

## Chapter III

### Procedural law related to matters of cooperation within the ICC or with the ad hoc Tribunals

#### 1. Cooperation with the Member States

The need for establishing successful cooperation within the framework of international criminal tribunals is evident. Without an effective system of assisting them in performing their main functions, namely those that they were created for, the courts are left ‘unarmed’ and without any means of enforcing their decisions. This characteristic is even called ‘a handicap’<sup>254</sup> of the tribunals. Not only do they not have a representative in the international community who would be competent to perform certain actions related to enforcement but also – if they did – the states’ sovereignty would not allow this representative to act on a foreign territory unhindered.<sup>255</sup> To assure a due and just trial is the most urgent question and cooperation with the tribunals is inevitable since none of them are authorised to hold a trial *in absentia*. However, neither *ad hoc* Tribunals nor the ICC have at their disposal powers to ensure that certain persons do appear in front of the judges for a trial.<sup>256</sup> The courts may seek for appearance of many types of persons, however cooperation proves especially necessary when the defendant is a high state official. They are most likely to avoid the courts’ jurisdiction. Having established that their immunity is invalid once they have ceased to hold an official position or – in case they are still incumbent representatives of states – leaving it to the judges to assess, then the arrest of these persons needs to be promptly performed. In the majority of cases the courts issue arrests warrants,<sup>257</sup> which are a way of declaring the courts call for a person to stand during a trial. Therefore, their enforcement needs to be vested in other participants of the international criminal justice

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<sup>254</sup> G. Sluiter *Cooperation of States with International Criminal Tribunals* in *The Oxford Companion to International Criminal Justice* by A. Cassese (edit.), New York 2009, p. 187.

<sup>255</sup> *Ibidem*.

<sup>256</sup> This is only one of many fields of cooperation that the courts rely on. Others include seizure of evidentiary material, compelling witnesses to give testimony, searching the scenes of crimes – see A. Cassese, *International...*, p. 346.

<sup>257</sup> An arrest without a warrant is also a possibility. This can happen however only under certain circumstances, namely when there is a suspicion that an defendant might commit a crime of serious gravity or has just committed one, and when it is believed that an arrest warrant had been issued. The last option is when such a person is caught red-handed. For more on the procedural aspects of arrest without a warrant see D. Nsereko, *op. cit.*, p. 983-988.

system. It is widely known that the international courts are fully dependent on the states and, more often nowadays, other subjects of international public law, such as international organisations.

The cooperation systems differ in the *ad hoc* Tribunals (as products of the UN SC Resolutions) and the ICC (as a separate legal entity governed by a treaty). Historically first, the ICTY and the ICTR are a good source of experience that the ICC should be making use of.<sup>258</sup> However, since they act on a different basis, a direct transposition of all the *ad hoc* Tribunals' characteristics onto the ICC is not possible. The Blaškić Case, heard by the ICTY Appeals Chamber, is the landmark case for establishing the international criminal cooperation terminology. Models of 'vertical' and 'horizontal' cooperation were defined and clarified by the Chamber to distinguish the ways the states assist the Tribunal in performing its functions.<sup>259</sup> The horizontal model is exemplified by typical cooperation in the international arena between sovereign states. Cooperation enshrined within the international criminal justice system constitutes the other form. It can be either purely 'vertical', which is the case of the *ad hoc* Tribunals, or a mix between 'vertical' and 'horizontal', the latter being characteristic of the ICC.<sup>260</sup>

**The *ad hoc* Tribunals: the vertical model.** The ICTY in the aforementioned decision determined the characteristics of the vertical model. The Appeals Chamber confirmed the framework of supremacy of the *ad hoc* Tribunals and their primacy over national courts, notwithstanding its concurrent jurisdiction.<sup>261</sup>

'(...) The Security Council for the first time established an international criminal court (...) and, in addition, conferred on the International Tribunal primacy over national courts. By the same token, the Statute granted the International Tribunal the power to address to States binding orders concerning a broad variety of judicial matters (...). Clearly, a "vertical" relationship was thus established, at least as far as the judicial and injunctory

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<sup>258</sup> G. Sluiter, *op. cit.*, p. 190; D. Nsereko *Cooperation with the Court on Matters of Arrest and Surrender of Indicted Fugitives: Lessons from the Ad Hoc Tribunals and National Jurisdictions in The Legal Regime of International Criminal Court. Essays in Honour of Professor Igor Blishchenko* by J. Doria, H.-P. Gasser, M. C. Bassiouni (edit.), Leiden 2009, p. 976; S. D. Roper, L. A. Barria *State co-operation and International Criminal Court bargaining influence in the arrest and surrender of suspects*, 21(2) L.J.I.L. 2008, p. 460.

