The impact of cooperation on the rights of defendants before the International Criminal Court

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Publication date
2016

Document Version
Final published version

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THE IMPACT OF COOPERATION ON THE RIGHTS OF DEFENDANTS BEFORE THE INTERNATIONAL CRIMINAL COURT

MARIA LAURA FERIOLI
Errata

- P. 117: footnote n. 77 is absent in the printed version of the thesis;
- P. 118: footnote n. 79 is absent in the printed version of the thesis;
- P. 140: footnote n. 159 is absent in the printed version of the thesis;
- P. 152: footnote n. 1 is absent in the printed version of the thesis;
- Because of the above-mentioned differences, the page numbers in the table of contents differ between the digital and printed version of the thesis.
THE IMPACT OF COOPERATION ON THE RIGHTS OF DEFENDANTS BEFORE THE INTERNATIONAL CRIMINAL COURT

ACADEMISCH PROEFSCHRIFT

ter verkrijging van de graad van doctor aan de Universiteit van Amsterdam
op gezag van de Rector Magnificus prof. dr. ir. K.I.J. Maex
ten overstaan van een door het College voor Promoties ingestelde commissie,
in het openbaar te verdedigen in de Agnietenkapel
op maandag 19 december 2016, te 14:00 uur
door Maria Laura Ferioli
egeboren te Cento, Ferrara, Italië
PROMOTIECOMMISSIE

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Faculteit der Rechtsgeleerdheid

This thesis was prepared within the partnership between the University of Amsterdam and Università di Bologna with the purpose of obtaining a joint doctorate degree. The thesis was prepared in the Faculty of Law at the University of Amsterdam and in the Dipartimento di Scienze Giuridiche at the Università di Bologna.

Dit proefschrift is tot stand gekomen binnen een samenwerkingsverband tussen de Universiteit van Amsterdam en de Università di Bologna met als doel het behalen van een gezamenlijk doctoraat. Het proefschrift is voorbereid in de Rechtenfaculteit van de Universiteit van Amsterdam en de Dipartimento di Scienze Giuridiche van Università di Bologna.
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Chapter I

INTRODUCTION

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1. Relevance of the study

In a still state-dominated international legal order, states act as the enforcement arm of international courts. Like the ad hoc Tribunals, the ICC depends on the cooperation of states (including through international organizations) in all phases of its activities and, above all, in arresting suspects and conducting investigations.

Increasingly, cooperation issues are at the centre of the debate regarding the ICC. The Court is facing serious hurdles in getting the custody of defendants due to the lack of cooperation of certain States. The most famous case is the one of Omar Al-Bashir, the first sitting head of State indicted by the Court on genocide charges, who keeps travelling around the world undeterred by the arrest warrants\(^1\) issued by the Court against him. In 2014, ICC Chief Prosecutor Fatou Bensouda informed the Security Council – which had referred the situation to the Court ten years earlier – that she

\(^1\) On 4 March 2009 the ICC issued an arrest warrant against Bashir for crimes against humanity and war crimes. On 12 July 2010 the ICC issued an additional warrant adding 3 counts of genocide for the ethnic cleansing of the Fur, Masalit, and Zaghawa tribes.
was ‘hibernating’ her investigations in Darfur due to the sheer obstruction and non-cooperation of the Government of Sudan, as well as the lack of support from the Security Council.²

More recently, all the Kenya cases relating to the 2007/08 post election violence collapsed due to a combination of lack of cooperation from the Government of Kenya, witness tampering and poor case construction on the part of the OTP.³ This is possibly the most evident failure of the ICC so far.

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

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In the midst of this debate, what is often overlooked is the impact that cooperation with the Court – a well as the lack thereof – has on defendants. Traditionally, the defence side and the accused have largely been overlooked in cooperation law and practice, both transnationally and internationally. In transnational cooperation, the relationship between the requesting and the requested State has long been conceived as a merely bilateral one, based on equality, reciprocity and the protection of the interests of the States involved. For the longest period, the individual has been considered a mere object of international legal practice. A major shift occurred in 1989, when the European Court of Human Rights (ECtHR) issued a seminal decision in the *Soering* case. Since the *Soering* judgment, the individual is no longer considered an object of the proceedings whose rights are to be determined exclusively by the States involved, but a subject of an international legal practice, entitled to independently claim certain rights guaranteed under international law.\(^5\)

In international criminal trials, the defence side and the accused are rarely at the centre. Instead, the focus is often on victims and the ‘fight against impunity’ for heinous crimes. However, cooperation with international tribunals is vertical in nature, and based on the hierarchical and supranational relationship of international courts with national authorities. It

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imposes stricter obligations to States and affords them less capacity to protect their interests. Moreover, from Nuremberg on, the rights of defendants have progressively been given more importance.

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

With specific reference to the ICC, it is undeniable that the Rome Statute represents a clear improvement in the protection of the human rights of the accused, especially in the pre-trial phase. It not only contains an overarching principle that the Statute be interpreted and applied in accordance with internationally recognized human rights (Article 21(3)), but it also imposes human rights obligations upon national authorities conducting investigations on behalf of the Court. Among others, individuals have the right not to be subject to arbitrary arrest and detention and, once

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7 Swart (n 6) 1684.
arrested on behalf of the ICC, to be brought promptly before a national judge who must verify that the their rights have been respected.\textsuperscript{8} These norms clearly break with the law of the \textit{ad hoc} Tribunals, where the execution of arrest warrants and the protection of persons in arrest proceedings by national authorities has received little attention.

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

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

\textsuperscript{8} Articles 55(1)(d) and 59(2) of the Rome Statute.
treatment, abuses, and torture. As a consequence, defendants requested the Court to take responsibility for the above violations and dismiss its jurisdiction.

Conversely, when States oppose the intervention of the Court, they are much less willing to allow either the Prosecutor or the Defence on their territory for the purpose of conducting investigations, let alone provide the necessary assistance to transfer the suspects to the Court. Undoubtedly, this undermines the Court’s credibility and the Prosecutor’s capacity to build his/her case. However, one must not forget that non-cooperation can be even more harmful for the suspect and accused. The first example that comes to mind is that of Saif al-Islam Gaddafi, who has been detained in solitary confinement in Libya since 2011 despite an outstanding arrest warrant by the ICC. Even if the person sought by the Court is not detained by national authorities, when his/her State of nationality does not wish to engage with the Court in any way, the Defence might face enormous difficulties in conducting its investigations and locating witnesses (see Banda and Jamus’s Defence in Sudan). The urgency of a study that puts fair trial and human rights of defendants at the core of the debate regarding cooperation with the Court is attested by the above examples.

2. Research questions

As Jacob Cogan has pointed out, the ‘fair trial question’ before international courts can be approached in two ways. First, are the substantive rights accorded to the accused adequate? This approach focuses on the rights delineated in the tribunals’ statutes, rules of procedure and evidence, and
case law.\textsuperscript{9} Within this approach, the conceptual background for discussing human rights in cooperation proceedings is that of the ‘fragmentation’\textsuperscript{10} of the criminal procedure over two or more jurisdictions, namely the international criminal tribunal and the relevant domestic jurisdictions. The starting point is the need to avoid loopholes in the protection of individual rights as a result of the division of labour between international courts and states authorities, as well as the claim that the requesting international criminal jurisdiction and the requested State have a shared responsibility for the rights of the suspects and accused.\textsuperscript{11} Therefore, the question is framed as one of the extent to which the former should bear responsibility (in the sense of providing remedies) for human rights violations occurred in the framework of its proceedings.\textsuperscript{12}

Conversely, a second approach seeks to address the problem of fair trial from a systemic perspective. It asks whether ‘international courts have the independence and coercive powers necessary to ensure fair trials, regardless of the sufficiency of the paper rights accorded to the accused in the tribunals’ statutes’.\textsuperscript{13} For example, some of the questions that are central to this approach are: ‘can these courts make certain that the accused is able

\begin{flushleft}
\textsuperscript{11} Astrid Reisinger-Coracini, ‘Cooperation from States and Other Entities’ in Göran Sluiter and others (eds), \textit{International Criminal Procedure: Principles and Rules} (Oxford University Press 2013) 111.
\textsuperscript{13} Cogan (n 9) 115.
\end{flushleft}
to obtain the evidence and witnesses necessary for a serious defence? Or do the courts’ judges have the independence necessary to withstand political pressure from the states on which they depend?’

The present research builds on the above sets of questions and addresses substantive rights of suspects and accused persons before the ICC in the context of the unique institutional and jurisdictional features of the Court. Addressing human rights through a systemic perspective in the ICC context is particularly important, due to the symbolic and historical significance of the Court. The ICC is the most ambitious experiment in the history of international criminal justice so far. Its immediate predecessors are the *ad hoc* Criminal Tribunals for the Former Yugoslavia (ICTY) and for Rwanda (ICTR), created by the UN Security Council in response to the disaggregation of the Federal Republic of Yugoslavia and the genocide in Rwanda respectively, as a means to restore international peace and security under Chapter VII of the UN Charter.

The *ad hoc* Tribunals were subject to the criticism of being established – at least in part – *ex post facto*, only to save the conscience of the international community for its failure to act to stop the ethnic cleansing that had taken place in the Balkans and Rwanda. They were ‘special tribunals’ established by a political organ (the Security Council), as the

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14 ibid.
15 On 25 May 1993, the UN Security Council passed resolution 827 formally establishing the International Criminal Tribunal for the former Yugoslavia; on 8 November 1994, the UN Security Council adopted resolution 955, establishing the International Criminal Tribunal for Rwanda.
organ’s sub-body. Conversely, the establishment of a permanent International Criminal Court was meant to move international criminal justice onwards to new grounds, so as to avoid the criticisms that previously plagued the ad hoc Tribunals. Unlike its ad hoc predecessors, the ICC is not an organ of the UN Security Council and does not deal with specific conflicts in geographically limited areas. The ICC is an independent permanent Court ‘in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole.’ Its Prosecutor has proprio motu powers of investigation and its jurisdiction can potentially cover international crimes committed in every part of the world after 2002. As Gerry Simpson has argued:

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

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18 ibid.
19 See 9th paragraph of the Preamble to the Rome Statute.
20 The Rome Statute of the ICC was adopted at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998. 120 States voted in favour of the treaty, seven voted against (US, China, Libya, Iraq, Israel Qatar and Yemen) and 21 abstained.
In other words, the ICC is really a project for an international criminal justice system, not just an international court. Yet, without enforcement powers of its own, the ICC is entirely reliant on States’ cooperation for the implementation of its ambitious mission. Inevitably, this means that the Court’s action is – to a greater or lesser degree – influenced by the interests of States and by the much-deprecated ‘realpolitik’. In this respect, it has rightly been argued that the pertinent question does not concern the role played by politics in international criminal justice, but rather the possibility that politics, in playing its role, corrupts the integrity of the judicial process and compromises the latter’s independence.

The present study locates the challenges faced by defendants during cooperation proceedings in the context of the unique structural system of the Court, and the inherent tensions and limitations that characterize the ICC’s functioning. In particular, the study seeks to answer the following research questions: does the unique structure of the Court influence and shape cooperation with States and international organizations? And do the law and practice of cooperation reduce the rights of the defendants before the Court?

3. Methodology and scope of the study

This study employs the methods of classical legal research and is based on the following building blocks: literature review, analysis of the Court’s legal instruments and assessment of the case law of the Court, including the filings of the participants to the proceedings. Although the focus of this study is on the ICC, the legal framework, experience and jurisprudence of the ad hoc Tribunals will be used as terms of comparison, so as to illuminate the distinct challenges confronting the Court.

Central to this study is the understanding of how the unique context in which the Court operates shapes the practice of cooperation before it and, ultimately, impacts on the rights of defendants. In the interest of a focused analysis, this study is concerned with two specific rights: the right to liberty and the principle of equality of arms.

It is important to clarify the standard by which the ICC law and practice will be judged in the course of the analysis. Traditionally, scholars evaluate international criminal proceedings against the background of international human rights law, that is, the norms enshrined in regional

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and international human rights treaties,\textsuperscript{25} as authoritatively interpreted by human rights courts and supervisory bodies.\textsuperscript{26} Human rights law has been described as the ideal lens through which to assess ‘the structure and functioning of international criminal justice’.\textsuperscript{27} In this respect, Article 21(3) of the ICC Statute explicitly demands that the interpretation and application of the Court’s law be consistent with ‘internationally recognized human rights’.\textsuperscript{28} So far, the practice of the Court reveals that, in their interpretation and application of the law under the Statute, the ICC judges rely extensively on the ECtHR’s jurisprudence.

However, the author of this study is mindful that human rights law offers only limited guidance in the assessment of the substantial fairness of proceedings before international courts.\textsuperscript{29} This body of law, in fact, is tailored to and assumes the existence of national States, which are the primary grantor of individual rights.\textsuperscript{30} Moreover, human rights law imposes mainly obligations of result to States, and is mostly silent on the way in which they might implement them. As a result, human rights law enshrines and prescribes only the minimum level of protection of individual rights,

\begin{enumerate}
\item See the International Covenant of Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR), the American Convention on Human Rights (ACHR) and the African Charter on Human and People’s Rights (ACHPR).
\item Such as the Human Rights Commission, the European Court of Human Rights, the Inter-American Court of Human Rights and the African Court of Human and People’s Rights.
\item Zappalà (n 24) 1.
\item Rebecca Young, ‘Internationally Recognized Human Rights before the International Criminal Court’ (2011) 60 International and Comparative Law Quarterly 189.
\item Warbrick (n 22) 51.
\end{enumerate}
rather than a normal or an optimum one.\textsuperscript{31} Borrowing Colin Warwick’s words:

it might be asked whether human rights standards, directed as they are to national trial processes, have any real relevance to an international process because the international court will have to operate in a much sparser legal environment and in much different factual circumstances than a domestic court.

Indeed, the dependence on cooperation makes proceedings before international tribunals qualitatively different from national proceedings and poses unique challenges to the rights of defendants. With respect to the right to liberty, one can think of the fragmentation of the arrest and surrender procedure over the jurisdiction of the ICC and that of the executing State, with all the risks that this entails for the arrestee.\textsuperscript{32} With respect to the principle of equality of arms, the Defence is confronted with the traditional problems of diminished institutional standing, inadequate support and difficulties in accessing crime scenes and potential witnesses.\textsuperscript{33}

Arguably, the dependence on States justifies possible divergence from existing standards and a ‘contextualisation’ of the rights of defendants before the Court. A methodological framework to guide the Court in this endeavour has already been developed.\textsuperscript{34} By connecting the analysis of the structural features of the Court (Chapter II and III) to the evaluation of the

\textsuperscript{31} ibid.
\textsuperscript{32} Christophe Paulussen, \textit{Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court} (Intersentia 2010).
\textsuperscript{34} Zeegers (n 24).
Court’s practice against human rights standards (Chapter IV and V), this study seeks to further contribute to the conceptualisation of the ICC procedure as a unique, *sui generis* system, where a meaningful protection of defendants’ rights often demands creative solutions capable of addressing the questions that the human rights law paradigm leaves unanswered.

4. Structure of the study

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

Chapter II addresses the ICC dependence on cooperation from an institutional, a political and a normative dimension. It explores the salient features of the Court as an international organization founded by a treaty, and its relationship with the world in which it operates (namely, States Parties to the Rome Statute, States non-parties, and international organizations). Subsequently, the Chapter delves into the salient features of the Court’s cooperation regime. On the one hand, it considers some of the so-called ‘weaknesses’ of the regime, which derive from the consensual base upon which it lays. On the other hand, it addresses cooperation matters not foreseen in Part 9 of the Statute. In the last two sections, the Chapter addresses the politics of cooperation. First and foremost, it engages with the paradox of an independent Prosecutor who often finds himself/herself in the difficult position of having to investigate and prosecute the very national authorities on whose cooperation s/he depends; secondly, it addresses the means at the disposal of the Court in case of non-compliance by States,
showing that compliance with requests for cooperation is ultimately tied to State political willingness and international political pressure.

Chapter III delves into the connection between cooperation and jurisdiction. The complementarity nature of the ICC implies that the Court is allowed to step in only in case national authorities remain inactive or, where there are domestic proceedings, those authorities appear unwilling or unable to genuinely prosecute international crimes themselves.  

Cooperation with an international court that has a complementary jurisdiction unfolds differently, and poses unique challenges to the rights of defendants whose conduct the Prosecutor decides to investigate and charge. Complementarity is a principle that the Prosecutor has to respect while deciding whether to start an investigation and, once the investigation has been opened, in the selection of cases. On a practical level, the complementarity assessment implies communication with national authorities and a careful planning on whether and how to divide labour with them. The Chapter critically evaluates the ‘positive approach’ to complementarity endorsed by the Office of the Prosecutor in order to enhance states cooperation, highlighting the consequences that this has had for the selection of cases. Moreover, it scrutinises the judges decisions on the challenges to the admissibility of the case made by some accused.

The second part of the study addresses the impact that cooperation occurring in the above-explained context has on the selected rights of defendants. It analyses the Statute’s provisions on the right to liberty and the right to equality of arms, as well as the Court’s practice regarding

35 Article 17 of the Rome Statute.
36 Article 53 and 17 of the Rome Statute.
allegations of violations of these rights brought forward by some defendants.

Chapter IV addresses cooperation in relation to the right to liberty of defendants, particularly, their right not to be subject to arbitrary arrest and detention (i.e., habeas corpus rights). In addition, the Chapter considers the impact of cooperation on the possibility for the accused to be released pending trial. With respect to habeas corpus rights, the Chapter assesses whether the law and practice of the Court sufficiently acknowledge the position of suspects detained by national authorities throughout part of the ICC investigation, and the risks to their liberty that the division of labour between the Court and States entails. The Chapter scrutinises how the Prosecutor has intended his/her responsibility toward the suspect from the opening of a preliminary examination on a situation to the request of the issuance of an arrest warrant from the Pre-Trial Chamber. Subsequently, it criticises the way in which the judges have intended their supervisory role vis-à-vis the Prosecutor and national authorities, and their responsibilities in guaranteeing the right to liberty of defendants.

With respect to interim release, the Chapter measures the advanced protection afforded to this right by the Statute against the reality that States Parties are not obliged to accept provisionally released persons on their territories. The Bemba case (as well as the cases regarding the offences against the administration of justice related to it) demonstrate that, despite the protection afforded to this right ‘on paper’, the willingness of States to accept provisionally released persons on their territory is ultimately the only factor capable of ensuring the effectiveness of the right of suspects to be freed pending trial.
Chapter V addresses cooperation in relation to the principle of equality of arms. First, the Chapter explains the meaning of equality under international human rights law and highlights the difficulties in its implementation before international criminal tribunals, given the specific context in which they operate. Second, it moves on to assesses the structural inequality between the Prosecution and the Defence within the institutional framework of the Court and critically analyses the features of the ICC’s support structure for the Defence. Third, it assesses whether the law and practice of the Court endows the accused with ‘adequate time and facilities’\(^\text{37}\) for the preparation of his/her defence. On the one hand, the Chapter investigates whether the Statute endows the Defence with adequate means to conduct its own investigations and how the Court has interpreted the right to on-site investigations by the Defence. On the other hand, it assesses the way in which the Statute purports to remedy to the inequality between the parties by imposing an obligation of objectivity on the Prosecutor and by envisaging the assistance of the Pre-Trial Chamber with requests for cooperation of the Defence. Finally, the Chapter provides a brief account of the ICC disclosure system and considers whether the Prosecutor’s disclosure obligations can adequately balance the general disadvantage of the Defence in securing States cooperation.

Chapter VI summarizes the main findings and recommendations of the present study. In addition, it offers suggestions for possible avenues to further improve the Court’s engagement with the structural tensions and limitations of the Court, with a view of protecting the rights of suspects and accused.

\(^{37}\) Article 67(1)(b) of the Rome Statute.
Chapter II

THE ICC DEPENDENCE ON COOPERATION: INSTITUTIONAL NORMATIVE AND POLITICAL DIMENSION

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1. Introduction

This Chapter addresses some of the distinctive structural constraints that characterize proceedings at the ICC and, in particular, the functioning of cooperation. It is aimed at understanding in what way the unique institutional setting, normative framework and political context of the Court influence and shape cooperation before it. The overall goal of the Chapter is setting forth the background against which the selected rights of defendants (Chapter IV and V) will be assessed.

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

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

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

Another important distinctive feature of the Court relates to its ex ante nature. According to the definition given by Mahnoush Arsanjani and Michael Resiman, ex ante tribunals ‘are established before an international security problem has been resolved or even manifested itself, or are established in the midst of the conflict in which the alleged crimes

occurred’. Indeed, the Court’s permanent mandate covers international crimes committed after 2002, and thus necessarily extends to a number of different situations, each with its own geopolitical context and various interests at stake.

This also implies that the Court operates in an environment where other ‘political entities’ are dealing with the crisis so as to re-establish order, and that the Court’s ‘various options for decision may influence these political and often military actions’. In other words, the Court is exposed to politics in a new way.

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

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

4 ibid.
moves on to consider States not-party (section 3.2) and international organizations (section 3.3).

Finally, the Chapter addresses the politics of cooperation in the last two sections. Section 5 engages with the paradox of an independent Prosecutor who often finds himself/herself in the difficult position of having to investigate and prosecute the very national authorities on whose cooperation s/he depends. Section 6 addresses the means at the disposal of the Court in case of non-compliance by States, showing that compliance with requests for cooperation is essentially tied to State political willingness and international political pressure.

