⁰ *ibid.*, 20.

⁵¹ The scenario of a state that arrests or detains a suspect unlawfully before surrendering him to the ICC has been thoroughly discussed by Christophe Paulussen in his doctoral thesis on the issue of *male captus bene detentus* before the ICC. See: Christophe Paulussen, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, vol 41 (Intersentia 2010). See also: Kelly Pitcher, Addressing Violations Of International Criminal Procedure, ACIL Research Paper (2013-14), available at: www.acil.uva.nl and SSRN; Karel De Meester, *The Investigation Phase in International Criminal Procedure*, vol 71 (Intersentia 2015).

care towards him/her arises by virtue of Articles 54(1)(c), 67(1)(c) and 21(3) of the Statute.⁵² The first article obliges the Prosecutor to ‘fully respect the rights of persons’ during an investigation; the second endows the accused with the right to be tried without undue delay, and the third one is the overarching principle according to which every activity of the Court must be in compliance with internationally recognized human rights.

A crucial issue that defendants had to face, therefore, was determining at which point in the investigations the Prosecutor's attention was drawn to them and they became suspects in the case. As has been seen, the Statute and the Rules do not regulate the matter and the Prosecutor has no obligation to formalize the moment in which a person becomes a suspect. Moreover, we have also seen how, in the view of the Court, a case in a legal sense arises only with the application of an arrest warrant by the Prosecutor. Katanga's Defence tried to show the limitations of this narrow view:

In the time preceding the issuing of an arrest warrant by the ICC there was an increase in interest in the accused by the ICC. This is not a black and white situation. The successful application for a warrant of arrest would be an artificial point to measure the beginning of participation by the ICC in the situation of the accused. At some point during the preceding period of growing interest in the accused there was a formulation of intention on the part of the OTP to treat the accused as a principal suspect in the case concerning Bogoro. It is at that point that the prosecutor assumes a duty of care towards the accused, whatever his status in the DRC.⁵³

Along these lines, defendants endeavoured to show that they had become target of the investigation long before the request of the prosecutor of an arrest warrant to the Pre-Trial Chamber. They did so by quoting public statements and interviews of OTP staff released at the early stages of the investigation (and even during the preliminary examination) in which they explicitly referred to the fact that the Prosecution was monitoring the accused.⁵⁴

At the same time, defendants claimed that the Prosecutor must have been fully aware of their unlawful conditions of detention. They reported visits of the Prosecutor's staff to their countries and meetings held between Prosecution representatives and national authorities that must have informed the OTP of their status. As Katanga's Defence put it:

⁵² Prosecutor v. Germain Katanga (n 44) 90.

⁵³ *ibid* at 80.

⁵⁴ Prosecutor v. Laurent Gbagbo (n 45) 236–238.

The Prosecutor ought to have been in possession of sufficient information, in this particular case, to be aware that the accused's detention in the DRC was inconsistent with international human rights standards. The fact that the arrest of the accused was not founded on evidence; that he had not been promptly brought before a judicial authority; that he had been kept in detention for an unreasonable time without any suggestion of a trial; that he was still in detention but with no reasonable prospect of a speedy trial; that he was deprived of the assistance of counsel while interviewed – these were all matters which ought to have been manifest to a Prosecutor acting diligently in his investigations of the accused, the activities of the DRC for admissibility, and on the basis of documents and information received from the DRC with respect to proceedings within the DRC.⁵⁵

In the Lubanga case, the Prosecutor's knowledge about the defendant's conditions of detention before national authorities was explicitly admitted by the Prosecutor himself. In submitting further information and materials to the Pre-Trial Chamber to complement his request of arrest and surrender, the Prosecutor stated that:

The DRC proceedings against, among others, Thomas Lubanga Dyilo are the subject of serious and increasing criticism. The arrest of TLD by the DRC authorities took place in the context of international pressure, arising from the reaction to the killing of UN (MONUC) peacekeepers on 25 February 2005 [the so called Ndoki incident] (...) To the extent that information is available to the Prosecution, neither at the time of his arrest nor later has evidence emerged that clearly links TLD to the Ndoki incident (...) This situation has resulted in increased criticism from international NGOs, alleging that the detention of TLD and the other leaders of the political e/o military groups may be irregular⁵⁶

He then moved on to quote a report from Human Rights Watch documenting the breaches of international standards of due process by the DRC authorities in arresting the suspects of the Ndoki incident. Apparently, the Prosecutor's only concern with respect to these allegations was the fact that they 'may result in the DRC authorities soon being prepared to release

⁵⁵ Prosecutor v. Germain Katanga (n 44) 84.

⁵⁶ Prosecutor v. Thomas Lubanga (n 47) 8–11.

TLD'.⁵⁷ Hence, he claimed, the urgency of the issuance of an arrest warrant by the Pre-Trial Chamber. Regrettably, Lubanga's Defense did not mention this in its motion challenging the jurisdiction of the case (although, with the benefit of hindsight, this probably would not have made much difference).

Finally, in light of the argument above, defendants alleged that the situation of unlawful detention in their home country enabled their transfer to the Court, and that the Prosecutor and national authorities collaborated closely to this end. The government of their state wanted them to be prosecuted before the ICC out of internal political calculations, while the Prosecutor, on his side, was more than willing to take up their cases and take advantage of the readiness of local authorities to cooperate. Once again, they supported their allegations with circumstantial evidence: public statements of government officials expressing deference towards the Court's expectations and decisions; Prosecution's representatives expressing their preference for a trial before the ICC; NGOs reports suggesting that state authorities in the DRC have been keeping individuals in detention without charge merely for the benefit of the ICC (Katanga); the fact that the local prosecutor charged the accused with different crimes from those under the Rome Statute in order to enable the Court to step in; the fact that the ICC Prosecutor waited a long time before requesting the issuance of an arrest warrant to the Pre-Trial Chamber. With respect to the latter criticism, it has to be noted that, after the opening of an investigation in the DRC, the Prosecutor waited almost three years before approaching the Chamber with a request for a warrant against Lubanga and Katanga. Defense counsels pointed out that, in the meantime, the suspects were kept in unlawful detention by local authorities and, therefore, the Prosecutor had a duty to act with speed and diligence in requesting their transfer to the Court once he had determined that there were reasonable grounds to believe that they had committed crimes.

4.1.2 Court's responsibility as the last forum of adjudication

Defendants argued that - irrespective of the negligence of the Prosecutor and her/his collusion with the government of their state - the Court should take responsibility for the violations of their rights committed by national authorities and dismiss its jurisdiction. Borrowing from the ICTR jurisprudence,⁵⁸ Katanga's Defense used the concept of 'constructive custody'. According to this notion, once the warrant of arrest is issued, the accused falls under the

⁵⁷ *ibid.*,12.

⁵⁸ See further at paragraph 4.3.

constructive custody of the ICC with the consequence that ‘any continuing illegality becomes the shared fruit and responsibility of the DRC and the ICC’⁵⁹. This is because the prior state of detention of the accused ‘serves the interests of, enables, and is in fact being taken advantage of by the ICC for the purpose of the accused eventual transfer to the ICC’⁶⁰. The very fact that serious violations occurred, therefore, obliges the Court to review and supervise such violations without the need to conduct any inquiry into issues of knowledge and duty of care of the Prosecutor.

Both Lubanga and Katanga's defense quoted the Barayagwiza jurisprudence of the ICTR, according to which, once it has been established that the human rights of the accused have been violated, it is irrelevant who is responsible for this violations and the accused must be afforded with a remedy.⁶¹

Finally, defendants proposed a reading of Articles 55 and 59 consistent with this view. As has been seen, Article 55 endows the accused with the right not to be subject to arbitrary arrest and detention with respect to an ‘investigation under this Statute’, whereas Article 59 regulates arrest and surrender proceedings in the custodial State and mandates the latter to ensure that due process rights of defendant are respected.

With regard to Article 55, defendants invited the Court to adopt a broader interpretation of the terms ‘investigation under this Statute’, encompassing all the proceedings whose purpose is to bring the person before the Court, including those pertaining to the custodial State.⁶² This interpretation would allow to widen the scope of the accused’s protection and of the Court’s review of violations committed by national authorities.

As far as Article 59 is concerned, defendants noted how this provision is drafted on the assumption that the accused would be at large, as local judicial authorities are mandated to review the respect of defendants’ rights *in the execution* of the request of the Court to arrest and surrender.⁶³ As Gbagbo Defense pointed out, however, defendants cannot be stripped of their protection from unlawful arrest on the pretext that they were already in detention at the time of execution of the procedure prescribed by the Court.⁶⁴ Unlawful arrest proceedings occurred *prior* to the application for a warrant of arrest to the Court constitute a violation of Article 59(2) of the Statute. In such cases, therefore, the arrest to be taken into account by the Court in supervising the activities of national authorities is the one that took place in the

⁵⁹ Prosecutor v. Germain Katanga (n 44) 101.

⁶⁰ *ibid* at 102.

⁶¹ ICTR, Prosecutor v. Jean-Bosco Barayagwiza, AC Decision, ICTR-97-19-AR72, 3 November 1999, 73.

⁶² Prosecutor v. Laurent Gbagbo (n 45) 256–257.

⁶³ Prosecutor v. Germain Katanga (n 44) 104; Prosecutor v. Laurent Gbagbo (n 45) 258–260.

⁶⁴ Prosecutor v. Laurent Gbagbo (n 45) 258–260.

context of national proceedings, and not the one executed on behalf of the Court. Doing otherwise would create inequality between persons already in custody at the time the Prosecutor initiates proceedings, who would not be afforded statutory protection, and persons at large, towards whom the guarantees of Article 59 would apply.⁶⁵

4.2 Responsibility of the Court for violations committed by national authorities

In its first decision on a challenge to the jurisdiction of the Court, the Appeals Chamber defined human rights law as an all-encompassing yardstick against which the provisions of the Statute and the proceedings of the Court must be measured, in accordance with Article 21(3) of the Rome Statute:

Human rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court. Its provision must be interpreted and more importantly applied in accordance with internationally recognized human rights; first and foremost, in the context of the Statute, the right to a fair trial, a concept broadly perceived and applied, embracing the judicial process in its entirety.⁶⁶

With respect to the right to a fair trial, the Chamber firmly stated the non-derogable, absolute nature of this right:

Where fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial. Justice could not be done. A fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped.

The adamant tone of these initial statements led to hope that the Court would assume a full responsibility for the situation of defendants appearing before it. Implicitly, this approach seemed to deny any possible contextualization and adaptation of fair trial rights in light of the special circumstances under which the Court operates. Yet, ICC judges have constantly

⁶⁵ *ibid.*

⁶⁶ Prosecutor v. Thomas Lubanga, AC Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Art. 19(2)(a) of the Statute of 3 October 2006, ICC-01/04-01-06 (OA4), 14 December 2006, 37.

dismissed the arguments brought forward by defendants in their challenges to the jurisdiction of the Court.⁶⁷

According to their view, Article 59 cannot be applied to the period of time before the receipt by the custodial state of the request for arrest and surrender by the Court ‘even in cases where the person may already have been in the custody of that state, and regardless of the grounds for any such prior detention’.⁶⁸ From this reasoning it is clear that the Court considers the successful application for a warrant of arrest as the point to measure the beginning of its participation in the situation of the accused and, therefore, its responsibility towards him/her. Violations of *habeas corpus* rights occurred prior to this moment can be supervised by the Court only upon the proof of ‘concerted action’ between an organ of the Court (i.e., the Prosecutor) and national authorities in the commission of such violations.

Violations of fundamental rights, however serious, can be said to constitute an abuse of process only insofar as they can be attributed to the Court. This means that they have to be i) either directly perpetrated by persons associated with the Court; ii) or perpetrated by a third person in collusion with the Court. Conversely, when a violation of the suspect’s fundamental rights, however grave, is established, but demonstrates no such link with the Court, the exceptional remedy of relinquishment of jurisdiction/staying of the proceedings is not available.⁶⁹

Six years earlier, the same Pre-Trial Chamber adopted a less categorical view by stating that, even in cases where no concerted action is established, ‘the abuse of process doctrine constitutes an additional guarantee of the rights of the accused’. At the same time, however, the Chamber recalled that this doctrine ‘has been confined to instances of *torture or serious mistreatment* [emphasis added] by national authorities of the custodial State *in some way related* [emphasis added] to the process of arrest and transfer of the person to the relevant international criminal tribunal’⁷⁰

⁶⁷ Katanga’s challenge was dismissed because it was filed too late: Prosecutor v. Germain Katanga, AC Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled “Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings”, ICC-01/04-01/07 OA 10, 12 July 2010.

⁶⁸ Prosecutor v. Laurent Gbagbo, PTC I Decision on the “Corrigendum of the Challenge to the Jurisdiction of the ICC on the Basis of Art. 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute”, ICC-02/11-01/11, 15 August 2012, 101.

⁶⁹ *ibid.*, 92.

⁷⁰ Prosecutor v. Thomas Lubanga, PTC I Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Art. 19(2)(a) of the Rome Statute, ICC-01/04-01/06, 3 October 2006, 10. On this point see Paulussen (n 51) 591, 865.

In all the above-mentioned cases the Court found no evidence that the arrest and detention of the accused prior to the issuance of the ICC arrest warrant was the result of any concerted action between the Prosecutor and local authorities. The Court clarified that ‘mere knowledge’ on the part of the Prosecutor of the investigations carried out by national authorities is no proof of his involvement in the way they are conducted or in the means applied therein. In the same vein, the mere fact that the Prosecutor was in contact with local authorities throughout the period of the preliminary examination and the investigation is not enough to demonstrate his/her complicity in the detention of the accused.⁷¹

4.3 The jurisprudence of the Court in relation to that of the *ad hoc* Tribunals

The reasoning of the ICC judges clearly resembles the approach adopted by the *ad hoc* Tribunals in their case law regarding violations of defendants’ *habeas corpus* rights. Upon their transfer to the Tribunals, some defendants alleged that they had been previously detained by national authorities on behalf of the Tribunal and this detention had been unlawful for various reasons.

The landmark case in this respect is the ICTR case of Jean-Bosco Barayagwiza. Barayagwiza had been subject to a long period of pre-trial detention in Cameroon during which his right to be promptly informed of the charges against him and the right to challenge the legality of his detention before a court of law were violated. The Prosecutor tried to diminish her own role in the prolonged pre-trial detention of the accused in Cameroon and the related violations of the accused’s rights, and to allocate responsibility to Cameroon.

In the first appeal decision, the Appeals Chamber found that these violations were so grave that amounted to an abuse of process and ordered the termination of the proceedings as the only adequate remedy for the accused.⁷² Although the Chamber found that the Prosecutor played a significant role in the continuous violation of the accused’s rights, it also made the following groundbreaking statement:

Even if fault is shared between the three organs of the Tribunal – or is the result of the actions of a third party, such as Cameroon – it would undermine the integrity of the judicial process to proceed. Furthermore, it would be unfair for the Appellant to stand trial on these charges if his rights were egregiously violated. Thus, under the abuse of

⁷¹ Prosecutor v. Thomas Lubanga (n 66) 42; Prosecutor v. Laurent Gbagbo (n 68) 109.

⁷² ICTR, Prosecutor v. Jean-Bosco Barayagwiza (n 61).

process doctrine, it is irrelevant which entity or entities were responsible for the alleged violations of the Appellant's rights.⁷³

Consequently, when specifically addressing Barayagwiza's right to be promptly informed of the charges, it considered 'irrelevant' the fact that only a small portion of the total period of his provisional detention was attributable to the Tribunal, 'since it is the Tribunal – and not other entity – that is currently adjudicating the Applicant's claims. Regardless of which other parties may be responsible, the inescapable conclusion is that the Appellant's right to be promptly informed of the charges against him was violated.'⁷⁴

Furthermore, the Appeals Chamber stressed the importance of its supervisory role over pre-trial human rights violations, as a means to provide a remedy for the violation of the accused's rights, deter future misconduct, and enhance the integrity of the judicial process.⁷⁵

This decision is praised by scholars as an important step in the establishment of the principle requiring that international tribunals supervise every violation of individual rights that occurs in the framework of their proceedings (irrespective of who committed them), with the aim of preserving the integrity and the fairness of the trial.⁷⁶ Indeed, this ruling raised hopes of a paradigm shift in how international tribunals conceptualize their responsibility for human rights violations that have occurred in the pre-trial phase.

Regrettably, the Appeals Chambers findings have remained isolated. The Prosecutor appealed the decision and, in a second judgment, the Chamber found that, based on 'new facts' presented by the Prosecutor, it emerged that violations were not as serious as had been previously determined, and, most importantly, they were due more to Cameroon than to the Prosecutor.⁷⁷ As a consequence, the Chamber held that, although the accused was entitled to some form of compensation, the remedy of relinquishment of jurisdiction was disproportionate. The appropriate remedy would have to be determined with the judgment on the merits as a reduction in sentence in case of conviction, or a financial compensation in case of acquittal.

As has been noted, in expressly attributing its decision to the new fact that it was Cameroon, rather than the Prosecutor, that was responsible for the violations of the

⁷³ *ibid.*, 73.

⁷⁴ *ibid.*, 85.

⁷⁵ *ibid.*, 76.

⁷⁶ Alexander Zahar and Göran Sluiter, *International Criminal Law: A Critical Introduction* (OUP 2007) 281–292.

⁷⁷ ICTR, Prosecutor v. Jean-Bosco Barayagwiza, AC Decision on Prosecutor's Request for Review or Reconsideration, ICTR-97-19-AR72, 31 May 2000.

defendant's rights, the ICTR 'appears to be implicitly reversing its earlier finding in the November 1999 decision that it was irrelevant which entity or entities were responsible for the alleged violations of the Appellant's rights'.⁷⁸

In the subsequent case law of the ICTR and ICTY, the involvement of the Prosecution in the violations of defendants' rights during arrest and surrender proceedings has always been considered essential for determining the responsibility of the Tribunal. As can be seen, the ICC requirement of 'concerted action' between the Prosecution and national authorities is perfectly consistent with the *ad hoc* Tribunals' jurisprudence. However, it is argued that the law and the context in which the ICC operates are different from that of its predecessors and, thus, the 'concerted action' requirement is more problematic from the accused's perspective.

First, before the *ad hoc* Tribunals, demonstrating the involvement of the Prosecution in the infringement of the rights of defendants is much easier, due to the mechanism of provisional detention set forth by the Rules of Procedure and Evidence of the Tribunals, which the ICC does not have. Under Rule 40, the Prosecutor may request a State, as a matter of urgency, to arrest a suspect 'provisionally' and place him/her into custody. Subsequently, Rule 40*bis* enables the Prosecutor to request a judge to order the transfer and provisional detention in the premises of the Tribunal of a person arrested by a State pursuant to Rule 40. The above-discussed case law concerning *habeas corpus* rights before the Tribunals emerged in the context of the application of these rules, i.e., the violations of defendants' rights were committed by national authorities that had been requested to provisionally arrest a suspect by the Prosecutor. Within this legal framework, considering the detention in a State as being 'at the behest' of the Tribunal is relatively easy.