<sup>259</sup> *Prosecutor vs. Tihomir Blaškić, Judgement on the Request of the Republic of Croatia for review of the Decision of Trial Chamber II of 18 July 1997*, Appeals Chamber, case no. IT-95-14-AR108bis, 29.10.1997, (hereinafter the Blaškić Case), § 47.

<sup>260</sup> A. Cassese, *International...*, p. 347 and 349.

<sup>261</sup> Art. 8 of the ICTY Statute, Art. 9 of the ICTR Statute.

powers of the International Tribunal are concerned (whereas in the area of enforcement the International Tribunal is still dependent upon States and the Security Council).<sup>262</sup>

With these words a brand new regime of international cooperation in criminal matters was established for the purposes of international criminal tribunals. The Court took the opportunity to present legal reasoning for its powers to demand cooperation from states. It may also be seen as a departure from the previous systems available under international public law, namely the horizontal, inter-jurisdictional regime.<sup>263</sup> There is no doubt that such a judicial decision would not have been possible if it was not for the coercive powers of the UN Security Charter which support the *ad hoc* Tribunals in performing their roles. States, needless to say, do not assist the courts voluntarily or as a matter of courtesy or favour.<sup>264</sup> A general obligation to cooperate with the steps taken by the SC is provided in Article 25 of the UN Charter.<sup>265</sup> The rationale for this provision is in the fact that the UN itself does not have any law enforcement agencies. Thus, it also has to rely on the Member States<sup>266</sup> to which a duty to perform these mandatory forms of assistance<sup>267</sup> is imposed. The general obligation to cooperate was repeated and made more precise in the Resolutions establishing the *ad hoc* Tribunals. Operative paragraph 4 of the UN SC Resolution 827 (1993) states:

‘all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute’<sup>268</sup>

Article 29 (and Article 28 of the ICTR Statute), to which this paragraph refers, indeed includes a provision for compliance ‘without undue delay with any request for assistance

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<sup>262</sup> The Blaškić Case, § 47; emphasis added.

<sup>263</sup> Extradition for that matter can be considered as the previous way of dealing with mutual assistance of the national jurisdictions. However the ICTY did not find it attractive for the purposes of safeguarding justice in the international relations, because of its out-dated mechanism that required reciprocity and voluntary action of the states rather than a legal obligation to cooperate. See G. Sluiter, *op. cit.*, p. 188.

<sup>264</sup> D. Nsereko, *op. cit.*, p. 975.

<sup>265</sup> The provision reads: ‘The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.’

<sup>266</sup> D. Nsereko, *op. cit.*, p. 975.

<sup>267</sup> G. Sluiter, *op. cit.*, p. 188.

<sup>268</sup> Emphasis added. A similar obligation is in UN SC Resolution 955 (1994) establishing the ICTR, operative paragraph 2.

or an order issued by a Trial Chamber' with respect to matters listed therein. These provisions altogether constitute an effective legal basis for cooperation within the UN system. Thanks to this, any UN Member State is obliged to assist the *ad hoc* Tribunals, since they are international bodies inherent in the UN framework. This rigid duty is not prone to limitations which stem either from national legislations<sup>269</sup> or other relationships that the Member States might be involved in. If there exist any inter-state assistance treaties that could constitute a valid ground for a refusal to comply with the Trial Chamber's order, they are not applicable nevertheless.<sup>270</sup> It is Article 103 of the UN Charter that has such a profound effect on any conflicting obligations under international law and defines them less important when juxtaposed with duties under the Charter (especially Chapter VII which was the basis for establishing the Tribunals). This Article is indeed considered to be the prevailing norm over immunities in international criminal law.<sup>271</sup> Moreover, the Member States which try to oppose the Tribunal's order by invoking the argument of sovereignty in connection to the immunities of high state officials cannot do so, for enforcement procedures are not considered an intrusion into their domestic jurisdictions.<sup>272</sup> On the other hand, it is the Security Council that ensures the enforcement of the obligation to cooperate, as was reaffirmed in the Blaškić Case. The Council may do so by making use of the powers of Chapter VII of the UN Charter.<sup>273</sup> However it is widely apparent that the SC is rather unwilling to resort to these means and focuses on putting some political pressure on the relevant state instead.<sup>274</sup>