2. The ICC as an independent international organization

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

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6 See Article 112 of the Rome Statute. The ASP has adopted the Elements of Crimes pursuant to Article 9 of the Statute and the Rules of Procedure and Evidence pursuant to Article 51 of the Statute. It elects officials of the Court, approves its budget, and adopts amendments to the Rome Statute.
7 Pursuant to Article 34 of the Rome Statute, the Court is composed of four organs: the Presidency, the Judicial Divisions, the Office of the Prosecutor, and the Registry.
The present section addresses the significance of the nature of the Court as an international organization. In particular, it explores the relationship of the Court with the UN system and with the host State (the Netherlands). Moreover, it analyses the legal framework relating to the international legal personality and the treaty making powers, as well as the scheme of privileges and immunities of the Court.

2.1 The relationship with the UN system

Although the drafters of the Statute created the Court as a separate institution, placed outside of the UN framework and its political workings, they also realized that, to be effective, the Court would need the active support of the UN.\(^8\) Moreover, the ICC and the UN were expected to closely cooperate in order to reinforce the shared goal of preventing the future commission of international crimes, which obstruct the maintenance of international peace and security and, therefore, justice.\(^9\)

Article 2 of the Statute mandates that the Court be brought into relationship with the UN through an agreement. The Negotiated Relationship Agreement with the UN (NRA) was signed on 4 October 2004 by the President of the Court Philippe Kirsch, and the UN Secretary-General Kofi Annan.\(^10\) It provides for institutional relations, cooperation

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\(^10\) Negotiated Relationship Agreement between the Court and the UN, 4 October 2004.
and judicial assistance between the Court and the UN, establishing a ‘quasi-political’ relationship between the two organizations.\textsuperscript{11}

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

2.2 The Host State

Article 3(2) of the Statute mandates that the Court enters into a headquarters agreement with the State that hosts its premises, the Netherlands. The

\textsuperscript{11} Gallant (n 5) 567.

Headquarters Agreement between the Court and the Netherlands entered into force on 1 March 2008.\textsuperscript{13} It governs the legal status and juridical personality of the Court, its privileges and immunities, and the inviolability and protection of its premises. Chapter V of the Agreement deals with ‘cooperation between the Court and the Host State’. Among other things, it contains provisions on the issuance of visas and permits for officials of the Court and other participants in its proceedings, including witnesses, victims and experts.\textsuperscript{14} Special provisions govern the entry and legal status of accused persons, including their departure and return if granted interim release and their transfer to another State after the sentence of acquittal or conviction.\textsuperscript{15}

2.3 International legal personality and treaty-making powers

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

\textsuperscript{13} Headquarters Agreement between the International Criminal Court and the Host State, ICC- BD/04- 01- 08, 1 March 2008.
\textsuperscript{14} Section 2 of the Headquarters Agreement.
\textsuperscript{15} Articles 46-48 of the Headquarters Agreement.
personality, and all their international activities are attributed to the political organ that established them.\textsuperscript{17}

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

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

As opposed to the court-wide agreements concluded by the President on behalf of the Court, the agreements under Article 54(3)(d) are negotiated and concluded by the OTP. Consequently, the Prosecutor may enter into such arrangements also where a general framework agreement for

\textsuperscript{17} ibid 203.
\textsuperscript{18} Gallant (n 5) 553, 567.
cooperation already exists\textsuperscript{19} and is not obliged to inform the President of their conclusion for confidentiality reasons.\textsuperscript{20}

2.4 The Privileges and Immunities of the Court

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

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

\textsuperscript{19} Regulation 107(1) of the Regulations of the Court.
\textsuperscript{20} Regulation 107(2) of the Regulations of the Court.
\textsuperscript{23} ibid.
\textsuperscript{24} Phakiso Mochochoko, ‘The Agreement on Privileges and Immunities of the International
The legal framework is set forth by Article 48 of the Statute, integrated by the Agreement on the Privileges and Immunities of the Court (APIC). The latter is a separate international treaty drafted by the Preparatory Commission for the ICC (PrepCom), and approved in its final version by the ASP.25 Interestingly, the APIC is open to accession also for States non-party.26

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

The imbalance in favour of the Prosecutor is clear. While the protections for the former are clearly defined under international law – by the Statute referring to international law of diplomatic protection - immunities of counsel are contained in a separate treaty that is only binding

26 Article 34 of the APIC provides that the APIC is open to ‘all States’.
27 Article 48(1) of the Rome Statute.
28 Article 48(2) of the Rome Statute.
29 Article 48(3) of the Rome Statute.
30 Article 48(4) of the Rome Statute. It is also important to note that the Statute makes no reference to the protection of the persons assisting counsel and investigators.
on States that have ratified it. The consequence is that, not being enshrined in the Statute, defence counsel immunity does not automatically apply to all State Parties to the Statute. At the time of writing, only 75 out of 124 States have ratified the agreement; among the countries that have not ratified it are also Sudan, Kenya and Ivory Coast, on whose territory ICC investigations are currently on-going. This is regrettable, as an appropriate set of privileges and immunities of counsel and his/her team is crucial for the effectiveness of defence investigations, as counsel may need to travel to countries that are hostile to their clients (with whom they are likely to be associated) and to unsafe areas (such as refugee camps) where many potential witnesses might be found.

3. The relationship with the cooperating actors

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

The Court might also need to rely on States that, for whatever reason, have decided to remain uninvolved in its system. As Kenneth Gallant has pointed out, ‘the ICC, both as an international organization and as a judicial entity, exists as an independent creation in the international legal system, which can interact with non-party States, not merely with

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31 Mochochoko (n 24) 654; Nilsson (n 22) 562–565.
33 Beresford (n 21) 126.
those that have created it.’34 In this respect, the relationship between the Court and States that did not accede to its Statute is far more important to the ICC than to the ICTY and ICTR. Given the quasi-universal nature of the UN Charter, the question of cooperation with states not parties was not of great significance at the ad hoc Tribunals.35

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

3.1 States Parties

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

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

34 Gallant (n 5) 568.
35 Astrid Reisinger-Coracini, ‘Cooperation from States and Other Entities’ in Göran Sluiter and others (eds), International Criminal Procedure: Principles and Rules (Oxford University Press 2013) 101.
37 Article 15(3) of the Rome Statute.
their nationals.\(^{38}\) The only exception is contained in Article 13(b) of the Statute, which provides for jurisdiction irrespective of the ratification of the Statute when the Security Council has referred the situation to the Court.

A major part of the provisions concerning investigations is embodied in Part 5 of the Statute,\(^{39}\) in which the rules regarding the commencement of investigations and prosecution of the suspect are set forth. Part 5 governs the internal part of investigation proceedings, addressing them from the perspective of prosecutorial powers. Part 9\(^{40}\) complements it by governing the external part of the Court’s procedure, that is, the obligations to cooperate incumbent on States Parties.\(^{41}\) Part 5 and 9 of the Statute, thus, must be read in conjunction.

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

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38 Article 12 of the Rome Statute.
39 Articles 53 to 61 of the Rome Statute.
40 Articles 86 to 102 of the Rome Statute.
41 Reisinger-Coracini (n 35) 95.
the authority to activate the cooperation regime enshrined in Part 9. Rule 176 RPE specifies that the OTP, as an independent organ of the Court, can communicate directly with States and intergovernmental organizations.43

Article 86 of the Statute obliges State Parties to cooperate fully with the Court in its investigations and prosecutions. State Parties are obliged to comply with requests for the types of assistance listed in Article 93(1), sub-paragraphs (a)-(k),44 and with any other type of requested assistance unless it is prohibited by the law of the State Party.45 Moreover, pursuant to Articles 89-92, they must comply with the requests for arrest and surrender of individuals. The obligation to cooperate also entails an obligation to adopt procedures under national law that will render such cooperation effective, giving States the means to comply with the Court’s requests.46

3.1.1 Beyond the ‘horizontal’ v. ‘vertical’ classification of the cooperation regime

As was the case with the ad hoc Tribunals, the ICC cooperation regime is a vertical one, in the sense that the Court is a supra-national institution in a hierarchical relationship towards national authorities.47

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43 Rule 176(2) RPE reads: ‘the OTP shall transmit the requests for cooperation made by the Prosecutor and shall receive the responses, information and documents from requested States and international organizations’. The same is true for international organizations under paragraph 4 of the same Rule.
44 This assistance includes the taking of witness statements, the service of documents or the execution of searches and seizures.
45 Article 93(1)(l) of the Rome Statute.
46 Article 88 of the Rome Statute.
subpoena decision, the Appeals Chamber of the ICTY clarified the distinction between the horizontal nature of inter-state cooperation and the vertical nature of cooperation with the Tribunals.

In the horizontal relationship between sovereign States, cooperation is not mandatory in the absence of a treaty to that effect. In other words, general international law does not establish an obligation on States to assist each other in international criminal matters.

Conversely, the Tribunals have the power to issue binding orders to States requesting their assistance, and States have an ensuing obligation to provide it. The duty of States to cooperate with the Tribunals is unconditional and absolute, as they may not invoke national interests, national law or competing obligations under international law as grounds for refusing to cooperate. More broadly, the vertical cooperation scheme is defined by stricter obligations, non reciprocity, and the right of the requesting party to interpret and determine the content and scope of a request for cooperation.

The verticality of the ad hoc Tribunals, however, is different from that of the ICC, and this has to do with the different source and legal base from which such verticality stems. The ICTY and ICTR cooperation regime draws upon the Tribunals’ status in the United Nations system. The Tribunals were established as subsidiary organs of the Security Council under Chapter VII of the UN Charter, as a means to restore international


\(^{50}\) ibid.

\(^{51}\) Reisinger-Coracini (n 35) 96–98.

\(^{52}\) ibid.
peace and security. Decision under Chapter VII are legally binding on all members of the UN pursuant to Articles 25 and 103 of the Charter, and requests for cooperation of the Tribunals ‘shall be considered to be the application of an enforcement measure under Chapter VII of the UN Charter’. In other words, the obligation to cooperate is an obligation placed, by the Security Council, on all UN members. The strictly vertical cooperation regime of the Tribunals corresponds to the general principle governing their jurisdiction, that is, the one of primacy over national courts.

Conversely, the ICC was established by a treaty negotiated by States and open to global accession. This means that ICC’s cooperation regime rests on a consensual basis. Therefore, it is limited and opposable primarily only to States Parties to the Statute. This entails two consequences. On the one hand and consistent with the law of treaties, the Rome Statute does not create obligations for States that are not party to it. On the other hand, it foresees more concessions to the sovereignty of States and contains some exceptions from the duty to cooperate fully with the

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53 Article 39 of the UN Charter.
54 Report of the Secretary General to the Security Council on the establishment of the ICTY, S/25704, 126. In accordance with the Security Council resolutions establishing the Tribunals (SC Res. 827/1993 for the ICTY and SC Res. 955 /1994 for the ICTR) and with Articles 29 and 28 of the Tribunal’s Statutes, all UN member states shall cooperate fully with the Tribunals and their organs, and shall comply with requests for assistance or orders issued by a Trial Chamber.
This corresponds to the general principle that the Court is complementary to national courts, which are vested with the primary right and obligation to prosecute international crimes.

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

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

Distinguishing between the vertical and the horizontal features of the cooperation regime is a useful descriptive tool of the normative framework of the Court. However, it must be pointed out from the outset that the effectiveness of States’ cooperation with the ICC does not depend entirely on (nor is undermined solely by) such features of the regime. It has rightly been argued that ‘[t]he usefulness of distinguishing between horizontal and vertical powers breaks down (...) where the requested State ceases to

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58 Reisinger-Coracini (n 35) 96–98.
59 Swart (n 56) 1594.
61 Swart (n 56) 1591; Sluiter and Swart (n 49) 97–105; Sluiter, International Criminal Adjudication and the Collection of Evidence (n 42) 87.
engage with the Tribunal or refuses to cooperate’. 62 This is because both the vertical and the horizontal model of cooperation hinge on an indirect enforcement system, in which compliance with the cooperation obligations depends primarily upon extra-judicial factors. 63

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

3.1.2 Execution of requests for assistance

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

63 Cryer and others (n 55) 528; Annalisa Ciampi, ‘Legal Rules, Policy Choices and Political Realities in the Functioning of the Cooperation Regime of the International Criminal Court’ in Olympia Bekou and Daley Birkett (eds), Cooperation and the International Criminal Court: Perspectives from Theory and Practice (Brill 2016) 7–57.
64 Rastan (n 62) 166.
65 Reisinger-Coracini (n 35) 98.
66 Swart (n 56) 1595.
Pursuant to Article 99(1), ‘requests for assistance shall be executed in accordance with the relevant procedure under the law of the requested State’. The ICC, thus, depends on the law of the requested state for the execution of a request for assistance. The same provision, however, allows the Prosecutor to require specific modalities of execution, including the permission for staff of the OTP to be present and assist during the carrying out of an investigative act by national authorities (for example, the exhumation of a grave site or the questioning of a witness). The procedure outlined in the request will have to be followed by the State unless its national law explicitly prohibits doing so.

According to an Expert Paper commissioned by the OTP, ‘the Prosecutor should take full advantage of this exhortation, setting out in each request the manner in which the request should be executed, including with the direct participation of his staff and, if appropriate, defence counsel.’

3.1.3 The limited access to States territories

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

Unlike the Statutes of the *ad hoc* Tribunals, which expressly lay down the power of the Prosecutor to conduct on-site investigations, the

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68 Article 18(2) ICTY Statute and Article 17(2) ICTR Statute. According to Cryer (n 55) 525, while doing so, the Prosecutor may seek assistance from State authorities, but their
Rome Statute does not give the Prosecutor a general power to access the territory of States and collect evidence autonomously.\textsuperscript{69} This emerges clearly from Article 54(2) of the Statute. This provision empowers the Prosecutor to conduct investigations on the territory of a State according to two procedures: first, in accordance with the provisions on cooperation under Part 9 of the Statute; second, in the circumstances of the so-called ‘failed state scenario’ under Article 57(3)(d), subject to the authorization of the Pre-Trial Chamber. As will be seen, this latter circumstance is rather exceptional, as it presupposes the total collapse of the institution of a State.

Considering the importance of on-site investigations, the scope under the Statute is very narrow and reflects the horizontal approach to cooperation; the ICC is seen as a separate entity, not an extension of the national jurisdiction, and the Court’s activities on the State territory are therefore an intrusion on the sovereignty of the State.\textsuperscript{70} As will be seen, the Prosecutor’s power to access States Parties’ territory is limited and always mediated by the cooperation of the national authorities, subject to the only exception of the failed state scenario. As a rule, investigations are conducted by States, who either collect evidence on behalf of the Prosecutor or assist the OTP staff in the performance of the investigative activities. Article 99(4) foresees a partial exception to this scheme, in that it empowers the

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prosecutor to conduct certain investigative acts on the territory of States. However, this power is confined to non-compulsory measures such as taking voluntary witness statements, and may require consultations and sometimes adherence to reasonable State-imposed conditions.

3.1.3.1 On-site investigations

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

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

modification.

Interviews with people and access to sites are an important part of an investigation. As of the first, the Prosecutor may only speak to people who agree to be interviewed and the exclusion of national authorities will only be possible if this is ‘essential’ for the execution of the request (i.e. most likely when a witness is intimidated by national authorities and refuses to speak in their presence).\(^{72}\)

The examination without modification of a public site or consists in the mere visit to a site without the possibility of collecting material evidence and having it examined or tested. The only activities that can be carried out, therefore, are the filming or the picture taking of the site. It follows from the clear wording of Article 99(4) that in no case national authorities can be excluded from the carrying out of these operations, and in no case can the Prosecutor access private premises without the authorization of the local authorities.

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

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\(^{72}\) Kress and Prost, ‘Article 99’ (n 71) 1626.

\(^{73}\) Kaul and Kress (n 71) 169.
Consequently, the State may not impose ‘unreasonable’ conditions and in particular those contrary to the express terms of Article 99(4) (i.e., requiring the presence of officials of the State during a witness interview).\textsuperscript{74}

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

3.1.3.2 The failed state scenario

The only situation in which the Prosecutor may take ‘specific investigative steps’ on the territory of a State outside of the cooperation regime is the one of the ‘failed state’, that is, a State whose institutions have collapsed and has lost control over its territory. Pursuant to Article 57(3)(d), however, such investigative steps must be authorized by the Pre-Trial Chamber, which must be satisfied that the State is ‘clearly unable’ to execute a request for assistance due to the ‘unavailability of any authority or any component of its judicial system competent to execute the request’.

According to Rule 115 RPE, the Prosecutor’s request for authorization under Article 57(3)(d) shall relate to specified investigative acts (‘certain measures’). This leaves no room for the authorization of vague

\textsuperscript{74} Broomhall et al., ‘Informal Expert Paper’ (n 67) 70.

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

\textsuperscript{76} Broomhall et al., ‘Informal Expert Paper’ (n 67) 14.
and unspecified investigative measures.\textsuperscript{77} Upon receiving the request, the Pre-Trial Chamber shall, ‘whenever possible’, seek the view of the State concerned, so that it can be taken into account in arriving at its determination.\textsuperscript{78} The Pre-Trial Chamber’s authorization takes the form of an order and may specify the procedure to be followed in carrying out the collection of evidence.\textsuperscript{79} Notably, given the breakdown of any authority to whom a request of assistance could be directed, the sole legal basis for the execution of the measure will be the authorization of the Pre-Trial Chamber.

Regarding the type of measures that can be executed on the territory of a ‘failed state’, it appears that, as opposed to Article 99(4), the Prosecutor may carry out directly any measures that are authorized by the Pre-Trial Chamber, including compulsory measures that would normally require a judicial authorization in the requested state (i.e. searches and seizures, exhumation of mass graves, interception of communications etc.).\textsuperscript{80} Even though a draft provision that explicitly allowed the Prosecutor to execute coercive measures in the territory of a failed state has been removed from the Statute, denying him/her such a power would seriously hamper the effectiveness of on-site investigations in these scenarios.\textsuperscript{81} As has been noted, Article 57(3)(d) represents the only exception to the principle of State consent under the Statute with respect to the enforcement of compulsory measures, which aims to remedy the void created by the absence of a


\textsuperscript{78} Rule 115(1) and (2) RPE.

\textsuperscript{79} Rule 115(3) RPE.

\textsuperscript{80} Kress and Prost (n 75) 1625, footnote 5; Alamuddin (n 69) 247; Sluiter (n 48). See also Broomhall et al. (n 67) 77.

\textsuperscript{81} Sluiter, \textit{International Criminal Adjudication and the Collection of Evidence} (n 42) 311.
domestic authority competent to authorize the measure itself.  

The stringent conditions imposed by Article 57(3)(d) are unlikely to manifest themselves in practice, even in the war-torn countries that capture the attention of the ICC Prosecutor. To date, the Prosecutor has never sought the authorization of the Pre-Trial Chamber under this article.

3.1.4 The limited power to compel witnesses to testify

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

82 Rastan (n 57) 438; Kress and Prost, ‘Article 99’ (n 71) 1625.
83 See Rastan (n 57) 438, noting that this provision does not apply when a State able, but unwilling, to cooperate. In such case the Court would only be empowered to refer the matter to the ASP or the UN Security Council.
84 Article 93(7)(a)(i) of the Rome Statute.
According to many, these provisions clearly show that the Statute does not endow the Court with *subpoena* powers to compel the attendance of witnesses before it. This has been described as a ‘serious weakness within a system of international criminal justice wherein the Court lacks direct enforcement power, while being built upon the aspiration that the testimony of a witness at trial shall be given in person’. One scholar went as far as saying that this system entails, on top of the absence of a State duty to compel a witness to appear and testify before the Court – an individual right of persons not to do so. The prevailing opinion, however, seems to be that, pursuant to Article 64(6)(b) of the Statute, the Court can indeed create an obligation of persons to appear and testify before it, but States do not have a duty to enforce such obligation.

Recently, the Court intervened on the matter. On 17 April 2014, the Trial Chamber granted the Prosecutor’s request to *subpoena* eight witnesses to appear before the Court in the trial of the case against Samoei William Ruto and Joshua Arap Sang (situation in Kenya).

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85 The term ‘subpoena’ refers to the legal mechanism to compel testimony by a witness or production of evidence throughout the common law systems; civil law countries refer to this mechanism as ‘citation’ or ‘witness summons’.
87 Claus Kress and Kimberly Prost, ‘Article 93’ in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn, Beck/Hart 2008) 1576. See also Article 69(2) of the Statute providing that the testimony of witnesses shall be given in person at the seat of the Court.
88 Sluiter, *International Criminal Adjudication and the Collection of Evidence* (n 42) 254, 346ss.
89 Kress and Prost, ‘Article 93’ (n 87) 1577.
90 Prosecutor v. Ruto and Sang, TC V(A) Decision on Prosecutor’s Application for Witness Summonses and Resulting Request for State Party Cooperation, ICC-01/09-01/11-1274-
Prosecution, those eight witnesses were no longer cooperating or had informed the Prosecution that they were no longer willing to testify.

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

The Appeals Chamber upheld the judgment of the Trial Chamber, however, it significantly restricted its scope. It first clarified that the question on appeal was not the *general* power of the Court to compel witnesses to come before it, as the Trial Chamber had implied, but whether the Court could summon unwilling witnesses to testify sitting *in situ* within Kenya or by way of video link to the ICC’s seat in the Netherlands.