Second, it has to be noted that before the Tribunals the distinction between 'suspect' and 'accused' is clear. A suspect is a person who is not yet indicted. Rule 2 of the ICTR RPE defines a suspect as a person about whom the Prosecutor possesses reliable information which tends to show that the person may have committed a crime within the jurisdiction of the Tribunal. He/she then becomes an 'accused' upon confirmation of an indictment against him/her in accordance with Rule 47 RPE. Within this framework, tracing the exact moment in which the Prosecutor becomes responsible for an individual is possible. This has been explicitly acknowledged by the ICTR Appeals Chamber in the *Kajelijeli* case, which involved facts that were virtually identical to the *Barayagwiza* case. Following a request of provisional detention by the Prosecutor pursuant to Rule 40 RPE, the defendant had been held in custody

⁷⁸ Melinda Taylor and Charles Chernor Jalloh, 'Provisional Arrest and Incarceration in the International Criminal Tribunals' (Social Science Research Network 2013) 310–311.

by the Benin authorities for 85 days without charge and without being brought promptly before a judge, prior to his transfer to the ICTR. According to the Chamber, ‘by making a Rule 40 request for the urgent arrest of a suspect, the Prosecution is, by definition under Rule 2 of the Rules, making the claim that it possesses ‘reliable information which tends to show that he may have committed a crime over which the Tribunal has jurisdiction’’.⁷⁹ Thus, it is from this very moment that the Tribunal’s Statute and Rules pertaining to the rights of suspects become applicable, and the duty of diligence of the Prosecutor arises.⁸⁰ In this respect, the Chamber clarified that, by setting the Tribunal proceedings in motion with Rule 40 RPE, the Prosecutor shares a legal responsibility with national authorities that ‘the case proceeds to trial in a way that respects the rights of the accused’.⁸¹ According to the Chamber ‘this flows from the rationale that the international division of labor in prosecuting crimes must not be to the detriment of the apprehended person’⁸².

It is unlikely that a similar jurisprudence and a similar conceptualization of the prosecutorial duty of due diligence will be developed by the ICC. This is because of the different ways through which cooperation plays out before this Court, which are not properly acknowledged by the Statute’s legal framework governing arrest and surrender proceedings and by the judges exercising their supervisory role over the Prosecutor’s activities and national authorities.

4.4 Final Remarks

The *ad hoc* Tribunal’s founding instruments have been much criticized because they do not impose human rights obligations on states when arresting suspects on behalf of the Tribunals. The judges, however, managed to develop a consistent jurisprudence that sanctioned the Prosecution’s misconduct and held it accountable for not making requests under Rule 40 and 40*bis* in a timely manner. This lack of diligence on its part made it complicit in the violations of *habeas corpus* rights perpetrated by national authorities.

By contrast, the Rome Statute has been praised for representing a clear improvement in protecting the right to liberty of the accused, especially through Article 59(2), which mandates national judges to supervise the lawful execution of arrests on behalf of the Court, and Article 55(1)(d), which forbids unlawful arrest and detention in the course of an ICC

⁷⁹ ICTR, Prosecutor v. Juvénal Kajelijeli, AC Judgment ICTR-99-44-A-A, 23 May 2005, 226.

⁸⁰ *ibid*, 217.

⁸¹ *ibid*, 220.

⁸² *ibid*.

investigation. Nevertheless, the early practice of the Court has shown that these guarantees alone are not sufficient when the investigation of the Prosecutor inserts itself in ongoing national proceedings where suspects are already in the custody of local authorities.

The drafters of the Rome Statute should have engaged more with the inherent tensions and limitations of the institution that they were about to establish and reflect more critically on how to avoid that they go to the detriment of the rights of the accused. In particular, they should have reflected more on the challenges that cooperation of states entails for the accused within the unique structural system of the ICC.

It is submitted that the status of ‘suspect’ should be legally acknowledged by the Statute. As has been seen, Defense counsels have advocated for the imposition of a duty of diligence on the Prosecutor when s/he becomes aware of national proceedings involving a person whom s/he has targeted for the purpose of the investigation (especially when the latter was triggered by a self-referral, and the accused happens to be a political opponent of the government which made that referral). This duty of diligence and transparency should be clearly spelled out in the Statute, along with specific rules governing the cooperation between the Prosecutor and states before the issuance of an arrest warrant against a person who is already in the custody of national authorities. Melinda Taylor and Charles Jalloh have exhaustively elaborated on the content of this duty, arguing, in particular, that the Prosecutor should notify the presence of detained suspects to the Pre-Trial Chamber.⁸³ This would indeed represent a viable way to more carefully supervise the cooperation of the Prosecutor with national authorities for the purpose of transferring suspects to the Court, and would enable the judges to better assess the timeliness with which the Prosecutor requests the issuance of an arrest warrant. The latter, should request an arrest warrant from the Chamber in a timely manner, and should be held accountable in case s/he does not do so without providing a valid justification.

As of the judges, it is submitted that the choice to acknowledge their responsibilities towards defendants only starting from the issuance of an arrest warrant is regrettable, as it fails to address the necessity of protecting the rights of persons who have been targeted by the Prosecutor long before the latter seeks an arrest warrant against them. Article 57 of the Statute bestows the duty to ‘provide for the protection (...) of persons who have been arrested’ upon the Pre-Trial Chamber. A meaningful protection of arrested persons necessarily implies that the judges supervise the violations of suspects’ rights occurring in the course of the

⁸³ Taylor and Jalloh (n 78) 333.

investigation and irrespective of a concerted action between national authorities and the Prosecutor, which should nonetheless be considered as an ‘aggravating factor’.⁸⁴ This approach would also give a meaningful content to Article 85(1) of the Statute, which foresees an enforceable right to compensation to anyone who has been the victim of unlawful arrest or detention.

5. The right to interim release

By interim release is meant the temporary release of an accused, upon specified conditions, for an extended period of time pending trial or judgment. The right to interim release emanates from the presumption of innocence, according to which the person is presumed innocent until proven guilty. The Rome Statute codifies this principle in Article 66. According to the first paragraph of this provision ‘[e]veryone shall be presumed innocent until proved guilty before the Court’, and, pursuant to the second paragraph, ‘[t]he onus is on the Prosecutor to prove the guilt of the accused’; finally, paragraph three states that [i]n order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt’.

If the accused is presumed innocent until it is otherwise proven, restriction to liberty prior to the final sentence must be exceptional and subject to the principles of necessity and proportionality. In other words, liberty is the norm and detention must be the exception. This fundamental rule is enshrined in many international human rights instruments, such as the Universal Declaration of Human Rights,⁸⁵ the International Covenant on Civil and Political Rights,⁸⁶ the European Convention for the Protection of Human Rights and Fundamental Freedoms,⁸⁷ the African Charter on Human and Peoples’ Rights⁸⁸ and the American Convention on Human Rights.⁸⁹

Yet, despite the unambiguous requirements under human rights law, before international criminal tribunals interim release has always been the exception. As one commentator has vividly put it ‘[i]nterim release is the Loch Ness monster of international

⁸⁴ *ibid* 331.

⁸⁵ UDHR, Art. 9, United Nations General Assembly, GA/RES/217 10 December 1948.

⁸⁶ International Covenant on Civil and Political Rights, Art. 9, 19 December 1966, UN Treaty Series, vol. 999, p. 171.

⁸⁷ Convention of Human Rights and Fundamental Freedoms, Art. 5, 4 November 1950, UN Treaty Series, vol. 213, p. 221.

⁸⁸ African Charter on Human and Peoples' Rights, Art. 6, 27 June 1981, UN Treaty Series, vol. 1520, p. 217.

⁸⁹ American Convention on Human Rights, Art. 7, 22 November 1969, UN Treaty Series, vol. 1144, p. 143.

criminal justice: much discussed, rarely seen'.⁹⁰ The Statutes of the *ad hoc* Tribunals did not contain any provision on pre-trial release. This omission has been explained with the exceptional characteristics of international criminal trials, such as the gravity of the crimes allegedly committed by the accused, the likelihood of retaliations against victims and witnesses, the risk that the accused would flee to escape a lengthy prison sentence, and the unavailability of *in absentia* proceedings.⁹¹ In addition, Rule 65(B) of the Tribunals RPE used to provide that interim release could only be granted in 'exceptional circumstances', thus, making continued custody the rule instead of the exception.

It was only in 1999 (at the ICTY) and in 2002 (at the ICTR) that the judges amended Rule 65 so as to allow defendants to request interim release pending trial. With respect to the ICTY, commentators have noted that 'increased co-operation with the successor states in Former Yugoslavia (and with SFOR and KFOR) has been the main factor in mitigating the initially restrictive attitude towards release pending trial',⁹² making it possible for the Tribunal to be more receptive to international human rights standards.⁹³

Be that as it may, the excessive length of pre-trial detention before the *ad hoc* Tribunals has been harshly criticized by scholars and practitioners, who have denounced that this practice is in contrast with internationally protected human rights.⁹⁴ Certainly, the exceptional circumstances and challenges faced by the ICTY and ICTR are equally present before the ICC. The drafters of the Rome Statute, however, departed from the precedent of the *ad hoc* Tribunals and expressly provided the possibility for the accused to be released pending trial both at the national level and, upon their transfer to the Court, before the Pre-Trial Chamber.

⁹⁰ Havneet Kaur Sethi, 'Lawful Unlawfulness: The (non)-Practice of Interim Release at the International Criminal Court as a Political Measure in Contravention of International Human Rights' (*Academia.edu*) 1 <https://www.academia.edu/12516298/LAWFUL_UNLAWFULNESS_THE_NON_PRACTICE_OF_INTERIM_RELEASE_AT_THE_INTERNATIONAL_CRIMINAL_COURT_AS_A_POLITICAL_MEASURE_IN_CONTRAVENTION_OF_INTERNATIONAL_HUMAN_RIGHTS?auto=download> accessed 1 June 2016.

⁹¹ Karim AA Khan, 'Article 60' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn, Beck/Hart 2008) 1159–1160.

⁹² John O'Dowd, 'Decision on Motion by Momir Talic' for Provisional Release – Commentary' in André Klip and Göran Sluiter (eds) *Annotated Leading Cases of International Criminal Tribunals*, Vol. VII: The International Criminal Tribunal for the Former Yugoslavia 2001 (Antwerpen, Intersentia, 2005) 100; See also Joachim Vogel, 'Decisions Related to Provisional Release – Commentary' in André Klip and Göran Sluiter (eds), *Annotated Leading Cases of International Criminal Tribunals*, Vol. IV: The International Criminal Tribunal for the Former Yugoslavia 1999-2000 (Antwerpen, Intersentia, 2002) 88-93.

⁹³ John O'Dowd (n 92) 100.

⁹⁴ Sluiter (n 3) 461.

5.1 Before national authorities

Article 59(3) of the Statute provides that the arrested person has the right to apply to national authorities for interim release pending surrender to the Court. Subsequent paragraph 4 creates a presumption in favor of custody by making detention the norm unless there are ‘urgent and exceptional circumstances to justify interim release’.⁹⁵ Moreover, this provision mandates national judges to take into account ‘the gravity of the alleged crimes’ and the existence of the ‘necessary safeguards’ to ensure that the custodial State is capable of surrendering the person to the Court.

From this language, it appears that the Statute looks with suspicion to the possibility that national authorities release the person sought by the Court. The criteria applicable by the national authority appear more restrictive than those governing the ICC’s power to grant interim release.⁹⁶ Moreover, they appear even more limiting than the ‘exceptional circumstances’ rubric previously contained in the Rules of Procedure and Evidence of the *ad hoc* Tribunals.

The Pre-Trial Chamber must be notified of any request for interim release and, before rendering a decision, the national authority must give ‘full consideration’ to its recommendations, including any on measures to prevent escape.⁹⁷ Moreover, the Chamber can request periodic reports on the status of the interim release.⁹⁸

In reaching a determination on interim release, national judges are not entitled to review the warrant of arrest issued by the Pre-Trial Chamber. Article 59(4) prohibits national authorities to consider whether the warrant of arrest was properly issued in accordance with Article 58(1)(a) and (b). Under Rule 117(3) RPE, the arrested person shall bring any challenge as to the issuance of the warrant directly to the Pre-Trial Chamber. To date, two defendants, Bemba and Ngudjolo, have requested interim release before national authorities with no success.⁹⁹

⁹⁵ Khan (n 91) 1162.

⁹⁶ See further paragraph 5.2.

⁹⁷ Article 59(5) of the Statute and Rule 117(4) RPE.

⁹⁸ Article 59(6) of the Statute and Rule 117(5) RPE.

⁹⁹ Prosecutor v. Jean-Pierre Bemba, Defence Application for Interim Release, ICC-01/05-01/-8, 23 July 2008, 8-10; Prosecutor v. Mathieu Ngudjolo, PTC I Decision on the Application for Interim Release of Mathieu Ngudjolo Chui, ICC-01/04-01/07, 27 March 2008, 4.

5.2 Before the Court

After the suspect has been surrendered to the Court by the custodial State, s/he shall appear promptly before the Pre-Trial Chamber pursuant to Rule 121 RPE. At this first appearance, the person has the right to apply for interim release.¹⁰⁰ Article 60 aims to provide the detainee with an early opportunity to contest his or her arrest and sequential detention and sets out the conditions for a continued deprivation of liberty.

Pursuant to the second paragraph of this provision, the person shall continue to be detained unless the Chamber is satisfied that the conditions outlined in Article 58(1) for the emission of an arrest warrant are not met. In other words, continued detention cannot be maintained, unless the judges are satisfied that there are reasonable grounds to believe that the person has committed the crimes charged,¹⁰¹ and that detention is necessary (i) to ensure the person's appearance at trial; or (ii) to ensure that the person does not obstruct or endanger the investigation or the Court proceedings; or (iii) where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.¹⁰²

Interim release can be granted with or without conditions. The latter are listed at Rule 119 RPE and may include limitations upon travel to certain places and contact with victims and witnesses, prohibition to undertake certain professional activities and the obligation to reside in a specific place.

Pursuant to Regulation 51 of the Regulations of the Court, for the purposes of a decision on interim release, the Pre-Trial Chamber shall seek observations from the host State and from the State to which the person seeks to be released. Such consultations are a crucial moment of the interim release process, as the Court needs to know whether that State is willing to accept the person on its territory and whether it can provide guarantees of the person's attendance at trial.¹⁰³

As will be seen, the willingness of States to accept provisionally released persons is indispensable to ensure the effectiveness of the right of suspects to be released pending trial. It must be noted that the Court is more likely to grant release to defendants outside of their countries of origin, as these are often politically unstable and geographically far removed

¹⁰⁰ The person may also apply for interim release after her/his initial appearance, either in addition to or independent of the request made at the initial appearance, see Alena Hartwig, 'Pre-Trial Detention of the Suspect' in Christoph Safferling (ed), *International criminal procedure* (OUP 2012) 299.

¹⁰¹ Article 58(1)(a) of the Statute.

¹⁰² Article 58(1)(b) of the Statute.

¹⁰³ Schabas (n 8) 727.

from The Hague. Moreover, defendants will have connections and support there. The unavoidable conclusion is that it will be on defendants to find a third State willing to accept them, failing which their application for release will be rejected.¹⁰⁴ In this respect, it is useful to remind that the Rome Statute does not impose an obligation on States Parties accept provisionally released persons on their territories. As has been seen in Chapter II, this area of cooperation is left to voluntary agreements (the so called ‘framework agreements’) to be concluded by the Court and States.¹⁰⁵ Regrettably, only Belgium has entered into an agreement on interim release with the Court so far.¹⁰⁶ The Court has made clear that:

the Agreement, far from witnessing to an unconditional availability and willingness on the part of the Kingdom of Belgium to accept that detainees from the Court be released on its territory or, even less, establishing an obligation on their part to do so, makes such acceptance explicitly conditional upon an assessment to be made ‘au cas-par-cas’ on the basis of the specific appreciation that the Belgian authorities may make of a given case.¹⁰⁷

Equally, pursuant to Article 47(1) of the Headquarters Agreement, the Netherlands are only obliged to facilitate the transfer of a released detainee to another State, but not to accept the person on their territory.¹⁰⁸

Article 60(3) and Rule 118(2) RPE, mandate the Pre-Trial Chamber to review its ruling on release or detention at least every 120 days on the request of the person or the Prosecutor. Upon such review, the Chamber may modify its ruling as to detention, release or conditions of release if it is satisfied that ‘changed circumstances so require’. The basis of the review, thus, is a change in the circumstances under which the original decision under Article 60(2) was taken. The Appeals Chamber clarified that while the Prosecutor does not have to re-establish circumstances that have already been established, he must show that there has been no change in those circumstances.¹⁰⁹ In light of the above, a Chamber carrying out a

¹⁰⁴ Bjorn Elberling, *The Defendant in International Criminal Proceedings: Between Law and Historiography* (Hart Publishing 2012) 179–180.

¹⁰⁵ See Chapter II, paragraph 3.1.5.

¹⁰⁶ *ibid.*

¹⁰⁷ See the ICC’s website at: <https://www.icc-cpi.int/iccdocs/doc/doc1802111.pdf>; see also Maïté Van Regemorter, ‘Assessing the Right to Liberty at the ICC with the Interim Release of Bemba’s Lawyers’, <https://beyondthehague.com/2014/11/28/assessing-the-right-to-liberty-at-the-icc-with-the-interim-release-of-bembas-lawyers/>

¹⁰⁸ Elberling (n 104) 179.

¹⁰⁹ Prosecutor v. Jean-Pierre Bemba, AC Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled "Decision on the review of the detention of Mr Jean-Pierre

periodic review of a ruling on detention must satisfy itself that the conditions under Article 58(1) of the Statute setting forth the requirements for the issuance of a warrant of arrest continue to be met.¹¹⁰

A second ground under which a detainee can be released arises in case of misconduct of the Prosecutor. Pursuant to Article 60(4), the Pre-Trial Chamber ‘shall ensure that a person is not detained for an unreasonable period prior to trial due the inexcusable delay of the Prosecutor’. If such delay occurs, the Court ‘shall consider’ releasing the person. This right is independent from that provided under Article 60(2). This means that, even if the detention was legitimate pursuant to the latter, the Chamber can still decide to release the person if it determines that the length of pre-trial detention was unreasonable due to a negligent behavior of the Prosecutor.¹¹¹ The requirement that the unreasonable length of detention must be due to an unreasonable delay of the Prosecutor is problematic. Scholars have noted that, under human rights law, the assessment of existence of unreasonable period of detention is not made dependent upon this condition.¹¹²

5.2.1 The reasonable duration of detention in the case law of the Court

In a recent judgment, the Pre-Trial Chamber ordered the release of four suspects pursuant to Article 60(4) despite the absence of an ‘inexcusable delay’ of the Prosecutor.¹¹³ According to the judge, the fact that the duration of the detention of the suspects is not due to the Prosecutor’s inexcusable delay does not relieve the Chamber of its ‘distinct and independent obligation (...) to ensure that a person is not detained for an unreasonable period prior to trial under article 60(4) of the Statute, which obligation is a corollary of the fundamental right of an accused to a fair and expeditious trial.’¹¹⁴ This reasoning was censored on appeal.¹¹⁵

Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence", ICC-01/05-01/08-OA4, 19 November 2010, 51.