In this regime of 'vertical' cooperation, assistance provided to the Tribunals seems legally very well-founded and clear. It is simply justified and has a strong basis in the system of the United Nations. What is quite surprising is the fact that the States essentially agreed to this method of cooperation and accepted the primacy of the *ad hoc* Tribunals.<sup>275</sup>

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<sup>269</sup> Neither does the lack of proper legislation within the national legal order does excuse the Member States for non-compliance with the UN obligations. D. Nsereko, *op. cit.*, p. 989.

<sup>270</sup> G. Sluiter, *op. cit.*, p. 190.

<sup>271</sup> R. Van Alebeek, *op. cit.*, p. 221.

<sup>272</sup> Art. 2(7) of the UN Charter: 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.' (Emphasis added.) See an exhaustive response to this problem G. Sluiter, *op. cit.*, p. 195.

<sup>273</sup> A procedure of notification about a failure of a state to cooperate is provided in the Rules of Procedure and Evidence of the ICTY and ICTR, see Rule 59(B), the ICTY Rules of Procedure and Evidence, IT/32/Rev. 45, 8.12.2010; the ICTR Rules of Procedure and Evidence, 9.02.2010.

<sup>274</sup> D. Shrager *Politics and Justice: The Role of the Security Council in The Oxford Companion to International Criminal Justice* by A. Cassese (edit.), New York 2009, p. 173.

<sup>275</sup> G. Sluiter, *op. cit.*, p. 189.

**The International Criminal Court: the combined model of cooperation.** The situation of the ICC is not so straightforward. There is a variety of means which might prove useful to enforce the assistance and that are dependant on the particular circumstances of a case. The Court is considered to be a part of a combined model of cooperation, i.e. a mix between the ‘horizontal’<sup>276</sup> and the ‘vertical’ mechanism. Indeed, the ICC is not empowered to the same extent as the *ad hoc* Tribunals and there is an explanation to account for that. Sluiter lists the reasons for which ‘the ICC had to temper its cooperation ambitions’.<sup>277</sup> The establishment of the Court, following negotiations between the members of the whole international community, was a compromise and the previous obligations of the states involved into its creation had to be taken into account.<sup>278</sup> Moreover, the scholars stress the importance of implementing adequate laws in the national legislations, which are in line with the ICC and its competencies.<sup>279</sup> The latter originates from Article 27 of the VCLT, which deals with the relationship between internal laws of the states and observance of treaties.<sup>280</sup>

This last reason is particularly important because as an international treaty the Rome Statute is generally binding on the State-Parties. Since it provides for a general obligation to cooperate in Article 86, the ‘lack of domestic enabling legislation (...) can undermine co-operation and render arresting suspects problematic’.<sup>281</sup> However, the ICC’s assistance mechanism is not purely ‘vertical’ in itself. It does not simplify the situation that the wording of the rules on cooperation with the Court is much more extensive than in the Statutes of the ICTY or the ICTR (Part 9 of the Treaty has seventeen Articles altogether on cooperation). On the contrary, the inter-state model of mutual assistance may be seen in many of these provisions. Thus, the ICC can only rely on its Member-States, leaving the majority of countries in the world probably unwilling to assist it with its functions. The *ad hoc* Tribunals’ prerogative of being supported by the UN Security Council is not a rule in this

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<sup>276</sup> The features of the ‘horizontal’ model (typical for inter-state assistance, visible in the traditional system of extradition) are that it has consensual basis, there is a double-criminality requirement, there are several exceptions and grounds for refusing extradition. See more B. Swart *International Cooperation and Judicial Assistance – General Problems in ICC Commentary*, II, by A. Cassese, P. Gaeta, J. Jones as referenced by A. Cassese, *International...*, p. 346. This model was also explained in the Blaškić Case, see §47 and 54.

<sup>277</sup> G. Sluiter, *op. cit.*, p. 188.

<sup>278</sup> *Ibidem*. This is visible in Art. 98(2) where priority over the Court’s request is given to other international agreements which may be inconsistent with it.