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91 ibid., Trial Chamber Decision, 124.
92 ibid.
93 ibid., 157ss.
95 ibid., Appeal Judgment, 31. See also Jalloh (n 94) 612.
Second, the Appeals Chamber addressed the question of whether Kenya was obligated to cooperate by serving summonses issued by the Court, and whether it was required to assist the Court through coercive powers to facilitate the witnesses’ appearance in situ or through video link.96

The Appeals Chamber rejected the defence argument that under Article 91(1)(e) States are required to abide by an ICC order only when the witness chooses to give testimony voluntarily.97 The Chamber explained that the drafting history of that clause makes clear that the term ‘voluntary’ had been inserted to accommodate the concerns of the countries in which it was not constitutionally permissible to force witnesses to travel to another country to give testimony.98 However, the preparatory works revealed that negotiators had discussed alternative methods, such as in-country testimony and video link, by which the ICC could receive testimony from a witness who was unwilling to engage in overseas travel.

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

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96 ibid., 114, 115. See also Jalloh (n 94) 612.
97 ibid., 115.
98 ibid., 118-119.
99 ibid., 120.
3.1.5 Cooperation not foreseen in the Statute

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

As will be seen in Chapter IV, the absence of an obligation on States to allow interim released persons on their territory can *de facto* impede the realisation of the right to liberty of the accused. Regrettably, to date, only Belgium has entered into an agreement on interim release with the Court.\(^{100}\)

Slightly more hopeful is the situation concerning the other forms of voluntary cooperation. To date, fifteen States have entered into witness relocation agreements and eight have signed an agreement on the enforcement of sentences with the Court.\(^{101}\) In this respect, it is important to remind that States always retain the discretion to enter into voluntary cooperation agreements, and to make a final decision whether or not to accept a specific person (be him/her a witness, an accused or a sentenced person).

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

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

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

\textsuperscript{102} ibid., 20.
\textsuperscript{104} ICC, Report of the Court on cooperation, ICC-ASP/13/23, 23 October 2014, 49.
\textsuperscript{105} ibid.
3.2 States non-party

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

The Statute, however, foresees several ways in which States non-party might become engaged with the Court. First, Article 12(3) provides that third States may accept the jurisdiction of the Court with regard to a particular crime filing an ad hoc declaration to that end. In such case, they ‘shall cooperate fully with the Court without undue delay or exception in accordance with Part 9’. A State not party accepting the Court’s jurisdiction, thus, is considered equivalent to a State Party for cooperation purposes.

Second, pursuant to Article 87(5)(a), ‘[t]he Court may invite any State not party to this Statute to provide assistance (…) on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis’. The word ‘invite’ shows that cooperation by non-party States is

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107 Article 34 of the Vienna Convention.
109 An example of such agreement is the one concluded in October 2005 between the OTP and the State of Sudan for the execution of the arrest warrants against the members of the Lord Resistance Army, a rebel group believed to be the most responsible for international crimes committed in Uganda. See OTP, ‘Report on the Activities Performed During the First Three Years’ (2006) 36. With respect to evidence gathering, agreements with States not party may include provisions related to access to or collection of evidence on their territory. To date, there is no public information available with respect to such agreements.
entirely ‘voluntary’ in nature. The commentators noted that, in these cases, the third State concerned has a strong negotiation position, in that it can decide the type and the degree to which cooperation with the Court would be provided. To date, there is hardly any public information available with respect to the conclusion of such agreements.

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

One of the problematic aspects of these referrals concerns the scope of the duties of cooperation arising out of them. Referrals are an enforcement measure of the Council under Chapter VII and thus, in

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112 In 2005 the OTP concluded an ad hoc agreement with Sudan regulating cooperation in the arrests of the LRA leaders in the Uganda Situation. See OTP, ‘Report on the Activities Performed during the First Three Years’ (2006), 36. In 2007, however, Sudan withdrew from the agreement following the first ICC arrest warrant in the Darfur cases, see Patrick S. Wegner, further footnote 118.
principle, they are binding on all UN members. In its current practice, however, the Council has limited the obligation to cooperate with the Court only to the States concerned by the referral.

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

3.3 International organizations

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

116 Pursuant to Article 25 of the UN Charter, all decisions made by the UN Security Council are binding upon all UN member States.
First and foremost, international forces deployed in conflict and post conflict situations - such as UN or EU peacekeeping missions, and AU troops- could be the only entities capable of enforcing arrest warrants without the involvement of States. More broadly, UN missions and NGOs operating on the territories where crimes occurred are a crucial source of information and evidence for the Court. Given the constraints on its time and resources, the Prosecutor needs to build partnerships with local actors who understand the geography of the region, have access to the local networks, and are able to provide logistical support, as well as facilitate the access to evidence and witnesses.

The Court, thus, would greatly benefit from the cooperation of international or regional forces that are already deployed on the territory with peacekeeping or law enforcement functions. However, the normative framework of the Statute regulating the relationship between the Court and international organizations does not facilitate the obtaining of such assistance. In this respect, it will be seen that the Rome Statute clearly departs from the *ad hoc* Tribunals’ regime.

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

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121 Zhou (n 119) 204.
122 SFOR is the legal successor to the NATO-led Implementation Force (IFOR), which was deployed to enforce the provisions of the Dayton Peace Agreement of 14 December 1995.
As the judges stated: ‘a purposive construction of the Statute yields the conclusion that [an order of the Tribunal] should be as applicable to collective enterprises of States as it is to individual States (…) There is no reason why Article 29 should not apply to collective enterprises undertaken by States, in the framework of international organizations and, in particular, the competent organ such as SFOR (i.e., the NATO force deployed in Bosnia Herzegovina’).¹²³

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

3.3.1 The normative framework of the Statute

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

Pursuant to Article 15(2) and Rule 104 RPE, the Prosecutor may, even before the commencement of an investigation, seek information from

¹²³ ICTY, Prosecutor v. Milan Simić, TC Decision on Motion for Judicial Assistance to be Provided by SFOR and Others, IT-95-9-PT, 18 October 2000, 46-49. See also Reisinger-Coracini (n 35) 103.
¹²⁴ Zhou (n 119) 204–205.
¹²⁵ Cryer and others (n 55) 517.
¹²⁶ For a detailed overview see Zhou (n 119) 201ss.
‘organs of the United Nations, intergovernmental or non-governmental organizations’ that will assist him in determining whether there is a reasonable basis to initiate the investigation. Once the investigation has started, Article 54, dealing with the duties and powers of Prosecutor, states that the Prosecutor may: i) seek the cooperation of any State or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate;\(^\text{127}\) ii) enter into such arrangements or agreements, not inconsistent with the Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person.\(^\text{128}\)

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

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

From this provision it follows that international organizations are not obliged to cooperate with the Court.\(^\text{129}\) As is the case with non-party States,

\(^{127}\) Article 54(3)(c) of the Rome Statute.

\(^{128}\) Article 54(3)(d) of the Rome Statute.

\(^{129}\) Claus Kress and Kimberly Prost, ‘Article 87’ in Otto Triffterer (ed), *Commentary on the*
cooperation by international organizations is voluntary, and its terms are left to the agreements between the Court and the respective organization.\textsuperscript{130} This is also confirmed by the fact that, whereas Article 87(7) empowers the Court to make a finding of non-compliance when States Parties do not comply with its requests and refer the matter to the ASP or the Security Council, Article 87(6) does not foreseen a similar power with respect to international organizations.\textsuperscript{131} Moreover, the cooperation and assistance that the organization provides to the Court must be explicitly envisaged in the organization’s mandate.

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

In addition to the Agreement with the UN, formal cooperation agreements have been concluded with the European Union (EU)\textsuperscript{132} and Interpol. The cooperation agreement with the EU marks the first time a regional organization has ever signed such an agreement with the Court. The agreement underlines a general obligation to cooperate and provide assistance to the Court through, for example, a regular exchange of

\textsuperscript{130} Reisinger-Coracini (n 35) 103.
\textsuperscript{131} Zhou (n 119) 212–213.
\textsuperscript{132} EU-ICC Cooperation and Assistance Agreement, 10 April 2006. Available at: https://www.icc-cpi.int/NR/rdonlyres/6EB80CC1-D717-4284-9B5C-03CA028E155B/140157/ICCPRES010106_English.pdf.
information,\(^{133}\) cooperating with and providing information to the Prosecutor,\(^{134}\) the development of training and assistance for Court’s officials and counsel\(^{135}\) and to take the necessary measures to waive any privileges and immunities of alleged criminals responsible for a crime within the jurisdiction of the Court.\(^{136}\) Further to the EU-ICC Cooperation and Assistance Agreement, a EU-ICC Implementing Arrangements was finalized in March 2008 for the exchange of classified information.\(^{137}\)

The OTP has also entered into a cooperation agreement with Interpol in 2004, for the exchange of police information and criminal analysis, as well as the search for fugitives and suspects.\(^{138}\) The agreement further gives the Prosecutor access to the Interpol telecommunications network and databases. Since, to date, nine out of ten ICC investigations concern African States, a similar cooperation agreement with the African Union would be extremely important. The current political situation, however, does not leave much hope. Increasingly, African countries have come to be critical of the ICC because of the perceived bias that the Court focuses only on Africa and the perceived threats to their sovereignty following the issuance of arrest warrants against some African heads of States.\(^{139}\) The African Union has gone so far as to ask member countries to implement a policy of non-

\(^{133}\) Article 7 EU-ICC Cooperation Agreement.
\(^{134}\) Article 11 EU-ICC Cooperation Agreement.
\(^{135}\) Article 15 EU-ICC Cooperation Agreement.
\(^{136}\) Article 12 EU-ICC Cooperation Agreement.
\(^{137}\) Security Arrangements for the Protection of Classified Information Exchanged Between the EU and the ICC, 15 April 2008.
compliance and non-cooperation with the ICC and has attempted (unsuccessfully) to withdraw from the Rome Statute.\(^\text{140}\)

3.3.2 Cooperation with peacekeeping missions

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

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

These provisions have been the legal base for the conclusion of a number of subsidiary agreements, in the form of Memoranda of Understanding (MoU),

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


\(^{142}\) Article 18(4) of the Negotiated Relationship Agreement.
between the Court and several UN peacekeeping missions operating on the territories subject to the Prosecutor’s investigations, such as MONUSCO (previously called ‘MONUC’) in the DRC\textsuperscript{143} and the United Nations Operation in Côte d’Ivoire (UNOCI).\textsuperscript{144} A Memorandum of Understanding with MINUSMA- the United Nations Multidimensional Integrated Stabilization Mission in Mali - was signed on 20 August 2014.\textsuperscript{145} Since the MoU with MONUSCO is the only agreement that has been disclosed to the public, the following subparagraphs will refer to it in discussing the cooperation of peacekeeping missions in ICC investigations.\textsuperscript{146}

Before moving on with the discussion, it is important underscore the importance of including a Defence perspective in the cooperation agreements negotiated by the Court. Specific provisions related to cooperation with the Defence have been systematically included in agreements with the UN, its specialized agencies and other partners. In the Memorandum of Understanding concluded with MONUC provisions apply to the OTP and the Defence in the areas of witnesses’ tracing, interviews and preservation of evidence. According to Articles 13(1) (4) and 15(1)(5) of the Agreement, MONUC may provide assistance to the Defence in identifying, tracing and locating witnesses, as well as in storing physical evidence, pursuant to an order of the Pre-Trial or Trial Chamber. The same

\textsuperscript{143} MOU ICC-MONUSCO in DRC, 8 November 2005.
\textsuperscript{144} ASP, Report of the Court on the status of on-going cooperation between the International Criminal Court and the United Nations, including in the field, ICC-ASP/12/42, 14 October 2013, 20. The MoU between the ICC and UNOCI was concluded on 12 June 2013.
\textsuperscript{145} ASP, Report on the activities of the International Criminal Court, ICC-ASP/13/37, 19 November 2014, 73.
\textsuperscript{146} For a detailed overview see Melillo (n 141).
provisions were included in the MoU with ONUCI (Côte d’Ivoire) and MINUSMA (Mali).  

3.3.3. The MoU with MONUSCO in the DRC

As has been seen, the power to carry out arrests or investigations on behalf of the Court must be explicitly envisaged in the UN mission’s mandate. So far, this has happened only in the context of proceedings before the Special Court of Sierra Leone (SCSL), where the Security Council explicitly mandated a UN peacekeeping force to arrest a suspect of an international crime (Charles Taylor).

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

The MoU between the ICC and MONUSCO foresees the assistance of the Mission, inter alia, in tracing witnesses, preserving physical evidence, and preparing for the transfer of accused persons to the ICC. This cooperation is crucial for ensuring the effective prosecution of those accused of war crimes and other international crimes. It reflects a growing recognition within the UN system of the need for international criminal tribunals to be supported by robust and effective peacekeeping forces.
evidence, carrying out arrests, searches, seizures and securing of crime scenes.\textsuperscript{152} However, it does not envisage the OTP directly requesting the aid of MONUSCO, but instead, views the territorial State (DRC) to be the party with the obligation to request support to the Mission.\textsuperscript{153} In other words, the enforcement powers of MONUSCO are made available at the request of the DRC Government, rather than that of the ICC.\textsuperscript{154}

Moreover, cooperation can take place only following a request by the Court and prior written consent from the Government of the DRC, the MoU reserving ample flexibility for MONUSCO to consider such requests on a case by case basis (taking issues of security, operational priorities, consistency of the requested measure with its mandate, as well as the capacity of the DRC authorities themselves to render the assistance sought). From this it follows that cooperation between the ICC and MONUSCO is conditional, indirect and inherently limited.\textsuperscript{155}

In 2013, however, the Security Council revised the mandate of MONUSCO following a new escalation of violence that took place in the country in 2012. With Resolution 2098/2013, the Security Council authorised the formation of ‘Intervention Brigades’, empowered to provide more proactive assistance to the Court.\textsuperscript{156} Moreover:

\begin{quote}
[it] authoris[ed] MONUSCO, through its military component […] to take all necessary measures to […] [s]upport and work with the Government of the DRC to arrest and bring to justice those responsible
\end{quote}

\textsuperscript{152} See Articles, 13, 15 and 16 of the MoU between MONUC and the ICC.
\textsuperscript{153} Submission of additional information on the status of the execution of the warrants of arrest in the situation in Uganda, 8 December 2006, ICC-02/04-01/05, 14.
\textsuperscript{154} Swaak-Goldman (n 151) 267.
\textsuperscript{155} Bekou (n 9) 112.
\textsuperscript{156} UN SC Resolution 2098 (28 March 2013) UN Doc S/RES/ 2098, 9.
for war crimes and crimes against humanity in the country, *including through cooperation with […] the ICC.*\(^{157}\)

As argued by Melillo, ‘this new explicit mandate sounds revolutionary’.\(^{158}\) According to her, MONUSCO is no longer prevented from entering into direct contact with the Court without having to seek an explicit authorisation from the Government.\(^{159}\)

Although the Resolution 2098 makes clear that the creation of ‘Intervention Brigades’ in the DRC was ‘on an exceptional basis and without creating a precedent or any prejudice to the agreed principles of peacekeeping’,\(^{160}\) in 2014, the Council established the UN Multidimensional Integrated Stabilisation Mission (MINUSCA)\(^{161}\) in the Central African Republic (CAR). One of the ‘priority tasks of this mission is:

Support[ing] and work[ing] with the Transnational Authorities to arrest and bring to justice those responsible for war crimes and crimes against humanity in the [CAR], *including through cooperation with States of the region and the ICC* [emphasis added].\(^{162}\)

This mandate, thus, significantly strengthens the UN-ICC cooperation regime in the CAR. It has been argued that this suggests an evolving pattern

\(^{157}\) ibid., 12. This mandate was extended until 31 March 2015 by UN SC Resolution 2147 (28 March 2014) UN Doc S/RES/2147.

\(^{158}\) Melillo (n 141) 780.

\(^{159}\) ibid.

\(^{160}\) UN SC Resolution 2098 (28 March 2013) UN Doc S/RES/2098, 9.

\(^{161}\) UN SC Resolution 2149 (10 April 2014) UN Doc S/RES/2149.

\(^{162}\) ibid., 30(f)(i).
in the way in which the Security Council envisages the fulfilment of its obligation to cooperate with the Court under the Rome Statute and the UN-ICC NRA.\textsuperscript{163}

3.4 Final Remarks

As noted by the Court in its Report to the ASP on the status of on-going cooperation with the UN, the ability to frame and carry out broader, more proactive mandates requires a willingness to cooperate not only on the part of the UN and the ICC but also from the situation-State.\textsuperscript{164} This system may work well in case the State is willing to cooperate, as is the case with the DRC or the CAR.

However, once can see the shortcomings of this system in situations where the UN mission is deployed against the will of local authorities, and where the government opposes the intervention of the ICC. This is the situation of Sudan. There, any links between the ICC and the international peacekeeping mission (UNAMID) have been avoided and UNAMID’s mandate contains no reference to international criminal investigations or prosecutions.\textsuperscript{165}

Regrettably, there is no legal basis in the Statute for a direct transfer of suspects from international custody to the seat of the ICC.\textsuperscript{166} In this situation, for the ICC is extremely difficult to gain custody of suspects in the absence of the cooperation of the territorial State. A possible solution

\textsuperscript{163} Bekou (n 9) 113.
\textsuperscript{165} Cryer and others (n 55) 517.
\textsuperscript{166} Ryngaert (n 120) 42.
would be that international forces obtain the transfer of the arrestee in a State that is willing to cooperate and surrender the person to the Court.\textsuperscript{167} This, however, would arguably give raise to concerns with respect to the rights of defendants, especially in relation to \textit{male captus, bene detentus} issues.\textsuperscript{168}

4. The politics of prosecutions

The independence of the Prosecutor is crucial for guaranteeing the right to a fair trial. Article 42(1) of the Statute affirms the principle of prosecutorial independence in stating that the OTP ‘shall act independently as a separate organ of the Court’ and that ‘a member of the Office shall not seek or act on instructions from any external source’. According to this definition, prosecutorial independence relates to both the institutional division of powers within the Court (internal independence) and the relationship of the Prosecutor with States and international organizations, first and foremost, the Security Council (external independence).\textsuperscript{169} Clearly, the latter is the most delicate and difficult to safeguard, due to the very nature of international criminal prosecutions, which usually concern perpetrators who hold top-level positions in the institutional or military hierarchy of a State. In order to protect the external independence of the Prosecutor, the Statute has endowed her/him with a considerable degree of discretion.

\textsuperscript{167} ibid.
Prosecutorial discretion has been described as ‘the cornerstone of prosecutorial independence’, in that it is indispensable for holding perpetrators accountable, irrespective of their position in the political or military hierarchy of States and regardless of the interests involved in their prosecution.\textsuperscript{170} Prosecutorial discretion relates to the choice of the situations over which the investigation is commenced, and, subsequently, to the selection of persons to investigate and prosecute within the situation selected. In this respect, it must be reminded that the jurisprudence of the Court distinguishes between ‘situations,’ which may be defined in terms of temporal, territorial or personal parameters, and ‘cases,’ which comprise specific incidents within a given ‘situation’ during which one or more crimes within the jurisdiction of the Court may have been committed, and whose scope are defined by the suspect under investigation and the conduct that gives rise to criminal liability under the Statute.\textsuperscript{171}

Pursuant to Article 15 of the Statute, the Prosecutor has the power to initiate criminal proceedings \textit{proprio motu}, subject to judicial authorization. In addition to a State or the Security Council referring situations to the Court, thus, the ICC intervention can be triggered by the Court itself through the decision of its Prosecutor, sanctioned by the Pre-Trial Chamber. This is an unprecedented power for an international criminal prosecutor and, undoubtedly, the most difficult compromise reached at the Rome Conference.\textsuperscript{172}

\textsuperscript{170} ibid 76.
In practice, this provision entitles the Court to act and request cooperation from States even in situations and cases where States or the Security Council have not requested its intervention, and thus, possibly, even when they are hostile to it. Such capacity significantly distances the Court from all the previous international criminal justice experiences, which operated in execution of a specific mandate from a political body.

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

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

With respect to the principle of independence, the OTP made clear that ‘[i]ndependence goes beyond not seeking or acting on instructions: it means that decisions shall not be influenced or altered by the presumed or known wishes of any party, or in connection with efforts to secure cooperation’. This also means that where a referral or a communication

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173 Rastan (n 62) 165.
174 As Rod Rastan has noted ‘the ability of the ICC to act independent of prior political sanction represents significant challenge to state-centric assumptions of world order’, see ibid.
175 Within the temporal frame set by the Statute at Article 11, i.e., after 2002.
under Article 15 is accompanied by documentation that identifies potential perpetrators, ‘the Office is not bound or constrained by the information contained therein when conducting investigations in order to determine whether specific persons should be charged’.\(^{178}\) With respect to impartiality, ‘the Office will examine allegations against all groups or parties within a particular situation to assess whether persons belonging to those groups or parties bear criminal responsibility’.\(^{179}\)

4.1 The dependence on cooperation

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

The ‘intractable paradox of independence and dependence’\(^{180}\) is particularly visible in relation to the States where the crimes occurred.