¹¹⁰ *ibid.*, 52.

¹¹¹ Khan (n 91) 1167; see also Prosecutor v. Thomas Lubanga, AC Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘*Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo*’, 01/04-01/06 (OA 7), 13 February 2007, 120.

¹¹² Sluiter (n 3) 464.

¹¹³ Prosecutor v. Jean-Pierre Bemba et al., PTC II Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido ICC-01/05-01/13-703, 21 October 2014. The case will be thoroughly addressed further at paragraph 5.4.

¹¹⁴ *ibid.*, 5.

¹¹⁵ Prosecutor v. Jean-Pierre Bemba et al., AC Judgment on the appeals against Pre-Trial Chamber II’s decisions regarding interim release in relation to Aimé Kilolo Musamba, Jean-Jacques Mangenda, Fidèle Babala Wandu, and Narcisse Arido and order for reclassification, ICC-01/05-01/13-969, 29 May 2015.

The Appeals Chamber explained that the Pre-Trial Chamber incorrectly interpreted and applied Article 60(4) of the Statute, as this provision explicitly requires that the unreasonable length of the detention be caused by the delay of the Prosecutor. Subsequently, the Chamber clarified the correct legal basis under which judges can release defendants due to the excessive length of their detention. The relevant provision is Article 60(3) – regulating periodic reviews on detention - interpreted in light of ‘internationally recognised human rights’ under Article 21(3) of the Statute. According to the Chamber:

[a] Chamber may determine that a detained person has been in detention for an unreasonable period, even in the absence of inexcusable delay by the Prosecutor, pursuant to article 60 (3) of the Statute. This provision, which governs the review of the detention in the present circumstances, must be interpreted and applied consistently with “internationally recognized human rights”, pursuant to article 21(3) of the Statute. Therefore, this provision is also a proper legal avenue to protect the right to liberty of a person, as well as the right to be tried within a reasonable period of time or to release pending trial.¹¹⁶

According to the judges, the lapse of time in detention cannot be considered on its own to be a changed circumstance within the meaning of Article 60(3) of the Statute. Rather, it is one of the factors that need to be considered along with the risks listed in Article 58(1)(b) ‘in order to determine whether, all factors being considered, the continued detention stops being reasonable and the individual accordingly needs to be released’.¹¹⁷

In other words, in the judges’ view, ‘interim release and the issue of the reasonableness of the period of detention are fact intensive and case specific’.¹¹⁸ In this respect, they recalled their previous finding under which ‘the unreasonableness of any period of detention prior to trial cannot be determined in the abstract, but has to be determined on the basis of the circumstances of each case’.¹¹⁹

¹¹⁶ *ibid.*, 43.

¹¹⁷ *ibid.*, 44-45.

¹¹⁸ *ibid.*, 45.

¹¹⁹ Prosecutor v. Thomas Lubanga (n 111) 122.

5.3 The Bemba case

On 23 May 2008, Pre-Trial Chamber III issued a warrant of arrest against Jean-Pierre Bemba, a Congolese national charged with war crimes and crimes against humanity for his actions as military commander in the Central African Republic in 2002 and 2003. On 24 May 2008, Bemba was arrested in Belgium and, on 3 July 2008, he was surrendered to the seat of the Court.

Since his first appearance before the Trial Chamber on 4 July 2008, Bemba made three applications for interim release, all of which were denied.¹²⁰ On 29 June 2009, after the charges against Bemba had been confirmed,¹²¹ the Single Judge Ekaterina Trendafilova held a hearing ‘for the sake of considering any issue related to the pre-trial detention of Mr. Bemba’.¹²²

At the hearing the Defence requested the interim release of Mr. Bemba, citing in support ‘changed circumstances’. The said circumstances included: (i) that the charges confirmed against the defendant significantly reduced his responsibility and consequently, if convicted, he would face a lighter sentence, (ii) that he would never abscond because of his personal security situation, (iii) that Bemba’s one year detention would be deducted from a possible sentence, thus reducing the likelihood of him absconding, (iv) his readiness to cooperate with the Prosecutor and to surrender voluntarily, and (v) the change in his financial situation due to the seizure and freezing of all of his assets

In light of these changed circumstances, the Defence requested Pre-Trial Chamber to revisit the conditions that formed the previous 14 April 2009 decision and that Bemba be released to one of the following States, namely, Belgium, France, or Portugal.¹²³ In the 14 April decision the Single Judge had held that the continued detention of Bemba appeared necessary, as she assessed the risk of absconding as likely. Interestingly, a further circumstance that weighted against Bemba’s release was the fact that ‘none of the countries

¹²⁰ Prosecutor v. Jean-Pierre Bemba, PTC III, Decision on application for interim release, ICC-01/05-01/08-73-Conf; a public redacted version thereof was issued on 26 August 2008, ICC-01/05-01/08-80-Anx. This decision was confirmed on appeal, see Appeals Chamber, Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of PTC III entitled ‘Decision on application for interim release’, ICC-01/05-01/08-323, 16 December 2008. See also, Prosecutor v. Jean-Pierre Bemba, PTC III, Decision on Application for Interim Release, ICC-01/05-01/08-200-tEN and annexes, 16 December 2008, and Prosecutor v. Jean-Pierre Bemba, PTC III, Decision on Application for Interim Release, ICC-01/05-01/08-403, 14 April 2009.

¹²¹ Prosecutor v. Jean-Pierre Bemba, PTC II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, 15 June 2009.

¹²² Pre-Trial Chamber H, Decision to Hold a Hearing pursuant to Rule 118(3) of the Rules of Procedure and Evidence”, ICC-01/05-01/08-425, 29 June 2009.

¹²³ Later, in a related filing, the Defence requested that Germany, Italy and South Africa be added to the list of States that Bemba wished to be released to. See ICC-01/05-01/08-433 dated 2 July 2009

seemed willing to accept the applicant if conditionally released and accordingly they offered no guarantees which ensure the applicant's appearance at trial'.¹²⁴ In light of this, the Single Judge had stated that:

[The Court] ibi on the cooperation of States, without which the applicant's trial might be compromised. Moreover, in Boskoski, the ICTY Appeals Chamber upheld the finding of the Trial Chamber when it considered that the failure of the Croatian government to 'issue guarantees of the Appellant's appearance for trial', combined with other factors, 'weigh[ed] heavily' against his provisional release. These reasons justify a cautious approach by the Single Judge.¹²⁵

In its novel decision of 14 August 2009, the Single Judge reversed her position.¹²⁶ At the outset, she recognized that the ICC Statute must be interpreted and applied in accordance with internationally recognized human rights standards, as provided for in Article 21(3) of the Statute. Moreover, she recalled that the review of her former decision would continue to be guided by the fundamental principle that 'deprivation of liberty [before a sentence of conviction] should be an exception and not a rule'.¹²⁷ Subsequently, the Judge went on to consider the events that took place since 14 April 2009 that she deemed worthy of a reassessment. Based on the defendant's good behavior in detention, his demonstrated willingness to cooperate with the Court and his strong family ties, the Judge found that the continued detention of Mr. Bemba was no longer necessary to ensure his appearance at trial pursuant to Article 58(1)(b)(i) of the Statute. As a consequence, he had to be released.

The implementation of the decision, however, was deferred pending a further decision of the Judge on the set of conditions to be imposed on Bemba, on the State to which he had to be released, and on all necessary arrangements.¹²⁸ It is interesting to note that, this time, the Judge placed less emphasis on the circumstance that States had not provided guarantees of accepting the defendant in case of a conditional release. On the contrary, she emphasized that:

¹²⁴ Prosecutor v. Jean-Pierre Bemba, PTC II Decision on Application for Interim Release, ICC-01/05-01/08-403, 14 April 2009, 48.

¹²⁵ *ibid.*, 49.

¹²⁶ Prosecutor v. Jean-Pierre Bemba, PTC II Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa, ICC-01/05-01/08, 14 August 2009.

¹²⁷ *ibid.*, 36-37

¹²⁸ *ibid.*, 78

The decision on interim release ultimately rests with the Single Judge, who is mandated to examine the prerequisites for any deprivation of liberty, based on the law exclusively and the specific circumstances of the case. The fact that States may have not provided guarantees cannot weigh heavily against Mr Jean-Pierre Bemba's release. Neither are conditions of 'guarantees' proposed by the States a prior indispensable requirement for granting interim release; rather they provide assurance to the Single Judge.¹²⁹

The Prosecutor appealed the decision, arguing against the 'two-tiered' approach adopted by the Pre-Trial Chamber.¹³⁰ According to the Prosecutor, identifying a State willing to accept the person concerned as well as to enforce conditions imposed by the Court is an essential prerequisite to granting conditional release.¹³¹

On 2 December 2009, the Appeals Chamber unanimously upheld the appeal.¹³² On the one hand, it found that the Pre-Trial Chamber disregarded relevant facts in finding that a substantial change of circumstances warranted the interim release of Bemba. On the other hand, it specified the conditions required to grant interim release. According to the Chamber:

in order to grant conditional release the identification of a State willing to accept the person concerned as well as enforce related conditions is necessary. Rule 119 (3) of the Rules of Procedure and Evidence obliges the Court to seek, *inter alia* the views of the relevant States before imposing or amending any conditions restricting liberty. It follows that a State willing and able to accept the person concerned ought to be identified prior to a decision on conditional release.¹³³

Pragmatically, the Chamber acknowledged that the ICC 'is dependent on State cooperation in relation to accepting a person who has been conditionally released as well as ensuring that the conditions imposed by the Court are enforced'. Therefore, in the absence of such cooperation, 'any decision of the Court granting conditional release would be ineffective'.¹³⁴

¹²⁹ *ibid.*, 88

¹³⁰ Prosecutor v. Jean-Pierre Bemba, Prosecution's Appeal against "Decision on the Interim Release of Jean-Pierre Bemba Gombo", ICC-01/05-01/08-476, 14 August 2009.

¹³¹ *ibid.*

¹³² Prosecutor v. Jean-Pierre Bemba, AC Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's "Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic, ICC-01/05-01/08-631-Red, 2 December 2009.

¹³³ *ibid.*, 106.

¹³⁴ *ibid.*, 107.

From a human rights perspective, the approach adopted by the Court is regrettable. It must be noted that this is not the only possible interpretation of the Statute. Even though the ICC's legal framework does not explicitly oblige States to accept provisionally released defendants on their territory, Article 93(1)(l) of the Statute stipulates that States Parties shall comply with requests by the Court to provide, in relation to investigations or prosecution, 'any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court'. It could be argued that hosting a provisionally released accused would be part of 'facilitating the investigation and prosecution of crimes' and that Article 21(3) of the ICC Statute requires an expansive interpretation in order to avoid potential human rights violations.¹³⁵

5.4 The case regarding the offences against the administration of justice related to the Bemba case

On 20 November 2013, the Pre-Trial Chamber II issued arrest warrants against Bemba, two lawyers of his legal team (Aimé Kilolo Musamba and Jean-Jacques Mangenda Kabongo) and two of his political associates (Babala Wandu and Narcisse Arido) for their alleged responsibility for several offences against the administration of justice¹³⁶ committed in connection with the case of *the Prosecutor v. Jean-Pierre Bemba Gombo*. Among other things, the offences include corruptly influencing witnesses by giving them money and instructions to provide false testimony and presenting false evidence and giving false testimony in courtroom.

According to Judge Cuno Tarfusser, acting as single Judge of the Pre-Trial Chamber, several factors justified the arrest of these individuals: the gravity of the offences, the risk of flight demonstrated by their possibility to travel freely and to benefit from Bemba's network, and the risk for the administration of justice and of committing new offences demonstrated by the nature of the offences. Several applications for interim release were filed. In this respect, it must be noted that all suspects requested to be released either to their home country, Belgium for Kilolo and the DRC for Babala, or to countries where they had a legitimate right to return, the UK for Mangenda and France for Arido.¹³⁷

¹³⁵ Van Regemorter (n 107).

¹³⁶ Article 70 of the Statute.

¹³⁷ Arido, a national of the Central African Republic, held a "document provisoire de séjour" of the French Republic, whereas Mangenda, a national of the Democratic Republic of the Congo, was the holder of a visa expiring in August 2015 for the United Kingdom.

On 26 September 2014, in its decision requesting observations from States,¹³⁸ the Pre-Trial Chamber considered that the duration of the suspects' detention made it necessary for the Pre-Trial Chamber 'to proceed *motu proprio* without delay to the review of such state of detention, in particular in light of the statutory penalties applicable to the offences at stake in these proceedings and of the paramount need to ensure that the duration of pre-trial detention shall not be unreasonable'.¹³⁹ The Pre-Trial Chamber requested that the relevant States submit observations on 'the possible conditional release of the suspects to their territory' and their ability to enforce the conditions of rule 119 (1) RPE.¹⁴⁰

Pursuant to Regulation 51 of the Regulations of the Court, these States and the Netherlands submitted observations regarding a potential release of defendants on their territory. All of them refused. Belgium raised the lack of legal framework for the implementation of such release,¹⁴¹ while the DRC noted their inability to prevent the accused from committing new offences.¹⁴² On the other hand, France, the UK and the Netherlands signaled their opposition to accepting the accused without any further explanation.¹⁴³

This notwithstanding, on 21 October 2004, Judge Tarfusser ordered the release of Kilolo to Belgium, of Mangenda to the UK, of Babala to the DRC and of Arido to France.¹⁴⁴ The Judge only conditioned the release of the suspects to the signature of a document stating their commitment to appear when summoned and to the indication of their address, this being sufficient to ensure their appearance at trial. Since no additional conditions were imposed, the Judge found no need 'to further consult with the relevant States, whether in writing or by way

¹³⁸ Prosecutor v. Jean-Pierre Bemba et al, PTC II Decision requesting observations from States for the purposes of the review of the detention of the suspects pursuant to regulation 51 of the Regulations of the Court", ICC-01/05-01/13-683, 26 September 2014.

¹³⁹ *ibid.*, 3.

¹⁴⁰ *ibid.*, 5.

¹⁴¹ Prosecutor v. Jean-Pierre Bemba et al., PTC II Decision on the 'Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba', ICC-01/05-01/13-259, 14 March 2014. As has been seen, in March 2014, Belgium and the ICC signed an agreement on interim release. Such agreement, however, does not establish an obligation on Belgium to accept that detainees from the Court be released on its territory but makes such acceptance conditional upon an assessment conducted by Belgian authorities on a case by case basis. In fact, even after the conclusion of this agreement, Belgium continued to oppose the release of the suspects because it would be easy for them to leave the country and because they could not legally monitor their communications. See Van Regemorter (n 107).

¹⁴² Prosecutor v. Jean-Pierre Bemba et al., PTC II Decision on the "Requête urgente de la Défense sollicitant la mise en liberté provisoire de monsieur Fidèle Babala Wandu", ICC-01/05-01/13-258, 14 March 2014; Van Regemorter (n 107).

¹⁴³ Prosecutor v. Jean-Pierre Bemba et al., PTC II Decision on "Narcisse Arido's request for interim release" ICC-01/05-01/13-588, 24 July 2014; Prosecutor v. Jean-Pierre Bemba et al., PTC II Decision on the "Requête de mise en liberté" submitted by the Defence for Jean-Jacques Mangenda ICC-01/05-01/13-261, 17 March 2014; Van Regemorter (n 107).

¹⁴⁴ Their release was motivated by the excessive length of their pre-trial detention under Article 60(4) of the Statute. See Prosecutor v. Jean-Pierre Bemba et al., PTC II Decision (n 113).

of a hearing'.¹⁴⁵ For the same reason, the inability of the DRC authorities to enforce the conditions set forth under Rule 119 (1)(c) and (d) RPE was not deemed an obstacle to the release of Babala to its territory.¹⁴⁶ Unfortunately, all the comments given by the States were confidential; therefore, it is not possible to speculate on the reasons why they changed their mind.¹⁴⁷

The four suspects were subsequently released from the custody of the ICC. Jean-Pierre Bemba, however, remained in detention in connection with ongoing proceedings in another case before the Court, *The Prosecutor v. Jean-Pierre Bemba Gombo*.¹⁴⁸ The Prosecutor appealed the Pre-Trial Chamber's decisions.¹⁴⁹

5.4.1 Appellate proceedings

On 29 May 2015, the Appeals Chamber reversed and remanded to the Trial Chamber the decision ordering the interim release of the four accused.¹⁵⁰ As has been seen in paragraph 5.2.1, in this judgment the Chamber reversed the ruling of the Pre-Trial Chamber and clarified the distinction and correct interpretation of Article 60(3) and (4) of the Statute. However, the Chamber found that, taking into account the length of time that has passed since their release, it would not be in the interests of justice for the suspects to be re-arrested. According to the judges:

given the specific situation of the suspects in this case, i.e. that they were ordered to be released on 21 October 2014, to which suspensive effect was not granted by the Appeals Chamber, and the length of time that has passed since their release, the Appeals Chamber finds that it would not be in the interests of justice for the suspects to be re-arrested because of the reversal of the Impugned Decision. Accordingly, despite reversing the Impugned Decision, the Appeals Chamber decides, in view of the exceptional

¹⁴⁵ *ibid.*, 6.

¹⁴⁶ *ibid.*

¹⁴⁷ Van Regemorter (n 107).

¹⁴⁸ *Prosecutor v. Jean-Pierre Bemba et al.*, PTC II Decision on “Mr Bemba’s Request for provisional release”, ICC-01/05-01/13-798, 23 January 2015.

¹⁴⁹ *Prosecutor v. Jean-Pierre Bemba et al.*, Prosecution’s Notice of Appeal of the “Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido” of 21 October 2014 and Urgent Request for Suspensive Effect of the Decision pending Appeal, ICC-01/05-01/13-706, 21 October 2014.

¹⁵⁰ *Prosecutor v. Jean-Pierre Bemba et al.*, AC Judgment (n 115).

circumstances, to maintain the relief ordered therein, i.e. the release of the suspects, pending the Trial Chamber's determination on this matter.¹⁵¹

Accordingly, on 17 August 2015, the Trial Chamber ordered the continued release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido with a number of conditions, including to be present in The Hague at their trial, scheduled to commence on 29 September 2015.¹⁵²

5.5 Final remarks

Even with respect to interim release pending trial, the high-sounding statements of principles of the Court are not backed up by a coherent practice. The Court's rulings in the Bemba cases demonstrate that the respect of the right to liberty of defendants can only be effective when States agree to cooperate with the ICC. In fact, the previous reviews of detention demonstrate that, without the identification of a State willing and able to implement the release of an accused, such release is not possible and that, therefore, the respect of the right to liberty is impossible as well.¹⁵³ The present author shares the views of Havneet Kaur Sethi, who rightly argued that:

‘the ICC has perverted the issue of interim release into a political as opposed to legal one. Indeed, States' lack of cooperation is often cited as a reason to deny interim release, resulting (...) in the Court's conflation of its legal duties with that of States' political motivations to deny the accused entry into their respective territories. The Court politicizes itself by predicating its decisions to deny interim release on State cooperation, whose own decisions are sometimes arbitrary, capricious and contingent on policies of changing governments. This inevitably leads to uncertainty and lacunae in the law, and may result in a Court that espouses a political – as opposed to truly legal – rhetoric, which ignores the rights of the accused, and which, ultimately, may even arguably render the defendants in front of the ICC the new victims of international criminal justice.’¹⁵⁴

¹⁵¹ *ibid.*, 57.

