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DOI

[10.4337/9781783472161.00018](https://doi.org/10.4337/9781783472161.00018)

Publication date

2016

Document Version

Final published version

Published in

Research Handbook on the International Penal System

License

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Citation for published version (APA):

van der Wilt, H. (2016). The transfer of the execution of sentences of the International Criminal Court in light of inter-State practice. In R. Mulgrew, & D. Abels (Eds.), *Research Handbook on the International Penal System* (pp. 193-210). (Research handbooks in international law). Edward Elgar. <https://doi.org/10.4337/9781783472161.00018>

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Research Handbook on the International Penal System

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RESEARCH HANDBOOKS IN INTERNATIONAL LAW

8. The transfer of the execution of sentences of the International Criminal Court in light of inter-State practice¹

Harmen van der Wilt

1. INTRODUCTION

The ICC and other international criminal tribunals have at their disposal premises for the purpose of the pre-trial detention of accused. However, for the enforcement of their sentences these international tribunals are dependent on the assistance of States. Article 103 of the ICCSt stipulates that a sentence of imprisonment shall be served in a State designated by the ICC from a list of States which have indicated to the Court their willingness to accept sentenced persons. Legally, this amounts to a transfer of execution of a (foreign) judgment, a device that is well-known in the realm of international cooperation in criminal matters. In this horizontal context such transfers are usually governed by international treaties, the most famous of them being the Convention on the Transfer of Sentenced Persons.² This Convention leaves States parties ample leeway to arrange the transfer of sentences and prisoners, but attaches a number of minimum requirements, like the condition that the sentenced person, the sentencing State and the administering State all agree to the transfer, that the sentenced person is a national of the administering State and that the condition of 'double criminality' is satisfied. Such conditions serve to reconcile the interests of States with those of the sentenced person.

In the vertical framework of cooperation between the ICC and States, both the sovereign interests of States involved and the position of the individual are less prevailing and, indeed, are expected to succumb to the overarching aspirations of international criminal justice. The aim of this chapter is to explore whether the current regulations on the enforcement of ICC sentences reflect the different nature of the relationship between the ICC and States. Has the existing body of law that governs inter-State transfers by and large served as a useful framework that only required small adaptations? Or has the hierarchical relationship between the ICC and States more radically pervaded the entire legal perspective? And how has this shift affected the position of the sentenced person?

¹ This chapter partially draws from and is an extension of my contribution (in Dutch) to the *Liber Amicorum* for G. de Jonge: 'Zware jongens in gevangenschap. De tenuitvoerlegging van de strafvonnissen van het Internationale Strafhof', in J. Claessen and D. de Vocht, *Humaan strafrecht* (Wolf Legal Publishers 2012) 391–407.

² Strasbourg, 21 March 1983, European Treaties Series No 112.

The chapter is structured as follows. Section 2 addresses the mutual rights and obligations of the sentencing and administering entities in a comparative perspective, highlighting the differences and commonalities between horizontal and vertical cooperation. Sections 3 and 4 investigate whether two strongholds of the transfer of enforcement of foreign judgments – double criminality and the nationality requirement, respectively – still apply in the vertical context. In Sections 5 and 6 the emphasis shifts to the position of the sentenced person. Section 5 explores the relevance of the consent of the sentenced person as a condition for the transfer of the execution of an ICC judgment to a particular State. And Section 6 inquires whether the ICC bears responsibility for the execution of its sentences by a State. The final topic requires some elucidation. Within the realm of inter-State relations, the cooperating States share mutual responsibility for the parts performed by each of them. While the administering State may take the fairness of the criminal trial in the sentencing State into consideration in deciding whether or not to take over the enforcement of the judgment, the sentencing State may be concerned about the way its sentence is executed. Although a refusal of the execution of a judgment rendered by the ICC on the basis of the verdict falling short of accepted fair trial standards cannot be excluded *a priori*, the chance that this will happen is merely theoretical, in view of the high procedural standards of the ICCSt. Conversely, it is more realistic that the ICC may have qualms about the quality of detention in the State of enforcement. The pertinent question is whether the Court has any powers of control over and whether it bears responsibility for the enforcement of its sanctions. The chapter concludes with some reflections on the nature of transfer of enforcement of sentences against the backdrop of the general regime of international cooperation between States and the ICC.

2. VERTICAL AND HORIZONTAL COOPERATION IN THE REALM OF TRANSFER OF ENFORCEMENT OF SENTENCES

Part 9 of the ICCSt on international cooperation and judicial assistance starts from the premise that States parties are under an obligation to cooperate with the ICC.³ The regulation on the enforcement of prison sentences obviously departs from this principle. Not only are States parties at liberty to express in general terms their willingness to enforce the Court's sentences (Art. 102, s. 1(a)), they also have the right to refuse a particular request, in spite of their previously articulated commitment.⁴ Without doubt, this more flexible attitude has been inspired by the consideration that the enforcement of prison sentences is a costly affair which may also involve political repercussions for the States.⁵ Against this background, it seems wise to seek the voluntary cooperation of States. Be that as it may, the regulation on the transfer of

³ Art. 86 ICCSt provides 'that State Parties shall (...) cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court' [emphasis added].

⁴ That follows *a contrario* from Art. 103(1)(c) which stipulates that a State designated in a particular case shall promptly inform the Court whether it accepts the Court's designation.