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(territorial states). Darryl Robinson explained the core of this tension very clearly:

Territorial states - from the eyes of the international prosecutor - have a duality of nature. As a matter of international law, a territorial state is the lawful authority in the territory, whose cooperation is required to carry out meaningful operations on its soil. As a matter of criminal law, those authorities are also potential targets of investigation. Combining these strands, in international criminal law, territorial states are both lawful authorities whose cooperation is valuable, and also objects of analysis and investigation.¹⁸¹

Since the beginning of his tenure, the ICC Prosecutor acknowledged that such duality changes the notion of prosecutorial independence, as traditionally understood.¹⁸² The above-described tension puts the Prosecutor in a position that is substantially different from that of national prosecutors, who may be seen to prejudice their independence if they engage with the political authorities of a State.

Conversely, the very nature of an ICC investigation demands that the Prosecutor enters into dialogue with heads of State and Governments and with agencies of a State. Particularly, the Prosecutor ‘may have to have such meetings in order to receive referrals of situations, in order to discuss the modalities of cooperation with the Court (...) and in order to discuss prospects for a State’s own authorities taking proceedings themselves.’¹⁸³

¹⁸¹ ibid.
¹⁸³ ibid. The latter form of interaction with national authorities is typical of the ICC, which
In the absence of strong institutional safeguards of prosecutorial independence provided elsewhere in the Statute, however, one cannot count on much more than the Prosecutor’s own assurance that s/he ‘will carry out his responsibilities in this way without jeopardizing his independence and impartiality’.\textsuperscript{184}

4.2 The Prosecutor as a political strategist

Referring to the role of the Prosecutor at the \textit{ad hoc} Tribunals, Victor Peskin said that the Prosecutor is not only ‘the trial lawyer who marshals evidence to convict war crimes suspects’, but is also ‘the political strategist who manoeuvres through the relatively unchartered shoals of the trials of cooperation to obtain state compliance for his or her courtroom mission to convict.’\textsuperscript{185}

The ‘trials of cooperation’ are the political interactions between the international tribunal’s Prosecutor, States and the international community over such matters as ‘whether and how many nationals or members of a particular ethnic group will be indicted; how far up the political and military hierarchy will such indictments reach; and how many nationals of enemy

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\textsuperscript{184} ibid. See also Brubacher (n 166) 85, noting that ‘Article 42(1) affirms the independence of the Prosecutor but phrases that affirmation as ‘the Prosecutor shall act independently’, making the responsibility of remaining independent a duty of the Prosecutor him or herself’, and Giulio Turone, ‘Powers and Duties of the Prosecutor’ in Antonio Cassese, Paola Gaeta and John RWD Jones (eds), \textit{The Rome Statute of the International Criminal Court: a Commentary}, vol II (Oxford University Press 2002) 1144.
\end{flushleft}

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nations or opposing ethnic or political groups will face indictment and prosecution’. Ultimately, these virtual trials will determine the level of cooperation that the Tribunals will receive from States and, consequently, the outcome of the trials of the accused.

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

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

186 ibid 9.
187 ibid.
what will enhance the international status, legitimacy, and effectiveness of their tribunal in the international system’. \(^{189}\)

Paragraph 4.1 has shown that the OTP has been very clear in stressing that political considerations and cooperation issues play no role in its strategy for the selection of situations and cases. At the same time, however, the 2016 Policy Paper on Case Selection introduces the concept of ‘prioritisation’, pursuant to which the OTP will give precedence to ‘those cases in which it appears that it can conduct an effective and successful investigation leading to a prosecution with a reasonable prospect of conviction’. \(^{190}\)

Interestingly, among the criteria for prioritizing a certain case are: (i) the security situation on the ground ‘or where the persons cooperating with the Office reside’, \(^{191}\) (ii) the ‘international cooperation and judicial assistance to support the Office’s activities’\(^ {192}\) and (iii) ‘the impact and the ability of the Office to pursue cases involving opposing parties to a conflict in parallel, weighed against the impact and the ability of the Office to do so on a sequential basis’\(^ {193}\).

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


\(^{191}\) ibid., 47 lett. d)

\(^{192}\) ibid., 47 lett. e)

\(^{193}\) ibid., 47 lett. h)
4.3 The Prosecutor’s investigations so far

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

[i]t seems unlikely that the Prosecutor would open an investigation into a situation where they knew, due to a lack of state cooperation, that no meaningful investigation could be performed. Opening an investigation in such circumstances would only re-enforce the argument the Court is incapable of fulfilling its mandate.\(^{194}\)

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

4.3.1 Self-referrals

At the beginning, the Prosecutor was cautious in using his \textit{proprio motu} power. Instead, he entered into negotiations with some governments over potential self-referrals. The Prosecutor publicly declared his ‘interest’ for the events occurring in some countries, encouraging their government to

\(^{194}\) Davis (n 188) 173.
refer the situation to the Court, and threatening to resort to his *proprio motu* powers in case they failed to do so.\(^{195}\)

The Prosecutor explicitly admitted that this strategy was aimed at facilitating cooperation.\(^{196}\) Between 2003 and 2004, three States followed the Prosecutor’s suggestion, namely, the Democratic Republic of Congo (DRC), Uganda, and the Central African Republic (CAR).\(^{197}\) By self-referring the situation on their territory, these countries welcomed the ICC’s intervention and promised their full cooperation with the OTP.

Indeed, cooperation from these countries has been forthcoming. On 20 July 2004, Uganda signed the ‘Agreement on Cooperation and Assistance’ and an agreement on protective measures towards witnesses with the OTP,\(^{198}\) which enabled the OTP staff to conduct over 50 missions to the field.\(^{199}\) The government of the DRC has been the most cooperative. The Prosecutor reported that members of its staff have been deployed in the Ituri region of the country since shortly after the start of the investigation, and have conducted more than 70 missions inside and outside of the DRC. A Judicial Cooperation Agreement between the Office and the DRC was signed on 6 October 2004 to facilitate the missions, and joint field offices with the Registry were established in Kinshasa and Bunia.\(^{200}\) Similarly, the

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\(^{196}\) ibid; OTP, ‘Annex to the Paper on some Policy Issues’ (2003), lett. D.


\(^{198}\) Situation in Uganda, Prosecutor's Submission of Authorities Relied Upon at Hearing Held on 16 June 2005, ICC-02/04, 17 June 2005, 3-5.

\(^{199}\) The cooperation from the Government of Uganda, however, has not always been smooth. The relationship between the OTP and the Government of President Museveni has raised a number of concerns. See Mark Kersten, ‘Why the ICC won’t Prosecute Museveni’ on The Justice Hub: https://justicehub.org/article/why-icc-wont-prosecute-museveni.

CAR entered into a cooperation agreement with the OTP on 18 December 2007.\textsuperscript{201} More recently, other two African states (Mali and Ivory Coast), referred their situation to the Court and promptly entered into a cooperation agreement with the OTP.\textsuperscript{202}

In each of the above situations, the Prosecution has focused the investigation exclusively on non-state actors (i.e. rebels) and the referring government’s adversaries. Not once has the OTP targeted a leader or government official from any of these States. As Mark Karsten put it on his blog: ‘whom prosecutors target is largely determined by the cooperation of states. Put simply, states cooperate in order to implicate their adversaries while those actors that the court depends on for such cooperation tend to be shield from prosecution’.\textsuperscript{203}

At an event held by the Coalition for the International Criminal Court (CICC), newly appointed ICC Deputy Prosecutor James Stewart, commented on the OTP’s choice of charging only the opponents of the government in power in Ivory Coast, assuring that the Prosecutor’s intention has always been to target all sides of the conflict. However, he added,\textsuperscript{201,\textsuperscript{202,\textsuperscript{203}}}

\begin{itemize}
  \item The cooperation agreement was amended on 31 October 2014 so as to guarantee continued cooperation with respect to a new investigation opened in the Country on 24 September 2014. See \url{https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/pages/pr1058.aspx}.
\end{itemize}
‘sometimes you just can’t do everything at once. You have to make a choice between action and paralysis and between pragmatism and ideals’. 204

4.3.2 Security Council referrals

The opposite can be seen in the context of referrals of situations from the Security Council. So far, the Council has twice referred situations to the ICC: in March 2005, the Darfur region of Sudan, and in February 2011, the situation in Libya. 205

In the Darfur conflict of 2003, Janjaweed militias backed by the Sudanese government began a murderous campaign against the African tribes in the Darfur region, which has left thousands of people dead, and at least one million people displaced from their homes. The international community remained largely inactive to the horrors in Darfur until March 2005, when the Security Council referred the situation to the Court. The ICC investigation revealed that many high-ranking Sudanese officials were involved in the crimes committed in Darfur. In 2007, the Pre Trial Chamber issued arrest warrants against several leaders of the Sudanese government, among which, President Omar Al-Bashir, the first sitting head of States to face charges before the ICC. 206


206 The Darfur investigation, however, has targeted both sides of the conflict. In 2010, the Pre-Trial Chamber unsealed summons to appear for three rebel commanders, allegedly responsible for attacks on African Union peacekeepers, Abu Garda, Abdallah Banda and Saleh Jerbo.
In February 2011, in the wake of the violence waged by the regime of Muammar Gaddafi against protesters, the UN Security Council referred the situation in Libya to the ICC. The OTP responded with unprecedented speed. Just days after the Security Council Resolution was passed, the OTP opened an official investigation and made clear that it was targeting senior figure of Gaddafi’s regime. Within three months, the Court had issued arrest warrants against Gaddafi, his son Saif and his intelligence and security chief, Abdullah al-Senussi.

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

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


209 In July 2009, the African Union announced that it would not cooperate with the ICC in arresting al-Bashir: https://www.opendemocracy.net/article/terrorism-theme/african-union-member-states-shall-not-cooperate-for-the-arrest-and-surrender-of-sudan-president-omar-al-
Libyan authorities have rejected the ICC’s demands to hand over Saif Gaddafi and Abdullah al-Senussi,\textsuperscript{210} claiming they were willing and able of trying them in Libya. Curiously, the non-cooperation of Libyan and Sudanese authorities is due to opposite reasons. In one case (Sudan), the ICC investigation targets the regime in power, which not surprisingly refuses to be judged by an international court; in the other case (Libya), the newly established government is eager to prosecute and try the exponents of the former regime without interferences from the international community.

Be that as it may, the first years of the ICC operations, have been marked by the perception that the Court is an institution that only delivers selective justice and that would ‘always side with governments and the Security Council in their political missions to discredit, delegitimize and dismiss their opponents.’\textsuperscript{211}

4.3.3 Proprio motu investigations

It is probably (also) for tackling this perception that, in 2010, the Prosecutor decided to use his \textit{proprio motu} powers for the first time, in relation to the violence that sprung after the disputed Presidential elections of 27 December 2007 in Kenya.\textsuperscript{212} In the investigation that followed, the

\begin{footnotesize}
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\item \textsuperscript{210} Proceedings against Abdullah Al-Senussi came to an end on 24 July 2014 when the Appeals Chamber confirmed Pre-Trial Chamber I’s decision declaring the case inadmissible before the ICC, see Prosecutor v. Abdullah Al-Senussi, AC Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled “Decision on the admissibility of the case against Abdullah Al-Senussi”, ICC-01/11-01/11-565, 24 July 2014.
\item \textsuperscript{211} See Mark Kersten, ‘The Lesson the ICC shouldn’t Learn in the Wake of Kenyatta’ on The Justice Hub: \url{https://justiceinconflict.org/2014/12/07/the-lesson-the-icc-shouldnt-learn-in-the-wake-of-kenyatta/}.
\item \textsuperscript{212} On 31 March 2010, Pre-Trial Chamber II issued a decision authorizing the Prosecutor to open an investigation pursuant to Article 15(3) of the Statute, see PTC II, Corrigendum of
\end{itemize}
\end{footnotesize}
Prosecutor targeted both sides of the conflict, and, on 23 January 2012, obtained the confirmation of the charges for two members of the opposition party at the time of the elections (Ruto and Sang), as well as for two members of the then incumbent party (Muthaura and Kenyatta). The four accused were allowed to remain at liberty pending trial.

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

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213 Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, PTC II Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11-373, 23 January 2012; Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11-382-Red, 26 January 2012.

On 11 March 2013, the Prosecutor announced the dropping of all charges against Muthaura, due to the loss of a key witness who had recanted testimony and claimed to have received bribes from defendants in the case and a lack of cooperation from the Kenyan government in gathering testimony. On 5 December 2014, the Prosecutor announced it was withdrawing all charges against Kenyatta. In the withdrawal notice, the Prosecutor cited a lack of cooperation from the Kenyan government in handing over documental evidence vital to the case as part of the reason for dropping the charges. On 5 April 2016, Trial Chamber terminated the case against Ruto and Sang in deciding on a ‘no case to answer’ application of the Defence. This decision came after the Appeals Chamber forbid the use of prior recorded testimony by the Prosecutor, that is, it denied permission to use the initial declarations of a number of witnesses who later recanted their testimony under pressure. The collapse of the Kenyan cases marked a huge setback for the Court and proved the impossibility of prosecuting State officials while depending on their cooperation, in the absence of a strong international support.

On 27 January 2016, the Pre-Trial Chamber authorized the Prosecutor to investigate war crimes and crimes against humanity allegedly

217 ibid.
219 Prosecutor v. William Samoei Ruto and Joshua Arap Sang, AC Judgment on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V(A) of 19 August 2015 entitled “Decision on Prosecution Request for Admission of Prior Recorded Testimony”, ICC-01/09-01/11-2024, 12 February 2016.
committed in South Ossetia in 2008 during the armed conflict between Georgia and Russia.\textsuperscript{220}

4.4 Final remarks

The present section has shown how the OTP has tried to reconcile the duality between its duty to act independently and the political realities within which its investigations and prosecutions take place. The vital need of cooperation from States has influenced the way in which the OTP has conceptualised and exercised its prosecutorial discretion. In particular, the section has shown that the main influence on the Prosecutor’s decision to commence an investigation into a situation and to target specific individuals is exercised by the actors who trigger the jurisdiction of the Court, especially when they are self-referring States or the Security Council; ‘these actors will try to direct the Prosecutor into investigating individuals and groups they view as ‘enemies’’.\textsuperscript{221}

Moreover, the most powerful States in the international community will also play a major role. ‘The ICC is likely to be prodded or encouraged to focus its work in specific ways and to investigate or not investigate certain cases where the interests of powerful actors are at play (see US position on ICC investigations in Palestine and Iraq; China, Russia and US position on ICC investigations in Syria).’\textsuperscript{222}

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\textsuperscript{220}Situation in Georgia, PTC I Decision on the Prosecutor’s request for authorization of an investigation, ICC-01/15-12, 27 January 2016.
\textsuperscript{221}Kersten (n 204).
\textsuperscript{222}ibid.
\end{flushright}
5. Addressing non-compliance: a political process

Like its *ad hoc* predecessors, the ICC is unable to issue sanctions on persons or States in case of non-cooperation, but must, instead, rely on political bodies to enforce the administration of justice. In the Blaškić case at the ICTY, where the Croatian government refused to comply with the Tribunal’s order to turn over documents, the Appeals Chamber denied the existence of an inherent power of the Tribunal to issue a *subpoena* to States and state officials.\(^{223}\) However, it acknowledged an ‘inherent power to make a judicial finding concerning a State’s failure to observe the provisions of the Statute or the Rules’ and ‘the power to report this judicial finding to the Security Council’.\(^{224}\)

Similarly, pursuant to Article 87(7) of the ICC Statute, where a State Party fails to comply with a request to cooperate by the Court, the latter may make a finding to that effect and refer the matter to the ASP or, where the Security Council referred the matter to the Court, to the Security Council. It has rightly been observed that the ICC’s findings on States cooperation are similar in nature to administrative decisions, and that they are ‘a form of dispute settlement that does not fit into the realm of criminal procedure’.\(^{225}\)

In addition, it must be emphasised that the two addressees of the Court’s information or finding of non-compliance, the ASP and the Security


\(^{224}\) ibid., 33.

\(^{225}\) Göran Sluiter and Stanislas Talontsi, ‘Credible and Authoritative Enforcement of State Cooperation with the International Criminal Court’ in Olympia Bekou, Daley Birkett and Annalisa Ciampi (eds), *Cooperation and the International Criminal Court: Perspectives from Theory and Practice* (Brill 2016) 81.
Council, disclose the link of the judiciary to the political body, which holds the primary responsibility for enabling the Court to work effectively.

Pursuant to Article 87(5)(b), the same regime applies to States not parties which have entered into an *ad hoc* arrangement or agreement with the Court, and to States not parties that have lodged a declaration in accordance with Article 12(3) of the Statute, which provides that ‘the accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9’. No similar powers are available in relation to the non-cooperation of international organizations.\(^{226}\)

The Court has given a very restrictive interpretation of the scope of Article 87(5) and (7) of the Statute. According to it, referral to the ASP or the Security Council is not an automatic consequence of a Chamber’s finding of a failure to comply with a request for cooperation. Rather, that Chamber has the discretion to determine whether it is necessary to refer the State concerned to the ASP (or to the Council).\(^{227}\)

5.1 The Assembly of States Parties

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

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\(^{226}\) Article 87(6) of the Rome Statute.

\(^{227}\) Prosecutor v. Uhuru Kenyatta, AC Judgment on the Prosecutor’s appeal against Trial Chamber V(B)’s “Decision on Prosecution’s application for a finding of non-compliance under Article 87(7) of the Statute”, ICC-01/09-02/11-1032, 19 August 2015.
calls into question the effectiveness of the Assembly’s responses to violations of the duty to cooperate’.  

228 At its tenth session, the ASP adopted the ‘Assembly procedures relating to non-cooperation’, which provide for informal and formal diplomatic and political measures to respond to situations of non-cooperation referred to the Assembly in accordance with Article 87(5) and (7) of the Statute.  

229 The procedures includes the holding of an emergency meeting of the Bureau of the Assembly; an open letter from the President of the Assembly to the State concerned requesting a written response; consultations with the State concerned at the ambassadorial level; a public meeting at the Assembly; the issuing of recommendations as a result of the dialogue with the State concerned; and the adoption of a resolution by the Assembly with the concrete recommendations.  

230 They also provide that, exceptionally, the ASP may act informally without a referral from the ICC when ‘there are reasons to believe that a specific and serious incident of non-cooperation in respect of a request for arrest and surrender of a person is about to occur or is currently on-going and urgent action by the Assembly may help bring about cooperation’.  

231 In the two years after the procedures were established, the Court referred to the ASP and the Security Council the non-compliance of Malawi and Chad, which, on separate occasions, had failed to cooperate with the arrest and surrender of Sudan’s president Al-Bashir during his visits to their

230 ibid., 14; Ruiz Verduzco (n 115) 49.  
231 Ibid (n 217), para 7b.
A fourth referral on non-cooperation was made following Bashir’s visit to the DRC in February 2014. The ASP acted on these referrals mainly by exercising diplomatic pressure on the States concerned, obtaining different outcomes. While Malawi denied to Sudan’s President access to its territory, Chad reacted negatively to diplomatic pressure granting immunity to Al-Bashir.

5.2 The Security Council

To ensure compliance, the Security Council has full discretion to make recommendations or decide upon appropriate measures available under Chapter VII. Although the Security Council has an array of coercive and non-coercive measures at its disposal, it has a poor record of enforcing international court orders and arrest warrants. The experience of the ad hoc Tribunals shows the absence of any political will on the part of the Council to enforce compliance with the Tribunals’ requests by means of

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


235 Brubacher (n 169) 91, 92.
Although, following judicial findings by the ICTY, the Security Council adopted a number of decisions reiterating the duty to cooperate, the Council never imposed sanctions on the Serbian and Croatian authorities.\(^\text{237}\)

In this respect, one commentator noted that ‘reliance on this mechanism (…) has been unpredictable, unduly time-consuming and often ineffective’.\(^\text{238}\) This is because ‘submitting the matter before the Security Council transforms a legal finding of non-compliance by the Tribunal into a political question and the resolution of such questions, if any, is complex and time-consuming’.\(^\text{239}\)

So far, the Council has maintained a similar disappointing inaction towards the ICC’s denounces of non-compliance. As has been seen, decisions by the Council to refer a situation to the Court are mostly made without the consent of the territorial state involved, which is often a State not-party to the Rome Statute.\(^\text{240}\) Not surprisingly, therefore, the cases arising out of the two Security Council’s-referred situations of Sudan and Libya have been extremely contentious, and have proven that only a


\(^{238}\) Harmon and Gaynor (n 237) 419.

\(^{239}\) ibid.