¹⁵² Prosecutor v. Jean-Pierre Bemba et al., TC VII Decision Regarding Interim Release ICC-01/05-01/13-1151, 17 August 2015.

¹⁵³ Van Regemorter (n 107).

¹⁵⁴ Sethi (n 90) 4.

6. Conclusion

Although the legal framework set forth by the Statute represents an improvement if compared to the *ad hoc* Tribunals, the actual safeguards for the right to liberty are still not sufficient in view of the structural characteristics of the ICC and the mode in which cooperation plays out in practice. The legal framework of the Statute is based on the assumption of a clear separation between national proceedings and proceedings of the Court. However, most often, this is not the case. As has been seen, this artificial distinction is upheld by the Judges in their considerations of the challenges to jurisdiction and admissibility of cases brought forward by defendants.

Moreover, under the ICC Statute, practices on designating suspects are a matter of unpublished internal policy, which involves neither the Defence nor the Court. There is no significant judicial oversight of the Prosecutor's activities until the issuance of an arrest warrant or a summons to appear, and thus, no protection of the rights of the persons targeted by the investigation until that moment. This lack of protection is exacerbated by the great discretion with which the Prosecutor is endowed with respect to the time frame of the investigation.

CHAPTER V

THE IMPACT OF COOPERATION ON THE EQUALITY OF ARMS

1. Introduction

Equality of arms between the Prosecution and the Defence is a central principle of modern international criminal justice. Although the founding instruments of international criminal tribunals and human rights treaties do not incorporate it as such, the case law of international courts and the ensuing doctrine widely acknowledge equality of arms to be a key element of the right to fair trial.¹ Moreover, the UN Human Rights Committee has defined it as an implicit guarantee of the International Covenant on Civil and Political Rights (ICCPR).²

This Chapter considers equality of arms with regard to access to cooperation from the Defence. Like the Prosecutor, the Defence has two ways to carry out its investigations: a request for assistance to States and non-state actors, or direct execution of investigative measures on the territory of a State (on-site investigations). The assistance of national authorities is indispensable for both. However, for the Defence, obtaining the cooperation it needs to build its case is often much more difficult.

The present Chapter examines the principle of equality of arms in cooperation proceedings at the ICC in light of the structural characteristics of this Court. First, the Chapter defines the meaning of the principle of equality of arms and its significance in the procedural context of the ICC. It then moves on to consider the institutional position of the Defence in the framework of the Court. Third, it assesses how the Defence is involved in and participates during the various stages of the investigation (passive position); fourth, it investigates whether and to what extent the Statute endows the Defence with adequate means to conduct its own investigations (active position). The goal is to individuate the major handicaps in the current cooperation regime (i.e., general and Defence-specific deficiencies), as far as the conduct of investigations and collection of evidence are concerned, and how these can best be remedied.

¹ Jarinde T Tuinstra, *Defence Counsel in International Criminal Law* (TMC Asser Press 2009) 145.

² Kweku Vanderpuye, 'Traditions in Conflict: The Internationalization of Confrontation' (2010) 43 *Cornell International Law Journal* 513, 539, cited by; Charles Chernor Jalloh and Amy Elizabeth DiBella, 'Equality of Arms in International Criminal Law: Continuing Challenges' in William Schabas, Yvonne McDermott and Niamh Hayes (eds), *The Ashgate Research Companion to International Criminal Law-Critical Perspectives* (Ashgate 2013) 255.

2. The right to equality of arms

Any individual accused of criminal conduct is entitled to a fair trial. Central to the fair trial guarantee is the concept of equality of arms. This requires that in criminal proceedings the defence shall never be placed at a ‘substantial disadvantage’ relative to the prosecution, in terms of its ability to present its case.³

As Richard Wilson has noted, ‘the most important and comprehensive of the cases to deal with procedural equality of arms was the 1999 decision of the Appeals Chamber in the first appeal from the first trial before the Tribunals, *Prosecutor v. Dusko Tadic*. There, the defence’s lead argument was that the defendant’s right to fair trial had been denied when lack of cooperation from the Republika Srpska prevented defence lawyers from properly presenting their case at trial. Specifically, most defence witnesses were Serbs still residing in the Republika Srpska, which refused cooperation with any aspect of the operation of the ICTY, while prosecution witnesses were Muslims residing in countries in Western Europe and North America whose governments cooperated fully with the tribunal (...) The Appeals Chamber ultimately rejected the defence contention, but not before it had gone far in determining the scope and content of the principle of equality of arms (...) It concluded that ‘equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case’. It found, however, that the ICTY did not enjoy the same authority as does domestic tribunals, ‘if not directly, at least through the extensive enforcement powers of the State, to control matters that could materially affect the fairness of the trial’. Thus the ICTY has no authority to respond in the manner suggested by the defence against a state that refuses to cooperate. It can only report such non-cooperation to the UN Security Council.’⁴

The Rome Statute does not explicitly mention equality of arms, but codifies the principle at Article 67, enshrining the rights of the accused at trial. Pursuant to paragraph 1, letter b) of this provision, the accused must be granted ‘adequate time and facilities for the preparation of the defence’, as well as the possibility to communicate freely with counsel of his/her choosing in confidence. Moreover, according to subsequent letter e), the accused has the right ‘to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her’.

³ Jens Dieckmann and Christina Kerll, ‘Representing the “General Interests of the Defence”: Boon or Bane? – A Stocktaking of the System of Ad Hoc Counsel at the ICC’ (2011) 11 *International Criminal Law Review* 105, 107.

⁴ Richard Wilson, ‘Assigned Defense Counsel in Domestic and International War Crimes Tribunals: The Need for a Structural Approach’ (2002) 2 *International Criminal Law Review* 145, 185–186.

2.1 Equality of arms in the pre-trial phase

The pre-trial phase of the ICC proceedings is clearly inspired by the adversarial model, in that the parties need to gather evidence in order to build and present their case at the confirmation hearing⁵ and at trial.⁶ In view of the structural inequalities between the Prosecutor and the Defence in terms of resources and access to states cooperation, this procedural choice can cause significant disadvantage to the Defence. Moreover, one must not forget that, given the structure of ICC proceedings, defence counsel usually enters the case at a very late pre-trial stage, long after the Prosecutor's investigation has commenced, when the OTP team has already gathered much evidence.

The drafters of the Statute, thus, made considerable efforts to expand the dimension of the Defence into the investigation process of the Prosecutor. Firstly, they imposed upon the Prosecutor the duty to investigate incriminating and exonerating circumstances equally pursuant to Article 54(1)(a). Moreover, they included in the Statute provisions that mandate that the Defence be involved into some of the crucial moments of the investigation, and envisage a strong role for the Pre-Trial Chamber in the supervision of the activities of the Prosecutor and in the protection of the rights of the Defence. As has been stated, without some form of judicial involvement at the investigation stage, an accused would be incapable of effectively collecting evidence and preparing his/her defence.⁷

The Prosecutor has a clear mandate to investigate and prosecute the persons allegedly responsible for the international crimes that fall within the jurisdiction of the Court and, to this end, has been given specific powers and independent resources as a distinct and independent organ of the Court. Conversely, the Defence is not equipped with investigative powers similar to those of the Prosecutor (and even less resources), but it is only entitled to 'adequate time and facilities for the preparation of the defence' pursuant to Article 67(1)(b) of the Statute. This means that the Defence capacity to collect evidence is limited in scope and tailored to react to the Prosecution's case.⁸ The Statute does not rule out independent fact-finding by the Defence. In principle, the Defence is free to conduct its own investigation, for it cannot be required to rely exclusively on the investigative activities of the Prosecutor,

⁵ Art. 61(3) of the Statute.

⁶ Art. 67(1)(e) of the Statute.

⁷ Fabricio Guariglia and Gudrun Hochmayr, 'Article 56' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn, Beck/Hart 2008) 1108.

⁸ Gabrielle McIntyre, 'Equality of Arms Defining Human Rights in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia' (2003) 16 *Leiden Journal of International Law* 269, 280.

despite their necessary objectivity.⁹ As has been argued, ‘no proper criminal justice system puts its faith solely in the Prosecutor to get things right, nor in the judges to understand perfectly the points for both sides in every case’.¹⁰ Thus, the adequate time and facilities for the preparation of the defence necessarily implies adequate resources for defence teams to conduct independent investigations at the scene of the alleged crimes and collect evidence.

2.1.2 The role of the Pre-Trial Chamber

‘The establishment of the PTC stems from the Civil Law tradition, where prosecutorial and investigative activities frequently undergo judicial scrutiny. Nevertheless, it must be emphasized that the PTC is not an investigative chamber. In contrast to the ‘juge d’instruction’ of civil law systems, the PTC has no investigative powers of its own nor is it responsible for directing or supervising the investigations of the Prosecutor. Rather, the Statute establishes a hybrid system of proceedings which lacks precedents at the international level.’¹¹

The Pre-Trial Chamber has an important role in the protection of the Defence in the pre-trial phase. In this respect, the relevant provisions of the Statute are Article 56, on the intervention of the Chamber in ‘unique investigative opportunities’, and Article 57(3)(b), governing the issuance of cooperation orders on behalf of the Defence. In addition, Article 57(3)(c) holds that, where necessary, the Pre-Trial Chamber is responsible to provide protection for the persons arrested or who appeared in response to a summons (along with the protection of victims and witnesses, national security information and the preservation of evidence). This provision is complemented by Regulation 48(1) of the Regulations of the Court, according to which the Pre-Trial Chamber may request the Prosecutor to provide specific or additional information or documents that the Chamber deems necessary in order to exercise its functions under Articles 53(3)(b),¹² 56(3)(a), and 57(3)(c) of the Statute. Article 56 and 57(3)(b) will be thoroughly discussed in the following paragraphs. For now, it is worth

⁹ Håkan Friman et al., Informal Expert Paper: Measures Available to the ICC to Reduce the Length of Proceedings (2003).

¹⁰ Steven Kay and Bert Swart, ‘The Role of the Defence’ in Antonio Cassese, Paola Gaeta and John RWD Jones (eds), *The Rome Statute of the International Criminal Court: a Commentary*, vol II (Oxford University Press 2002) 1421.

¹¹ Fabricio Guariglia and Gudrun Hochmayr, ‘Article 57’ in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn, Beck/Hart 2008) 1118–1119.

¹² According to this provision, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed with an investigation if the latter is based solely on considerations relating to the interest of justice.

mentioning an interesting application that the Chamber made of 57(3)(c) of the Statute in the Lubanga case.

On 15 November 2006, the Defence requested the Pre-Trial Chamber to order the Prosecution to obtain and disclose a number of NGO's notes and transcripts of interviews concerning witnesses on which the Prosecution intended to rely at the confirmation hearing.¹³ The Defence had made such request pursuant to Rule 76 RPE, governing pre-trial disclosure relating to prosecution witnesses, according to which the Prosecutor shall provide the Defence with the names of witnesses whom s/he intends to call to testify and copies of any prior statements made by those witnesses.

The Chamber found that the materials sought by the Defence did not refer to 'prior statements' within the meaning of Rule 76 RPE, because they consisted in 'notes taken by certain journalists, non-governmental organisations and MONUC officials of their interviews with witnesses'¹⁴ that the Prosecutor intended to call at the confirmation hearing. Moreover, the relevant witnesses did not have an opportunity to re-read such notes and did not sign them.¹⁵

The Chamber, however, in the capacity of 'the ultimate guarantor of the rights of the Defence', found in Article 57(3)(c) – combined with Articles 67(1)¹⁶ and 87(6)¹⁷ of the Statute – the appropriate legal basis to resort to the cooperation regime between the United Nations and the Court¹⁸ in order to obtain items which can be material for the Defence's preparation of the confirmation hearing, even if they do not fall within the Prosecution's disclosure obligations pursuant to article 67(2) of the Statute and Rules 76 and 77 RPE.¹⁹

Accordingly, the Chamber ordered the Registrar to send a cooperation request to the United Nations in order to obtain notes of those interviews of MONUC officials with the witnesses concerned.²⁰

¹³ Prosecutor v. Thomas Lubanga, Defence Requests for Disclosure of Materials, ICC-01/04-01/06-701-Conf., 15 November 2006.

¹⁴ Prosecutor v. Thomas Lubanga, PTC I Decision on Defence Requests for Disclosure of Materials, ICC-01/04-01/06, 17 November 2006, 4.

¹⁵ *ibid.*

¹⁶ This provision lists the rights of the accused at trial.

¹⁷ Pursuant to this provision: '[t]he Court may ask any intergovernmental organization to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate'.

¹⁸ As has been seen, such regime is comprised of Article 2 of the Statute, the Cooperation Agreement between the United Nations and the Court and the Memorandum of Understanding between the MONUC and the Court.

¹⁹ Prosecutor v. Thomas Lubanga, PTC I Decision (n 14) 5.

²⁰ *ibid.*, 6.

3. Institutional in(equality)

The Rome Statute does not include the organization of defence services in its legal framework. According to Article 34 of the Statute, the Court is composed of four organs: the Presidency, the Pre-Trial, Trial and Appeals Divisions, the OTP, and the Registry. Legally speaking, therefore, the Defence is not an organ of the Court. Admittedly, this is nothing new. Starting with the Nuremberg and Tokyo Tribunals, international courts have always failed to set up the necessary structure to ensure the realization of defence rights (with the significant exception of the Special Tribunal for Lebanon established in 2007²¹).²² In contrast, those same instruments spell out in great detail the institutional role of the other organs of the tribunals, namely, the Prosecution, Chambers, and the Registry.

As Charles Jalloh has pointed out, this failure is mainly due to sovereignty concerns and to the traditional prerogative of states to prosecute international crimes committed on their territory or by their nationals. ‘In an environment in which international prosecution efforts must be justified, legalized, and legitimated for state consent to be given, concerns for defence rights have largely been overshadowed by prosecution concerns. This is particularly true given that the defence routinely challenges, both within and outside of these trials, the legality and the legitimacy, of the tribunals purporting to assert jurisdiction over the defendants.’ Similarly, Elise Groulx described how the international push to end impunity led ‘to a focus on the prosecution of alleged perpetrators and compensation of victims. The system was built very rapidly without including the legal profession in an organized and continuous manner, in the design of the system – or looking critically at the methods of protecting the rights of individuals accused of committing heinous crimes.’²³

The Rules of Procedure and Evidence and the Regulations of the Court, however, provide a legal basis for the provision of institutional support for defendants, in an effort to fill in the omissions in the Statute. In particular, Rule 20 sets out the ‘responsibilities of the Registrar relating to the rights of the Defence’ and mandates the Registrar to, *inter alia*, provide support, assistance and information to all defence counsel and professional defence investigators, and equip the Defence with the adequate facilities for the performance of its

²¹ Charles Chernor Jalloh, ‘The Special Tribunal for Lebanon: A Defense Perspective’ [2014] Florida International University, Legal Studies Research Paper Series 786.

²² Borrowing Elise Groulx’s words, president of the International Criminal Defense Lawyers Association, ‘the institutional basis for a truly independent body of defense lawyers is very much lacking in the Statutes of these courts, even though the rights of the accused are clearly articulated on paper’, Elise Groulx, ‘Equality of Arms: Challenges Confronting the Legal Profession in the Emerging International Criminal Justice System’ (2010) 2010 *Revue Quebecoise de Droit International* 21, 22, cited by Jalloh (n 21) 787.

²³ *ibid* 23.

duties.²⁴ Furthermore, Rule 20(2) states that the Registrar must carry out its duties, including the Registry's financial administration, in such a manner that the independence of the Defence is upheld.

3.1 Support structures for defence services

At the ICC, the institutional support for defendants operates through two main channels: the Counsel Support Section (CSS) – a unit created within the Registry, with the task of providing logistical and administrative support to both defence and victims' counsel – and the Office of Public Counsel for the Defence (OPCD), a permanent unit of the Court, which falls within the Registry only for administrative purposes, but is otherwise a wholly independent office.²⁵ The CSS was created by the Registrar in 2009. It manages the List of Counsel eligible to practice before the ICC and provides training and support for counsel on the list; it also administers the legal aid scheme of the Court on behalf of the Registrar.

The most significant effort to remedy an imbalance between the prosecution and the Defence in terms of institutionalization, however, is represented by the creation of the OPCD. The latter was established in accordance with Regulation 77 of the Regulations of the Court and its tasks include: i) representing and protecting the rights of the defence during the initial stages of the investigation; ii) providing legal advice and research to defence teams and defendants; iii) advocating for the general interests of the defence in connection with internal and external policies and agreements.

OPCD members work independently²⁶ and are governed, in the exercise of their duties, especially as regards respect for confidentiality, by the Code of Professional Conduct for Counsel. The OPCD is the voice of the Defence before the ICC and serves the purpose of fostering the principle of equality of arms at an institutional level. Moreover, it represents a significant advancement to the practice of the Court's predecessors, where no formal structure existed to represent the interests of the Defence.²⁷

²⁴ Rule 20 (1)(b) and (e) RPE.

²⁵ Support for victims and their legal representatives is provided by the Victims Participations and Reparations Section (VPRS), attached to the division of the Court Services and the Office of Public Counsel for Victims (OPCV), the counterpart of the OPCD mandated to provide legal support and advice to victims and legal representatives.

²⁶ Pursuant to Regulation 114 of the Regulations of the Registry 'the members of the Office shall not receive any instructions from the Registrar in relation to the discharge of their tasks as referred to in regulations 76 and 77 of the Regulations of the Court'.

²⁷ At the ICTY, the general interests of the defence were represented by an external partner of the Tribunal, the Association of Defense Counsel at the ICTY (ADC-ICTY).

3.1.1 Representing and protecting the rights of the defence during the initial stages of the investigation

Regulation 77(4) of the Regulations of the Court entrusts the OPCD with the protection of the rights of the defence both during the preliminary examination under Rule 47(2) RPE, and during the formal investigation pursuant to Article 56, governing the proceedings concerning a ‘unique investigative opportunity’. Moreover, OPCD may be appointed to serve as *ad hoc* counsel for the general interest of the defence ‘when the interests of justice so require’ pursuant to Regulation 76(1) and (2).