⁵ On this topic, see G.A.M. Strijards, 'Art. 103', in O. Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (Nomos 2008), 1640–55.

sentences in the ICCSt resembles the inter-State regime, rather than reflecting the hierarchical relationship between international criminal tribunals and States.⁶ After all, the Convention on the Transfer of Sentenced Persons, mentioned above, is equally predicated on the sovereign decisions and freedom of States to cooperate or not. On closer scrutiny, however, this respect for State sovereignty is slightly deceptive, because after the State has consented, the Court's will prevails. In this respect the ICCSt closely follows the practice and approach of the *ad hoc* Tribunals. Abels observes that 'in line with the other tribunals' experiences, the ICC has sought to strike a balance between the interests of the States of enforcement and the notion of primacy'.⁷ And Strijards distinguishes sharply between the two chronological stages (before and after consent): 'The basic conclusion could be that, with a view to the enforcement, the Court enjoys before the statal acceptance of the sentenced person no primacy at all, and after acceptance a moderate or diffuse primacy'.⁸

The primacy of the Court comes to the fore in a number of ways. First, it is revealed in Article 105, Section 1 of the Statute, prescribing that the sentence of imprisonment shall be binding on the States parties, which shall in no case modify it. It implies that the State of enforcement is not allowed to tamper with the nature and length of the sentence by, for instance, granting early release to the convict. The ICTY has deduced the prohibition from the special legal relationship between the Tribunal and the State which acts as its agent:

Accordingly, a State which has indicated its willingness and has been designated will execute the sentence on behalf of the International tribunal in application of international criminal law and not domestic law. Therefore, that State may not in any way, including by legislative amendment, alter the nature of the penalty so as to affect its truly international character.⁹

Secondly, the enforcement of a sentence of imprisonment shall, according to Article 106, Section 1 of the Statute, be subject to the supervision of the Court.¹⁰ The scope of this provision is not entirely clear: does the supervision only pertain to the enforcement of the sentence or does it also cover the conditions of detention? The ICTY has clearly opted for the latter, broader interpretation: 'The International Tribunal bases its right to

⁶ On the cooperation regime of the ICC as an intermediate between inter-State cooperation and cooperation between States and the *ad hoc* International Criminal Tribunals, see the excellent essay by B. Swart and G. Sluiter, 'The International Criminal Court and International Criminal Co-operation', in H.A.M. von Hebel, J.G. Lammers and J. Schukking (eds), *Reflections on the International Criminal Court; Essays in Honour of Adriaan Bos* (TMC Asser Press 1999) 91–127.

⁷ D. Abels, *Prisoners of the International Community. The Legal Protection of Persons Detained at International Criminal Tribunals* (TMC Asser Press 2012) 462.

⁸ Strijards (n 5) 1651.

⁹ Erdemović IT-96-22-T (Sentencing Judgment, 29 November 1996) para 71.

¹⁰ The supervision connotes a hierarchical relationship, compare D. Tolbert, 'The International Tribunal for the former Yugoslavia and the Enforcement of Sentences' (1998) 11 *Leiden Journal of International Law* 659: "'Supervision" generally implies a relationship in which one party has authority over the other or at least has the right to decisively intervene'.

supervise how persons it has convicted are treated on Article 27 of the Statute and Rule 104 of the Rules.¹¹

This interpretation appears to be correct in view of the fact that both Article 28 of the ICTYSt and Rule 104 of the ICTY RPE mention the 'supervision of imprisonment'. The Tribunal does not only refer to relevant treaty provisions concerning the protection of the rights of convicts, but also to the entire body of 'soft law', like the UNSMR and the Body of Principles for the Protection of All Persons under Any Form or Imprisonment. According to the Tribunal, these principles solidly sustain the legal position of convicts, offering a basic level that should in no circumstances be undercut.¹²

The regulation in the ICCSt is more ambiguous. Whereas Article 106, Section 1 only speaks of the enforcement of a sentence being subject to the supervision of the Court, Rule 211, Section 1(a) of the ICC RPE explicitly mentions the conditions of imprisonment that the sentenced person is allowed to discuss in the communications with the Court exercising its supervision task. Abels has correctly observed that a narrow interpretation of Article 106 would be hard to reconcile with the second part of the provision which stipulates that the enforcement must be consistent with widely accepted international treaty standards governing the treatment of prisoners.¹³ Remarkably, Article 106, unlike previous drafts of the provision, does not explicitly refer to the UNSMR. Schabas argues that this is no big deal. Nothing would prevent the Court from following the practice of the monitoring bodies of international treaties on the protection of human rights by interpreting the provisions of the Statute in light of these Minimum Rules.¹⁴

The primacy of the Court vis-à-vis States is mitigated by Article 106, Section 2 of the Statute which provides that the conditions of imprisonment shall be governed by the law of the State of enforcement. A greater control by the Court over the conditions of imprisonment was not feasible, as it would imply a major incursion on State sovereignty.¹⁵ Interestingly, the article continues by holding that such conditions shall in no case be more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement. The provision cuts both ways. On the one hand, it is in line with the principle of complementarity which imposes primary responsibility for the prosecution of international crimes on States. It would be rather arbitrary and unfair if domestically and internationally tried perpetrators were to face different conditions of detention. On the other hand, the provision may restrict the

sentencing and detention policy of the States, by pressuring them to improve the general penitentiary climate.¹⁶

How are we to judge the nature of the relationship between the Court and States in the realm of enforcement of sentences, when comparing it with the inter-State context of cooperation? There is no easy answer to that question. At first blush, the Court appears to exercise a firm grip on the enforcement of its sentences, through its powers of supervision (Art. 106, s. 1) and by way of the binding character of its sentences (Art. 105, s. 1). It would appear that the State has no other option than to accept the enforcement of the sentence 'lock, stock and barrel' and would be precluded from converting the sentence in any way.¹⁷ The impression of ICC-dominance is countered, however, by Article 106, Section 2 which declares the law of the State of enforcement applicable to the conditions of imprisonment. This provision which pertains to the circumstances of detention does not affect the prohibition of tampering with the length of the sentence, as pronounced by the ICC, but even that interdiction may be less rigid than meets the eye. The condition that the situation of the sentenced person may not be aggravated when compared to prisoners convicted of similar offences in the State of enforcement may backfire on the ICC when that State harbours a more favourable early release regime than the ICC.¹⁸ And while Article 110, Section 2 grants the monopoly to decide on any reduction of sentence to the Court, it is not clear whether this rule would not yield to an acceptance of a State, predicated on the very condition that it would be allowed to apply its favourable early release rules.¹⁹ In this respect, it is telling that Article 105 subjects the stern admonition that the sentence of imprisonment shall be binding to the proviso that a State may specify conditions in accordance with Article 103.²⁰

To sum up, the entire regulation of enforcement of prison sentences in Part 10 of the ICCSt is the outcome of a balancing act which typifies the relationship between the ICC and States.²¹ In view of the recent sentencing judgments in *Lubanga* and *Katanga*, we will soon learn how the contest will work out in practice. Problems loom, however,

¹⁶ See also R.S. Clark, 'Art. 106', in O. Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (Nomos 2008) 1665: 'We suspect that in some cases, the levelling out that takes place will encourage an improvement of national standards as enforcement States are driven to give more attention to international standards.'