\(^{240}\) Ruiz Verduzco (n 115) 45.
decisive action by the Council would ensure the effectiveness of investigations and prosecutions.\textsuperscript{241}

The ICC’s findings of non-compliance,\textsuperscript{242} however, have fallen on deaf ears. Despite the Council’s experience in using financial, travel and diplomatic sanctions as part of its post 9/11 counterterrorism strategy, it has never done so in the context of crimes under the Rome Statute. This is regrettable, as these measures have, next to their practical aim of limiting individuals’ ability to escape ICC’s proceedings, also an important symbolic value.\textsuperscript{243}

In sum, the Security Council has taken no action to support the Court in accomplishing the judicial mandate that it had triggered. As has been noted, ‘[t]his inaction is driven by the Council’s political imperatives and divides with regard to the ICC’s investigations. This ‘on again, off again’ support makes the ICC seem like an instrument for achieving political ends through judicial means.’\textsuperscript{244}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{241} ibid.
\item \textsuperscript{243} David Kaye and others, ‘The Council and the Court | Developing a Strategy to Build UN Security Council Support for the International Criminal Court’ (University of California, Irvine - School of Law 2013) 20–21, at http://councilandcourt.org/.
\end{itemize}
\end{footnotesize}
5.3 The support of the international community

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

The *ad hoc* Tribunals faced serious hurdles in obtaining cooperation from territorial States. For example, Serbia and Republika Srpska have a long history of refusing to execute arrest warrants by the ICTY.\(^{245}\) Despite the inaction of the Security Council, however, compliance with the Tribunal’s request for cooperation was prompted by powerful international actors, such as the United States, the European Union and NATO, who exercised a great deal of political pressure by diplomatic and economic means, outside the framework of the Security Council. For example, the United States and the European Union conditioned their financial aid to Belgrade and the prospect of EU membership to the surrender of Slobodan Milošević to the ICTY.\(^{246}\) More broadly, it is widely agreed that, at the ICTY, successful compliance was secured ‘because of a common, unified position adopted by the international community with regard to the values represented by the Tribunal’.\(^{247}\)

By contrast, in the case of many of the situations before the ICC, the interests of the international community and the state concerned are

\(^{245}\) The challenges faced by the ICTY in obtaining the arrest and transfer of Slobodan Milošević, Radovan Karadžić and Radko Mladić are well known.

\(^{246}\) Shraga (n 236) 173–174.

\(^{247}\) Charania and others (n 117) 2, noting that compliance was secured ‘through issue-linkage strategies employed by the EU through its Stabilisation and Association Process and by NATO’s Partnership for Peace programme, as well as by means of World Bank and other bilateral donor efforts that linked cooperation with the ICTY to other areas of economic, political and military activity, which changed the strategic national interest calculations for the states concerned’. 
typically far more disparate.\textsuperscript{248} Due to the ICC’s open-ended jurisdiction, the constant support of the international community is much more difficult to obtain. Whenever the Court seeks to prosecute individuals without the consent of the State on whose territory the crimes have been committed (and/or against whose nationals arrest warrants have been issued), it is very unlikely that the government will cooperate with the Court (as the situations of Sudan, Libya, and Kenya clearly demonstrate). Lacking the means to enforce the arrest warrants at its own initiative, and lacking any credible threat mechanism, the OTP will necessarily turn to other powerful actors: other States and international organizations, or, put differently, ‘the international community’.\textsuperscript{249}

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

the Milošević indictment had a greater prospect of international support, since it came during the NATO assault to reverse Serbia’s military gains in Kosovo and the mass expulsions of Kosovar Albanian refugees that followed the beginning of the NATO air war. In contrast, Moreno-Ocampo’s bid to prosecute Bashir has not occurred in the

\textsuperscript{248} ibid.
\textsuperscript{249} Ryngaert (n 120) 17–18.
context of military intervention or substantial international pressure against Sudan’s president to reverse the situation in Darfur.250

Peskin outlines that the international community – despite publicly portraying the Bashir government as a criminal and violent regime – ‘has engaged [it] in a long-running effort to find a negotiated solution to the Darfur crisis’. Similarly, the EU has been reluctant to press the Khartoum government to hand over suspects, due to its ‘interest in persuading the government to allow an expanded peacekeeping force into Darfur and bring a resolution to the conflict’. 251

This makes it extremely difficult for the Prosecutor to obtain a constant and effective pressure on the Sudanese government and, thus, seriously undermines its efforts to bring Sudanese crimes suspects to trial. Generally speaking, it is a fact that the political priorities of the international community are often shifting. Its willingness to enforce the Court’s cooperation requests, therefore, will be informed by political calculations and its pressure will ultimately be selective.252

6. Conclusion

This Chapter addressed some of the distinctive structural and normative constrains that characterize cooperation at the ICC, setting out the context for a proper understanding of the challenges that cooperation poses to the rights of defendants.

250 Peskin (n 2) 675.
251 ibid 663.
252 Ryngaert (n 120) 17, 21.
As the *ad hoc* Tribunals, the ICC relies on an indirect enforcement system and is dependent on the cooperation of States (both party to the Statute and not-party) and international organizations (first and foremost, the UN and its peacekeeping missions in the field) for conducting investigations and arresting suspects. Therefore, just like its predecessors, the ICC is bound to be faced – and in fact, on several occasions, has been faced - with instances of non-cooperation.

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

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

From a normative perspective, the ICC cooperation regime is ‘weaker’ than that of the *ad hoc* Tribunals. The Prosecutor has more limited powers to access the territory of States and the Court has no power to compel witnesses to testify before it in The Hague.
However, the Chapter has endeavoured to demonstrate that the real weakness of the ICC cooperation system lies elsewhere.\textsuperscript{253} Regardless of the norms enshrined in the Statute, the effectiveness of the ICC is largely dependent on whether the broader interests of the requested State coincide with those of the Court, and, should that fail, on the support of the international community.

Accordingly, the Chapter has explored the paradox of an independent Prosecutor who often finds himself/herself in the difficult position of prosecuting the States’ authorities on whose cooperation s/he depends, and the role of the power politics at play in influencing the discretion of the Prosecutor in the selection of cases. When the government in power is supportive of the ICC’s intervention, the Prosecutor has ended up targeting persons that are hostile to the government, so as not to put cooperation at risk. In such situations, the effectuation of arrest is selective, and this inevitably casts a shadow over the universal, blind justice that the Court is supposed to administer.\textsuperscript{254}

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

\textsuperscript{253} For a similar conclusion see Ciampi (n 63) 7–57.
\textsuperscript{254} Ryngaert (n 120) 9–10.
The Chapter has thus analysed the role played by the ASP, the Security Council and the broader international community in case of non-compliance with requests of the Court. It concludes that, in a state-dominated enforcement system, ICC investigations and prosecutions remain tied to a political process that is, by nature, selective. As has been argued, such process ‘pays little or no heed to the imperatives of a pending investigation, trial or to international standards relating to the rights of an accused’.255

255 Harmon and Gaynor (n 237) 421.
Chapter III

COOPERATION WITH A COMPLEMENTARY COURT: A HUMAN RIGHTS PERSPECTIVE

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1. Introduction

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

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

Part 2 of the Statute – on ‘Jurisdiction, Admissibility and Applicable law’ – and Part 9 on cooperation are closely inter-related. The rules on cooperation are shaped by and mirror the fundamental choices of the Statute in terms of jurisdiction. Early on, scholars recognized that jurisdiction and cooperation are linked at the level of ‘fundamental legal principles’, in that their analysis ‘offers guidance to what degree the Statute is directly individual-related instead of constituting a purely inter-state instrument’.² In other words, it is in light of the rules on cooperation and jurisdiction that a determination can be made as to whether, in the development of international criminal law, ‘a state-sovereignty oriented approach has been gradually supplanted by a human-being oriented approach’.³

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

¹ Salvatore Zappalà, ‘Summary and Conclusion’ in Göran Sluiter and others (eds), International Criminal Procedure: Principles and Rules (OUP 2013) 129.
³ ibid.
⁴ Rule 11bis ICTY and ICTR RPE.
remain inactive, or if they show unwillingness or inability to genuinely deal with international crimes on their territory.\textsuperscript{5}

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

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

Third, the Chapter examines the influence that complementarity has on the obligation of States to cooperate with the Court. The priority of national criminal prosecutions demands a particular regulation of issues

\textsuperscript{5} Article 17 of the Rome Statute.
such as simultaneous proceedings in the requested State, competing requests of assistance from other States, and, most importantly, cooperation duties pending admissibility challenges. Although, as rule, a decision of the Court on admissibility is decisive of the matter of whether States have to comply with requests for cooperation, the Libya situation demonstrates that, when a State opposes the intervention of the Court, it is very unlikely to cooperate with it, both before and after the Court’s determination on admissibility. As the Gaddafi and Al-Senussi cases demonstrate, this might entail serious consequences for ICC suspects who are detained by national authorities in violation of their obligation to cooperate and surrender persons to the Court.

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

2.1 Preliminary remarks: complementarity v. primacy

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

Primacy and complementarity are different allocation mechanisms adopted by the founding instruments of international courts for determining which jurisdiction shall prevail in a given case. Pursuant to the former, the Tribunals can request States to defer a criminal investigation to their competence under Rule 9 of their Rules of Procedure and Evidence. Conversely, under complementarity, the Court may take up a certain case only if States fail in carrying out their duty to prosecute international crimes committed on their territory.\(^8\) Complementarity, thus, entails a conditional primacy of national courts, in the sense that States have to meet certain

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

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

\(^8\) Article 17 of the Rome Statute.
criteria in order to pre-empt the Court’s intervention. Such criteria are set forth by Article 17 of the Statute, which prescribes that the Court may step in only if States remain inactive, or their proceedings show ‘unwillingness’ or ‘inability’ to genuinely prosecute international crimes. Article 17 will be discussed in more details below, at paragraph 2.3.

2.2 The ‘complementarity paradox’

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

The term ‘complementarity’ was introduced in the ILC discussions, where it was acknowledged that this notion was not a ‘established legal principle’. Frequently, however, States discussed complementarity referring to the entire set of norms governing the complementary relationship between the ICC and national jurisdictions. In particular, the drafters intended complementarity mainly as an instrument to regulate

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9 Stigen (n 6) 5.
10 ibid 24.
potential conflicts between the primary jurisdiction of national courts and the residual jurisdiction of the ICC, and they viewed it primarily as a means to overcome sovereignty fears against the intervention of the Court.\textsuperscript{12} By granting priority to genuine domestic proceedings, complementarity was meant to strike a balance between the necessity of effective prosecution of international crimes and the safeguard the sovereign right of States to prosecute their own nationals without external interference.\textsuperscript{13}

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

In brief, by acceding to the Rome Statute, States Parties have agreed to delegate their sovereign right to prosecute international crimes to the

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{13}] Stigen (n 6) 12–13.
\item[\textsuperscript{14}] William Schabas, ‘Complementarity in Practice: Creative Solutions or a Trap for the Court?’ in Mauro Politi and Federica Gioia (eds), \textit{The International Criminal Court and National Jurisdictions} (Ashgate 2008) 25; Robert Cryer, ‘Darfur: Complementarity as the Drafters Intended?’ in Carsten Stahn and Mohamed M El Zeidy (eds), \textit{The International Criminal Court and Complementarity: from theory to practice}, vol II (CUP 2011) 1097; Stahn, ‘Complementarity’ (n 12) 89.
\end{itemize}
\end{footnotesize}
ICC, should they not be willing and able to do so. At the same time, they have also agreed to undertake obligations of cooperation and assistance without which the Court would be utterly impotent.\textsuperscript{16} It has rightly been observed that, conceptually, this amounts to a paradox, by which the Court depends on the cooperation of States that do not have the will or the ability to prosecute international crimes themselves. Early on, Paolo Benvenuti summarized this tension in a rhetorical question:

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

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

2.3 The legal framework: admissibility v. jurisdiction

Although it can be argued that complementarity was intended more as a synonym of ‘sovereignty’, rather than a defined normative concept with an


inherent meaning,\textsuperscript{18} the Statute does provide for a codification of this principle in Article 17, a provision regulating the admissibility of cases before the Court. Complementarity, thus, is also a legal norm, which operates as an admissibility rule determining when the Court may intervene with the investigation or prosecution of a case within its jurisdiction. The first paragraph of Article 17, titled ‘Issues of admissibility’, reads as follows:

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

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

Article 17(1) lett. a) and b) embody the complementarity principle \textit{stricto sensu}. They make clear that the ICC is not supposed to replace national

\textsuperscript{18} Cryer (n 14) 1100 –1101.
judicial systems, but its intervention should be viewed as a ‘last resort’, only stepping in when States remain inactive or, when their proceedings show an ‘unwillingness’ or ‘inability’ to genuinely investigate or prosecute. Interestingly, the wording of this article suggests that the complementarity regime protects the sovereignty of any State with jurisdiction over a case, including States that are not party to the Rome Statute.\(^\text{19}\) Article 17(1) lett. c) envisages the situation where a person has been tried by another domestic court and makes a \textit{bis in idem} a cause for inadmissibility. Finally, Article 17(1)(c) enshrines the criterion of gravity. This is distinct from the other criteria, as it applies to all cases that are brought before the Court, not just those with respect to which national authorities have already taken action.\(^\text{20}\)

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

Complementarity/admissibility does not relate to the existence of jurisdiction, but regulates when the latter may be exercised by the Court. The admissibility criteria of Article 17 embody the conditions for the \textit{exercise} of the Court’s jurisdiction in specific cases. As such, they must be distinguished from the conditions of \textit{existence} of the ICC’s jurisdiction,

\textsuperscript{19} See also Article 19(2)(b)-(c) of the Rome Statute.

which are a pre-requisite for the Court to act\textsuperscript{21} and consist in limitations \textit{ratione materiae, ratione temporis and ratione personae}. \textsuperscript{22}

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

\begin{itemize}
\item \textsuperscript{21} Benzing (n 11) 594.
\item \textsuperscript{22} Pursuant to Article 24(1) of the Rome Statute, the competence of the Court is limited to those crimes listed in Article 5 of the Statute, committed after the entry into force of the latter in 2002. Pursuant to Article 12(2) and (3) of the Statute, outside of the hypotheses of referral from the Security Council, the Court does not have jurisdiction unless either the State in which the crime was committed (territorial state) or the State of which the accused is a national (State of nationality) is a party to the Statute or has accepted the jurisdiction of the Court with an \textit{ad hoc} declaration.
\item \textsuperscript{24} ibid.
\end{itemize}
that, in the absence of a challenge, the Court has the discretion to make a finding on admissibility.

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

2.4 The nature of the admissibility assessment

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

Although it is formally part of the criminal process, the complementarity assessment does not concern the guilt or innocence of a

25 See, among others, Prosecutor v. Jean-Pierre Bemba, PTC II Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, 15 June 2009, 23; Prosecutor v. Joseph Kony et al., PTC Decision on the admissibility of the case under article 19(1) of the Statute, ICC-02/04-01/05-377, 10 March 2009, 45.
person, but the admissibility before a particular forum. As a consequence, it involves aspect of inter-state litigation and systemic considerations relating to the objectives of the Court, including the appropriate balance between its role as a watchdog and its function as gentle incentivizer of domestic proceedings.

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

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

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28 OTP, Informal Expert Paper on Complementarity (n 26) 37.
29 OTP, Informal Expert Paper on Complementarity (n 26) 36.
2.5 The rights of defendants in the complementarity system

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

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

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31 Situation in the DRC, AC Judgment on the Prosecutor’s Appeal against the Decision of the PTC I entitled “Decision o the Prosecutor’s Application for a Warrant of Arrest, Article 58”, ICC 01-04, 13 July 2006, 51.
32 Article 19(4) of the Rome Statute.
33 Burke-White and Kaplan (n 30) 86, 91.
34 Ibid.
35 Benzing (n 11) 598; Burke-White and Kaplan (n 30) 92–94.
As compelling as this perspective might be, the truth is that it could hardly be sustained. Burke-White and Kaplan have rightly observed that, in a variety of occasions, States have waived their sovereign right to exercise jurisdiction in favour of other States or other judicial bodies. Moreover, pursuant to the principle of universal jurisdiction, international crimes offend humanity as a whole, and, therefore, any State has a right to try the perpetrators. Hence, since States Parties to the Rome Statute have transferred their territorial or national jurisdiction to the Court, ‘there is no reason for the accused to expect to be tried by his home court’.36 To the contrary, ‘the Rome Statute must be viewed as conferring new rights or supplementing existing rights of the accused with respect to the appropriate forum for prosecution’.37

Along these lines, it has also been argued that the accused right to challenge admissibility under Article 17(1)(a) and (b) – as opposed to a challenge based on the *ne bis in idem* principle embodied in Article 17(1)(c) and 20(3) – does not amount to a right of an individual, but merely provides an individual with a ‘standing to raise an issue that relates to State sovereignty’.38

Another important question is whether human rights of defendants can be invoked as a ground to challenge admissibility pursuant to complementarity, that is, whether a State could be considered ‘unwilling’ or ‘unable’ to genuinely prosecute because, instead of shielding perpetrators of international crimes from justice, it fervently and overzealously prosecutes

36 Burke-White and Kaplan (n 30) 94.
37 ibid.
them disregarding their fair trial rights. Some scholars have endorsed this view based on the wording of Article 17, according to which, in determining whether a State is unwilling to prosecute, the court shall have regard to the ‘principles of due process recognized by international law’.  

In a recent decision, however, the Appeals Chamber sanctioned the opposite view according to which the determination under Article 17(1)(2) does not involve an assessment of whether the due process rights of a suspect have been breached *per se*. In particular, the concept of proceedings ‘being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice’ should generally be understood as referring to proceedings designed to make a defendant more difficult to convict, that is, sham proceedings aimed at protecting the person so that s/he can evade justice. In other words, ‘in the context of admissibility proceedings, the Court is not primarily called upon to decide whether in domestic proceedings certain requirements of human rights law or domestic law are being violated’; instead, ‘what is at issue is whether the State is willing genuinely to investigate or prosecute.’ Doing otherwise would amount to consider the ICC as a human rights court, sitting

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41 ibid., 218-221.

42 ibid.
in judgment over domestic legal systems to ensure that they are compliant with international standards of human rights, a role which is clearly not envisaged by the Rome Statute.\(^{43}\)

However, the Chamber acknowledged that in some circumstances, depending on the facts of the individual case, ‘violations of the rights of the suspect are so egregious that the proceedings can no longer be regarded as being capable of providing any genuine form of justice to the suspect so that they should be deemed, in those circumstances, to be ‘inconsistent with an intent to bring the person to justice’.\(^{44}\)

More generally, the types of complaints set forth by Article 17(1)(a) and (b) do not apparently relate to the cooperation of States during the investigation. Rather, they have to do with the division of labour between the Court and States. Usually, admissibility criteria are conceptualized as an \textit{a priori} set of conditions for the initiation of the investigation. The Rome Statute addresses them in its Part II regarding ‘jurisdiction, admissibility and applicable law’; manuals of international criminal procedure analyse them in their static and substantial dimension, before tackling the procedure of the investigation and cooperation.\(^{45}\)

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

\(^{43}\) ibid., 219.

\(^{44}\) ibid., 230.

that it influences the extent and the modalities in which the latter plays out in the course of the investigation.

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

3.1 Preliminary examination

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

The Prosecutor may receive *notitia criminis* through a referral of a situation from any State Party or from the United Nations Security Council.\(^{46}\) In addition, individuals or groups, States and international organizations may submit ‘communications’ to the OTP containing information on crimes within the jurisdiction of the Court.\(^{47}\) Upon receipt of a referral or a communication regarding the commission of crimes, the Prosecutor starts a ‘preliminary examination’ of the information received in order to determine whether a ‘reasonable basis’ to open an investigation exists.\(^{48}\) To this end, s/he is mandated to determine - in addition to the

\(^{46}\) Article 13(a) and (b) of the Rome Statute.

\(^{47}\) Article 15(1) of the Rome Statute.

\(^{48}\) Article 53(1) of the Rome Statute.
existence of the ICC’s jurisdiction and the interest of justice in the situation concerned - whether ‘the case is or would be admissible under Article 17’.

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

The Prosecutor, thus, has only limited means of fact finding. According to Article 15(2) and Rule 104 RPE, s/he may seek additional information on the alleged crimes from States, organs of the United Nations, intergovernmental and non-governmental organizations and other reliable sources, and may receive testimony at the seat of the Court. At this stage, thus, the OTP relies heavily on information from outside sources rather than its own investigators (i.e., UN inquiries, media reports and NGOs analysis). For the same reason, the cooperation regime under Part 9 seems not to be available yet. According to the Informal Expert Paper:

49 ibid; Article 15(3) of the Rome Statute and Rule 48 RPE.
52 The OTP’s Expert Paper on Complementarity makes clear that ‘as a practical matter, it is expected that States Parties and other supportive States will choose to co-operate voluntarily with the OTP, and will likely respond to reasonable requests for information. Co-operation might also be further encouraged by courteously making States aware of the possibility that reasonable inferences might of necessity be drawn if information cannot be collected because of non-co-operation’, see OTP, Informal Expert Paper on Complementarity (n 26) 30.
it is only once a reasonable basis has been found by the Prosecutor under Article 53(1) or the Pre-Trial Chamber under Article 15(4), that an investigation would commence, and at that point Part 9 would become available to the Prosecutor (...) with the resulting obligations for the States Parties under Articles 86 and 93. Consequently, the measures taken during a preliminary examination are not measures within a formal ‘investigation’.\textsuperscript{53}

The OTP has endorsed this view and, in its Policy Paper on Preliminary Examinations of 2013 confirmed that ‘at the preliminary examination stage, the Office does not enjoy investigative powers, other than for the purpose of receiving testimony at the seat of the Court, and cannot invoke the forms of cooperation specified in Part 9 of the Statute from States.’\textsuperscript{54}

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


cooperation of States that will be so essential in the future, should an investigation commence.