<sup>279</sup> *Ibidem*; D. Nsereko, *op. cit.*, p. 980; S. D. Roper, L. A. Barria, *op. cit.*, p. 458. An obligation to enact proper procedures under national laws of the State-Parties is provided in Art. 88 of the ICC Statute. However, as noted by Rastan, the wording of the Rome Statute is nevertheless considerate of its Member-States and instead of using the term ‘orders’, a more polite word is used – ‘requests’. This, according to Rastan, indicates a weaker form of asking for cooperation than the one of the *ad hoc* Tribunals. See R. Rastan *Testing co-operation: the International Criminal Court and national authorities*, 21(2) L.J.I.L. 2008, p. 435-436.

<sup>280</sup> ‘A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.’

<sup>281</sup> S. D. Roper, L. A. Barria, *op. cit.*, p. 458.

case. Its intervention may only be possible under specific circumstances, namely the previous referral of the situation concerned by means of a resolution (Art. 13(b) of the ICC Statute).<sup>282</sup> Moreover, there are many additional qualifications which have an impact on the enforcement of the Court's request.<sup>283</sup> The previously considered Article 98(1) – a provision of utter importance for immunities – is indeed one of them.

Notwithstanding the existence of the general duty to cooperate, some scholars question the ICC's bargaining influence. Certain characteristics of the particular cases may affect the way the Court's request is processed by the State-Parties. The type of referral is, among others, one of the factors which may deem cooperation more or less effective. While the weakest type is the investigation triggered by the Prosecutor *proprio motu*, the one instigated by the UN Security Council seems to be the most powerful.<sup>284</sup> This is because in the latter case the obligation is doubled with the duties that stem from the UN Charter and therefore other forms of enforcement<sup>285</sup> are available.

On the other hand, the influence of the UN Security Council might not be as effective, given that three of its permanent members are not State-Parties to the ICC and their consent is inevitable to achieve better compliance with the ICC's requests.<sup>286</sup> Other factors having an impact on the cooperation are for instance the type of charges<sup>287</sup> or the type and the stage of a conflict.<sup>288</sup>

Although the general system of cooperation with the ICC seems well designed and effective, the factors presented by the scholars which may influence its final outcomes indicate that there are many loopholes which can badly impact on the Court's effectiveness.

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<sup>282</sup> Since the State-Parties are generally obliged to comply with the Court's request, the impact of the Security Council is particularly important for the third states and therefore this problem is discussed further herein, see Ch. III(2).

<sup>283</sup> Rastan enumerates *inter alia*: the option for a Member-State to seek consultation, modification or postponement of the cooperation for the reasons of national security, competing requests or third-party interests. See more: R. Rastan, *op. cit.*, p. 433-434; A. Cassese, *International...*, p. 349-351.

<sup>284</sup> S. D. Roper, L. A. Barria, *op. cit.*, p. 464. The authors assessed a self-referral also enhanced in comparison to the investigation *proprio motu*.

<sup>285</sup> The methods of enforcement in the ICC are set out in Art. 87(7) of the Rome Statute. In general, when there was an referral of a situation by the UN SC, a finding of a failure to cooperate may be made to the Security Council (a notification may be made to the Assembly of State Parties when the Court derived its jurisdiction from other sources).

<sup>286</sup> S. D. Roper, L. A. Barria, *op. cit.*, p. 464. The author refers more to obtaining the permission from the permanent members of the SC, however it seems unlikely in some situations.

<sup>287</sup> For there is an opt-out clause in the Rome Statute for the jurisdiction of the ICC over war crimes, they are generally considered less serious and thus seeking appearance of persons charged with this crime is enhanced in comparison to crimes against humanity or genocide. *Ibidem*, p. 465.

<sup>288</sup> The ICC is to be more effective when it reacts to an internal conflict which has been terminated. *Ibidem*.

The ICC, as a product of a broad political discussion, cannot be freed from this background and will always be intertwined with the political issues of the State-Parties.

Since all European Union (hereinafter the EU) Member States are at the same time State-Parties of the ICC, an extra tool for cooperation may be the European Arrest Warrant (hereinafter the EAW). This tool was designed to facilitate judicial assistance in criminal matters within the borders of the EU and was introduced by the Framework Decision on the European Arrest Warrant and the surrender procedures between Member States in 2002.