¹⁷ Both procedures are presented in the Convention on the Transfer of Sentenced Persons as possible alternatives, in Arts 10 and 11 respectively.

¹⁸ According to Art. 110 ICCSt, the Court shall review the sentence when the person has served two-thirds of the sentence, or 25 years in the case of life imprisonment, in order to determine whether it should be reduced. The provision adds that such a review shall not be conducted before that time.

¹⁹ Art. 103(1)(b) stipulates that a State may, at the time of declaring its willingness to accept sentenced persons, attach conditions to its acceptance as agreed by the Court and in accordance with this Part.

²⁰ It should be noted, however, that Rule 200(5) ICC RPE stipulates that the bilateral agreements must be consistent with the Statute.

²¹ Commenting on the general cooperation regime, Swart and Sluiter (n 6) 127 observe that '(...) the need for consensus-building inevitably influenced the outcome of the negotiations. It may well have been a political necessity, therefore to accept significant differences between the

¹¹ *Erdemović* IT-96-22-T (Sentencing Judgment, 29 November 1996) para 74.

¹² *Erdemović* IT-96-22-T (Sentencing Judgment, 29 November 1996) para 74:

The significance of these principles resides in the fact that a person who has been convicted of a criminal act is not automatically stripped of all his rights. The Basic Principles for the Treatment of Prisoners state that except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights.

¹³ Abels (n 7) 463.

¹⁴ W. Schabas, *The International Criminal Court. A Commentary on the Rome Statute* (Oxford University Press 2010) 1082.

¹⁵ *Ibid.*

because some agreements do not acknowledge the Court's monopoly of decision on early release. The agreement with Denmark has copied the system that was applied in its relations with the *ad hoc* Tribunals.²² Article 5 of this Agreement provides that Denmark will notify the Court if the sentenced person becomes eligible for early release or pardon under domestic law and it adds that, should Denmark disagree with the Court's view on the appropriateness of early release or pardon, the Court may transfer the prisoner to another State. The agreement suggests that the State of enforcement has a greater say in the release decision. Such provisions are ill-advised, if not simply flawed, because they thwart the ICC statutory system.²³

3. DUAL CRIMINALITY

Article 3, Section 1(e) of the Convention on the Transfer of Sentenced Persons provides that a person may only be transferred for the purpose of the execution of a sentence in another State if the acts or omissions on account of which the sentence has been imposed constitute a criminal offence according to the law of the administering State or would constitute a criminal offence if committed on its territory. This provision embodies the famous dual criminality rule that imbues international cooperation in criminal matters. Several rationales sustain this rule.²⁴ As dual criminality guarantees symmetry in mutual performances, it connotes the idea of sovereign equality and reciprocity. Moreover, the rule safeguards States from the embarrassing situation that they would be bound to render assistance to criminal procedures in respect of conduct they do not consider criminal themselves.²⁵ Finally, there is a link with the *nulla poena sine lege* principle that precludes punishment without law. As extradition and the exchange of evidence do not constitute punishment, but merely assistance in criminal procedures of another State, the connection with the *nulla poena* principle is not immediately obvious. In cases of transfer of execution of sentences the link is considerably stronger, because the administering State is expected to 'take over a substantial part of the criminal process. States would be quite reluctant, if not precluded by their own constitutions, to imprison persons for conduct that would not constitute a criminal offence under their legal systems. It demonstrates that the interpretation and application of legal principles like the rule of dual criminality may depend on the

²² Agreement between the Kingdom of Denmark and the ICC on the Enforcement of Sentences of the ICC (ICC-PRES/09-03-11, 28 May 2012).

²³ For a detailed analysis of the agreement with Denmark, see R. Mulgrew, *Towards the Development of the International Penal System* (Cambridge University Press 2013) 78–9.

²⁴ E. van Sliedregt, 'The Dual Criminality Requirement', in N. Keijzer and E. van Sliedregt (eds), *The European Arrest Warrant in Practice* (TMC Asser Press 2009) 52–4.

²⁵ As phrased by the Dutch Supreme Court in the *Pauksch* case (SC, 16 January 1973, *Netherlands Yearbook of International Law* 1974 309–10):

that the requirement of double criminality laid down in Art. 2 of the Convention (on Extradition) is intended to avoid the imposition on the requested State of the obligation to cooperate in the maintenance of standards that are contrary to its own legal conceptions or to cooperate in cases where the requested State would not consider justified the imposition of a

specific form of international cooperation at hand.²⁶ The strong involvement of the administering State also explains why dual criminality must be assessed *in concreto* and not (only) *in abstracto*. Unlike extradition, in which the court can suffice to inquire whether the fact pattern corresponds to criminal legal provisions, in case of transfer of enforcement of foreign sentences the court of the administering State is obliged to discern whether the sentenced person could indeed have been convicted. In the latter case, the availability of justifications and excuses and the applicability of statutes of limitations are to be taken into account.²⁷

Meanwhile it has become clear that the rule of dual criminality is not sacrosanct in international cooperation in criminal matters. The Framework Decision on the European Arrest Warrant identifies 32 'categories of crimes' in respect of which the executing State is required to surrender the requested person without being allowed to verify double criminality.²⁸ The Framework Decision on enforcement of foreign sentences has followed suit by literally copying the list of the Framework Decision on the European Arrest Warrant. This implies that a Member State would be obliged to recognize the judgment and enforce the sentence, even if the underlying conduct would not constitute a criminal offence under its national law.²⁹ From the perspective of consistency that makes sense. Otherwise the surrender of nationals would have to be refused in case of lack of dual criminality, because the State would not be able to enforce the foreign sentence after their return to their home country where they would be entitled to serve their sentence. Dual criminality would thus enter 'by the back door'.³⁰ In view of the *nulla poena* principle, however, it is problematic that someone can be detained for conduct which does not constitute an offence in the State that deprives him of his liberty.