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

It is submitted that, although it does not take the form of a formal cooperation envisaged by Part 9 of the Statute, the interaction between the OTP and national authorities in the pre-investigative stage implies a peculiar relationship between the Court and States which is absent in any other international tribunal. This relationship is significant for the rights of suspects. In this respect, it is important to underscore the fact that the Statute does not impose a deadline on the Prosecutor for completing the preliminary examination, nor does it foresee the involvement of the Pre-Trial Chamber in supervising the Prosecutor’s activities. This means that unsupervised negotiations between the Prosecutor and States can go on for years without a meaningful involvement of the judges in the situation of

56 Some preliminary examinations, including those in Afghanistan, Colombia, and Georgia, have gone on for years without a decision either to close the examination or open a full investigation.
suspects until the issuance of an arrest warrant. As will be seen, this is especially problematic for those ICC suspects who are also subject to national proceedings at the time of the Prosecutor’s investigation.

3.2 Formal investigation

Upon the conclusion of the preliminary examination, should the Prosecutor find the existence of a reasonable basis to proceed, s/he will open a formal investigation.\(^{57}\) It must be remembered, however, that in the absence of a referral from a State or the UN Security Council, the investigation has to be authorized by the Pre-Trial Chamber.\(^{58}\) It is from now on that the Prosecutor can make use of the powers set forth in Article 54, among which is the power to request cooperation and enter into agreements,\(^{59}\) and that States have the obligation to cooperate fully with the Court in the investigation and prosecution of crimes.\(^{60}\) Moreover, it is during this phase that the Prosecutor gathers allegations against one or more identified individuals and, when the evidence acquired satisfy the requirements under Article 58, applies to the Pre-Trial Chamber for an arrest warrant. The issuance of an arrest warrant marks the passage from the ‘situation’ to the ‘case’ stage of the investigation.\(^{61}\).

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\(^{57}\) Article 53(1)(2) of the Rome Statute.
\(^{58}\) Article 15(3)(4) of the Rome Statute.
\(^{59}\) Article 54(3)(c) and (d) of the Rome Statute.
\(^{60}\) Article 86 of the Rome Statute.
\(^{61}\) According to the Pre-Trial Chamber, ‘situations are generally defined in terms of temporal, territorial and in some cases personal parameters’ and ‘entail the proceedings envisaged in the Statute to determine whether a particular situation should give rise to a criminal investigation as well as the investigation as such’. Cases, on the other hand, ‘comprise specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects’ and ‘entail proceedings that take place after the issuance of a warrant of arrest or a summon to appear’,
It is important to underscore the fact that the Statute does not provide a deadline for the Prosecutor to apply the Pre-Trial Chamber for an arrest warrant. ICC investigations, thus, can be ended explicitly or implicitly, by deciding not to prosecute.\(^62\) The Chamber may review an explicit decision of the Prosecutor not to prosecute, but cannot to compel him/her to prosecute.\(^63\)

Once the investigation has commenced, facts relevant for determination of admissibility form part of the investigation.\(^64\) The importance of cooperation for the purpose of the complementarity assessment is reflected in the organization of the OTP, which comprises a specialized unit – the ‘Jurisdiction, Complementarity and Cooperation Division’ (JCCD), composed by experts advising on both issues.\(^65\) This unit has the functions to: i) analyse the information received with the communications or the referrals; ii) provide the factual and legal analysis to enable decisions on whether initiating an investigation; iii) encourage and assist national proceedings (where possible), and verify that national proceedings are genuine; iv) establish networks of international cooperation by ensuring that necessary agreements and arrangements are in place to secure the cooperation of States and international organizations\(^66\) and,

\(^{62}\) Sarah Nouwen, *Complementarity in the Line of Fire* (CUP 2013) 78.

\(^{63}\) Article 53(2)(c) and (3)(a)(b) of the Rome Statute.

\(^{64}\) OTP, Informal Expert Paper on Complementarity (n 26) 32.


\(^{66}\) Article 54(3)(d) of the Rome Statute.
throughout an investigation, maintain contact with relevant authorities to facilitate on-going cooperation.\textsuperscript{67}

The OTP Expert Paper on Fact-Finding and Investigations has rightly observed that ‘the relationship with the State exercising jurisdiction under complementarity is critical to facilitating the admissibility determination by the Prosecutor’ and that ‘the degree to which there is a cooperative arrangement established may determine how successful the Prosecutor is in discharging his responsibilities’.\textsuperscript{68} In this respect, the experts acknowledged that, although the standards set forth by Article 17 are of an unambiguously legal nature, ‘there may be need to be political discussions and arrangements undertaken in order to facilitate decisions based on those legal standards.’\textsuperscript{69}

3.3 Admissibility as an issue of litigation

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

\textsuperscript{67} OTP, Annex to the Paper on Some Policy Issues (n 65) 6.
\textsuperscript{68} Broomhall et al. (n 53) 35.
\textsuperscript{69} ibid.
3.3.1 Admissibility at the situation stage

Article 18 of the Statute governs challenges to the initiation of an investigation into a situation as a whole.\(^{70}\) It provides that, following the notification of the commencement of the investigation from the Prosecutor, a State may seek a deferral of the investigation by informing the Court that it is investigating or it has investigated the crimes concerned. The Appeals Chamber has clarified that the wording ‘crimes concerned’ should be interpreted relatively broadly, particularly as ‘[o]ften, no individual suspects will have been identified at this stage, nor will the exact conduct nor its legal classification be clear.’\(^{71}\)

This Procedure is only available when the Prosecutor decides to open an investigation \textit{proprio motu} or after a referral of a situation by a State, but not if the situation was referred by the Security Council.\(^{72}\) It is apparent from the wording of Article 18 that its regime also applies to investigations conducted by States not party. This Article, thus, evinces a broad recognition that the Court should only intervene where domestic jurisdictions are either unwilling or unable to do so.\(^{73}\)

The Prosecutor shall comply with the State’s request to defer the investigation, unless the investigation is authorized by the Pre-Trial


\(^{72}\) Article 18(1) of the Rome Statute.

Chamber.\textsuperscript{74} Pursuant to Rule 53 RPE, the State seeking deferral will have to provide information concerning its investigation, and the additional information requested by the Prosecutor. Moreover, nothing prevents the Prosecutor from seeking information from other sources, such as NGO’s court monitors.\textsuperscript{75} In case of a deferral, the Prosecutor will follow up the national development of the case in question and the State may be asked to submit periodical information on its progress pursuant to Article 18(5) of the Statute.

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

\begin{quote}
[t]he complementarity principle, as enshrined in the Statute, strikes a balance between safeguarding the primacy of domestic proceedings vis-à-vis the International Criminal Court on the one hand, and the goal of the Rome Statute to put an end to impunity on the other hand. If States do not or cannot investigate and, where necessary, prosecute, the International Criminal Court must be able to step in.\textsuperscript{76}
\end{quote}

Whereas States have a very limited window through which to assert their primacy over a situation, the Appeals Chamber has nonetheless suggested

\begin{flushright}
\textsuperscript{74} Article 18(2) of the Rome Statute.
\textsuperscript{75} Broomhall et al. (n 53) 35, 41.
\textsuperscript{76} Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, AC Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/4-01/07-1497, 25 September 2009, 85; see also Melinda Taylor (n 73).
\end{flushright}
that, outside of the framework of admissibility proceedings, the Prosecution should use its discretion to enter into dialogue with States concerning the division of labour between them.\textsuperscript{77}

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

\textsuperscript{77} Melinda Taylor (n 73).
in principle, not the place for such issues to be raised with a Chamber in the context of admissibility proceedings.  

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

3.3.2 Admissibility at the case stage

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

79 Melinda Taylor (n 73).
80 Under Article 61 of the Rome Statute, this status is acquired after the confirmation of the charges.
81 Article 19(7) of the Rome Statute.
challenge continue to be valid).\textsuperscript{82} Third, pursuant to Article 19(3), the Prosecutor may seek a ruling from the Court regarding a question of admissibility (or jurisdiction). Finally, Article 19(1) provides that the Court ‘may’, on its own motion, determine the admissibility of a case in accordance with Article 17.\textsuperscript{83}

So far, the Pre-Trial Chamber has mainly used this prerogative at the moment of the issuance of an arrest warrant.\textsuperscript{84} The Appeals Chamber, however, has criticized this approach, in that a determination of admissibility at such an early stage may jeopardize the right of the suspect to challenge admissibility of his/her case pursuant to Article 19(2)(a). This is especially true when the Prosecutor’s application for a warrant of arrest has been is made on a confidential and \textit{ex parte} basis. The Appeals Chamber, therefore, has cautioned the Pre-Trial Chamber to exercise its discretion under Article 19(1) only when it is appropriate in the circumstances of the case – such as, for example, when a ‘ostensible cause’ or a ‘self-evident factor’ impels the exercise of such discretion - bearing in mind the interests of the suspect.\textsuperscript{85}

Pursuant to Article 19(5), the State challenging the admissibility of a case shall make the challenge at ‘the earliest opportunity’. The Court clarified that this means that a State must file the challenge ‘as soon as

\textsuperscript{82} See Article 19(9) of the Rome Statute, according to which, ‘the making of a challenge shall not affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Court prior to the making of the challenge’.

\textsuperscript{83} The same article provides that the Court ‘shall satisfy itself that it has jurisdiction in any case brought before it’.

\textsuperscript{84} See Prosecutor v. Thomas Lubanga, PTC I Decision on the Prosecutor’s Application for a Warrant of Arrest, ICC-01/04-01/06, 10 February 2006; PTC III, Prosecutor v Bemba, Decision on the Prosecutor’s Application for a Warrant of Arrest, ICC- 01/05- 01/08, 23 May 2008, 21-22.

\textsuperscript{85} ibid., 52-53.
possible’ once it is in a position to actually assert that it is investigating the same case.86

Under article 19(10), the prosecutor may submit a request for the review of the admissibility decision after being satisfied ‘that new facts have risen which negate the basis on which the case had previously been found inadmissible under article 17 by the Court’. The Appeals Chamber held that the inclusion of article 19(10) clarifies that any admissibility assessment must take into consideration the change of circumstances over time. It explained that ‘the admissibility of a case under article 17 (1)(a), (b) and (c) of the Statute depends primarily on the investigative and prosecutorial activities of the States having jurisdiction. These activities may change over time.’87 Thus, a case that was originally admissible may be rendered inadmissible by a change of circumstances in the concerned States and vice versa’.

3.3.3 Provisional investigative measures

In case of a deferral to a State’s investigation (or pending a ruling by the Pre-Trial Chamber) under Article 18, or a challenge to the jurisdiction or the admissibility according to Article 19, the Prosecutor may seek authorization from the Pre-Trial Chamber for provisional investigative measures ‘for the purpose of preserving evidence where there is a unique opportunity to


obtain important evidence or there is a significant risk that such evidence may not subsequently be available.\footnote{Article 18(6) and 19(8) of the Rome Statute.}

In case of a challenge under Article 19, the available measures are more extensive, and also include the taking of a statement or testimony from a witness, completing the collection of evidence already initiated, and preventing the absconding of persons subject to an arrest warrant in cooperation with the States concerned.\footnote{Article 19(8) of the Rome Statute.} Cooperation under Part 9 is available for the measures authorized by the Chamber.\footnote{Broomhall et al. (n 53) 46-47.}

4. The influence of complementarity on the obligation to cooperate

The principles governing jurisdiction and admissibility have a great influence on the rules on cooperation. It is essential, thus, that the provisions on jurisdiction and admissibility in Part 2 of the Statute are coherent with those on cooperation in Part 9. As has been stated, ‘in so far as a legal problem of cooperation arises that is directly interrelated with issues covered in Parts 2 and 5 and that is not specifically dealt with in Part 9, it appears advisable to resort to a systematical interpretation that guarantees the coherency between the solution found in Part 9 and the relevant rule(s) in Parts 2 and/or 5.’\footnote{Claus Kress, Kimberly Prost and Peter Wilkitzki, ‘Part 9. International Cooperation and Judicial Assistance: Preliminary Remarks’ in Otto Triffterer (ed), Commentary on the Rome Statute of the International Criminal Court (2nd edn, Beck/Hart 2008), 1506.}

Under complementarity, genuine domestic investigations and prosecutions have priority; at the same time, however, pursuant to the principle of kompetenz-kompetenz of the Court enshrined in Article 19(1) of...
the Statute, it is exclusively up to it to determine whether it has jurisdiction on a given case and whether a case is admissible. As a consequence, the provisions of Part 9 provide that a refusal to cooperate with the Court can never be based on the requested State’s unilateral assessment that the Court has no jurisdiction or that a case is inadmissible.\(^{92}\) In other words, a decision of the Court on admissibility is determinative of the issue of whether states parties have an obligation to cooperate with it.

The interplay between jurisdiction and cooperation is especially reflected in the regulation of States’ obligations to cooperate in case of simultaneous domestic proceedings and competing requests for surrender or judicial assistance by other States.\(^ {93}\) Consequently, Articles 95 and 89(2) that are about to be addressed, reflect the scheme of Articles 17 \textit{et seq}.\(^ {94}\)

4.1 The postponement of the execution under Art. 95 St.

It has been seen that a complementarity challenge by a State under Articles 18 and 19 of the Statute has the effect that the Prosecutor must suspend the investigation,\(^ {95}\) but the making of such a challenge does not affect the validity of any previous act performed by the Prosecutor, or any previous order or warrant issued by the Court.\(^ {96}\)

Article 95 reflects the consequences of such suspension of the investigation for cooperation. It provides that a State may temporarily postpone the execution of any request under Part 9 while the Court is considering an admissibility challenge pursuant to Articles 18 and 19, with

\(^{92}\) Kaul and Kress (n 2) 144; Kress, Prost and Wilkitzki (n 91) 1506.  
\(^{93}\) Cryer and others (n 45) 519.  
\(^{94}\) Kress, Prost and Wilkitzki (n 91) 1506.  
\(^{95}\) Article 18(2) and 19(8) of the Statute; Cryer and others (n 45) 519.  
\(^{96}\) Article 19(9) of the Rome Statute.
the only exception of cooperation requests related to the provisional investigative measures that the Court has specifically ordered under Article 18(6) or 19(8). As the Pre-Trial Chamber has noted ‘it would be untenable for the Court to insist on compliance with a request (…), even at the risk of hampering the national proceedings, while its own investigation is suspended [due to an admissibility challenge].’  

It is important to emphasize, however, that the suspension of the execution of the request is only temporary, and can only last until such time that a determination on admissibility is made by the Court. Moreover, the request for cooperation remains valid in accordance with Article 19(9), and, during the postponement, the State must take all necessary measures in order to ensure an immediate execution of the request should the case be found admissible. As will be seen, Article 95 is consistent with Article 89(2), which regulates cooperation duties in case a suspect brings a ne bis in idem challenge before a national court.

4.2 Art. 95 in the situation in Libya

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

97 Prosecutor v. Saif Gaddafi and Abdullah Al-Seniussi, PTC I Decision on the postponement of the execution of the request for surrender of Gaddafi pursuant to Article 95 of the Statute, ICC-01/11-01/11, 1 June 2012, 36.
98 ibid., 40.
99 See further paragraph 4.2.
In February 2011, a massive civil uprising and anti-government protests in Libya were met with brutal violence and repression from the 41-years regime of leader Muammar Gaddafi. In the midst of the upheaval, an interim opposition government, the National Transitional Council (NTC), was established, and eventually came to be universally accepted as the new governing body of the country.

The ICC investigation in Libya, a State not party to the Statute, was opened on 3 March 2011, following the UN Security Council Resolution 1970 (2011), which referred the situation to the Court. On 27 June 2011, the Pre-Trial Chamber I issued warrants of arrest for Colonel Muammar Gaddafi, his son Saif Al-Islam Gaddafi, Libyan government spokesman, and Abdullah Al-Senussi, Director of Military Intelligence, for alleged crimes against humanity committed against the civilian population. Contrary to the majority of the situations that are currently before the Court, in Libya the State of nationality of the suspects antagonizes the ICC, as the new government in power is very keen to prosecute the most high-ranking members of the old regime. Conversely, the Defence wishes to see them tried before the Court, as it is very unlikely that they would receive a fair trial in Libya.

101 The Security Council’s referral was part of the international community’s response to the Libyan humanitarian crisis, along with a range of economic, political, and military measures aimed at isolating and defeating the Gaddafi regime.
102 Situation in the Libyan Arab Jamahiriya, PTC I Decision on the Prosecutor’s Application pursuant to Article 58 as to Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al- Senussi, ICC-01/11-12, 27 June 2011. On 22 November 2011, PTC I decided to terminate the case against Muammar Gaddafi following his death on 20 October 2011 by hands of the NTC forces in the battle of Sirte, see Prosecutor v. Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, PTC I Decision to Terminate the Case Against Muammar Gaddafi, ICC-01/11-01/11-28, 22 November 2011.
On 19 November 2011, Saif Gaddafi was arrested in the Libyan region of Zintan by rebel forces. On 17 March 2012, Al-Senussi was arrested in Mauritania and extradited to Libya on 5 September 2012. It was immediately clear that the suspects were not arrested on account of the ICC warrant, and that the new government did not intend to turn them over to the Court. Shortly after the arrest of Saif Gaddafi, on 23 November, the NTC wrote a letter to the Court stating that: ‘the National Transitional Council wishes to affirm that, in accordance with the Rome Statute, the Libyan judiciary has primary jurisdiction to try Saif al- Islam Gaddafi and that the Libyan State is willing and able to try him in accordance with Libyan law’. Subsequently, similar affirmations were made by Libya’s Foreign Minister with respect to Al-Senussi. Not surprisingly, thus, Libya never complied with its obligation to surrender Gaddafi and Al-Senussi to the Court. Moreover, it challenged the admissibility of the cases and simultaneously invoked Article 95 in order to postpone surrender pending the decision on the admissibility challenge.

4.2.1 The impact on the rights of suspects

The Defence vehemently opposed such request, arguing that Libya was not entitled to hold the suspects while it challenged admissibility, but had to surrender them to the Court. The delay in the implementation of the

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surrender was seriously hampering the right of suspects to a fair trial, in particular, their right to be tried within a reasonable time and to be present and participate in the proceedings under Article 67(1)(c) and (d) of the Statute.  

Al-Senussi’s Defence submitted that Al-Senussi’s presence at the seat of the Court was required in order to ‘advance proceedings on admissibility and because it is the only way to give effect to his rights under the Court’s Statute and Rules’. More specifically, the Defence averred that only if Al-Senussi is transferred to the Court, will he be in a position to, inter alia, provide instructions to his counsel, discuss with him factual issues relevant to the admissibility of the case, receive a copy of the warrant of arrest issued by the Chamber against him as well as of the admissibility filings, and attend the confirmation of charges hearing.

In the Gaddafi case, the admissibility challenge filed by the Libya’s Government came after 6 months from the initial arrest of Gaddafi by Libyan authorities; in the Al-Senussi case, after more than one year. Throughout this period, suspects were held in isolation without the possibility to communicate with counsel, and were not brought before a judge, contrary to Articles 55 and 59 of the Statute. As a consequence,

107 Prosecutor v. Abdullah Al-Senussi, Defence Response (n 104) 3(b), 58.
108 ibid., 58.
109 In Gaddafi, Libya challenged admissibility on 1 May 2012; in Al-Senussi, Libya challenged admissibility on 2 April 2013. In Al-Senussi, the Prosecutor supported Libya’s argument in favour of national prosecution. In Gaddafi, however, the Prosecutor opposed Libya’s challenge.
110 Prosecutor v. Saif Gaddafi, OPCD Response to the Government of Libya’s Appeal Against the ‘Decision Regarding the Second Request for Postponement of the Surrender of
suspects were not able to effectively participate in admissibility proceedings, instruct counsel on a regular basis and attend court hearings.\textsuperscript{111} The Senussi’s Defence thoroughly explained how these violations resulted from Libya’s non-cooperation combined with the misuse of its prerogatives under the complementarity regime.\textsuperscript{112} In particular, the Defence pointed out that Libya, despite its own admission\textsuperscript{113} that it could have challenged admissibility already on 1 May 2012, waited nearly a year before it actually did so on 2 April 2013, contravening to Article 19(5), which requires States to challenge admissibility ‘at the earliest opportunity’.\textsuperscript{114}

Moreover, the Defence stressed that Libya had obtained custody of Al-Senussi from Mauritania in violation of Security Council resolution 1970 and the requests of the ICC for surrender. As a consequence, granting Libya the possibility to postpone the surrender of Al-Senussi would amount to sanction its non co-operation, and allow it to benefit from its flouting of the Court’s requests.\textsuperscript{115} Finally, both the Defence of Gaddafi and of Senussi reported statements of high-level Libyan authorities to the effect that Libya

\textsuperscript{111} Prosecutor v. Saif Gaddafi, OPCD Response (n 110) 17; Prosecutor v. Abdullah Al-Senussi, Defence Appeal (n 104).

\textsuperscript{112} Prosecutor v. Abdullah Al-Senussi, Defence Response (n 110).

\textsuperscript{113} Prosecutor v. Abdullah Al-Senussi, Defence Appeal on behalf of Mr Al-Senussi against the ‘Decision on Libya’s postponement of the execution of the request pursuant to article 95 and related Defence request to refer Libya to the UN Security Council’, 9 September 2013, 15: ‘in its Application of 1 May 2012, Libya stated that at that time its “national judicial system is actively investigating Mr Gaddafi and Mr Al-Senussi for their alleged (...) crimes against humanity.” Libya explained in its filing of 1 May 2012 that the investigation had been going on for many months, that the two men were to be tried together and it was in a position to challenge the admissibility of Mr. Al-Senussi’s case as well as Mr Gaddafi’s.’