3.1.2 Assistance to defence teams

As mentioned, the OPCD assists defence teams and defendants with legal advice and research pursuant to Regulation 77(5) of the Regulations of the Court. In the absence of any further elaboration by the Court’s legal instruments, the 2010 Report of the Registry provides the most insightful information regarding the actual contents of this task.²⁸

According to it, the OPCD provides new defence teams with manuals and memoranda, which enables them to acquaint themselves with the complex legal framework and jurisprudence of the Court. Subsequently, the defence teams may also request the OPCD to conduct research into legal and procedural issues arising in their case.²⁹ Through these activities, the OPCD seeks to create a ‘collective defence memory’ and ‘resource centre’. Moreover, it endeavours to achieve an equality of arms between individual defence teams and prosecution teams, which are assisted by a separate appellate and legal advisory section.³⁰

The Report further explains that, through its access to all public decisions and transcripts, the OPCD has compiled various legal digests on specific subject matters (such as victim participation, oral decisions on trial procedures etc.) which it updates on a regular basis and disseminates to all defence teams to ensure that they are familiar with the most recent legal precedents issued in other cases. Moreover, by virtue of its insight into all the proceedings before the ICC, the OPCD has been invited by different Chambers to file

²⁸ ICC Registry, ‘Behind the Scenes: the Registry of the ICC’ (2010), available at: <https://www.icc-cpi.int/iccdocs/PIDS/docs/behindTheSce.pdf>. The section on the OPCD has been written by Xavier-Jean Keita, Principal Counsel OPCD & Melinda Taylor, Legal Advisor OPCD.

²⁹ Keita and Taylor, ‘Behind the Scenes: the Registry of the ICC’ (2010), 69-71.

³⁰ *ibid.*

observations concerning the development of protocols regulating the system of disclosure between the parties, which could have significant ramifications for all future defence teams.³¹

The relationship between OPCD and external counsel is a very delicate one. As the Registry has emphasized, ‘the OPCD is not a public defender’s office per se, it exists to supplement rather than replace the role of external defence counsel’.³² On the one hand, the OPCD must be careful not to interfere with the strategy of individual defence teams, which are ultimately responsible for the contents of defence filings and submissions. On the other hand, the OPCD must avoid the possibility of conflicts of interest arising from assistance provided to different defence teams. For this reason, the OPCD does not provide any advice or assistance in relation to factual issues, nor does it seek or receive instructions from the defendants.³³

3.1.3 Representation of the rights of the Defence in ICC policies

In this capacity, the OPCD represents the rights of the Defence in deliberations regarding ICC policies and procedures, so as to ensure that they are formulated in a manner which is consistent with fair trial rights. For example, the OPCD has provided input on issues related to intermediaries, victim participation and legal aid.

Additionally, the OPCD engages with external partners, namely NGOs and States, to promote awareness on defence-related issues, such as the importance of equality of arms and the role of defence counsel.

3.2 The appointment of counsel

The Rome Statute foresees the right to counsel both at the investigation stage and after an arrest or a summons have been issued (case stage). However, there is no general right to counsel at the investigation stage, as this is limited to the questioning proceedings. Conversely, after a person has been arrested or has appeared voluntarily, his/her right to counsel is guaranteed throughout all procedural stages following arrest.³⁴

³¹ *ibid.*

³² *ibid.*,69.

³³ For these reasons, the OPCD informed the Pre-Trial Chamber in the Thomas Lubanga Dyilo case that it would not be consistent with its mandate to file factual submissions on behalf of a defendant, who was at that time, represented by another defence counsel.

³⁴ Kenneth S Gallant, ‘The Role and Powers of Defense Counsel in the Rome Statute of the International Criminal Court’ [2000] *The International Lawyer* 21, 22; Dieckmann and Kerll (n 3) 107.

The relevant provisions are the following. Article 55(2)(c), guarantees to all persons who are under investigation by the Prosecutor and who are to be questioned the right ‘to have legal assistance of the person’s choosing, or (...) to have legal assistance assigned to him or her, in any case where the interests of justice so require’. Questioning must be carried out in the presence of counsel ‘unless the person has voluntarily waived his or her right to counsel’³⁵.

Pursuant to Rule 117(2) RPE, at any time after the arrest, the person may make a request to the Pre-Trial Chamber for the appointment of counsel to assist with proceedings before the Court. Once a person has been charged with a particular crime or crimes within the jurisdiction of the Court, his or her status shifts from that of a suspect to an accused. According to Article 67(1), in the determination of any charge the accused shall be entitled to, *inter alia*, b) communicate freely with counsel of his/her own choosing; and d) conduct the defence in person or through legal assistance of his/her own choosing, or to have legal assistance assigned by the Court in case s/he lacks sufficient means to pay for it.

The Rome Statute, thus, enshrines the principle that a defendant may freely choose counsel to represent them, provided that the counsel in question meets certain qualifications.³⁶ Rule 21(2) RPE provides that defendants may choose counsel from a list maintained by the Registrar, or can choose any ‘other counsel who meets the required criteria and is willing to be included in the list’.

Counsel, however, may also be appointed as duty or *ad hoc* counsel in particular circumstances. Pursuant to Regulation 73(2) of the Regulations of the Court, duty counsel may be appointed by the Registrar ‘if any person requires urgent legal assistance and has not yet secured legal assistance, or where his or her counsel is unavailable’. In appointing duty counsel, the Registrar must take into account the wishes of the person, and the geographical proximity of, and the languages spoken by, the counsel.

Pursuant to Regulation 76(1) and (2) of the Regulations of the Court, the Pre-Trial Chamber may appoint defence counsel ‘in the circumstances specified in the Statute and in the Rules’ as well as ‘when the interests of justice so require’. The latter type of appointment is especially relevant where there is no person charged but investigative activities are being carried out by the Prosecutor.³⁷

³⁵ Article 55(2)(d) of the Statute.

³⁶ See Rule 22 RPE.

³⁷ IBA Report, ‘Counsel Matters at the International Criminal Court’ (2012) 12.

3.2.1 Appointment of *ad hoc* counsel to represent the general interests of the Defence

Traditionally, from the Defence's point of view, the proceedings become relevant after a suspect is identified³⁸ and the Prosecutor needs to carry out an investigative act that requires the presence of counsel, such as the interrogation of the suspect pursuant to Article 55(2)(c) of the Statute. As has been seen in the previous Chapters, the Court has clarified that the issuance of a warrant of arrest or a summons to appear marks the transition from the situation to the case stage. However, proceedings taking place prior to the issuance of an arrest warrant may affect the case against the future defendant in various ways.

As soon as it is decided to open an investigation, the OTP may send over a team of investigators to interview potential witnesses and collect evidence with the assistance of local authorities. By the time the defence lawyer comes into the picture – which is usually after the warrant of arrest or the summons to appear have been issued- the Prosecutor might have been involved in the case for years. The Statute, therefore, expressly envisages a role for defence counsel at the situation stage of the investigation and, in certain circumstances, even earlier, during the preliminary examination.

As noted by Dieckmann and Kerll, prior to the establishment of the Court there were only two ways in which criminal lawyers could participate in proceedings before an international tribunal: either as defence counsels representing suspects and accused, or as *amicus curiae* appointed to assist on a particular matter.³⁹

The Rome Statute creates a new type of counsel (the so called *ad hoc* counsel), appointed to represent the general interests of the Defence at a very early stage of the investigation, where no suspect has yet been identified or charged. The need for such representation stems from the unique and novel jurisdiction of the Court, which is exercised not only over individual cases, but also over situations.⁴⁰ Importantly, proceedings taking place in the context of a situation, such as those regarding victim participation or evidentiary issues – each of which involve the participation of the Prosecutor – may affect the cases against individual accused yet to be identified by the Court.⁴¹

The Statute empowers the Pre-Trial Chamber to appoint *ad hoc* counsel both during the preliminary examination under Rule 47(2) RPE, and during the formal investigation

³⁸ Christoph Safferling, 'The Rights and Interests of the Defence in the ICC Pre-Trial Phase' (2011) 9 Journal of International Criminal Justice 651, 653.

³⁹ Dieckmann and Kerll (n 3) 105–106.

⁴⁰ *ibid* 109.

⁴¹ War Crimes Research Office, 'Protecting the Rights of Future Accused During the Investigation Stage of International Criminal Court Operations' (2008) 1.

pursuant to Article 56, governing the proceedings concerning a ‘unique investigative opportunity’. In these instances, Regulation 77(4) of the Regulations of the Court mandates that *ad hoc* counsel be selected among the members of the Office of Public Counsel for the Defence (OPCD).

Additionally, pursuant to Regulation 76(1) and (2) of the Regulations of the Court, the Pre-Trial Chamber may appoint defence counsel ‘when the interests of justice so require’. In such cases, counsel may be chosen either from the list maintained by the Registry pursuant to Rule 21 RPE, or from the OPCD. By appointing *ad hoc* defence counsel to represent the general interests of the future accused, the Court’s legal instruments strive to ensure equality of arms throughout the proceedings, and ultimately to protect the fairness of any resulting cases against individuals.⁴²

3.2.1.1 The preliminary examination

As has been seen, in the preliminary examination stage the Prosecutor analyses the reliability of the information received through a referral or a communication. In this stage, the Prosecutor is not explicitly granted investigative powers. However, pursuant to Article 15(2) of the Statute s/he might decide to receive ‘testimonies’ at the seat of the Court.

Rule 47(2) RPE foresees a potential role for *ad hoc* counsel for the Defence when there is a serious risk that it might not be possible for the testimony to be taken subsequently. In such case, the Prosecutor ‘may request the Pre-Trial Chamber to take such measures as may be necessary to ensure the efficiency and integrity of proceedings and, in particular, to appoint counsel or a judge from the Pre-Trial Chamber to be present during the taking of the testimony in order to protect the rights of the Defence’.

Nevertheless, it is difficult to assess what role defence counsel might actually have at such an early stage of proceedings. The Prosecutor is not investigating but merely evaluating the reliability of the information received in order to decide whether or not to start an investigation, and a suspect will normally not yet have been identified. As is the case with Article 56 (see below), the purpose of this provision is to make sure that the evidence will be available at the confirmation hearing and at trial, should the Prosecutor decide to rely on it. However, information under Article 15(2) is most likely to be used for the purpose of the hearing in which the Pre-Trial Chamber authorizes the commencement of the investigation

⁴² Dieckmann and Kerll (n 3) 109; War Crimes Research Office (n 41) 2.

pursuant to Article 15(4). Given the different standard of proof (which is formulated as..) and distinct purpose of Article 15 hearing, and the limited ways in which information can be gathered at this stage, it may not be possible to obtain it in a form that would render it admissible for subsequent proceedings.⁴³

3.2.1.2 Unique investigative opportunity

Article 56 provides for a mechanism to protect the rights of the future defendant in relation to the collection of evidence that is not likely to be available in the future. According to this provision, when the Prosecutor comes across a ‘unique opportunity to take testimony or a statement from a witness, or to examine, collect or test evidence’, s/he has a duty to inform the Pre-Trial Chamber, which may take the necessary measures to ‘ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the Defence’.

Article 56(2) sets forth a non-exhaustive list of measures that the Pre-Trial Chamber may take. From a Defence perspective, the most important is the one envisaged by letter d), according to which the Pre-Trial Chamber may i) authorize counsel for the person arrested or appeared in response to a summons to ‘participate’, or ii) in case there has not yet been such an arrest or appearance, or counsel has not been designated, appoint another counsel to ‘attend and represent the interests of the Defence’.

As can be seen, thus, this provision protects the rights of future accused both at the situation stage, where a suspect has not been yet identified, and at the case stage, following the arrest or the appearance of the person. The presence of counsel serves the purpose of ensuring that the evidence taken during the investigation will be admissible at trial.⁴⁴

It must be stressed that, where counsel is appointed in the absence of an arrest or designation of counsel by the person, counsel may have no actual client.⁴⁵ This means that the future accused may not be available for to give instruction to counsel and discuss a defence strategy with him/her. In this case, thus, counsel protects the ‘general interests of the Defence’, rather than the rights of a specific defendant.⁴⁶ What is more, in this situation conflicts of interests are likely to arise. As explained by Gallant:

⁴³Broomhall et al., *Informal Expert Paper: Fact-finding and Investigative Functions of the Office of the Prosecutor, Including International Co-operation*, 8.

⁴⁴ Guariglia and Hochmayr (n 7) 1109; Claus Kress, ‘The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise’ (2007) 5 *Journal of International Criminal Justice* 537, 608; Safferling (n 38) 660.

⁴⁵ Gallant (n 34) 23.

⁴⁶ Safferling (n 38) 662.

several persons, some with conflicting defences, may have evidence given against them during a single “unique investigative opportunity”. Where the targets of the investigation are clear, separate counsel may be appointed for each potential accused. The court, however, may not know in advance the identity of those against whom evidence will be given. For this reason, “defence” counsel may be placed in the position of attempting to protect the interests of more than one potential accused, who at later stages may try to blame each other for the alleged crimes.⁴⁷

Safferling, however, has highlighted the important function that defence counsel still serves in this context, which is making sure that proceedings are conducted in accordance with the ‘rule of law’, meaning that counsel has the function to guard over issues such as the adherence to procedural provisions, the legitimacy of investigatory measures, and the coordination of several national legal orders and the ICC.⁴⁸

3.2.1.3 The investigation

The Pre-Trial Chamber appointed *ad hoc* counsel to represent the interests of the defence both at the situation and at the case stage of proceedings. With respect to the case stage - which is concerned with the conduct of identified individuals and takes place after the issuance of a warrant of arrest or a summons to appear – the Chamber deemed it necessary to appoint an *ad hoc* counsel where the person was not represented by defence counsel⁴⁹ (for example, because the person was still at large). Moreover, the Pre-Trial Chamber has appointed *ad hoc* counsel both from the list of attorneys maintained by the Registrar (list counsel) and from OPCD lawyers.⁵⁰

The reasons for the appointment were various. In the situation of the Democratic Republic of the Congo (DRC), Pre-Trial Chamber I appointed an attorney pursuant to Article 56, following the Prosecutor’s notification of a ‘unique investigative opportunity to carry out forensic examinations’ to be carried out by the Dutch Forensic Institute.⁵¹

In the same situation, the Chamber appointed a second lawyer as *ad hoc* defence counsel for the purpose of responding to applications from victims seeking to participate in

⁴⁷ Gallant (n 34) 23–24.

⁴⁸ Safferling (n 38) 662–666.

⁴⁹ Dieckmann and Kerll (n 3) 124.

⁵⁰ *ibid* 112–115; War Crimes Research Office (n 41) 25–47.

⁵¹ Situation in the DRC, PTCI Decision on the Prosecutor’s Request for Measures under Art. 56, ICC-01/04-21, 26 April 2005.

the proceedings pursuant to Rule 89(1) RPE.⁵² This provision provides that victims wishing to participate in proceedings before the Court must submit a written application to the Registrar, and that copies of all such applications will be provided to the Prosecutor and the Defence, who shall be entitled to reply. Although this rule does not expressly require the appointment of *ad hoc* counsel, the Chamber deemed it necessary to use its power under Regulation 76(1) of the Regulations of the Court to represent and protect the interests of the defence during the application proceedings of Rule 89 RPE, so as to respond to victims' applications.⁵³

In the situation in Darfur, Pre-Trial Chamber I appointed defence counsel to respond to the *amicus curiae* observations submitted by Louise Arbour and Antonio Cassese pursuant to Rule 103(1) RPE,⁵⁴ which states that the Chamber may 'invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate'.

Finally, in the case against Joseph Kony et al. (situation in Uganda), Pre-Trial Chamber II initiated *proprio motu* proceedings under Article 19(1) of the Statute to determine the admissibility of the case.⁵⁵ In inviting the Republic of Uganda, the Prosecutor and particular victims to submit their observations on admissibility, the Chamber also appointed *ad hoc* counsel arguing that: 'in the present circumstances, where none of the persons for whom an arrest warrant has been issued is yet represented by a defence counsel, appointment of a counsel for the defence (...) is in the interest of justice'.⁵⁶

3.2.2 Limits and scope of *ad hoc* defence counsel's mandate

The lack of detailed provisions concerning *ad hoc* counsel in the legal texts of the Court gave rise to controversies and confusion with regard to the scope of *ad hoc* counsel's mandate in

⁵² Situation in the DRC, PTC I Decision on Protective Measures Requested by Applicants 01/04-1/dp, ICC-01-04-73, 21 July 2005, 5. Article 68(3) of the Statute provides that 'where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial'.

⁵³ Pre-Trial Chamber II, following the rationale employed by Pre-Trial Chamber I, also appointed *ad hoc* counsel to represent the interests of the Defence by responding to victims' applications to participate in the Uganda situation, see Situation in Uganda, PTC II Decision on legal representation, appointment of counsel for the defence, protective measures and time-limit for submission of observations on applications for participation, ICC-02/04-01/05-134, 1 February 2007.

⁵⁴ Situation in Darfur, Sudan, PTC I Decision Inviting Observations in Application of Rule 103 RPE, ICC-02/05-10, 24 July 2006.

⁵⁵ Prosecutor v. Joseph Kony et al., PTC II Decision initiating proceedings under Article 19, requesting observations and appointing counsel for the defence, ICC-02/04-01/05-320, 21 October 2008.

⁵⁶ *ibid.*, 8.

each of the above-mentioned circumstances. The lawyers appointed as ad hoc counsel interpreted their mandate as being much broader than intended by the Pre-Trial Chamber.

In the situation of DRC, the appointed counsel made a submission challenging not only the existence of a unique investigative opportunity, but also making ‘preliminary remarks on issues of jurisdiction and admissibility’.⁵⁷ The Chamber held that *ad hoc* counsel for the defence had no procedural standing to challenge the jurisdiction of the Court and the admissibility of the case pursuant to Article 19(2)(a) of the Statute, as this can only be made by an accused person against whom a warrant of arrest or a summons to appear has been issued.⁵⁸

Similarly, the appointed counsel in the Darfur situation, rather than filing a response to the *amicus curiae* observations, submitted a request that the Pre-Trial Chamber determine questions of jurisdiction and admissibility prior to take any further action with respect to the situation in Darfur.⁵⁹ The Pre-Trial Chamber rejected the request for the same reasons adopted in the previous finding in the DRC situation.⁶⁰

A few weeks later, noting the Prosecutor’s expressed intention to visit 14 individuals in custody on Sudanese territory, appointed counsel requested that the Pre-Trial Chamber permit him to attend those meetings and, more generally, allow defence counsel to attend all proceedings in the situation in Darfur relating to ‘questioning, interviewing witnesses and victims, witness confrontations’ and so on.⁶¹ The Defence further requested that the Chamber order the Prosecution to inform them of any envisaged proceedings and to invite them to attend and participate therein. In denying this request, the Chamber clarified that the mandate of *ad hoc* counsel is ‘strictly restricted’ by the terms of his/her appointment and does not extend automatically to other proceedings at the pre-trial stage set out in the Statute and the Rules.⁶²

Finally, in *Prosecutor v. Joseph Kony et al.*, the Pre-Trial Chamber did not appoint counsel for the situation, but rather for the case against the four defendants, who remained at

⁵⁷ Situation in the DRC, PTC I Decision following the Consultation on the Prosecutor’s Submission on Jurisdiction and Admissibility, ICC-01/04-93, 10 November 2005, 2-3 (summarizing the confidential submission received by defence counsel).