In the vertical context, dual criminality by no means has a similar status as in the realm of inter-State relations. Neither Part 9 of the ICCSt – on general cooperation – nor Part 10 – on enforcement of sentences – mentions lack of dual criminality as a

²⁶ Compare the classic essay of Hulsman who distinguishes between primary and secondary assistance in criminal matters (*entraide judiciaire primaire et entraide judiciaire secondaire*), L.H.C. Hulsman, 'Transmission des poursuites pénales à l'état de séjour et exécution des décisions pénales étrangères', in *Le Droit Pénal International; Recueil d'Études en Hommage à Jacob Maarten van Bemmelen* (Brill 1965) 113–14.

²⁷ See the Council of Europe's *Explanatory Report on the Convention on the Transfer of Sentenced Persons*, Strasbourg 1983, 11: 'The condition (of dual criminality) is fulfilled if the act which gave rise to the judgment in the sentencing State would have been punishable if committed in the administering State and if the person who performed the act could, under the law of the administering State, have had a sanction imposed on him' [emphasis added].

²⁸ Provided that the crime is punishable in the issuing State by a custodial sentence or a detention order for a maximum period of at least three years. Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, OJ EC, L 190/1, Art. 2, s. 2.

²⁹ Council Framework Decision on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, Brussels 21 April 2008, 5602/08 COPEN 12, Art. 7 s. 1.

proper ground for refusal of cooperation.³¹ The absence of dual criminality in the Rome Statute need not surprise us. After all, allowing a State to invoke a lack of dual criminality would defeat the very purpose of the Statute. The principle of complementarity requires that national States should have priority in prosecuting and trying suspects of international crimes. Failure to incorporate the elements of international crimes into domestic legislation would render those States 'unable' to genuinely carry out investigations and prosecutions. But if they would subsequently be allowed to present the lack of domestic implementation as a reason not to cooperate, they would be able to frustrate the Court and impede it from performing its default function. In the case of the transfer of execution of sentences, the fact that a State has not implemented the corresponding crimes in its legislation will prevent that State from enforcing the sentence. As the enforcement of ICC sentences is predicated on the voluntariness of the State, a State can simply inform the Court that it will decline to take over the execution of the sentence, in conformity with Article 103 ICCSt.³²

4. TRANSFER OF ENFORCEMENT AND NATIONALITY OF THE SENTENCED PERSON

One of the major goals of transfer of enforcement of sentences is the social rehabilitation of the offender, the assumption being that he or she will have a future in his/her home country and that he/she will more easily reintegrate into society if the prison sentence is served in the home State. Legal instruments explicitly refer to this objective.³³ Against this backdrop, it makes sense that the 1983 Convention stipulates that a sentenced person can only be transferred if he/she is a national of the administering State (Art. 3, s. 1(a)). Paragraph 4 of the same provision adds that any State may by way of declaration define the term 'national' for the purpose of the Convention. The Explanatory Report elucidates that the provision enables Contracting States to extend the application of the Convention to persons other than nationals within the strict meaning of national legislation, encompassing, for instance, stateless

³¹ Compare, in respect of surrender, B. Swart, 'Chapter 41: Arrest and Surrender', in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary, Volume II* (Oxford University Press 2002) 1681: 'Where surrender of persons to the Court (ICC) is concerned, a State Party is not entitled to refuse cooperation on the grounds that the conduct does not constitute a criminal offence according to domestic law.'

³² In their negotiations with international criminal tribunals, States have revealed particular preferences and choices. Finland, for example, is only prepared to execute sentences of the SCSL that have been imposed in respect of international crimes, *id est* not for crimes under Sierra Leonean law that belong to the jurisdiction of the Court (Art. 5 SCSLSt). Information derived from Mulgrew (n 23) 38.

³³ Explanatory Report on the Convention on the Transfer of Sentenced Persons (n 27) para 9 and Framework Decision (n 20) Art. 2(1) (b).

persons or citizens of other States who have established roots in the country through permanent residence.³⁴

The concept of 'residency' has acquired special relevance in light of the freedom of movement within the European Union, the idea of 'European citizenship' and the repercussions on international cooperation in criminal matters. After all, the Framework Decision on the European Arrest Warrant has conferred certain rights on people being resident of, or even staying in a Member State, equalizing them with nationals. Article 5, Section 3 of the Framework Decision provides that the execution of a European Arrest Warrant in respect of a national or resident of the executing Member State may be subject to the condition that the person is returned to the executing State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State. In that situation, the legal instruments of surrender and transfer of enforcement are applied consecutively. Article 4, Section 6 of the Framework Decision proposes transfer of enforcement as an alternative to surrender: a Member State is entitled to refuse the execution of a European Arrest Warrant for the purpose of the execution of a sentence if the requested person is staying in, or is a resident or national of the executing State and that State undertakes to execute the sentence or detention order itself.

In some landmark decisions, the European Court of Justice has shed light on the content of 'staying in' and 'residency'. In *Kozłowski*, the ECJ held that the interpretation of the terms 'staying' and 'resident' could not be left to the assessment of each Member State, but rather should be given an autonomous and uniform interpretation throughout the Union, 'having regard to the context of the provision and the objective pursued by the legislation in question'.³⁵ The Court continued by emphasizing that the ground for optional refusal of Article 4(6) of the Framework Decision in particular served the purpose of increasing the requested person's chances of reintegrating into society when the sentence expires (para 45). Next, the Court defined the terms 'resident' and 'staying' – in the light of that objective – respectively, as 'the situations in which the person (...) has either established his actual place of residence in the executing Member State or has acquired, following a stable period of presence in that State, certain connections with that State which are of a similar degree to those resulting from residence' (para 46). The Court explained that:

in order to determine whether there are connections between the requested person and the executing State (...) it is necessary to make an overall assessment of various objective factors characterizing the situation of that person, which include, in particular, the length, nature and conditions of his presence and the family and economic connections which he has with the executing Member State.³⁶

In the *Wolzenburg* case, the right of a resident to be considered on the same par as nationals for the purpose of the enforcement of foreign sentences was explicitly put into the key of the prohibition of discrimination on account of nationality (Art. 18 EC Treaty; Art. 12 EC Treaty (old)) and the freedom of movement and residence within the

³⁴ Explanatory Report (n 27) para 20.