The EAW applies only between European Member States, however it might also prove useful for ensuring the surrender of persons to the ICC. This instrument is unique in the world and since its entry into force it has constituted a coherent means of the EU States to comply with the general obligation to cooperate with the ICC.<sup>289</sup> The Court is based in the Hague, thus any person who is being transported to the Netherlands might attempt to escape and make use of the open-borders system in the EU. In such a situation the EAW will enable a quick apprehension of the accused.<sup>290</sup>

A problem might arise when interpreting the obligation to cooperate set out by the Rome Statute and the procedural aspects of the EAW detailed in the Decision. Indeed, at first sight the procedures seem contrary. Article 20 of the Decision on the privileges and immunities requires all the immunities that may hinder the execution of a request to be waived by the competent authority.<sup>291</sup> Therefore, when EU Member States are considered, each time there is an arrest warrant issued for a high state official his immunity would have to be waived by the home-state. This is inconsistent with the well-established framework on immunities under the Rome Statute. By virtue of the previously described Article 27, the waiver is not required between the ICC State-Parties and it would only be necessary when third states are concerned.

Vierucci argues that this problem is nevertheless easily solved. The author refers to the hierarchy of the international sources of law and points out that no *inter se* treaty derogations by State Parties to the ICC are available, since the Statute itself provides for a special

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<sup>289</sup> L. Vierucci *The European arrest warrant: an additional tool for prosecuting ICC crimes*, 2(1) J.I.C.J. 2004, p. 277.

<sup>290</sup> *Ibidem*.

<sup>291</sup> *Council Framework Decision of 13 June 2002, 2002/584/JHA*, Official Journal L 190, 18.07.2002. The Article reads: '1. (...) The executing Member State shall ensure that the material conditions necessary for effective surrender are fulfilled when the person no longer enjoys such privilege or immunity. 2. Where power to waive the privilege or immunity lies with an authority of the executing Member State, the executing judicial authority shall request it to exercise that power forthwith. Where power to waive the privilege or immunity lies with an authority of another State or international organisation, it shall be for the issuing judicial authority to request it to exercise that power.' (Emphasis added.)

amendment procedure.<sup>292</sup> Moreover, in the Decision the term ‘extradition’ is used, rather than ‘surrender’, which indicates that it shall apply only on the horizontal level of cooperation and not to the ICC. The same distinction is confirmed in Article 102 of the ICC Statute where ‘surrender means the delivering up of a person by a State to the Court’. As a consequence ‘when an EAW is issued by a Member State to another Member State at the instigation of the ICC (...) the Statute’s bar on immunities shall prevail over the immunity regime adopted in the Decision.’<sup>293</sup>

Cooperation of the State-Parties under the ICC Statute seems to have two outcomes. At first sight, the system works perfectly well given the general obligation to cooperate. State-Parties cannot simply refuse to execute the Court’s request, unless certain conditions arise. However, at the same time the Court is subject to various factors which in the end affect the performance of the states involved. The execution speed and validity of an arrest warrant for a high state official depends strongly on the particular circumstances of the case, such as the nature of the referral or its political background.

So far, 114 states have accessed the ICC,<sup>294</sup> 27 of which are Members of the EU. The latter group is equipped with an extra tool to facilitate cooperation with the Court – the European Arrest Warrant. At least in the territory of Europe the inter-state, or in other words ‘horizontal’ model of cooperation, is enhanced for this additional instrument. However, outside the ICC system there is a plethora of states that have not signed the treaty and thus are either unwilling to do so or indifferent to it.

## **2. Cooperation with third states (the ICC) and the states opposed to cooperation (the ad hoc Tribunals)**

International criminal justice administered by the international courts of both temporary and permanent nature is not universal – many states are not a part of that system (that relates to the ICC especially) or might not be interested in providing assistance to these institutions. Therefore one may say that there are some loopholes in the mechanism which somehow need to be overcome in order to achieve the aim of bringing the perpetrators of atrocities to justice. However some obstacles cannot simply be ignored as they are

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<sup>292</sup> L. Vierucci, *op. cit.*, p. 283.

<sup>293</sup> *Ibidem*, p. 284.