\textsuperscript{114} Prosecutor v. Abdullah Al-Senussi, Defence Response (n 104) 35; Prosecutor v. Abdullah Al-Senussi, Defence Appeal (n 113) 15.

\textsuperscript{115} Prosecutor v. Abdullah Al-Senussi, Defence Response (n 104) 39-43.
had no intention to surrender the suspects to the ICC, irrespective of the merits of their admissibility challenge.\textsuperscript{116}

4.2.2 Art. 95 in the rulings of the Court

The Court refused to give weight to the Defence arguments in favour of a contextual reading of Article 95, but rigidly stuck to a literal interpretation of this provision. According to it, the only consideration that the Pre-Trial Chamber is called upon to make in deciding on a State’s request to postpone surrender is whether the admissibility challenge ‘has been properly made pursuant to Article 19(2) of the Statute and Rule 58(1)’.\textsuperscript{117} In both \textit{Gaddafi} and \textit{Al-Senussi}, the Court found that this had been the case, and agreed to the postponement of the request for arrest and surrender of the suspects.\textsuperscript{118} It is worth taking a closer look to the Chamber’s decisions, as the \textit{Al-Senussi} and \textit{Gaddafi} cases had different admissibility outcomes.

4.2.2.1 Art. 95 in the \textit{Al-Senussi} decision

\textsuperscript{116} Prosecutor v. Saif Gaddafi, OPCD Response (n 110) 31.
\textsuperscript{117} Prosecutor v. Saif Gaddafi, PTC I Decision on the postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to Article 95 of the Statute, ICC-01/11-01/11, 1 June 2012, 37; Prosecutor v. Abdullah Al-Senussi, PTC I, Decision on Libya’s postponement of the execution of the request for arrest and surrender of Abdullah Al-Senussi pursuant to Article 95 of the Statute and related Defence request to refer Libya to the UN Security Council, ICC-01/11-01/11, 14 June 2013, 34.
\textsuperscript{118} Prosecutor v. Saif Gaddafi, PTC I Decision (n 117) 38; Prosecutor v. Abdullah Al-Senussi, PTC I Decision (n 117) 33.
In *Al-Senussi*, the judges rejected *in toto* the arguments advanced by the Defence relating to the inapplicability of Article 95. However, they did not give any satisfactory reason in support of their findings. As of the timeliness of the challenge, the Pre-Trial Chamber simply stated that the mere chronology outlined by the Defence did not persuade it to consider the challenge tardy or abusive, and that the information before it did not ‘appear to indicate that Libya, despite being in a position to properly and timely challenge the admissibility of the case against Al-Senussi, unduly failed to do so in violation of Article 19(5) of the Statute.’

Moreover, the Chamber considered ‘immaterial’, for the limited purposes of Article 95, a determination of whether Libya obtained and/or maintained custody of Al-Senussi in non-compliance with the Court’s request for his arrest and surrender. The purpose of the Court’s evaluation of the applicability of Article 95 ‘is not to determine whether or not the State has previously fulfilled its obligation to cooperate with the Court, but is rather limited to preventing an abusive filing of an admissibility challenge automatically resulting in the illegitimate postponement of the execution of a cooperation request.’

Equally, the fact that domestic proceedings against Al-Senussi had not been terminated and that several statements by Libyan officials indicated Libya’s intention to try Al-Senussi domestically irrespective of the outcome of the challenge, did not persuade the Chamber. In this respect, it observed that ‘these mere facts do not, per se, amount to a violation of Libya’s obligation to cooperate with the Court, insofar as Libya must ensure

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119 ibid., 32
120 ibid., 35.
that its on-going criminal proceedings do not hinder or delay Al-Senussi’s surrender to the Court should the case eventually be declared admissible’. 121

The most unsatisfactory answer, however, was given to the Defence’s complaint that the postponement of surrender would *de facto* deprive the accused of his rights under the Statute and the Rules. The Chamber ‘noted’ this argument. However, it held that ‘such argument, even if upheld, would not negate Libya’s entitlement to postpone the execution of the Surrender Request in the presence of an admissibility challenge that has been properly made consistently with the terms of the relevant statutory provisions’. 122 It did not give further explanations.

Nevertheless, the Chamber emphasizes that the postponement in no way affects Libya’s continuing obligation to cooperate with the Court, as decided by the Security Council. Accordingly, Libya remains under the duty to provide all assistance required by the Court in particular in order to ensure the full and effective exercise of Al-Senussi’s rights and to facilitate a timely determination of the admissibility challenge. 123 The Chamber, thus, warned Libya to refrain from taking any action which could hamper the prompt execution of the surrender request should the case be found admissible. 124

The Defence appeal against this decision was dismissed after the Appeals Chamber confirmed the Pre-Trial Chamber’s finding that Al-Senussi’s case is inadmissible. 125 Despite this finding, the Chamber

121 ibid. 36.
122 Prosecutor v. Abdullah Al-Senussi, PTC I Decision (n 117) 37.
123 ibid.
124 ibid., 40.
125 Prosecutor v. Abdullah Al-Senussi, AC Decision on the Appeal of Mr Al-Senussi against the Pre-Trial Chamber’s ‘Decision on Libya’s postponement of the execution of the request for arrest and surrender of Abdullah Al-Senussi pursuant to Article 95 of the Statute
observed that the Prosecutor may still submit a request for review of the decision in accordance with article 19(10). On 28 July 2015, the Tripoli Court of Assize convicted and sentenced Al-Senussi to death along with several other co-accused for their roles during Libya’s 2011 uprising. In its latest report to the UN Security Council, the OTP stated that ‘[t]he Office continues to collect and analyse relevant information in relation to Al-Senussi’s case within the framework of article 19(10) of the Rome Statute’. However, as of now, it ‘is not fully satisfied that new facts have arisen which negate the basis on which Pre-Trial Chamber I found Al-Senussi’s case inadmissible’. The Office recalled the Appeals Chamber’s finding that, for due process violations in a domestic trial to lead to a case being deemed admissible before the ICC, the violations must be ‘so egregious that the proceedings can no longer be regarded as being capable of providing any genuine form of justice to the accused.’

4.2.2.2 Art. 95 in the Gaddafi decision

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129 Prosecutor v. Abdullah Al-Senussi, AC Judgment (n 40) 190.
In *Gaddafi*, the Pre-Trial Chamber used similar arguments. It is, however, worth quoting the central reasoning by which the judges rejected the reading of Article 95 proposed by the Defence, in that it is particularly revealing of the Court’s tendency to entrench itself behind the literal interpretation of the Statute. To the objection that the delay in the implementation of the surrender was seriously hampering the right of Gaddafi to a fair trial, the judges replied that:

> the Court must fulfil its mandate in accordance with its legal framework and that the complementarity principle is a central aspect thereof and a key feature of the institution. The suspension of the [Court’s] investigation and the corresponding postponement of the cooperation requests is one major consequence of this principle. It would be untenable for the Court to insist on compliance with a request for arrest and surrender, even at the risk of hampering the national proceedings, while its own investigation is suspended.\(^{130}\)

It is interesting to note that the Court failed to engage with the thorny issue of individuals’ rights in complementarity/cooperation proceedings. The non-stated assumption behind the above quoted passage, however, is that individuals’ rights are not a counter-weight to the distortions caused by the ‘legal framework’ (of cooperation) within the given ‘key feature’ (complementarity) of the institution.

Just like in *Al-Senussi*, the Pre-Trial Chamber remarked that the arrest warrant remained valid in accordance with Article 19(9) of the

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\(^{130}\) Prosecutor v. Saif Gaddafi, PTC I Decision (n 117) 36.
Statute, and that Libya must ensure that ‘all necessary measures are taken during the postponement in order to ensure the possibility of an immediate execution of the Surrender Request should the case be found admissible’.  

Unlike the case of Al-Senussi, however, the Court has eventually found the Gaddafi case to be admissible. Despite this finding, however, Libya has failed to comply with the request of the Court and, to date, has not surrendered Gaddafi to its seat. On 10 December 2014, Pre-Trial Chamber I made a finding of non-compliance by Libya and transmitted it to the Security Council, which so far has taken no action.

On 28 July 2015, the Tripoli Court of Appeal sentenced Gaddafi to death along with Al-Senussi. The Prosecutor, thus, immediately requested that the Court ordered Libya to refrain from executing Gaddafi and surrender him to the Court. In its response to this request, Libya submitted that ‘Mr Gaddafi continues to be in custody in Zintan and is presently ‘unavailable’ to the Libyan State.’ In its latest report to the UN Security Council, the Prosecutor stated that, in view of the fact that Libya remains unable to surrender Gaddafi to the Court, the OTP has been exploring ‘other avenues’ through which Gaddafi could be surrendered to the Court. The Prosecutor has confirmed that Gaddafi continues to be detained in Zintan where he is in the custody of the Abu-Bakr al-Siddiq

\[\text{\footnotesize{\textsuperscript{131}} ibid., 40.}\]
\[\text{\footnotesize{\textsuperscript{132}} Prosecutor v. Saif Gaddafi, PTC I Decision on the non-compliance by Libya with requests for cooperation by the Court and referring the matter to the United Nations Security Council, ICC-01/11-01/11-577, 10 December 2014.}\]
\[\text{\footnotesize{\textsuperscript{133}} See supra n 125.}\]
\[\text{\footnotesize{\textsuperscript{135}} 11th Report of the Prosecutor (n 128) 3.}\]
Battalion commanded by Mr al-ʻAjami al-ʻAtiri. On 26 April 2016, thus, the Prosecutor filed a request with Pre-Trial Chamber I for an order directing the Registry to transmit the request for surrender directly to Mr al-ʻAtiri. The Pre-Trial Chamber has not issued a decision on the request at the time of writing. In the event that Mr al-ʻAtiri and the Battalion decide not to cooperate, however, the Prosecutor encouraged the Security Council to impose sanctions on them.

4.3 Simultaneous national proceedings

The provisions of the Statute regulating the impact of the obligation to cooperate with the Court on national proceedings are Article 89 and 94 of the Statute. The former is concerned with requests for arrest and surrender, whereas the latter is concerned with other forms of assistance, such as those envisaged by Article 93 of the Statute. Article 89(2) and (4) regulate the hypotheses in which domestic investigations or prosecutions are underway with respect to the same person targeted by the Prosecutor. Article 89(2) deals with the case of national proceedings that concern the same crime(s). It stipulates that, if the person sought for surrender by the Court brings a challenge before a national

136 ibid.
137 Prosecutor v. Saif Gaddafi, OTP Request for an order directing the Registrar to transmit the request for arrest and surrender to Mr al-ʻAjami AL-ʻATIRI, Commander of the Abu-Bakr al-Siddiq Battalion in Zintan, Libya, ICC-01/11/01/11, 26 April 2016.
138 11th Report of the Prosecutor (n 128) 3.
139 This provision empowers the Court to requests assistance to States with respect to, among others, the identification of persons or the location of items, the taking and the production of evidence, the examination of places (including the exhumation and examination of grave sites) and the execution of searches and seizures. See Article 93 (1), sub-paragraphs (a)-(k) of the Rome Statute.
court\textsuperscript{140} based on the principle of \textit{ne bis in idem} under Article 20 of the Statute, the requested State shall immediately consult with the Court to determine if there has been a relevant ruling on admissibility. If an admissibility ruling is pending, the requested State may postpone the execution of the request until the Court makes its determination. However, if and when the case is found admissible, the state shall proceed with the surrender of the person. As can be seen, Article 89(2) brings the obligation to surrender in line with the principle of \textit{ne bis in idem} enshrined in Article 20, and the related possibility of an admissibility challenge pursuant to Article 17(1)(c) of the Statute.\textsuperscript{141}

Article 89(4) is concerned with national proceedings that deal with a different case.\textsuperscript{142} It provides that the requested State, ‘after making its decision to grant the request, shall consult with the Court.’ This language is rather ambiguous. On the one hand, it seems to rule out the possibility to exploit domestic proceedings for a different case as a ground for refusal, making it clear that the obligation to surrender the person the Court prevails. On the other hand, though, it suggests that there is a decision to be made by the requested State to grant the request.\textsuperscript{143} The Pre-Trial Chamber, however,

\textsuperscript{140} As Kress and Prost pointed out: ‘this is not intended to recognize national courts jurisdiction over the issue, as it is only for the Court to decide the admissibility of the case. Rather, Article 89(2) acknowledges the necessity that, since individuals cannot be prevented from bringing \textit{ne bis in idem} applications before domestic courts, there be consultations between local authorities and the Court to determine whether there has been an admissibility ruling already’, Claus Kress and Kimberly Prost, ‘Article 89’ in Otto Triffterer (ed), \textit{Commentary on the Rome Statute of the International Criminal Court} (2nd edn, Beck/Hart 2008) 1543.

\textsuperscript{141} \textit{ibid} 1540.

\textsuperscript{142} ‘Different case’ does not pertain to the legal qualification of the offence with which the person is charged under national law, but has to be understood as ‘different crime’, Kress and Prost (n 140) 1547. See also Article 94(1) of the Rome Statute.

\textsuperscript{143} \textit{ibid}. 1548, where they also say that ‘this is attributable to the fact that while the issue was resolved in the late stages of the negotiation, the question of inclusion of grounds for
clarified that Article 89(4) does not provide a basis for postponing surrender. Rather, it ‘requires the requested State to grant the request and then consult with the Court [emphasis added]’. Moreover, it has been suggested that the conflict is only apparent, as Article 89(4) must be interpreted in accordance with the general clause enshrined in Article 86, by which States Parties shall ‘cooperate fully’ with the Court in the investigation and prosecution of crimes. The decision to grant the request thus must be taken in accordance with this interpretative guideline.

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

Finally, Article 94 deals with requests other than requests for surrender interfering with national proceedings relating to a different case. It provides that the requested State may postpone the execution of the request for a period of time agreed upon with the Court. However, the postponement shall be no longer than is necessary to complete the relevant investigation or prosecution in the requested State. Moreover, the State should also consider granting the request immediately subject to certain refusal [with respect to surrender in general, ndr] was not resolved until the very final stage’.

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


On the distinction between Article 89(4) and Article 94(1) see Prosecutor v. Saif Gaddafi, PTC I Decision on Libya’s submission regarding the arrest of Gaddafi (n 144), 15.
conditions. During the postponement period, the Prosecutor may seek measures to preserve evidence, pursuant to Article 93(1)(j) of the Statute.

4.4 Competing request of another State

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

As of the competing request to surrender a person of another State, Article 90 sets different regimes depending on: (i) whether the requesting State is a member to the Rome Statute, (ii) whether the requesting State (regardless of it being a party to the Statute) seeks the extradition of the person for a different conduct than that selected by the ICC Prosecutor.

4.4.1 The status of the requesting State

If the requesting State is a party to the Statute, the requested State may postpone the execution of the request until the Court has decided on the admissibility of the case. If the Court decides that the case is admissible, though, the state has to surrender the person to the Court.\textsuperscript{147}

Conversely, if the requesting State is not a party to the Statute and the requested State is under an international obligation to extradite the person to that State, it is the requested State’s discretion to determine which of the two obligations shall prevail.\textsuperscript{148} In making this decision, it shall consider all the relevant factors, such as, for example, the respective dates of the requests, the interests of the requesting State (including, where

\textsuperscript{147} Article 90(2)(a) and (b) of the Rome Statute.

\textsuperscript{148} Article 90(4) and (6) of the Rome Statute.
relevant, whether the crime was committed in its territory and the nationality of the victims and of the person sought), and the possibility of subsequent surrender between the Court and the requesting State.\textsuperscript{149}

If, however, the requested State is not under an international obligation to surrender the person to the requesting State, it shall give priority to the request from the Court if the latter has determined that the case is admissible;\textsuperscript{150} in case the Court has determined that the case is inadmissible, though, the requested State has the discretion to deal with the request for extradition from the requesting State.\textsuperscript{151}

4.4.2 Competing request for a different conduct

If any State requests a State party the extradition of a person for a different conduct than that for which the person is sought by the Court, the requested State shall give priority to the request from the Court if it is not under an international obligation to extradite the person to the requesting State.\textsuperscript{152} Conversely, if such international obligation exists, the requested State has discretion to determine whether to surrender the person to the Court or to extradite the person to the requesting State.\textsuperscript{153} In making its decision, the requested State shall consider all the relevant factors, and give special consideration to the relative nature and gravity of the conduct in question.\textsuperscript{154}

\textsuperscript{149} Article 90(6) of the Rome Statute.
\textsuperscript{150} Article 90(4) of the Rome Statute.
\textsuperscript{151} Article 90(5) of the Rome Statute.
\textsuperscript{152} Article 90(7)(a) of the Rome Statute.
\textsuperscript{153} Article 90(7)(b) of the Rome Statute.
\textsuperscript{154} Article 90(7)(b) of the Rome Statute.
4.5 Competing request for other forms of assistance

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

5. Complementarity and cooperation in practice

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

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

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155 Benvenuti (n 17) 50.
156 Cryer (n 14) 1099.
consequence, the practice of the various organs of the Court is decisive in giving content to this principle.\footnote{ibid.}

As the following paragraphs will show, contrary to what was anticipated by early scholars and commentators, in the practical application of the principle of complementarity the Court did not struggle so much with the ambiguous concepts of ‘genuineness’, ‘unwillingness’ or ‘inability’, but rather with the question of ‘inactivity’ of States, and on what constitutes a ‘case’ for the purpose of the Rome Statute. Curiously, these concepts - which had been quite neglected during the drafting process - have come to shape and dominate the current debate on complementarity.\footnote{Nouwen (n 62).}

5.1 ‘Positive complementarity’ as a prosecutorial strategy\footnote{A shorter version of this paragraph has appeared in a previous article by this author: ‘The Impact of Cooperation of States on the Right to Liberty of Detained Suspects before the ICC: A Contextual Approach’, available on the ICD-International Crimes Database of the T.M.C. Asser Instituut of the Hague: \url{http://www.internationalcrimesdatabase.org/upload/documents/20151207T093605-Ferioli%20Brief%20ICD%20final%20(002).pdf}.}

Twelve years ago, at the beginning of his tenure, the first Chief Prosecutor Luis Moreno-Ocampo made clear that: ‘as a consequence of complementarity, the number of cases that reach the Court should not be a measure of its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.’\footnote{Statement by Mr. Luis Moreno-Ocampo, Ceremony for the Solemn Undertaking of the Chief Prosecutor, 16 June 2003.} This statement conveyed the idea that the complementarity system is aimed at establishing an international order
wherein national institutions respond effectively to international crimes, thereby obviating the need for trials before the ICC.

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

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

162 ibid., 5.
163 ibid., 3.
164 OTP, Informal Expert Paper on Complementarity (n 26) 3.
the structural constrains that characterize its functioning, first and foremost, the need for States cooperation.

In the experts’ opinion, ‘the complementarity regime serves as a mechanism to encourage and facilitate the compliance of States with their primary responsibility to investigate and prosecute core crimes’. 165 Accordingly, the Paper introduced (albeit without defining it as such) what has become known as ‘positive complementarity’. 166 Pursuant to this approach, the Prosecutor’s objective is not to ‘compete’ with States for jurisdiction, but to help ensure that the most serious international crimes do not go unpunished. 167

The concept of ‘partnership’ with States, therefore, became a key aspect of the prosecutorial strategy. 168 In brief, ‘partnership’ with States entails a positive and constructive relationship with national authorities that are genuinely investigating and prosecuting, by which the Prosecutor may encourage the latter to take action with respect to international crimes, help develop cooperative anti-impunity strategies, and even provide them with direct assistance and advice. 169

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165 ibid.
166 In 2006, the positive approach to complementarity was officially formulated as a policy principle in the report of the OTP on Prosecutorial Strategy. According to the definition contained therein, ‘the OTP encourages genuine national proceedings where possible; relies on national and international networks; and participates in a system of international cooperation. OTP, ‘Report on Prosecutorial Strategy’ (2006) 5.
168 ‘Vigilance marks the converse principle that, at the same time, the ICC must diligently carry out its responsibilities under the Statute. The Prosecutor must be able to gather information in order to verify that national procedures are carried out genuinely. Cooperative States should generally benefit from a presumption of bona fides and baseline levels of scrutiny, but where there are indicia that a national process is not genuine, the Prosecutor must be poised to take follow-up steps, leading if necessary to an exercise of jurisdiction’, OTP, Informal Expert Paper on Complementarity (n 26) 4.
169 OTP, Informal Expert Paper on Complementarity (n 26) 4.
Undeniably, positive complementarity is based on a particular understanding of the relationship between the ICC and national jurisdictions, a relationship that is ‘uncompetitive’¹⁷⁰ and presupposes the ‘interdependency between two fora rather than the complete independence of the ICC from domestic courts’.¹⁷¹ This approach welcomes a ‘consensual division of labour’ between the OTP and States, and claims that, in some circumstances, this might be the most appropriate course of action.