⁵⁸ *ibid.*, 4.

⁵⁹ Situation in Darfur, Sudan, Ad hoc Counsel for Defence conclusions aux fins d’exception d’incompétence et d’irrecevabilité, ICC-02-05-20, 9 October 2006.

⁶⁰ Situation in Darfur, Sudan, PTC I Decision on the Submissions Challenging Jurisdiction and Admissibility, ICC-02/05-34-tENG, 22 November 2006.

⁶¹ Situation in Darfur, Sudan, Ad Hoc Counsel for Defence, Application requesting the presence and participation of the ad hoc counsel for the defence during proceedings that the OTP will undertake in Sudan, ICC-02-05-41-tEN, 18 December 2006.

⁶² Situation in Darfur, Sudan, PTC I Decision on the ad hoc counsel for the defence request of 18 December 2006, ICC-02-05-47, 2 February 2007.

large.⁶³ Counsel contended that the terms of the mandate as outlined in the decision of the Chamber were very broad and ambiguous.⁶⁴ He claimed that the decision mandated him to ‘represent’ the four defendants. Thus, all defendants were in fact his clients within the meaning of Article 2(2) of the Code of Professional Conduct for counsel.⁶⁵ The foreseeable conflict of interest resulting from the representation of four defendants in the same criminal proceedings constituted a breach of Article 12 of the Code of Conduct (governing impediments to representation) and thus also endangered the rights of each of the defendants to be represented effectively.⁶⁶

The matter was settled by the Appeals Chamber on 16 September 2009.⁶⁷ It clarified the difference in the mandate of counsel appointed to represent suspects individually, as his clients, as opposed to the mandate of counsel appointed to represent more generally the interests of the Defence. It held that the mandate of the latter is of a *sui generis* nature⁶⁸, in that:

In circumstances where the suspects are at large and counsel is appointed to represent their interests generally in proceedings, such counsel cannot speak on their behalf. A client and counsel relationship does not exist between them, and counsel does not act for or as agent of the suspects. Counsel’s mandate is limited to merely assuming the defence perspective, with a view to safeguarding the interests of the suspects in so far as counsel can, in the circumstances, identify them. The provisions of the Code of Conduct regarding representation are therefore not directly applicable to such counsel.⁶⁸

⁶³ On 28 October 2009, counsel for the Defence, while not declining his appointment, requested the Presidency to review the decision of the Registrar relating to his appointment. See... He also applied to the PTC for a conditional stay of the proceedings pending the outcome of the request to the Presidency, see... On 31 October 2008, the PTC rejected the application for conditional stay, see.... On 11 November 2008, the Presidency also dismissed the request for a review of the Registrar’s decision, see....

⁶⁴ Prosecutor v. Joseph Kony et al., Defence Counsel’s Submission of observations on the admissibility of the case under Article 19(1) of the Statute, ICC-02/04-01/05-350, 18 November 2008, 33.

⁶⁵ Article 2(2) Code of Conduct provides that “[i]n this code... ‘client’ refers to all assisted or represented by counsel”

⁶⁶ Prosecutor v. Joseph Kony et al., Defence Counsel’s Submission (n 64) 33.

⁶⁷ Prosecutor v. Joseph Kony et al., AC Judgment on the Appeal of the Defence against the ‘Decision on the admissibility of the case under Article 19(1) of the Statute’ of 10 March 2009, ICC-02/04-01/05-408, 16 September 2009. This judgment upheld the PTC II Decision on the admissibility of the case under Article 19(1) of the Statute, ICC-02/04-01/05-377, 10 March 2009.

⁶⁸ *ibid.*, 56.

3.4 Final remarks

Notwithstanding the existing support structure, the defence lacks the institutional autonomy and visibility enjoyed by the Prosecution. ‘Whilst the creation of the OPCD has been an important step forward, the defence still does not have the same structural powers as the Prosecution: the defence cannot enter into agreements with States and organizations for cooperation, they cannot formulate their budget needs or lobby the State parties for their own budget requirements, and they have no direct representation in committees which decide upon the legal and administrative policies of the Court. True equality of arms will thus only be achieved when the defence are recognized in principle and in practice as a pillar of the ICC.’ ‘One view is that the establishment of a fifth organ would remedy this perceived anomaly. A contrary view is that defence issues should be dealt with by an independent, representative, and external body of counsel in order to safeguard the fairness and legitimacy of ICC proceedings and the rights of accused persons’.

‘The lack of financial autonomy is one of the major limitations to the effective functioning of the current defence office at the ICC. Both the CSS and the OPCD are financially dependent on the Registry, and, unlike the OTP, do not enjoy the autonomy to determine their operational budget. The ability to determine and manage the budget is key to an office’s independence.’⁶⁹

As has been seen, the Court considers the appointment of *ad hoc* counsel to be ‘in the interest of justice’ both when suspects have not yet been identified at the situation stage, and when identified suspects remain at large and do not appear before the Court following the issuance of an arrest warrant against them. However, the mandate of *ad hoc* counsel is extremely confined. The Court has consistently interpreted the general interests of the defence as limited to the specific issue that justified the appointment of counsel; *ad hoc* counsel may in any case not exceed the scope of their appointment by asserting the general defence interests of possible future accused persons.

⁶⁹ IBA Report, ‘Fairness at the International Criminal Court’ (2011) 34.

4. Defence access to cooperation

As has been noted, ‘Defence efforts to obtain information held by sovereign states, non-governmental entities, or international organizations have proven to be one of the most enduring challenges confronted since the IMT’.⁷⁰ The practice of the *ad hoc* Tribunals has shown that State cooperation with the Defence has been far less forthcoming in comparison to cooperation with the Prosecutor.⁷¹

At the outset, the institutional inequality between the Prosecution and the Defence must be mentioned. Article 86 imposes on States Parties an obligation to ‘cooperate fully with the Court in its investigation and prosecution of crimes’. As has been seen, the Defence is not an organ of the Court. Legally speaking, therefore, States Parties do not have an obligation to comply with requests of assistance sent by the Defence, which makes them wholly dependent on the States’ good will. In any event, requests for assistance coming from the Defence might also be disregarded by the national authority in charge of its execution or they might be executed less diligently than a request coming from an organ of the Court.⁷²

Second, many national civil law jurisdictions may not be familiar with the concept of defence investigations, which is a typical feature of the adversarial model, and, therefore, might not be prepared to respond to the Defence’s requests for assistance.⁷³ A consequence of this institutional inequality is the perception of defence counsel and defence activity by national authorities. As a prominent defence lawyer put it, unlike the Prosecutor, Defence counsel is not perceived to act on behalf of the international community, but merely on behalf of his/her client, with whom s/he is associated.⁷⁴

At a closer look, however, the reasons of the defence disadvantage are mostly political. Certain States do not wish to assist certain defendants, given their political positions in the past, as they are perceived as a threat after a regime change. ‘Unique structure and jurisdiction of the ICC, which renders it vulnerable to the political interests of those who

⁷⁰ Michael A Newton, ‘Evolving Equality: The Development of the International Defense Bar’ (2011) 47 *Stan. J. Int’l L.* 379, 416.

⁷¹ Masha Fedorova, *The Principle of Equality of Arms in International Criminal Proceedings* (Intersentia 2012) 186; Newton (n 70) 390; Mark Ellis, ‘Achieving Justice Before the International War Crimes Tribunal: Challenges for the Defense Counsel’ (1997) 7 *Duke Journal of Comparative & International Law* 519, 533–537; Michail Wladimiroff, ‘Cooperation on Criminal Matters: A Defence Lawyer’s Perspective’ in Rodrigo Yepes-Enriquez and Lisa Tabassi (ed), *Treaty Enforcement and International Cooperation in Criminal Matters with Special Reference to the Chemical Weapons Convention* (TMC Asser Press, 2002).

⁷² Guariglia and Hochmayr (n 11) 1124.

⁷³ Wladimiroff (n 71) 248.

⁷⁴ *ibid* 246; Fedorova (n 71) 187; Kay and Swart (n 10) 1424–1425.

support and instrumentalise it'.⁷⁵ Referrals of conflict situations by States Parties and the UNSC have de facto resulted in one-sided prosecutions, which reflect the preferences of those who refer the situation.⁷⁶ The Prosecutor himself has encouraged States Parties' referrals in the expectation that the referring State would subsequently be cooperating with the investigation. Of the eight situations currently before the Court, five are the results of self-referrals from the governments of States on whose territory the crimes were committed. In many of the situations currently before the Court, the Prosecutor and the government in power are on the same side. Against this backdrop, it is not difficult to assume that local authorities will not be particularly willing to provide Defence teams with information and access to sites. The Statute does not mention a Defence's 'power' to directly request assistance to States and international organizations, similar to the one granted to the Prosecutor. In practice, however, the Defence sends requests for cooperation to States and non-state actors exactly as its counterpart. The early practice of the Court has shown that such requests are often ignored, prompting counsel to request the assistance of the Registry. The Registry then transmits the Defence's request with a cover letter or note verbale to the relevant State or organization. If Registry-backed requests are ignored, counsel then turns to the Court.⁷⁷ As a matter of fact, the strongest legal grounding for cooperation requests by the Defence is an order of the Pre-Trial Chamber pursuant to Article 57(3)(b) of the Statute, which will be discussed in the following paragraph.

4.1 The power of the Pre-Trial Chamber under Article 57(3)(b) of the Statute

Article 57(3)(b) of the Statute empowers the Chamber to assist the person arrested or summoned with the preparation of his/her defence. It states that, upon the request of an arrestee or a person who has appeared pursuant to a summons, the Chamber may, 'issue such orders, including measures such as those described in article 56,⁷⁸ or seek such cooperation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence.'

The power granted to the Pre-Trial Chamber to assist the Defence and the procedural right given to the Defence to obtain such assistance is meant to balance, at the pre-trial stage,

⁷⁵ Alana Tiemessen, 'The International Criminal Court and the Politics of Prosecutions' [2014] *The International Journal of Human Rights* 1, 4.

⁷⁶ *ibid.*, 2.

⁷⁷ IBA Report (n 69) 36.

⁷⁸ See previous paragraphs.

the situation of the Defence with that of the Prosecution in the collection of evidence. It is meant to ensure some degree of equality of arms in the collection of evidence at the pre-trial stage, giving effect to the right of the accused, pursuant to Article 67(1)(b) of the Statute, to have adequate time and facilities for the preparation of his or her defence.⁷⁹

The possibility of the Defence to request an order for cooperation from the Pre-Trial Chamber is particularly useful in preparation for the confirmation hearing. After confirmation and the transfer of the case to the Trial Chamber, the Defence will still be entitled to request cooperation orders from the Trial Chamber, which, pursuant to Article 61(11) of the Statute, ‘shall be responsible for the conduct of subsequent proceedings and may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings’.

The possibility of requesting an order from the Court, however, is subject to various threshold requirements, which are set out in Rule 116(1) RPE. This provision stipulates that the Pre-Trial Chamber shall issue an order or seek cooperation under this provision where it is satisfied that: (a) such an order would facilitate the collection of evidence that may be material to the proper determination of the issues being adjudicated, or to the proper preparation of the person’s defence; (b) sufficient information to comply with Article 96(2) of the Statute has been provided. Moreover, pursuant to Rule 116(2) RPE, the Chamber has the discretion to seek the Prosecutor’s view before granting the order, since s/he might have already collected the evidence sought by the Defence.

The requirement under letter a) is the one of ‘relevance’. It refers to the evidence sought by the Defence and is meant to provide a bar against frivolous requests. At the same time, however, the drafters of the Rules were conscious of the fact that only limited information might be available to counsel before obtaining the cooperation sought and, therefore, intentionally left the threshold relatively low, as is suggested by the use of the conditional form.⁸⁰ The relevance requirement has not been particularly controversial so far and, at the time of writing, no Defence request under Article 57(3)(b) has been denied by the ICC for lack of relevance.

The requirement under letter b) is the one of ‘specificity’. It refers to the way in which Defence requests must be formulated and to their content. The Defence seeking the cooperation order has to provide sufficient information to comply with Article 96(2) of the

⁷⁹ Guariglia and Hochmayr (n 11) 1123–1124.

⁸⁰ Håkan Friman, ‘The Rules of Procedure and Evidence in the Investigative Stage’ in Horst Fischer, Claus Kress and Sascha Rolf Lüder (eds), *International and National Prosecution of Crimes Under International Law: Current Developments* (Arno Spitz 2001) 200.

Statute, according to which the request should, inter alia, contain a concise statement of the assistance sought, as much detailed information as possible about the location or identification of any person or place that must be found or identified, and a concise statement of the essential facts underlying the request, along with the reasons and details of any procedure to be followed.

The reason for this requirement is twofold. First, it is necessary to enable the Court to make a request for cooperation in accordance with the provisions of Part 9 of the Statute, while, at the same time, it enables the requested government or entity to identify the material sought.⁸¹ Second, it is meant to avoid the so-called ‘fishing expeditions’, meaning requests for overly broad categories of investigative acts to be conducted that are lacking sufficient information such as names, dates, places, etc.⁸² The case law of the court has shown how these requirements have been interpreted.

4.1.1 The ‘necessity’ requirement of jurisprudential creation

In the case against Katanga and Ngudjolo, the Defence for Mr Katanga requested that the Pre-Trial Chamber seek cooperation from the DRC under Article 57(3)(b) of the Statute, in order for it to collect information material to the preparation of the Defence.⁸³ The Pre-Trial Chamber rejected the request in relation to three items sought by counsel.⁸⁴ Despite the absence in Rule 116 RPE of any reference to a requirement concerning the necessity of the Court’s cooperation request on behalf of the Defence, the Chamber considered the issuance of an order not to be necessary at that stage.⁸⁵ This decision is particularly important as it was the first one concerning the application of Article 57(3)(b) of the Statute.

According to the Chamber, some documents sought by the Defence were ‘likely to be in the possession or control of the Prosecutor’ and, therefore, the Defence should have first approached him pursuant to Rule 77 RPE.⁸⁶ This Rule governs the ‘inspection of material in possession or control of the Prosecutor’, and states that the latter shall allow the Defence to

⁸¹ Håkan Friman, ‘Investigation and Prosecution’ in Roy SK Lee (ed), *The International Criminal Court: elements of crimes and rules of procedure and evidence* (Transnational Publishers Inc 2001) 510.

⁸² Newton (n 70) 410.

⁸³ Prosecutor v. Germain Katanga and Mathieu Ngudjolo, Defence Application pursuant to Article 57(3)(b) of the Statute to Seek the Cooperation of the Democratic Republic of Congo (DRC) ICC-01/04-01/07-371-Conf-Exp., 7 April 2008.

⁸⁴ The content of these items is confidential.

⁸⁵ Prosecutor v. Germain Katanga and Mathieu Ngudjolo, PTC I Decision on the ‘Defence Application pursuant to Article 57(3)(b) of the Statute to Seek the Cooperation of the Democratic Republic of Congo (DRC)’, ICC-01/04-01/07, 25 April 2008.

⁸⁶ *ibid.*, 6.

inspect any evidence which is material to the preparation of the Defence or is intended for use by the Prosecutor for the purpose of the confirmation hearing or at trial.

As to another item sought by the Defence concerning the execution of the warrant of arrest against Katanga, the Chamber explained that, since ‘the Registry is the competent organ of the Court for the execution of the Court’s warrants of arrest’, the Defence could file a motion requesting the Chamber to order the Registry to provide the relevant information.⁸⁷ Since the necessity requirement was not met, the Chamber did not enter into the analysis of whether the conditions of specificity and relevance were satisfied.⁸⁸

The Court considered the necessity requirement as additional to those prescribed by Rule 116(1) RPE, but did not give an explanation for this interpretative choice. Presumably, it did so on the basis of the letter of Article 57(3)(b) itself, which enables the Court to seek such cooperation ‘as may be necessary’, and the case law of the ICTY and ICTR. Indeed, the *ad hoc* Tribunals have consistently required the party requesting an order for cooperation to show a sufficient prior effort to obtain the material sought independently. Judge Anita Usacka filed an interesting dissenting opinion.⁸⁹ According to her:

the conclusion of the majority that the specific information requested could be obtained from another source is not only not supported by the record, but also sets the threshold too high for granting a cooperation request, and appears to create an unnecessary additional requirement for article 57(3)(b) requests. The conclusion of the majority seems to be that if there is any other source of the information besides the State, the Defence is not entitled to seek cooperation from a State.⁹⁰

This ‘additional requirement’ created by the majority unduly infringes on the suspect’s right to have adequate facilities for the preparation of his defence pursuant to Article 67(1)(b) of the Statute.⁹¹ In particular, she highlighted that imposing a mandatory requirement for the Defence to seek its evidence from the Prosecution prior to turning to the Chamber contrasts with the purpose of Rule 116(2) RPE, according to which the Pre-Trial Chamber has the discretion – and not the obligation - to seek the view of the Prosecutor before granting the

⁸⁷ *ibid.*, 7.

⁸⁸ *ibid.*, 7.

⁸⁹ Prosecutor v. Germain Katanga and Mathieu Ngudjolo, Partly Dissenting Opinion of Judge Anita Usacka to the PTC I Decision on the ‘Defense Application pursuant to Article 57(3)(b) of the Statute to Seek the Cooperation of the Democratic Republic of Congo (DRC)’, ICC-01/04-01/07, 25 April 2008.

⁹⁰ *ibid.*, 3.

⁹¹ *ibid.*, 5.

order. The discretion accorded to the Chamber in deciding whether to involve the Prosecution serves the purpose of protecting the right of the Defence not to reveal its strategy. As Judge Usacka put it: ‘if the Defence is required to seek its evidence from the Prosecution prior to making a cooperation request, it renders rule 116(2) meaningless’.⁹²

Judge Usacka’s reasoning is particularly convincing given the fact that the Chamber had dealt with the Defence’s application on an *ex parte* basis, given the sensitive nature of some of the documents sought.⁹³ Moreover, the Defence had already requested the documents concerned from the Prosecution twice, receiving no response.⁹⁴

More broadly, Judge Usaka took issue with the obligation that the majority’s decision imposed on the Defence to request the information from an organ of the Court before approaching the Chamber for an order on cooperation from States. As she remarked: ‘[t]he majority’s solution does not appear to take into account that even if the Prosecution and the Registry provide information relevant to these items, it would not satisfy the Defence’s interest in also receiving the DRC’s version of the information’.⁹⁵ Accordingly, the purpose of Rule 116 RPE would be that of granting the Defence the possibility of ‘seek[ing] the same information from several sources in order to compare or corroborate’.⁹⁶

Subsequently, the necessity of an order of the Court on behalf of the Defence was debated in the Banda and Jamus case (situation in Darfur, Sudan). Interestingly, this requirement was given a particular interpretation in connection with the phase of the proceedings in which the order of the Chamber was sought, i.e., prior to the confirmation hearing.⁹⁷

Defence counsel had filed an application pursuant to Article 57(3)(b) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of Sudan.⁹⁸ To that end, the defence had made various attempts to secure the cooperation of Sudan both by way of a request to the Registry and requests directly addressed to the Republic of Sudan, all of which had been unsuccessful. The Single Judge, however,

⁹² *ibid.*, 13

⁹³ Prosecutor v. Germain Katanga and Mathieu Ngudjolo, PTC I Decision (n 85) 4.