<sup>294</sup> Grenada will be the 115<sup>th</sup> state that joins the ICC. The Rome Statute will enter into force in that country on the 1 August 2011. See: <http://www.icc-cpi.int/NR/exeres/23DBD840-9893-496B-A987-065C1C0BD23B.htm>, accessed on 22.05.2011.



a foundations of international public law as a whole. For example, this is true for the principle *pacta tertiis nec nocent nec prosunt* provided for in Article 34 of the VCLT.

The category of the third states applies to both the *ad hoc* Tribunals and the ICC. Whilst it plays a significant role in the cooperation system in the latter, it is of marginal importance in the former. The United Nations consists of 192 Member States, leaving very few entities outside its system.<sup>295</sup> Since this category is very limited and the *ad hoc* Tribunals have essentially accepted these states as not being a part of the UN,<sup>296</sup> as far as the institutions created by the UN SC resolutions are concerned it is important to point out their attitudes towards countries resisting cooperation. Assistance however may be sought by referring to other means. Practice has shown that there are instances of third states' participation in proceedings concerning high state officials, which can have a form of being somehow related to the person sought to surrender. Therefore it is important to establish the way this problem is dealt with in the international arena.

The ICTY and the ICTR encountered some difficulties with exercising the effective surrender of persons in the past. In this first phase of their existence, only officers of a lower status were brought in front of the Tribunal for a trial.<sup>297</sup> However further on, together with broadening the usage of various bargaining arguments, their effectiveness grew too, creating a functional system of cooperation as a result. Many factors, separately chosen for the particularities of a case, triggered the improvement of the mechanism, namely the threat of force, EU incentives or increasing institutionalisation.

The ICTY has more often resorted to other means in order to apprehend a suspect. It benefited from cooperating with NATO-led Stabilisation Forces (known as SFOR), who by threatening to use military assets helped the Tribunal to achieve the assistance of Bosnia and Herzegovina.<sup>298</sup> A different route was pursued by the EU pressure on Croatia and Serbia. Having had troubles arresting Ratko Mladić for the purposes of the ICTY, the EU refused to continue negotiations concerning a Stabilisation and Association Agreement which eventually resulted in the successful cooperation of Serbia.<sup>299</sup> A similar means was used in Croatia, where the EU conditioned the accession talks on arresting the persons sought

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<sup>295</sup> E.g. the Vatican City and Palestine.

<sup>296</sup> G. Sluiter, *op. cit.*, p. 192.

<sup>297</sup> S. D. Roper, L. A. Barria, *op. cit.*, p. 460.

<sup>298</sup> *Ibidem*, p. 460-461; R. Rastan, *op. cit.*, p. 445.

<sup>299</sup> S. D. Roper, L. A. Barria, *op. cit.*, p. 461. A fugitive for 16 years, on 26.05.2011 Mladic was eventually arrested in Serbia. See: <http://www.icty.org/sid/10670>, accessed on 26.05.2011.

by the Tribunal.<sup>300</sup> More than just a simple political pressure and diplomatic efforts, economic incentives proved to be very successful in that case,<sup>301</sup> as it is widely recognised that EU membership is associated with large sums of money which boost the state's economy. Increasing institutionalisation of the Tribunal, together with some measures taken in order to solve the conflicts at issue, influenced the ICTR's ability to exercise its jurisdiction after obtaining successful assistance from the states.<sup>302</sup>

Apart from these non-judicial arguments which are often employed by the *ad hoc* Tribunals, they are entitled to enter into agreements with other international organisations (which was for example the case of cooperation with SFOR). This is an alternative mechanism which is provided for in Rule 59*bis* of the respective Rules of Procedure and Evidence of both Tribunals.<sup>303</sup> The same is true for the ICC. According to Article 54 of the Rome Statute, the Prosecutor may seek to obtain cooperation from other international institutions by means of entering into an agreement on that matter.<sup>304</sup>

As far as the situation with the ICTY and the ICTR is relatively uncomplicated with respect to cooperation between the Tribunals and the UN Member States – thanks to the UN obligations' prevailing nature – it is not as simple in the ICC system. There are 78 states that, in comparison to the scope of the UN membership, shall be considered third states to the Rome Statute. This illustrates the range of difficulties which may occur when a case involving one of these states arises before the ICC. As if aware of that situation, the creators of the Rome Statute in its preamble urge 'every State' to comply with the obligation to bring to justice the persons responsible for perpetration of international crimes.<sup>305</sup>

The statutory instrument of the Court provides for a few opportunities to engage third states into cooperation with the ICC. First of all, a jurisdiction over such a state might be exercised when a resolution on that matter is issued by the Security Council. By virtue of Article 13(b) of the ICC Statute such a jurisdiction is rightly established. Further provisions on cooperation have a more voluntary basis than the referral under Chapter VII of the

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<sup>300</sup> *Ibidem*.