European Union (Art. 21 EC Treaty; Art. 18 EC Treaty (old)).³⁷ First, the Court acknowledged that a national of a Member State who was lawfully resident in another Member State could rely on Article 12 (old) EC Treaty against national legislation which lays down the conditions under which the competent judicial authority can refuse to execute a European Arrest Warrant issued with a view to the enforcement of a custodial sentence (para 47). Next, the Court held that Article 12 did not preclude Member States from distinguishing between nationals and residents, by requiring the latter to demonstrate that they had lawfully resided for a continuous period of five years in that Member State of execution (para 54). However, the Court cautioned that States should not, in addition to a condition as to the duration of residence, make application of the ground for optional non-execution of a European Arrest Warrant subject to supplementary administrative requirements, such as possession of a residence permit of indefinite duration.³⁸

The case law of the ECJ demonstrates that the Court attaches major importance to the question whether the 'resident' has developed genuine bonds with the State where he prefers to serve his prison sentence. Apparently, the Court takes the objective of social rehabilitation seriously.

In the context of vertical cooperation between the ICC and States parties nationality is far less preponderant. Article 103, Section 3(d) mentions 'nationality of the sentenced person' only as one of the parameters to be taken into account by the Court in designating a State of enforcement. Schabas notes that some States parties have indicated their preparedness to enforce sentences of the ICC only in respect of nationals or residents.³⁹ Moreover, he mentions a proposal to allow States which had indicated their willingness to enforce sentences to make surrender of its national to the Court dependent on the condition that the person would have the right to return to that State in order to serve any sentence imposed.⁴⁰ Obviously, the proposal reminds us of the construction in the Framework Decision on the European Arrest Warrant, as expounded above. Nonetheless, it is not difficult to understand why this proposal was not accepted. The fact that the ICC requests the surrender of a State's national in the first place implies that the Court has found its ability or willingness to investigate and prosecute international crimes wanting. There may be good reasons to suspect that such deficiencies rebound on the State's capacity to adequately enforce prison sentences. It demonstrates that ideas and practices which are tested and work in inter-State relations cannot be simply transplanted to the vertical context. But it equally makes clear that the rights and interests of the sentenced person may be at peril. This takes us to the topic of the next paragraph.

5. THE CONSENT OF THE SENTENCED PERSON

In view of the fact that one of the major goals of transfer of execution of foreign judgments is the rehabilitation of the offender, it makes sense to make any transfer dependent on his or her personal consent.⁴¹ Hence, Article 3, Section 1(d) of the 1983 Convention requires the consent of the sentenced person or of his/her legal representative. The 2008 Framework Decision even reinforces the position of the sentenced person by granting him the formal right to request the competent authorities of the issuing State to initiate a procedure, conducive to the transfer of enforcement of the sentence. Such requests shall however not create an obligation for the issuing State to forward the judgment and the certificate to another State.⁴²

In the ICCSt, the interests of the sentenced person are far less pronounced. Article 103, Section 3 mentions 'the views of the sentenced person' as one of the factors to be taken into account by the Court in designating an appropriate State of enforcement. Rule 203 of the ICC RPE elaborates on the procedure. The Presidency informs the sentenced person that it is addressing the designation of a State of enforcement and invites him to express his views, in writing or orally. The sentenced person has the right to be assisted by an interpreter, but apparently not by counsel.⁴³ The views of the sentenced person on the preferable State of enforcement are only one of the factors controlling the designation of the State; it is thus obvious that such designation does not require his consent. Such a requirement would indeed be far-fetched and self-defeating, as the situation is rather different from the inter-State context. After all, in that case any refusal of consent would imply that the sentenced person has to serve his sentence in the administering State. Such a natural alternative is not available in the vertical context, which means that the sentenced person might have the power to thwart any enforcement of his sentence. For several reasons, it would be practically impossible for sentenced persons to insist that they can serve their ICC imposed sentence in their home country. First of all, only eight States have concluded agreements with the ICC, indicating their willingness to enforce the Court's sentences.⁴⁴ Moreover, enforcement of sentences in turbulent States, still recovering from armed conflict and rife with political tensions may simply not be a realistic option. This has been acknowledged by the ICTY in *Erdemović*:

The Trial Chamber shares the view of the Secretary-General that the sentences should be served outside the territory of the former Yugoslavia (S/25704, para 121). It believes that because of the situation prevailing in the region, it would not be possible to ensure the security of the convicted person or the full respect of a decision of the International Tribunal in that regard.⁴⁵

³⁷ *Wolzenburg* C-123/08 (European Court of Justice, 6 October 2009).

³⁸ *Ibid.*, para 53.

³⁹ Schabas (n 14) 1071. Nationals: Andorra, Liechtenstein, Lithuania, Slovakia, Switzerland. Residents: Liechtenstein, Slovakia, Switzerland. However, these countries have no agreements with the ICC. Sweden had attempted to include a nationality or residence clause in its agreement with the ICTY, but removed it after the ICTY had ended negotiations with Switzerland that had also insisted on incorporating this condition. See Mulgrew (n 23) 38.

⁴⁰ Schabas (n 14) 1071.

⁴¹ The Explanatory Report to the 1983 Convention (n 27) explicitly makes the connection in para 23: '[The condition of consent] is rooted in the convention's primary purpose to facilitate the rehabilitation of offenders: transferring a prisoner without his consent would be counter-productive in terms of rehabilitation.'

⁴² 2008 Framework Decision (n 28) Art. 4 s. 5.

⁴³ Schabas (n 14) 1072.

⁴⁴ To wit, Austria, Belgium, Colombia, Denmark, Finland, Mali, Serbia and the UK. *ICTY v. Tadić* (Sentencing Judgment, 29 November 1996) para 70.