⁹⁴ Prosecutor v. Germain Katanga and Mathieu Ngudjolo, Partly Dissenting Opinion of Judge Anita Usacka (n 89) 13.

⁹⁵ *ibid.*, 22.

⁹⁶ *ibid.*, 23.

⁹⁷ Prosecutor v. Abdallah Banda and Saleh Mohammed Jerbo, PTC I Decision on the "Defence Application pursuant to article 57(3)(b) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of Sudan", ICC-02/05-03/09, 17 November 2010.

⁹⁸ Prosecutor v. Abdallah Banda and Saleh Mohammed Jerbo, Defence Application pursuant to Article 57(3)(b) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of the Sudan, ICC-02/05-03/09-95, 10 November 2010.

deemed an order of the Chamber not necessary at that stage ‘in particular in light of the strategy pursued by the Defence in respect of the forthcoming confirmation hearing’.⁹⁹ In fact, the Defence had filed a joint submission with the Prosecutor stating that it would have not objected to the charges nor presented evidence for the purpose of the confirmation hearing.

This decision is regrettable. The Pre-Trial Chamber has unduly restricted the scope of Rule 116(1) RPE, which makes no distinction between the confirmation hearing and the trial for the purpose of assisting the Defence in obtaining cooperation from States. Moreover, this reading of Article 57(3)(b) of the Statute infringes upon the Defence’s right to freely choose a strategy in the presentation of its case. It has been rightly argued that ‘agreeing not to challenge the charges at the confirmation of charges stage does not mean the defence is conceding the allegations and that it will not challenge the charges when the case goes to trial’.¹⁰⁰

Following the confirmation of the charges on 7 March 2011,¹⁰¹ the Defence reiterated its request to the Trial Chamber.¹⁰² In rejecting the request, the Chamber further clarified the content of the necessity requirement.¹⁰³ Endorsing the Pre-Trial Chamber’s finding in the Katanga and Ngudjolo case, the Chamber definitively established that an order pursuant to Article 57(3)(b) of the Statute can be deemed ‘necessary’ only when the following two conditions are met: i) the Defence has exhausted all the other possibilities to seek the cooperation from the State, such as direct contact with the local authorities and the assistance of the Registry; ii) the Defence has explored possible alternatives, short of a request for cooperation to the State, such as approaching the Prosecutor, taking into account her/his obligation to ‘investigate incriminating and exonerating circumstances equally’ pursuant to Article 54(1)(a) of the Statute.¹⁰⁴ The Banda and Jamus decision is very important and will be thoroughly analysed in the following paragraphs.

⁹⁹ Prosecutor v. Abdallah Banda and Saleh Mohammed Jerbo, PTC I Decision (n 97) 3.

¹⁰⁰ Fedorova (n 71) 209.

¹⁰¹ Prosecutor v. Abdallah Banda and Saleh Mohammed Jerbo, PTC I Corrigendum of the "Decision on the Confirmation of Charges", ICC-02/05-03/09, 7 March 2011.

¹⁰² Prosecutor v. Abdallah Banda and Saleh Mohammed Jerbo, Defence Application pursuant to Article 57(3)(b) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of the Sudan, ICC-02/05-03/09-145 and public annexes A to F, 11 May 2011

¹⁰³ Prosecutor v. Abdallah Banda and Saleh Mohammed Jerbo, TC IV Decision on ‘Defence Application pursuant to articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of the Sudan’ ICC-02/05-03/09, 1 July 2011.

¹⁰⁴ *ibid.*, 26 and 31.

4.2 The Defence's request for assistance to the Court in the Banda and Jamus case

The Banda and Jamus case arises out of the situation in Darfur, Sudan. As has been seen, the Government of Sudan refused to engage with the Court in any way, denying access to its territory to any person connected with the Court, including the Prosecution.¹⁰⁵ Mr Banda and Mr Jamus are rebel commanders, enemies of the government of Omar al-Bashir, charged with crimes arising from an attack against the African Union Mission in Sudan (AMIS) at the Haskanita Military Group Site (MGS Haskanita).

On 16 June 2010, the defendants appeared voluntarily before the Court in response to summonses to appear issued under seal on 27 August 2009 and unsealed on 15 June 2010. The charges against them were confirmed on 7 March 2011. For the preparation of its case, the Defence requested the assistance of the Trial Chamber in order to let a defence team enter the territory of Sudan for carrying out on-site investigations and locate and interview witnesses.¹⁰⁶ To that end, the defence had made various attempts to secure the cooperation of Sudan both by way of a request to the Registry and requests directly addressed to the Republic of Sudan, all of which had been unsuccessful.¹⁰⁷

A great part of Banda and Jamus' defence strategy hinged on the proof that the attack on MGS Haskanita was in fact lawful, and that the AMIS is not a peacekeeping mission in accordance with the UN Charter.¹⁰⁸ Accordingly, the Defence submitted that, '[i]n order to carry out even the most basic investigation into this case, it is essential that the Defence visit [a number of] locations' in the vicinity of Haskanita and other sites of AMIS bases in Darfur.¹⁰⁹ As the Defence pointed out, 'inevitably, a significant number of witnesses to the attack, to the events leading up to the attack and to the broader situation in the region are still located in the vicinity of Haskanita'.¹¹⁰ Similarly, '[i]t is likely that witnesses to the activities of AMIS at these bases still reside in the vicinity of these bases.'¹¹¹ Finally, the Defence

¹⁰⁵ See Chapter II.

¹⁰⁶ Prosecutor v. Abdallah Banda and Saleh Mohammed Jerbo, Defence Application (n 102).

¹⁰⁷ On 21 September 2010, the Registry replied to the Defence. It indicated that 'taking into account the volatile security situation' it was not in a position to provide the requested assistance.' See Defence Application (n 108) 7; On 24 September 2010, the Defence wrote to the Sudanese embassy in The Hague to request permission to visit Sudan in order to investigate the Defence case. The Embassy refused to accept this letter and it was returned to the Defence unopened, see Defence Application (n 102) 8 and 9. Subsequently, The Sudanese Ambassador to The Netherlands informed the Defence team members that he was under instructions from his government not to accept any communications or documentation related to proceedings before the Court, including letters from the Defence, see Defence Application (n 102) 16.

¹⁰⁸ Prosecutor v. Abdallah Banda and Saleh Mohammed Jerbo, Defence Application (n 102) 30 and 31.

¹⁰⁹ Prosecutor v. Abdallah Banda and Saleh Mohammed Jerbo, Defence Application (n 102) 30-33.

¹¹⁰ Prosecutor v. Abdallah Banda and Saleh Mohammed Jerbo, Defence Application (n 102) 30.

¹¹¹ Prosecutor v. Abdallah Banda and Saleh Mohammed Jerbo, Defence Application (n 102) 31.

requested access to the camps for internally displaced persons within Sudan, since it had ‘reasons to believe’ that persons who witnessed the Haskanita attack and who could offer evidence relating to the operation of AMIS bases in Darfur could be found at these camps.¹¹² Importantly, the Defence noted that it could not provide further information, as revealing its strategy in advance of trial would be detrimental to the accused.¹¹³

In a different application, the Defence requested the Chamber’s assistance in acquiring several documents from the African Union.¹¹⁴ As an international organization, the African Union itself is not a party to the Rome Statute and is not under an obligation to cooperate with the Court. As has been seen, however, the Court may ask any intergovernmental organization to provide information or documents under Article 87(6) of the Rome Statute.

4.2.1 The Court’s decisions

In addressing the Defence’s requests, the Trial Chamber developed a test for evaluating them. The Chamber considered that it might seek cooperation from a State or an international organization on behalf of the Defence when the requirements of (i) specificity, (ii) relevance, and (iii) necessity have been met.¹¹⁵

The Trial Chamber rejected the Defence request to seek cooperation from the Government of Sudan due to lack of specificity. Defence counsel had requested that defence investigators be allowed to visit ‘a non-exhaustive list of localities in Darfur and other regions of Sudan’ in order to interview persons that were ‘likely’ to still be located in the conflict area.¹¹⁶ According to the Chamber, far from providing the information required under Article 96(2)(b) of the Statute, the Defence had required a ‘permission to undertake an open-ended

¹¹² Prosecutor v. Abdallah Banda and Saleh Mohammed Jerbo, Defence Application (n 102) 32.

¹¹³ Prosecutor v. Abdallah Banda and Saleh Mohammed Jerbo, Defence Application (n 102) 34.

¹¹⁴ Prosecutor v. Abdallah Banda and Saleh Mohammed Jerbo, Defence Application pursuant to Articles 57(3)(b) and 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the African Union, ICC-02/05-03/09-146, 11 May 2011.

¹¹⁵ Prosecutor v. Abdallah Banda and Saleh Mohammed Jerbo, TC IV Decision on ‘Defence Application pursuant to articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of the Sudan’ ICC-02/05-03/09, 1 July 2011; Prosecutor v. Abdallah Banda and Saleh Mohammed Jerbo, TC IV Decision on Defence Application pursuant to Articles 57(3)(b) and 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the African Union, ICC-02/05-03/09-170, 1 July 2011 (not public); Prosecutor v. Abdallah Banda and Saleh Mohammed Jerbo, TC IV Public redacted Decision on the second defence's application pursuant to Articles 57(3)(b) and 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the African Union, ICC-02/05-03/09, 21 December 2011.

¹¹⁶ Prosecutor v. Abdallah Banda and Saleh Mohammed Jerbo, TC IV Decision, 1 July 2011 (n 115) 22.

expedition to the Sudan in order to find out whether there might be something or someone potentially useful to the defence case'.¹¹⁷

Importantly, the Chamber criticized the Defence for having made 'an indiscriminate request to execute all measures unhindered and unmonitored by the Government of Sudan or any agency of the State'.¹¹⁸ Recalling that the general regime applicable to the execution of requests for assistance under Part 9 of the Statute presupposes the execution by state authorities, and that on-site investigations are strictly subject to the conditions under Article 99(4), the Chamber clarified that, even in the circumstances contemplated in the latter provision, 'measures sought need to be specific enough to allow for the consultations required therein'.¹¹⁹

Since the condition of specificity required in Rule 116(1)(b) RPE was not met, the Chamber did not deal with the condition of relevance under Rule 116(1)(a). However, it deemed useful to express some observations on the requirement of 'necessity', which it derived from the wording of Article 57(3)(b) of the Statute, according to which the Chamber may seek such cooperation 'as may be necessary'.¹²⁰ This part of the decision has been addressed in the previous paragraph.

The Trial Chamber equally rejected the Defence request to seek the cooperation of the African Union.¹²¹ It found that only some of the documents the Defence sought to obtain had been identified to the requisite standard, while others had 'not been sufficiently identified' so as to meet the requirement of specificity, since they referred to broad categories of documents without any type of limitation, be it temporal or otherwise.¹²²

Moreover, while the Chamber was satisfied that the Defence had exhausted the steps to obtain the cooperation from the African Union, it considered that it had not explained which steps, if any, it had undertaken to explore whether the documents in question or documents of similar value could be obtained from the Prosecutor. The Chamber thus concluded that the defence should first attempt to obtain these documents in accordance with Rule 77 RPE, before

¹¹⁷ *ibid.*, 22.

¹¹⁸ *ibid.*, 23.

¹¹⁹ *ibid.*, 23.

¹²⁰ *ibid.*, 24ss.

¹²¹ Prosecutor v. Abdallah Banda and Saleh Mohammed Jerbo, TC IV Decision on Defence Application pursuant to Articles 57(3)(b) and 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the African Union, ICC-02/05-03/09-170, 1 July 2011 (not public), as referred to by Prosecutor v. Abdallah Banda and Saleh Mohammed Jerbo, TC IV Public redacted Decision on the second defence's application pursuant to Articles 57(3)(b) and 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the African Union, ICC-02/05-03/09, 21 December 2011.

¹²² Prosecutor v. Abdallah Banda and Saleh Mohammed Jerbo, TC IV Decision 1 July 2011 (n 115) 18-20.

seeking the assistance of the Chamber. Upon a second application by the Defence,¹²³ the Chamber reversed its finding in relation to some documents sought by counsel.¹²⁴ The above examined case law makes clear that orders under Article 57(3)(b) of the Statute may be issued only when the Defence has already identified the specific evidence (such as one or more documents, material items or potential witnesses) that it needs. Requests are deemed ‘specific’ only when they identify with sufficient clarity the documents or the persons sought. This makes it impossible for the Defence to make use of Article 57(3)(b) to conduct investigations in an ordinary sense, that is, to access the State’s territory and search for potential witnesses and material evidence. In other words, orders under Article 57(3)(b) cannot operate as a legal basis for on-site investigations by the Defence.

The specificity requirement is particularly burdensome in the pre-trial phase, where there has not yet been any disclosure from the Prosecutor and defence investigations aimed at identifying and interviewing potential witnesses might be essential to challenge the Prosecutor case at the confirmation hearing. However, the specificity requirement is in line with the general regime of the ICC investigations, according to which on-site investigations are confined within the strict limits of Articles 99(4) and 96 of the Statute.¹²⁵

The necessity requirement is not contained in the ICC Statute and Rules. The Court derived it from the letter of Article 57(3)(b) of the Statute according to which the Pre-Trial Chamber may seek such cooperation on behalf of the Defence ‘as may be necessary’. In the Court’s interpretation, the necessity requirement relates to the order of the Chamber, which has to be the last available option for the Defence. In other words, the defence needs to show that all its attempts to obtain the specific information or documents - a direct request to the State, a request to the State through the Registry, or a request to the Prosecutor - have been unsuccessful.

This is in contrast with the wording of the Statute and the Rules. As opposed to the legal instruments of the *ad hoc* Tribunals, the ICC Statute and Rules do not contain any reference to the ‘sufficient prior effort’ condition. Article 57(3)(b) should be interpreted in light of Rule 116 RPE, according to which the Chamber must be satisfied that its order ‘would facilitate the collection of evidence’. Arguably, the drafters of the Statute purposely

¹²³ Prosecutor v. Abdallah Banda and Saleh Mohammed Jerbo, Second Defence Application pursuant to Articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the African Union, ICC-02/05-03/09-234, 20 October 2011.

¹²⁴ Prosecutor v. Abdallah Banda and Saleh Mohammed Jerbo, TC IV Public redacted Decision on the second defence’s application pursuant to Articles 57(3)(b) and 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the African Union, ICC-02/05-03/09, 21 December 2011.

¹²⁵ See Chapter II.

lowered the threshold in view of the experience and difficulties for the Defence before the *ad hoc* Tribunals in obtaining cooperation from states.

Instead, the approach adopted by the Court seems to create a heavy burden on the already disadvantaged Defence. The requirement that an order of the Chamber ‘would facilitate the collection of evidence’ is sufficiently broad and leaves room for a decision to be taken on a case-by-case basis. The necessity of an order of the Chamber may depend on the situation. For example, if the evidence sought is in possession of the Prosecutor, but the Defence does not want to give her/him any insight into its strategy, then an order of the Chamber might be necessary.

Another aspect that must be taken into account is the relationship between the State and the Court and, in particular, the relationship between the government in power and the defendant. Asking the Defence to exhaust all possible efforts to obtain cooperation from a State whose government is notoriously hostile to the accused might be unfair and excessively time consuming for the Defence.

4.3. Defence access to cooperation from international organizations

4.3.1 Disclosure of exculpatory evidence

Article 54(3)(e) of the Statute provides that the Prosecutor may ‘[a]gree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents’. A similar provision is contained in Article 18(3) of the NRA, which authorizes the United Nations and the Prosecutor to agree that documents and information be provided confidentially and that ‘such documents or information shall not be disclosed to other organs of the Court or to third parties, at any stage of the proceedings or thereafter, without the consent of the United Nations.’

The early practice of the Court revealed the difficulty of balancing these provisions with the right of the accused to the disclosure of exculpatory evidence under Article 67(2) of the Statute, according to which ‘the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor’s possession or control which he or she believes shows or

tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence'.¹²⁶

In the Lubanga case, the Prosecution had collected significant information pursuant to Articles 54(3)(e) of the Statute and 18(3) NRA, which it subsequently submitted that it was unable to disclose to the Defence or even to the Chamber because the information provider (i.e., MONUSCO and other organizations) had not consented to disclosure.

The Trial Chamber took the view that the trial could not proceed under these conditions, finding that the 'trial process had been ruptured to such a degree that it [was] impossible to piece together the constituent elements of a fair trial'.¹²⁷ The Chamber observed that Article 53(3)(e) was only intended to be used in 'highly restricted circumstances' with the sole purpose of 'generating new evidence', but that the Prosecutor had used that provision extensively and inappropriately.¹²⁸ While the Court recognized that there is a potential conflict between Articles 54(3)(e) and 67(2) of the Statute, it also stressed that if the Prosecutor had entered into Article 54(3)(e) agreements only in appropriate circumstances, the tension between the two articles would be 'negligible'.¹²⁹

Very importantly, the Chamber was also greatly concerned by the fact that the Prosecutor had agreed not to disclose the relevant documents to the Chamber as well, in that this had prevented it from exercising its duty to determine whether or not the non-disclosure of potentially exculpatory evidence constituted a breach of the accused's right to a fair trial pursuant to Article 67(2) of the Statute.¹³⁰ The Appeals Chamber upheld the Trial Chamber's decision. However, it reversed the staying of the proceedings because the information provider had, in the meantime, consented to the disclosure of the information.

5. Defence on-site investigations in the Rome Statute: a legal vacuum

The possibility for the Defence to investigate on the territory of States where crimes were committed is essential. As Steven Kay has pointed out, visits to the crime scene are

¹²⁶ The Prosecutor is also obliged, under Rule 77 RPE, to 'permit the defence to inspect any books, documents, photographs, and other tangible objects in the possession or control of the Prosecutor, which are, inter alia, 'material to the preparation of the defence'.

¹²⁷ Prosecutor v. Thomas Lubanga, TC I Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, ICC-01/04-01/06-1401, 13 June 2008, 91-93.

¹²⁸ *ibid.*, 71-72.

¹²⁹ *ibid.*, 76.

¹³⁰ *ibid.*, 92.

‘necessary to familiarize the lawyer with the areas that feature in the evidence of the case, to check the accuracy of evidence relied upon by the prosecution, and to search for evidence that is relevant to the defence’.¹³¹

Despite the crucial importance of on-site investigations, however, the Statute is at best unclear regarding the right of the Defence to conduct them. Pursuant to Article 99(4), the direct execution of measures on the territory of States is *lex specialis* within the general cooperation regime of Part 9, to be applied under the strict terms and conditions set out in that provision. Accordingly, the Prosecutor may only perform non-coercive investigative acts on the territory of States, such as voluntary interviews and visits to public sites.