<sup>301</sup> *Ibidem*, p. 467.

<sup>302</sup> *Ibidem*, p. 461.

<sup>303</sup> D. Nsereko, *op. cit.*, p. 979-980.

<sup>304</sup> R. Rastan, *op. cit.*, p. 444-445. See Art. 54(3)(c) and (d) of the Rome Statute. The author stresses the fact that these organisations would not be obliged to cooperate with the ICC unless a necessary agreement is undertaken. They have a duty to do so only on the voluntary basis and no other entity, such as the UN, cannot compel them to perform a wanted action.

<sup>305</sup> J. Bing Bing *The International Criminal Court and Third States in The Oxford Companion to International Criminal Justice* by A. Cassese (edit.), New York 2009, p. 161.

UN Charter. For instance, Article 12(3) enables a third state to accept jurisdiction of the Court over its own nationals. As a result, cooperation is triggered and it remains an obligation of the interested state.<sup>306</sup> Another example is Article 87(5) which allows the Court to enter into *ad hoc* arrangements with State not parties to the Statute to ensure provision of the necessary assistance. The Statute also refers to reaching a consensus on ‘any other appropriate basis’ which indicates that, as far as a third state acts voluntarily, any agreement with the ICC will be deemed legal. However it is evident in the literature that such a state has a strong negotiating position in comparison to the Court and thus can demand specific conditions of assistance.<sup>307</sup>

Although multiple theoretical ways of cooperation with third states are available under the Rome Statute, the reality is not as much assuring. With respect to the UN Security Council, whose aid is definitely the most powerful measure provided for in this instrument, its reluctance to use means under Chapter VII has been pointed out by the scholars. In general, cooperation between the ICC and the United Nations has been legally confirmed – in 2004 the Negotiated Relationship Agreement between the International Criminal Court and the United Nations was adopted. Article 3 establishes a general cooperation system with the UN<sup>308</sup> and Articles 17 and 18 specify the procedural aspects of cooperation between the Court itself as well as the Prosecutor. Among other options, entering into agreement with the UN for the purposes of a specific case is possible.

The Security Council’s actions and their influence can be very successful. Generally, a resolution referring a situation to the ICC may contain an additional obligation imposed on all the UN Member States. In such a situation, they would be legally bound to assist the Court and to exercise its request for example with regards to the surrender of persons.<sup>309</sup> As was pointed out by another scholar, this should be viewed as an automatic outcome of the UN SC referral.<sup>310</sup> A third state would be bound by the resolution and not the ICC Statute. Therefore, the referral constitutes ‘the relevant appropriate basis for the Court to issue its requests – that is, the conclusion of an *ad hoc* agreement with the non-party state [under

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<sup>306</sup> G. Sluiter, *op. cit.*, p. 193.

<sup>307</sup> *Ibidem.*

<sup>308</sup> ‘The United Nations and the Court agree that, with a view to facilitating the effective discharge of their respective responsibilities, they shall cooperate closely, whenever appropriate, with each other and consult each other on matters of mutual interest pursuant to the provisions of the present Agreement and in conformity with the respective provisions of the Charter and the Statute.’ (Emphasis added.)

<sup>309</sup> J. Bing Bing, *op. cit.*, p. 166.

<sup>310</sup> R. Rastan, *op. cit.*, p. 442.

Art. 87(5)] would not be a prerequisite.’<sup>311</sup> Rastan enumerates the possible options of the Security Council to manipulate the process of cooperation by simply inserting particular operative statements in the resolutions. *Inter alia*, an obligation to disregard or lift immunities might be included, even if such behaviour would amount to an infringement of pre-existing duties under international law.<sup>312</sup>

Having so many possibilities to act one could assume that the Security Council plays an important part in coercing third states to cooperate with the ICC. It could certainly be true, if it was not for the fact that on numerous occasions it has failed to recognise its role in creating a functional framework for assistance in international criminal matters. This is illustrated in particular in the previously described Bashir Case.<sup>313</sup> Instead of outlining clear obligations of the UN Member States, it merely referred to Sudan, recognising its independence as a state which is not a party to the ICC Statute. Resolution 1593 (2005) is often considered to be highly problematic as far as cooperation with the Court is concerned. In the strong words of Sluiter, ‘the Council has added its own failure to provide for an adequate legal framework in the referring resolution.’<sup>314</sup> Indeed, it is not even definite that Sudan is bound by the wording of this instrument, since as a third state it is not bound by the ICC Statute.