Nonetheless, the Chamber expressed understanding of and concern for the predicament of the sentenced person in the very same Judgment:

In addition, because persons found guilty will be obliged to serve their sentences in institutions which are often far from their places of origin, the Trial Chamber takes note of the inevitable isolation into which they will have been placed. Moreover, cultural and linguistic differences will distinguish them from the other detainees. The situation is all the more true in cases of convicted persons who have co-operated with the Prosecutor because it is not unreasonable to assume that they will also be excluded from the very group to which they should normally belong.⁴⁶

Such considerations perfectly reflect the quandaries and dilemmas involved in the designation of the 'most appropriate' State. Obviously, the sentenced person has no right of choice, a privilege that is not recognized in the horizontal context either, at least not as a human right.⁴⁷ However, the European Court of Human Rights has acknowledged that in exceptional cases the right to family life may be at stake, in particular when alternative options are available:

[T]he detention of a person at a distance from his family which renders any visit very difficult, if not impossible, may in exceptional circumstances constitute an interference with his family life, the possibility for members of the family to visit a prisoner being an essential factor for the maintenance of family life.⁴⁸

It would be reasonable to assume that the State must make an effort to allow the sentenced person to serve his sentence in the surroundings of his family. Such an obligation might even require that the State would be under a duty to enable a transfer of the enforcement of the sentence to the home country, whenever that option is available. Although the ICC is formally not bound by the ECHR, that principle would be equally valid for the Court. The European Commissioner for Human Rights has confirmed this by, in respect of detained persons of the Court, stressing the connection between social rehabilitation as a penal goal and the obligation to enable the sentenced person to keep in touch with family and friends.⁴⁹ In view of these principles and case law, the Court should seriously take the interests of the sentenced person into account. Such concern should not only be a guide line in the choice of the most appropriate State of enforcement, but the Court must also during the detention make efforts to further contacts between the sentenced person and his family. Moreover, both the choice of the State of enforcement and the penitentiary regime should be informed by

⁴⁶ Ibid., para 75.

⁴⁷ This has been confirmed by the ECtHR, *Plepi et al v Albania and Greece* App nos 1546/05, 33285/05 and 33285/05 (ECtHR, 4 May 2010) (Decision on Admissibility) para 2: the Convention does not grant prisoners the right to choose the place of detention and the separation and distance from the prisoner's family are inevitable consequences of his detention'.

⁴⁸ *Selmani v Switzerland* App no 70258/01 (ECtHR, 28 June 2001) (decision on admissibility) para 1.

⁴⁹ Council of Europe, Opinion of the Commissioner for Human Rights regarding family visits to persons deprived of their liberty, CommDH (16 June 2008) 15 para 12.

the aim of reintegration. Resocialization and reintegration are low on the list of priorities of international criminal tribunals. International prisoners are doubly ostracized, as they serve long sentences in foreign countries. However, Rule 61 of the UNSMR provides that 'the treatment of prisoners should emphasize not their exclusion from the community, but their continuing part in it'. Reintegration is no doubt a cumbersome process, that requires careful preparation during detention and that could be facilitated by a community that is sensitive to restorative justice.⁵⁰

6. THE ICC'S POWERS OF SUPERVISION OVER AND ITS RESPONSIBILITY FOR IMPRISONMENT

In Section 2 we noticed that it is still unclear whether the Court's powers of supervision merely cover the enforcement of a sentence or must be interpreted broadly as to encompass the conditions of detention as well. We have defended the broader view and that position can arguably be sustained by referring to the practice of the *ad hoc* Tribunals and by the concept of shared responsibility which governs international cooperation in criminal matters.

Powers of supervision connote a continuous scrutiny of detention conditions and imply the interference of the supervisory body when things go awry. The *ad hoc* Tribunals have demonstrated such responsibility. The ICTR Trial Chamber in the *Serugendo* judgment expressed its concern over the plight of the sentenced person by holding that:

[I]t is clear that *Serugendo* is not in a position to serve a sentence under normal prison conditions. He has recently been diagnosed with a terminal illness, has very fragile health and a poor prognosis. The Tribunal must continue to ensure that he receives adequate medical treatment, including hospitalization to the extent needed.⁵¹

One may expect the ICC to follow the example of its predecessors by displaying a similar sense of permanent responsibility.

The concept of shared responsibility in the context of international cooperation in criminal matters has taken shape in the case law of the ECtHR. In the landmark *Soering* decision the ECtHR acknowledged that a State party could incur responsibility by extraditing a person to a State where he would run a real risk of being exposed to torture, or cruel, inhuman and degrading treatment.⁵² Moreover, the Court did not exclude that 'an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country'.⁵³ The *Soering* case was innovative, because the Court acknowledged for the first time that States could incur responsibility for prospective violations which occurred outside their territory. The decision served as

⁵⁰ On reintegration of international prisoners, see Mulgrew (n 23) 230–32.

⁵¹ *Serugendo* ICTR-2005-84-I-T/I (Judgment and Sentence, 12 June 2006) para 94 [emphasis added].

⁵² *Soering v United Kingdom* App no 14038/88 (ECtHR, 7 July 1990) Series A No 161.

an outstanding precedent for a rich jurisprudence on extradition and human rights.⁵⁴ However, the *Soering* case concerned an extradition within the inter-State context. In order to ascertain whether the principles expressed in *Soering* have any bearing on the responsibility of the ICC for the detention conditions in the State of enforcement, we should make two leaps. First, we have to ascertain whether the human rights considerations in horizontal cooperation also govern the vertical relations between international courts and States, or at least serve as a normative framework for their actions. Next, we must inquire whether States – and *mutatis mutandis* international criminal courts – assume similar responsibilities for human rights violations in the sentencing State as, apparently, in the case of extradition.

The first issue came to the fore in the *Naletilić* decision of the ECtHR, in which the applicant challenged his transfer to the ICTY, contending among others that the Tribunal could not be qualified as an independent and impartial court established by law, which is required by Article 6, Section 1 of the ECHR. The Court rejected the complaint:

The Court recalls that exceptionally an issue might be raised under Article 6 of the Convention by an extradition decision in circumstances where the applicant risks suffering a flagrant denial of a fair trial. However, it is not an act in the nature of an extradition which is at stake here, as the applicant seems to think. Involved here is the surrender to an international court which, in view of the content of its Statute and RPE, offers all the necessary guarantees including those of impartiality and independence. Accordingly, no issue arises under Article 6, para 1 in this respect.⁵⁵

It is not immediately clear how this passage should be interpreted.⁵⁶ On the one hand one could argue that the Court puts the ICTY to the test of Article 6 and concludes that it meets the requirements of an independent and impartial tribunal. This would imply that in exceptional circumstances surrender to the Tribunal should be refused if it were to transpire that the fundamental rights of the requested person would not be respected.⁵⁷ On the other hand, it may just be that the ECtHR took the quality of justice delivered by the Tribunal for granted, leaving States no discretion to refuse surrender at all. In that case, the *Soering* case law would not govern the international cooperation between international criminal tribunals and States.