Article 99(4) however, does not provide the Defence with a similar possibility, as it is framed exclusively from a prosecutorial perspective.¹³² It has been argued that ‘since even the Prosecutor does not automatically have the right to investigate on the territory of a State Party, it is hard to see how the Defence would have such a right in the absence of any specific or implicit provision to that effect’.¹³³

The practice of the ICC, however, indicates that Defence investigations in the field occur in nearly all cases and that defence attorneys usually consider this to be an essential part of their tasks.¹³⁴ Moreover, despite the absence of any explicit reference in the Statute of the ICC, the need for Defence investigations is implicitly acknowledged by the Rules of Procedure and Evidence, particularly, at Rule 20 dealing with the responsibilities of the Registrar relating to the rights of the Defence. According to its letter b), the Registrar shall, inter alia, ‘provide support, assistance, and information to all defence counsel appearing before the Court and, as appropriate, support for professional investigators necessary for the efficient and effective conduct of the defence’.

Elaborating on this Rule, Regulation 119(1)(a) of the Regulations of the Registry provides that the Registrar shall ‘assist counsel and/or his or her assistants in travelling to the seat of the Court, to the place of the proceedings, to the place of custody of the person entitled to legal assistance, or to various locations in the course of an on-site investigation. Such assistance shall encompass securing the protection of the privileges and immunities as laid

¹³¹ Kay and Swart (n 10) 1423–1424.

¹³² Göran Sluiter, *International Criminal Adjudication and the Collection of Evidence: Obligations of States* (Intersentia 2002) 321.

¹³³ Simon De Smet, ‘A Structural Analysis of the Role of the PTC in the Fact-Finding Process of the ICC’ in Göran Sluiter and Carsten Stahn (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers 2009) 426.

¹³⁴ This was also the case at the ad hoc Tribunals, see: Jenia Iontcheva Turner, ‘Defense Perspectives on Law and Politics in International Criminal Trials’ (2007) 48 Va. J. Int’l L. 529, 554.

down in the Agreement on the Privileges and Immunities of the Court and the relevant provisions of the Headquarters Agreement.’

5.1 Privileges and immunity of Defence counsel

As has been seen in Chapter I, Article 48 of the Statute, setting out the privileges and immunities of the Court, stipulates that defence counsel ‘shall be accorded such treatment as is necessary for the proper functioning of the Court’, in accordance with the APIC.¹³⁵

The APIC largely compensates for the inequalities contained in the Statute with respect to privileges and immunities of defence counsel. Expanding upon the provisions of Article 48, the Agreement attributes to defence counsel and his/her assisting persons a set of privileges and immunities ‘to the extent necessary for the independent performance of their functions’¹³⁶; by so doing, the Agreement attributes to defence counsel prerogatives that are similar to those of the Deputy Registrar, the staff of the OTP and the staff of the Registry as stipulated in Article 16 of the Agreement.

According to Article 18(1) of the APIC, counsel and assisting persons are given personal immunity from arrest and detention, as well as functional immunity from prosecution in respect of words spoken or written and all acts performed in their official capacity. Importantly, they also enjoy inviolability of papers and documents relating to the exercise of their functions, and the right to communicate with their clients in whatever form. The ability to communicate with their clients in confidence and maintain the confidentiality of their files and channels of communication is particularly important during the investigation stage of the proceedings, when counsel and client are located in different countries.¹³⁷ Finally, defence counsels are exempt from immigration restrictions and inspection of personal baggage; they are also granted fair treatment of currency and exchange, and repatriation facilities in times of crisis.

Art. 18(2) provides that, upon appointment, counsel shall be provided with a certificate signed by the Registrar for the period required for the exercise of her/his functions. Even though the document in question is referred to as a certificate, it provides the same protections as those contained in the *laissez-passer* which is issued for the Prosecutor and

¹³⁵ Article 48(4) of the Statute. It is also important to note that the Statute makes no reference to the protection of the persons assisting counsel and investigators.

¹³⁶ Article 18 APIC.

¹³⁷ Stuart Beresford, ‘The Privileges and Immunities of the International Criminal Court: Are They Sufficient for the Proper Functioning of the Court or Is There Still Room for Improvement’ (2002) 3 San Diego International Law Journal 83, 126.

her/his staff.¹³⁸ The ability to travel freely to the region where the crimes occurred as well as to other destinations where potential witnesses might be located is essential for the performance of the counsel's function.

This right to travel, however, does not automatically entail the freedom of movement within a State to collect evidence and interview witnesses. Thus, it does not compensate for the absence of a legal basis for defence on-site investigations in the Statute. This has been referred to as 'the most important inequality of arms'.¹³⁹

5.2 The support of the Registry to defence teams

According to the Report of the Bureau on cooperation of the ASP released in November 2009, 'most of the instances of cooperation and assistance requested to States by the Registry on behalf of the Defence are related to defence investigative missions in the field'.¹⁴⁰ Practically, the support of the Registry consists of requests for visa for counsel and members of their teams to national authorities in order to enable them to travel to the respective countries, issuance of notes verbales to facilitate defence missions to meet witnesses in prisons, issuance of official certificates under Article 18 of the Agreement on the Privileges and Immunities of the Court (APIC) etc.¹⁴¹ According to the Report, once they are in the field, 'defence counsel and their teams receive the same security, logistical and administrative assistance as Court staff. Such assistance is primarily provided by the Court's field offices, but also by UN offices and States'.¹⁴²

More recently, the issue of cooperation with the Defence was thoroughly addressed by a Briefing Paper annexed to the Report of the ASP Bureau on Cooperation of 21 November 2014. At the outset, the paper emphasizes that:

[i]n order to respect the principles of fair trial and equality of arms enshrined in the Rome Statute, it is crucial importance that defence teams can effectively obtain cooperation from States and international organizations in the conduct of their activities, as the Office

¹³⁸ Phakiso Mochochoko, 'The Agreement on Privileges and Immunities of the International Criminal Court' (2001) 25 *Fordham Int'l LJ* 638, 655.

¹³⁹ Kenneth S Gallant, 'Protection of the Rights of the Defence in the Agreement on Privileges and Immunities of the ICC, with Special Attention to the Needs of the Defence Outside the Host Country' in Martine Hallers, Chantal Joubert and Jan Sjocrona (eds), *The Position of the Defence at the International Criminal Court and the Role of the Netherlands as the Host State* (Rozenberg 2002) 113–114.

¹⁴⁰ ASP, Report of the Bureau on cooperation, ICC-ASP/8/44, 15 November 2009, 104.

¹⁴¹ *ibid.*

¹⁴² *ibid.*

of the Prosecutor does, notwithstanding the fact that the Defence is not listed in article 34 of the Rome Statute as being an organ of the Court.¹⁴³

The paper moves on to consider the assistance of the Registry to defence teams, which covers three main areas:

- (a) Facilitating the work of the Defence by *inter alia* ensuring that their privileges and immunities will be respected, organizing their travels to different States, facilitating their meetings with government officials, liaising with States to transmit, respectfully of the applicable procedures, their various requests (i.e. requests for obtaining information, documentation, visit to specific places, interview of witnesses, including of detained persons);
- (b) Liaising with States in order to encourage the signature of interim and provisional release agreements, as well as sending *ad hoc* requests in the absence of such agreement;
- (c) Liaising with States to request their assistance in order to facilitate the appearance and the protection of Defence witnesses.¹⁴⁴

In practice, the assistance of the Registry to Defence on-site investigations consists in: i) preparing ‘the necessary certificate under the signature of the Registrar enabling counsel to benefit from the relevant privileges and immunities during the period required for the exercise of their functions in accordance with article 18 of the APIC and Article 25 of the Headquarters Agreement’;¹⁴⁵ (ii) coordinating with the competent authorities via *note verbale* on upcoming missions of the Defence unless a specific arrangement was agreed upon with the State;¹⁴⁶ and (iii) providing necessary travel arrangements, such as requesting UN security clearance, requesting assistance from the UN (for example with MONUSCO flights), arranging for visas to travel to The Hague or the field, etc.¹⁴⁷

In order to obtain the cooperation of a State Party, the Defence teams have to respect the general provisions rules set forth by Article 87 of the Rome Statute and Rule 176 of the RPE. In this respect, the Registry may advise the defence teams on which States accept direct

¹⁴³ ASP, Briefing Paper: Cooperation and Defence Issues, Annex III to the Report of the Bureau on Cooperation, ICC-ASP/13/29, 21 November 2014, 2. See also, Report of the Court on Cooperation, ICC-ASP/13/23, 23 October 2014, 50.

¹⁴⁴ *ibid.*, 5.

¹⁴⁵ *ibid.*, 7(b)

¹⁴⁶ *ibid.*, 7(c)

¹⁴⁷ *ibid.*, 7(d)

requests from defence teams. The Registry also assists by following up with requested States to monitor the status of implementation of these requests. According to the Briefing Paper, in 2013, the Registry transmitted 11 requests on behalf of the Defence and conducted 85 follow-up activities on Defence requests across situation countries.¹⁴⁸

5.3 Inability to conduct on-site investigations in Darfur: Defence request to stay the proceedings

In the case against Banda and Jamus the Defence requested a temporary stay of the proceedings due to the impossibility of accessing the territory of Sudan for the purpose of defence investigations.¹⁴⁹ The Government of Sudan, in fact, has been totally uncooperative with the Court since the issuance of the first arrest warrants in the investigation in Darfur.¹⁵⁰ Not only has the Bashir government refused to let either the Prosecutor or Defence teams on its territory, but it went so far as obstructing the work of the Court, criminalizing cooperation with it by individuals (such as potential witnesses) and NGOs.

For these reasons, although the Defence had identified numerous potential witnesses who were believed to reside in Darfur, it was unable to travel there to conduct interviews or to identify and locate other potential witnesses.¹⁵¹ Interestingly, the Defence submitted that although the Prosecution was also impeded in its own investigations in the Sudan, these impediments prejudiced the Defence more than its counterpart, and that the Defence would have been unable to obtain the attendance and examination of defence witnesses under the same conditions as the Prosecution witnesses. This is due to the fact that, of the 15 witnesses selected by the Prosecution, at least 12 were based outside the Sudan. In the Defence's view, these witnesses would provide a narrow view of the contested facts, one based solely on the perspective of the AMIS personnel who were within the base when it was attacked.¹⁵² Conversely, gathering contrary evidence on these key aspects would have been impossible for the Defence, due to the volatile security situation and the active obstruction of the Government of Sudan.

According to the Defence, the minimum guarantee of 'adequate facilities' for the preparation of the Defence under Article 67(1)(b) of the Statute 'grants [it] the right to all

¹⁴⁸ *ibid.*, 9.

¹⁴⁹ Prosecutor v. Abdallah Banda and Saleh Mohammed Jerbo, Defence Request for a Temporary Stay of Proceedings, ICC-02/05-03/09-274, 6 January 2012.

¹⁵⁰ Quote Peskin

¹⁵¹ Prosecutor v. Abdallah Banda and Saleh Mohammed Jerbo, Defence Request (n 149) 9.

¹⁵² *ibid.*, 18.

resources and access which are necessary to prepare the defence for trial. This necessarily implies a right to carry out defence investigations at the scene of the alleged crimes.’¹⁵³ Equally, the right to obtain the attendance of witnesses pursuant to Article 67(1)(e) must necessarily imply a right to investigate: without first being able to investigate, and hence to identify and interview witnesses, the Defence would never be able to obtain the attendance of witnesses’.¹⁵⁴

Finally, counsel submitted that, within the ICC regime, any investigative difficulties experienced by the Defence should, in part, be offset by the Prosecution’s duty under Article 54(1) of the Statute to investigate incriminating and exonerating circumstances equally and to ensure that such investigations are effective. However, because of Sudan’s stance against the Court and the Prosecution’s inability to investigate in the country, the OTP has only been able to discharge part of its Article 54 obligations by focusing its investigations on a limited part of the incriminating circumstances of the case, without undertaking any investigations into the exonerating circumstances.

6.3.1 The Trial Chamber Decision

The Trial Chamber, however, rejected this interpretation and reiterated that the direct execution of requests for assistance on the territory of a State is *lex specialis* to be applied under the terms and conditions of Article 99(4) of the Statute. Therefore, in the Chamber’s view, Part 9 of the Statute does not foresee ‘an absolute and an all-encompassing right by the prosecution and the defence to on-site investigations’.¹⁵⁵

Accordingly, ‘the Chamber should not automatically conclude that a trial is unfair, and stay proceedings as a matter of law, in circumstances where States would not allow defence (or prosecution) investigations in the field even if, as a result, some potentially relevant evidence were to become unavailable.’¹⁵⁶ Doing otherwise would amount to render the prosecution of the most serious crimes contingent upon a State’s choice to cooperate or not cooperate with the Court.¹⁵⁷

¹⁵³ *ibid.*, 26.

¹⁵⁴ *ibid.*, 30.

¹⁵⁵ Prosecutor v. Abdallah Banda and Saleh Mohammed Jerbo, TC IV Decision on the defence request for a temporary stay of proceedings (and Concurring Separate Opinion of Judge Eboe-Osuji) ICC-02/05-03/09-410, 26 October 2012, 99.

¹⁵⁶ *ibid.*, 100.

¹⁵⁷ *Ibid.*

Therefore, when on-site investigations are impossible, the Court needs to be satisfied that the accused has been provided with adequate facilities for the preparation of his/her Defence and the opportunity to obtain the attendance of witnesses on his/her behalf ‘by means *other than* on-site investigations [emphasis added]’.¹⁵⁸

Once again, the Chamber imposed on the Defence the particularly burdensome requirement of ‘specificity’. According to the judges, ‘the unavailable evidence must be identified with sufficient specificity by the defence in light of the information available to it at [the] stage’.¹⁵⁹ The Defence, however, failed to properly substantiate the claim that lines of defence and exculpatory evidence would have become available had it been allowed to enter the Sudan. As a consequence, the high threshold set out for a stay of proceedings was not met.¹⁶⁰

With respect to this remedy, the Chamber stressed its exceptional character. A stay of proceedings can be resorted to only where the Chamber is convinced that the situation motivating the request for the stay cannot be resolved at a later stage or cannot be cured during the Chamber’s conduct of the trial.¹⁶¹ At that moment, a stay would have been unjustified, in that ‘the Chamber may take into consideration the difficulties encountered by the defence when weighing the entirety of the evidence at the end of the trial, in order to resolve any unfairness towards the accused’.¹⁶²

In a situation like that of Sudan, the only hope for the Defence seems to be the assistance of the Prosecutor. Although the judges acknowledged that it’s ultimately the witnesses’ choice to speak or not with the Defence, ‘given the difficulties experienced by the defence to conduct on-site investigations, the prosecution should spare no efforts to secure defence access to these individuals’.¹⁶³ The Chamber, thus, encouraged the Prosecution to do more than ‘just put the scenario to them and let them decide.

¹⁵⁸ *ibid.*

¹⁵⁹ *ibid.*, 102.

¹⁶⁰ *ibid.*, 101-102.

¹⁶¹ *ibid.*, 121

¹⁶² *ibid.*, 102

¹⁶³ *ibid.*, 128.

CHAPTER VI CONCLUSION

The present study has located the challenges faced by defendants during cooperation proceedings in the context of the unique structural system of the ICC, and the inherent tensions and limitations that characterize its functioning. Chapter II addressed the ICC dependence on cooperation from an institutional, a political and a normative dimension, exploring the salient features of the Court as an international organization founded by a treaty, and its relationship with the world in which it operates (namely, States Parties to the Rome Statute, States non-parties, and international organizations). As the *ad hoc* Tribunals, the ICC relies on an indirect enforcement system and is dependent on the cooperation of States and international organizations for conducting investigations and arresting suspects. Therefore, just like its predecessors, the ICC is bound to be faced – and in fact, on several occasions, has been faced - with instances of non-cooperation.

Unlike the *ad hoc* Tribunals, however, the Court is an independent international organization that does not have the backing of the UN Security Council. Its jurisdiction is not related to one geographically limited area/conflict, but can potentially cover crimes committed in every part of the world. Moreover and most often, the ICC intervenes in the midst of a conflict, where many other political actors are involved and conflicting interests are at stake. From a normative perspective, the ICC cooperation regime is ‘weaker’ than that of the *ad hoc* Tribunals. The Prosecutor has more limited powers to access the territory of States and the Court has no power to compel witnesses to testify before it. However, the Chapter has endeavoured to demonstrate that the real weakness of the ICC cooperation system lies elsewhere. Regardless of the norms enshrined in the Statute, the effectiveness of the ICC is largely dependent on whether the broader interests of the requested State coincide with those of the Court, and, should that fail, on the support of the international community.

Chapter III delved into the connection between cooperation and jurisdiction. The complementarity nature of the ICC implies that the Court is allowed to step in only in case national authorities remain inactive or, where there are domestic proceedings, those authorities appear unwilling or unable to genuinely prosecute international crimes themselves. Cooperation with an international court that has a complementary jurisdiction unfolds differently, and poses unique challenges to the rights of defendants whose conduct the Prosecutor decides to investigate and charge. The Chapter critically evaluated the ‘positive

approach' to complementarity endorsed by the Office of the Prosecutor in order to enhance states cooperation, highlighting the consequences that this has had for the selection of cases. Moreover, it scrutinised the judges decisions on the challenges to the admissibility of the case made by some accused.

The second part of the study addressed the impact that cooperation occurring in the above-explained context has on the selected rights of defendants. It analysed the ICC's law on the right to equality of arms and the right to liberty, as well as the practice regarding allegations of violations of these rights brought forward by some defendants. Chapter IV addresses cooperation in relation to the right to liberty of defendants. It addresses two specific components of the right to liberty: the right not to be subject to arbitrary arrest and detention (i.e., *habeas corpus* rights) and the right to interim release. With respect to the former, the Chapter assessed whether the law and practice of the Court sufficiently acknowledge the position of suspects detained by national authorities throughout part of the ICC investigation, and the risks to their liberty that the division of labour between the Court and States entails. With respect to interim release, the Chapter measures the advanced protection afforded to this right by the Statute against the reality that States Parties are not obliged to accept provisionally released persons on their territories. The Bemba case (as well as the cases regarding the offences against the administration of justice related to it) demonstrate that, despite the protection afforded to this right 'on paper', the willingness of States to accept provisionally released persons on their territory is ultimately the only factor capable of ensuring the effectiveness of the right of suspects to be freed pending trial.

Chapter V addressed cooperation in relation to the principle of equality of arms. First, it assessed the structural inequality between the Prosecution and the Defence within the institutional framework of the Court and critically analysed the features of the ICC's support structure for the Defence. Second, the Chapter assessed whether the law and practice of the Court endows the accused with 'adequate time and facilities' for the preparation of his/her defence. In particular, it scrutinised the Court's interpretation of Article 57(3)(b) of the Statute, empowering the Pre-Trial Chamber to assist the person arrested or summoned with the preparation of his/her defence; subsequently, it addressed the difficulties encountered by the Defence in conducting on-site investigations in Sudan, in the absence of a clear legal framework of the Statute to that effect, and given the sheer non cooperation from the Government of the country.