From the above some conclusions should be drawn. While the Security Council seems to be afraid of establishing any new obligations on its Member States and thus enhancing cooperation with the ICC, other factors – such as military or peacekeeping pressure – could play a significant role in enhancing the Court’s ability to capture the persons sought. However, economic strain, similar to that of the *ad hoc* Tribunals, is definitely the most successful strategy. Since current international relations are based on financial values, threatening to limit them could improve the ICC’s efficiency.<sup>315</sup> The mix between the ‘horizontal’ and ‘vertical’ model of cooperation is visible here: ‘the Statute draws on the

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<sup>311</sup> *Ibidem*. It should be borne in mind that the SC cannot influence the ICC to the extent that it is not bound by its provisions laid down in Part 9 of the Statute. The Security Council’s decision will not have an effect on the limitations of the jurisdiction of the ICC, because in such a case the Court would be acting *ultra vires*.

<sup>312</sup> *Ibidem*, p. 443. Other possibilities listed by the author include: a requirement to render specific forms of cooperation to the ICC, an overriding of the ICC Statute provisions by asking to act regardless of the obligations inherent therein (i.e. Art. 98), asking for cooperation regardless of the third parties rights enjoyed under the Statute, a prioritisation of ICC requests for surrender over competing requests or – the least likely one – a requirement to amend the Rome Statute itself in order to somehow fulfil the aim wanted by the SC.

<sup>313</sup> See herein Ch. II (1)(b).

<sup>314</sup> G. Sluiter, *op. cit.*, p. 193.

<sup>315</sup> S. D. Roper, L. A. Barria, *op. cit.*, p. 466-467. The author further examines the current cases in the ICC. An interesting analysis on Central African Republic, Democratic Republic of the Congo, Sudan and Uganda may be found therein, see p. 467-474.

principles of consent and good faith expressed in mutual assistance regimes by basing cooperation on the issuance of requests'.<sup>316</sup> As if foreseeing the ICC's difficulty in surrendering the accused persons to the Court, it enables the Prosecutor to take necessary steps in order to reach that objective.

Rastan states that the loopholes in cooperation are inherent in the whole international criminal justice system itself. It is impossible to avoid some political repercussions of having a troublesome case in the Court, since this institution is a result of intergovernmental negotiations and some concessions had to be made.<sup>317</sup> The scholars predict that the ICC will grow bigger over time. It will not suffice that only a part of the states in the world are parties to the Statute and a global system will emerge sooner or later, in which the duties and powers of the Court and the State-Parties intertwine.<sup>318</sup> At the same time it is not precluded that the importance of some provisions in the Statute will increase significantly. In this way new international customary rules could be created. Such a possibility is even provided for in Article 38 of the VCLT. When this happens, third states would be bound by the same norm, however not by means of the Rome Statute (to which they would still remain third states), but rather by virtue of customary law<sup>319</sup> which does not have a set time of entering into force.

Since the *ad hoc* Tribunals will soon cease to exist as the completion strategy aims at ending the proceedings gradually (appeals in the current cases in the ICTY are set to finish in 2014), the ICC which is a permanent Court will be the one that the task of administering the justice in international criminal law will be rested upon. Therefore, having derived the Tribunals' experience, it is very likely that the ICC will have the leading role in its field. Moreover, the ICC Trial Chamber courageously continues to attempt at obtaining arrests of the state officers of the highest rank even when the circumstances are not favourable, e.g. the Bashir Case. This indicates that the usage of powers with respect to cooperation and its enforcement will evolve and eventually reach the level sufficient to assure international security.

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<sup>316</sup> R. Rastan, *op. cit.*, p. 453.

<sup>317</sup> *Ibidem*, p. 455.

<sup>318</sup> *Ibidem*, p. 456; J. Bing Bing, *op. cit.*, p. 167.

<sup>319</sup> J. Bing Bing, *op. cit.*, p. 161.