While the distinction is subtle and relevant in cases where States are expected to cooperate with international tribunals' conducting criminal trials, it is of less concern in the reversed situation, when international tribunals assist States in criminal law

⁵⁴ See, among other decisions, *Mamatkulov and Askarov v Turkey* App nos 46827/00 and 4695/99 (ECtHR, 4 February 2005); *Al-Moayad v Germany* App no 35865/03 (ECtHR, 20 February 2007); *Saadi v Italy* App no 37201/06 (ECtHR, 27 February 2008). Compare also H. van der Wilt, 'On the Hierarchy between Extradition and Human Rights', in E. de Wet and J. Vidmar (eds), *Hierarchy in International Law; The Place of Human Rights* (Oxford University Press 2012) 148–75.

⁵⁵ *Naletilić v Croatia* App no 51891/99 (ECtHR, 4 May 2000).

⁵⁶ See the perceptive annotation to this case by C. Buisman in *NJCM-Bulletin* 26(1) (2001) 50.

⁵⁷ Buisman, *ibid.*, mentions the example of a terminally ill suspect whose surrender would constitute inhuman treatment.

enforcement. After all, in the former case States are typically confronted with a conflict of obligations which can be resolved by postulating the priority of either respect for human rights or the duty to surrender. International criminal tribunals do not face similar legal constraints. The observance of human rights is an integral part of the application and interpretation of law by the ICC, as Article 21 of the Statute makes abundantly clear. And while there may be tensions between forensic truth finding and human rights, the *ad hoc* Tribunals have acknowledged that, although they are not formally bound by regional or international conventions on human rights, the provisions of these conventions are general principles of international law or constitute evidence of international custom. As such they are part and parcel of the law to be applied by the Tribunals.⁵⁸ Moreover, international criminal tribunals are generally not under an obligation to cooperate with States. In other words, they are not confronted in the same sense as States with a conflict of legal obligations. Their predicament derives rather from practical necessities, requiring them to seek the assistance of States for an adequate performance of their functions. The relevant issue concerns the limits of their dedication to human rights. Are international criminal tribunals and the ICC co-responsible for (grave) violations of human rights of sentenced persons during their detention in the State to which they transferred for the enforcement of a sentence?⁵⁹ Here again a comparison of the inter-State practice in the realm of international cooperation may shed light on this interesting question.

The ECtHR has addressed the (shared) responsibility of States in the context of the transfer of prisoners on several occasions. In the *Drozd and Janousek* case the applicants asserted that the denial of a fair trial during criminal proceedings in Andorra should be attributed to France which had taken over the execution of the sentence, due to the insufficient detention facilities in Andorra.⁶⁰ The Court rejected the complaint, but accepted the theoretical chance that France could have incurred responsibility in case of a flagrant denial of justice:

As the Convention does not require the Contracting Parties to impose its standards on third States or territories, France was not obliged to verify whether the proceedings which resulted in the conviction were compatible with all the requirements of Article 6 of the Convention. To require such a review of the manner in which a court not bound by the Convention had

⁵⁸ *Barayagwiza* ICTR-97-19-AR72 (Decision, 3 November 1999) para 40. The Appeals Chamber of the Special Court for Sierra Leone confirmed that the Court's proceedings 'must be in tune with international human rights instruments', *Norman et al* SCSL-2004-14/16-AR72E (Decision on Constitutionality and Lack of Jurisdiction, 13 March 2004) para 55. On this topic see L. Gradoni, 'The Human Rights Dimension of International Criminal Procedure', in G. Sluiter et al, *International Criminal Procedure; Principles and Rules* (Oxford University Press 2013) 74–95.

⁵⁹ The attack on Radislav Krstić in 2010 by three armed men in Wakefield prison in the UK, in revenge for the massacre of Muslims in Srebrenica, an event for which General Krstić had been held criminally responsible as aider and abettor by the ICTY, provides a good example. While the three men faced trial in the UK and Krstić was moved to another prison in the UK, the ICTY insisted on his return to the UNDU. Whereas for all practical purposes this was the wisest thing to do, it did not offer the international prisoner a remedy for the violation of his rights, as

applied the principles enshrined in Article 6 would also thwart the current trend towards strengthening international cooperation in the administration of justice, a trend which is in principle in the interests of the persons concerned. The contracting States are, however, obliged to refuse their cooperation if it emerges that the conviction is the result of a flagrant denial of justice (see *mutatis mutandis* the *Soering v the United Kingdom* judgment of 7 July 1989).⁶¹

This balancing act serves a certain logic. Precisely because a principled rejection of a previous trial falling short of accepted standards of justice would damage the interests of the sentenced person, it makes sense to put the threshold as high as possible. It begs the question, though, what should be understood by a 'flagrant denial of justice'. In *Othman (Abu Qatada) v the United Kingdom* – a case of expulsion to Jordan – the ECtHR has neatly summarized its findings and opinions on the issue. First, the Court more generally found that the concept would entail a breach of the principles of a fair trial guaranteed by Article 6 'so fundamental as to amount to a nullification or the destruction of the very essence of the right guaranteed by that Article'.⁶² Next, the Court, referring to other case law, identified a number of situations which could amount to such a 'flagrant denial of justice'.⁶³ On the basis of the *Drozd and Janousek* case, we have to assume that only such blatant violations of fair trial rights would also trigger the responsibility of a State that would subsequently take over the enforcement of the sentence. Apparently, the threshold is sufficiently high to preclude the Court from taking awkward decisions.⁶⁴

Remarkably, all these cases concern the potential responsibility of the administering State on account of preceding serious fair trial rights in the sentencing State. To my knowledge the Court has never pronounced on the reverse situation, eliciting the legal issue whether the sentencing State could, after having transferred the enforcement of its sentence, still be held responsible for ensuing maltreatment during detention in the administering State. Taking the philosophy expressed in *Soering* as point of departure, there would in my view be no reason to doubt this. After all, it would be strange if a State could be held responsible for flagrant violations of human rights after having extradited someone, but would get away with it, if it would expose a sentenced person to abuse or even torture by transferring that person to another State where he or she is

to serve his/her sentence.⁶⁵ The involvement of the sentencing State is arguably even larger, as the enforcement of the sanction is an integral part of the entire criminal process that started in the sentencing State. If we accept that the sentencing State can be held responsible for grave maltreatment in the administering State, we should equally be prepared to endorse such a responsibility for international criminal tribunals and the ICC.

7. TRANSFER OF ENFORCEMENT BY THE ICC: SOME FINAL REFLECTIONS

This chapter has attempted to draw some parallels between the transfer of the execution of foreign judgments between States and transfer of enforcement of a sentence by the ICC. It soon becomes apparent that the context in which the ICC operates accounts for some conspicuous legal and practical differences. On the one hand, the hierarchical relationship between ICC and States obviates time-tested legal devices like dual criminality and the nationality of the sentenced person as prerequisites for transfer. On the other hand, the ICC has no choice other than to rely on States, a circumstance that limits the options. Unlike the inter-State context, there does not exist a 'natural alternative' – imprisonment in the sentencing State – and only a few Member States have expressed their willingness to enforce an ICC sentence in the first place.

The net result of these forces is that the position of the sentenced person may be at peril. He or she runs the risk of being sent to a State that is largely unknown and unfamiliar. The sentenced person can hardly wield influence over the choice of a State of enforcement and international criminal courts and tribunals, while not entirely oblivious to their responsibility for the fate of the sentenced person, have no legal obligations carved in stone in this respect. The prospects of rehabilitation are slight for prisoners who have no or few cultural, emotional and linguistic ties with the place where they must serve their sentence. The ambiguity of international tribunals as regards their lasting responsibility for sentenced persons can perhaps be attributed to their general posture towards rehabilitation as a sentencing goal in case of international crimes. In the *Čelebići* appeal judgment the Appeals Chamber, alluding to the (very) serious nature of the crimes being prosecuted, explicitly held that rehabilitation 'cannot play a predominant role in the decision-making process of a Trial Chamber of the Tribunal', adding that 'although rehabilitation (...) should be considered as a relevant factor, it is not one which should be given undue weight'.⁶⁶ In *Kunarac* the Trial Chamber avowed that it fully supported rehabilitative programmes, but denied that rehabilitation was a significant sentencing objective for the Tribunal. National rehabilitative programmes were the business of the States in which convicted persons would

⁶¹ Ibid., para 110.

⁶² *Othman (Abu Qatada) v United Kingdom* App no 8130/09 (ECtHR, 17 January 2012) ECHR' 2012/64 note by Den Heijer para 260.

⁶³ *Othman (Abu Qatada) v United Kingdom* App no 8130/09 (ECtHR, 17 January 2012) para 59.

These have included: conviction in absentia with no possibility subsequently to obtain a fresh determination of the merits of the charge; a trial which is summary in nature and conducted with a total disregard for the rights of the defence; detention without any access to an independent and impartial tribunal to have the legality of the detention reviewed; deliberate and systematic refusal of access to a lawyer, especially for an individual detained in a foreign country.

⁶⁴ To my knowledge, the Court has never held an administering State responsible on account of enforcing a sentence that was produced in a trial that lacked the elementary features of fairness, see, for instance, *Willcox and Hurford v United Kingdom* App nos 43759/10 and 771/12 (ECtHR, 8 January 2003) 'ECHR' 2013/155 note by Van der Wilt.

⁶⁵ In a similar vein, H. Sanders, *De tenuitvoerlegging van buitenlandse strafvonnissen* (Intersentia 2004) 243 who observes that it would be a lot easier to determine the responsibility of the sentencing State for maltreatment of a prisoner in the administering State than in the mirror situation (the responsibility of the administering State for denial of fair trial in the sentencing State).

⁶⁶ *Delalić et al* ('Čelebići case') IT-96-21-A (Appeal Judgment, 20 February 2001) para 806.

have to serve their sentence, and were not of concern to the International Tribunal.⁶⁷ The subtle shift in emphasis is telling. Whereas the Appeals Chamber in *Čelibići* questioned the overall relevance of rehabilitation as a sentencing objective in the case of international crimes, the Trial Chamber in *Kunarac* acknowledged its importance but tried to shirk its responsibility for its success. Admittedly, the ICTY has incidentally stressed the relevance of rehabilitation, but predominantly as a factor in mitigation of sentence, not as a cause of permanent concern.⁶⁸

One of the main lines of argument in this chapter has been that international criminal tribunals in general and the ICC in particular bear co-responsibility for the enforcement of its sentences, both as to the choice of State and as to the lasting supervision of detention conditions. In his captivating study on the Nazi interns of Spandau prison in Berlin, Norman Goda has advocated a prescient court that carefully considers the future effects of its judgment:

Spandau thus became a macabre symbol for the Nazi past but also for the following problem. The discussion concerning war criminals and the place in the memory of the past is not national but international. And becomes most contentious not during the trial but afterward. The years and even decades of punishment must thus receive the same careful thought from the advocates of international justice as do the months of trial. Otherwise, the punishment can erode some of the foundations on which the trial itself was built.⁶⁹

Whereas Goda primarily alluded to the political repercussions which had insufficiently been foreseen, the argument can probably be generalized. International criminal tribunals and the ICC should, when passing judgment, anticipate the enforcement of the sentence and remain to a certain extent responsible for the execution of the sanction. They cannot permit themselves the luxury of closing the books and shutting their eyes after having rendered judgment. That may sound a far-reaching responsibility, but we should not forget that international criminal justice makes heavy demands on its representatives.

⁶⁷ *Kunarac et al* IT-97-23-T and IT-96-23/1-T (Judgment, 22 February 2001) para 844.
⁶⁸ *Obrenović* IT-02-60/2-S (Sentencing Judgment, 10 December 2003) paras 143–146.

⁶⁹ N.J. Goda, *Tales from Spandau; Nazi Criminals and the Cold War* (Cambridge University Press 2007) 17.