In particular, there may be situations where a State expressly acknowledges that it is not carrying out an investigation or prosecution, so as to render the case admissible before the Court (uncontested admissibility scenario). This is perfectly consistent with a literal reading of Article 17, which clearly (albeit implicitly) provides that a case is admissible where no State has initiated any investigation. In such cases there will be no question of ‘unwillingness’ or ‘inability’¹⁷² and the express acknowledgement of the State merely simplifies the factual determination of admissibility.¹⁷³

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

¹⁷⁰ Nouwen (n 62) 341.
¹⁷² OTP, Paper on Some Policy Issues (n 161) 2; OTP, Informal Expert Paper on Complementarity (n 26) 18, 59-66.
¹⁷³ Appropriate circumstances for burden-sharing with the Court may occur, for example, when a State is incapacitated by mass crimes, or where opposing factions refuse national prosecutions for fear of biased proceedings, and yet agree to be tried before an external body which they perceive as impartial.
accused would be left with the possibility of challenging admissibility only on the grounds of *ne bis in idem* and gravity.¹⁷⁴

Finally, it is important to remark that agreements between the Court and States regarding the most appropriate forum of adjudication will often go hand in hand with agreements on cooperation. The Expert Paper advises the OTP to develop ‘a form wherein the State acknowledges non-exercise of jurisdiction in favour of ICC jurisdiction and pledges its co-operation with the ICC investigation and prosecution’.¹⁷⁵ This is especially important when the state concerned is not a party to the Statute and, therefore, does not have an obligation to cooperate arising from it. However, such arrangements may be equally useful with states parties, as they can ‘effectively bolster or make more effective compliance with obligations of Part 9.’ As has been seen in Chapter II, to date, the OTP has signed cooperation agreements with states that have referred situations on their territories.¹⁷⁶

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

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¹⁷⁴ OTP, Informal Expert Paper on Complementarity (n 26) 64.
¹⁷⁵ ibid., 66.
¹⁷⁶ See Chapter II, paragraph 4.3.1.
Statute.”

So far, five out of nine situations investigated by the Court result from self-referrals, namely, the situations in the Democratic Republic of the Congo (DRC), Uganda, Central African Republic (CAR), Ivory Coast and Mali.

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

5.2 The Court’s case law on admissibility

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

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177 OTP, Annex to the Paper on Some Policy Issues (n 65) I.D.
178 The investigation into the situation in Ivory Coast was technically opened at the Prosecutor’s initiative under Article 15 in 2011; however, the engagement of the Court in the country was prompted by a declaration accepting its jurisdiction under Article 12(3) by the government of Ivory Coast in 2003. This situation, thus, is de facto a self-referral.
According to the Appeals Chamber, when a State having jurisdiction remains inactive with respect to a case (that is, it is not investigating or prosecuting, or has not done so), the latter is admissible, and the question of unwillingness or inability does not arise. As a consequence, unwillingness and inability have to be considered only a) when there are domestic investigations or prosecutions that could render the case inadmissible before the Court, b) when there have been such investigations and the State having jurisdiction has decided not to prosecute the person concerned.

Despite the fact that some form of national proceedings was ongoing before national courts, in its decisions on admissibility so far the Court has found cases to be admissible due to the inaction of the relevant state, and has not inquired on the issues of unwillingness and inability. These findings of inactivity are based on two reasons, which will be examined below.

5.2.1 A narrow interpretation of a ‘case’ under Art.17 St.

In the decision issuing an arrest warrant against the first defendant of the Court, Thomas Lubanga Dyilo, the Pre-Trial Chamber held that ‘it is a conditio sine qua non for a case arising from the investigation of a situation to be inadmissible that national proceedings encompass both the person and

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181 ibid., 78.

182 Nouwen (n 62) 45.
the conduct which is the subject of the case before the Court’ (same conduct test).\textsuperscript{183}

The DRC authorities were prosecuting Lubanga for very serious charges, such as genocide and crimes against humanity; however, they did not include the one and only charge selected by the ICC Prosecutor, namely, the enlistment and conscription of child soldiers. Applying the ‘same conduct test’, the Pre-Trial Chamber considered that the DRC was ‘inactive’ in relation to the Prosecutor's case and, as a consequence the latter was admissible before the Court. This standard has been applied in many subsequent decisions on arrest warrants (among others, the one against Katanga),\textsuperscript{184} as well as in judgments on challenges to admissibility raised by states.\textsuperscript{185}

5.2.2 A decision to close national proceedings to the benefit of the Court

In its decision on the challenge to the admissibility of the case raised by Katanga’s Defence, the Court ruled that, if a state decides to relinquish its jurisdiction in favour of the ICC, the case is admissible regardless of the state’s willingness or ability to prosecute it.\textsuperscript{186} The Appeals Chamber considered that, at the time of the challenge,\textsuperscript{187} no investigation regarding

\textsuperscript{183} Prosecutor v. Thomas Lubanga, PTC I Decision on the Prosecutor’s Application for a Warrant of Arrest, ICC-01/04-01/06, 10 February 2006, 31.
\textsuperscript{186} Prosecutor v. Germain Katanga, AC Judgment (n 180) 80.
\textsuperscript{187} Contrary to what the Defence had claimed, the Appeals Chamber found that the
Katanga was taking place in the DRC, as the latter had closed any investigation that may have been on-going when it decided to surrender Katanga to the Court in October 2007. There was no same conduct test to apply because there were simply no proceedings, and the DRC had to be considered inactive in relation to any investigations or prosecutions of any crime allegedly committed by Katanga.\textsuperscript{188}

The decision to end the national investigations did not constitute a decision not to prosecute under Article 17(1)(b) either, as its thrust was not that ‘the Appellant should not be prosecuted, but that he should be prosecuted, albeit before the International Criminal Court’.\textsuperscript{189} In the view of the Chamber: ‘if the decision of a State to close an investigation because of the suspect's surrender to the Court were considered to be a decision not to prosecute, the peculiar, if not absurd, result would be that because of the surrender of a suspect to the Court, the case would become inadmissible. In such scenario, neither the State nor the ICC would exercise jurisdiction over the alleged crimes, defeating the purpose of the Rome Statute.’\textsuperscript{190}

Finally, the judges acknowledged that, depending on the circumstances of each case, the decision of a State to relinquish its jurisdiction in favour of the Court may not be inconsistent with the duty to exercise its criminal jurisdiction under the sixth paragraph of the Preamble.\textsuperscript{191}

\textsuperscript{188} Prosecutor v. Germain Katanga, AC Judgment (n 180) 80.
\textsuperscript{189} ibid., 82.
\textsuperscript{190} ibid., 83.
\textsuperscript{191} Ibid., 85.
This reasoning has been applied for dismissing every challenge to admissibility brought up by accused persons so far. For example, in its decision on the admissibility challenge raised by Bemba, the Trial Chamber expressly acknowledged that the CAR authorities were investigating the accused for the same case as the ICC Prosecutor’s.\textsuperscript{192} However, on 16 December 2004 the Bangui Court of Appeal ordered the transfer of the case to the Court, which made the CAR inactive with respect to that case at the time of the admissibility challenge (2010).\textsuperscript{193}

In its document in support of the appeal, the Defence of Katanga made interesting observations concerning the impact that such conception of admissibility might have on the rights of the accused. According to it, the latter should be entitled to challenge consensual burden sharing when his/her rights are violated as a result of this or when the national ‘waiver of prosecution’ would be unduly prejudicial.\textsuperscript{194} It rightly pointed out that ‘if the Court informs States that it will not inquire into the reason why the State is unwilling to investigate or prosecute, it will have the effect of encouraging the current practice of the DRC to simply keep detainees in detention indefinitely until the ICC decides whether or not it wants to prosecute them.’\textsuperscript{195}

\textsuperscript{192} Prosecutor v. Jean-Pierre Bemba, TC III Decision on Admissibility and Abuse of Process Challenges, ICC-01/05-01/08, 24 June 2010, 218.
\textsuperscript{193} ibid., 224, 238-242.
\textsuperscript{195} ibid., 100.
6. Conclusion

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

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

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

Stahn, ‘Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified Defeference?’ (n 27) 229.
In addressing the merits of these challenges, ICC Judges have not engaged with the structural tensions and limitations of the Court with a view of protecting the accused. Rather, they have given narrow/legalistic answers to broader policy questions. Although the case law on the challenges to jurisdiction and admissibility examined above is consistent with the letter of the Statute, these decisions are nonetheless problematic from a human rights perspective. The ICC Judges have adopted an interpretation of admissibility that is extremely obsequious towards the interests of states. By so doing, they have *de facto* sanctioned the policy of positive complementarity of the Prosecutor and have refrained from questioning the most problematic aspects of the practice of consensual burden sharing between the OTP and national authorities.
Chapter IV

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

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1. Introduction¹

This Chapter aims at understanding the challenges that State cooperation poses to the right to liberty of suspects and accused, particularly, to their right not to be subject to arbitrary arrest and detention. In addition, the Chapter considers the impact of cooperation on the possibility for the accused to be released pending trial, which is a closely related issue.

Section 2 of the Chapter starts by assessing the content of the right to liberty under human rights law. Section 3 examines the protection of this right in the Rome Statute, showing the drafters’ intent to align the protection

contained in the Statute with the relevant provisions of human rights conventions.

Section 4 and 5 consider whether the law and practice of the Court sufficiently acknowledge the position of suspects detained by national authorities throughout part of the investigation, and the risks to their liberty that the division of labour between the Court and States entails. To this end, section 4 examines the ICC procedure for the deprivation of liberty and tries to account for the steps that lead the Prosecutor to focus on a specific person as the subject of the investigation. Section 5 examines the challenges to the jurisdiction raised by three accused: Thomas Lubanga, Germain Katanga and Laurent Gbagbo, as they provide the clearest example of the problems that States’ cooperation with the Court in arresting suspects raises with respect of the right to liberty of the latter. At the same time, the arguments used by the Court in its decisions concerning these challenges are a clear indicator on how the judges have intended their supervisory role vis-à-vis the Prosecutor and national authorities, and their responsibilities in guaranteeing the right to liberty of defendants.

Section 6 is concerned with the practice of interim release before the Court. Here too, the Chapter weighs the advanced substantive protection that the Statute affords ‘on paper’ to the right of the accused to be released pending trial against the reality imposed by States cooperation.

2. The right to liberty in international human rights law

The right to personal liberty and security enshrined in Article 9 of the Universal Declaration of Human Rights has been included in most of the existing human rights treaties, both at the international and regional level.
Article 9 of the International Covenant of Civil and Political Rights (ICCPR), Article 7 of the American Convention of Human Rights (ACHR), Article 5 of the European Convention of Human Rights (ECHR) and Article 6 of the African Charter on Human and Peoples Rights (ACHPR) all establish certain procedural guarantees and minimum standards for protection against arbitrary arrest and detention.

In particular, they prescribe that deprivations of liberty are lawful only when they are done in accordance with the law, and are carried out in a number of specified circumstances. Article 5(1) ECHR differs from the other Conventions in that it defines exhaustively the cases in which a person may be deprived of her/his liberty. These are, inter alia, i) detention after a conviction, ii) detention in case of non-compliance with a court order or legal obligation, iii) and detention on remand, i.e., ‘for the purpose of bringing a person before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so’.\(^2\)

Human rights conventions also include a number of procedural safeguards for anyone who is arrested or detained. In particular, they require that anyone arrested be promptly informed as to the reasons of the arrest and the charges against them, in a language that they understand.\(^3\) The purpose of this requirement is to enable the person to challenge the lawfulness of the arrest (see below).

Moreover, they give everyone arrested or detained on suspicion of having committed an offence the right to be promptly brought before a

\(^2\) Article 5(1)(a), (b) and (c) ECHR.

\(^3\) Article 9(2) ICCPR; Article 5(2) ECHR.
judge, be tried within a reasonable time or be released pending trial.\textsuperscript{4} In this respect, the ICCPR establishes the principle by which detention shall not be the rule for persons awaiting trial, but the exception.\textsuperscript{5}

Distinct from the right to apply for interim release is the right to have the legality of detention reviewed by a judge. Challenges to the lawfulness of the deprivation of liberty must be speedily decided by a court, and if the detention is ruled unlawful the person must be released.\textsuperscript{6} Finally, human rights treaties provide that victims of unlawful arrest or detention have an enforceable right to compensation.\textsuperscript{7}

The following section will examine the protection of the right to liberty in the Rome Statute, which is aligned with the relevant provisions of human rights conventions.

3. The right to liberty in the Rome Statute

3.1 The overarching principle in Art. 21(3)

The Rome Statute contains significant innovations in the codification of human rights, in particular during the pre-trial phase of the Court’s proceedings. At the outset, Article 21 must be mentioned. This provision is located in Part II of the Statute and follows the provisions governing the jurisdiction and the admissibility of the Court. It lists the sources of law applicable by the Court, establishing a clear hierarchy between them.\textsuperscript{8}

\begin{itemize}
\item \textsuperscript{4} Article 9(3) ICCPR; Article 5(3) ECHR.
\item \textsuperscript{5} ibid.
\item \textsuperscript{6} Article 9(4) ICCPR; Article 5(4) ECHR.
\item \textsuperscript{7} Article 9(5) ICCPR; Article 5(5) ECHR.
\item \textsuperscript{8} Article 21(1) of the Rome Statute reads as follows: ‘The Court shall apply: (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence; (b) In the
According to Article 21(3), such legal instruments \textit{(in primis, the Rome Statute)} must be interpreted and applied in accordance with internationally recognized human rights. It follows from this provision that human rights law is set as a review mechanism for all the dispositions of the Statute. This is a significant innovation if compared to the law of the ICTY and ICTR, where no such hierarchy among the sources of law existed, and where the position of the Tribunals with respect to human rights norms was much more ambiguous.\textsuperscript{9}

One commentator noted that Article 21(3) has the potential to trigger a paradigm-shift in the interaction between human rights law and international criminal proceedings. In this respect, it is useful to recall that much of the debate before the ICTY and ICTR hinged on the question of whether the exceptional context and circumstances in which the tribunals operate justified a re-interpretation of the existing corpus of internationally recognized human rights.\textsuperscript{10} It goes without saying that such a re-interpretation would often result in a reduction of protection for the accused, to the benefit of the Prosecution. Conversely, the existence of the overarching principle enshrined in Article 21(3) would prevent a similar jurisprudence to form at the ICC, in that:

\begin{footnotesize}
second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict; (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.’

\textsuperscript{9} Göran Sluiter, ‘Human Rights Protection in the ICC Pre-Trial Phase’ in Carsten Stahn and Göran Sluiter (eds), \textit{The Emerging Practice of the International Criminal Court} (Nijhoff 2009) 460.

\end{footnotesize}
‘internationally recognized human rights’ are applicable fully, and thus need not be ‘re-interpreted’ in light of the unique mandate and context of the ICC. More concretely, the mandatory and specific content of Article 21(3) of the Statute appears to prevent Judges from adjusting the content of human rights law to the unique ICC-context.\textsuperscript{11}

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

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

Other provisions of the Statute protecting the right to liberty of suspects and accused are located in Part V of the Statute, dealing with the investigation and prosecution. Article 55 contains an explicit codification of the rights of persons in the course of the investigation.\textsuperscript{12} Along with other rights concerning mainly the questioning procedures, the second paragraph of this provision contains the overarching principle according to which, ‘in respect of an investigation under this Statute, a person (…) shall not be subjected to arbitrary arrest and detention, and shall not be deprived of his/her liberty except on such grounds and in accordance with such procedures as

\textsuperscript{11} Sluiter (n 9) 463.
established in the Statute.\textsuperscript{13} The grounds for arrest and the safeguards for the arrested person are set forth in other articles of the Statute, namely, Articles 58 and 59, which are addressed in paragraph 4.2 of this Chapter.

For now, it is worth noting that the letter of Article 55(1)(d) appears to limit the right not to be subject to arbitrary arrest and detention to ‘an investigation under this Statute’. In this respect, the Court has clarified that the right not to be subject to unlawful detention ‘does not extend to every arrest or detention that related in any way to an investigation by the Court’. Rather, ‘in order for an arrest or detention to be “in respect of an investigation” within the meaning of Article 55(l)(d), it would need to be demonstrated, at minimum, that there is concerted action between the Court and national authorities.’\textsuperscript{14} In other words, the person must have been unlawfully arrested or detained in a manner which is attributable to the Prosecutor or any other organ of the Court, and ‘concerted action’ between the Court and States is required before the Court evaluates whether someone’s right to liberty has been violated.

3.3 The right to challenge one’s detention

The right of the accused to challenge the lawfulness of his/her detention is not provided for by the Rome Statute. Rule 117(3) RPE, however, makes up for this omission by prescribing that a challenge as to whether the warrant

\textsuperscript{13} Article 55(1)(d) of the Rome Statute.
\textsuperscript{14} Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta, TC V Decision on the Application for a Ruling on the Legality of the Arrest of Mr Dennis Ole Itumbi, ICC-01/09-02/11, 19 November 2012, 7.
of arrest was properly issued under Article 58 of the Statute\textsuperscript{15} shall be made in writing to the Pre-Trial Chamber.

So far, however, problems of unlawful detention have not arisen with respect of the criteria set forth by Article 58 of the Statute, but rather, with respect to the execution of arrest requests of the Court by national authorities. As will be seen, defendants have lamented the fact of having been arbitrarily arrested and detained in their home country prior to their transfer to The Hague, as well as the existence of irregularities in the implementation of the request for arrest and surrender. The legal basis that they used to file such complaints is Article 19 of the Statute, which grants an accused or a person for whom a warrant of arrest or a summons to appear has been issued the possibility to challenge the jurisdiction of the Court.\textsuperscript{16} In other words, defendants have complained about violations of their \textit{habeas corpus} rights by making challenges to the jurisdiction of the Court.

Interestingly, such challenges are not meant to address human rights issues, but relate to the restrictions that the Statute imposes on the jurisdiction of the Court (i.e., the limitations \textit{ratione materiae}, \textit{ratione temporis}, \textit{ratione personae} and \textit{ratione loci}). In the Lubanga case, the Appeals Chamber noted the \textit{sui generis} character of jurisdictional challenges based on human rights grounds:

\begin{quote}
Abuse of process or gross violations of fundamental rights of the suspect of the accused are not identified as such as grounds for which the Court may refrain from embarking upon the exercise of its jurisdiction (…).
\end{quote}

\textsuperscript{15} Article 58 of the Statute, setting out the criteria for the issuance of an arrest warrant, is addressed at paragraph 4.2 of this Chapter.
\textsuperscript{16} See Chapter III, paragraph 2.5.
Notwithstanding the label attached to it, the application of Mr. Lubanga Dyilo does not challenge the jurisdiction of the Court (…) What the appellant sought was that the Court should refrain from exercising its jurisdiction in the matter in hand. Its true characterization may be identified as a *sui generis* application, an atypical motion, seeking the stay of the proceedings, acceptance of which would entail the release of Mr. Lubanga Dyilo.\(^{17}\)

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

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

be of considerable importance for the outcome of subsequent jurisdictional challenges.

Drawing on the Lubanga jurisprudence, the Appeals Chamber in Gbagbo clarified that a decision of the Pre-Trial Chamber addressing a request for a stay of proceedings based on allegations of violations of a suspect's fundamental rights is not jurisdictional in nature.\(^\text{18}\) Thus, it cannot be appealed under Article 82(1)(a) of the Statute. The correct legal basis for appealing such decisions is Article 82(1)(d), which requires the leave of the Pre-Trial Chamber.\(^\text{19}\) Since Gbagbo had not requested the leave of the Pre-Trial Chamber, his challenge has been found inadmissible and its merits were not considered.

3.4 Remedies for unlawful arrest and detention\(^\text{20}\)

3.4.1 Financial compensation

In reproducing the content of Article 9(5) ICCPR, Article 85(1) of the Statute provides that ‘anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation’. By so doing, this provision sanctions the violations of the rules governing the arrest and pre-trial detention of a person set forth in other articles of the Statute, first and foremost Articles 58 and 59 (see further at paragraph 4.2).\(^\text{21}\)


\(^{19}\) ibid., 102.

\(^{20}\) The issue of remedies for procedural violations at the ICC is beyond the scope of this thesis. For a comprehensive analysis of the topic see Kelly Pitcher, ‘Judicial Responses to Pre-Trial Procedural Violations in International Criminal Proceedings’ (forthcoming).

\(^{21}\) Karel De Meester and others, ‘Chapter 3. Investigation, Coercive Measures, Arrest, and Surrender’ in Göran Sluiter and others (eds), *International Criminal Procedure: Principles*
Given that arrests are executed by national authorities on behalf of the Court, the biggest shortcoming of Article 85(1) is that it does not specify whether the unlawful detention must be attributable to the ICC in order for the compensation to be awarded. Recently, the Court has given a positive answer to this question, confirming that ‘in order to obtain a finding under Article 85(1) of the Statute it is insufficient to establish that a person’s arrest is merely “connected with Court proceedings” in the absence of concerted action’ between the Prosecutor and national authorities under Article 55(1)(d) (see supra paragraph 3.2).

3.4.2. Stay of proceedings

A stay of proceedings is a judicial ruling by which the proceedings are brought to a halt, permanently or for a limited period of time. Neither the Rome Statute nor the RPE provide for it in case of unlawful deprivations of the right to liberty of the accused. However, this remedy has been recognized for the first time by the ICC judges in Lubanga, where the Appeals Chamber was requested to permanently stay the proceedings due to allegations that Lubanga had been illegally detained and ill-treated by the DRC authorities in collusion with the Prosecutor.

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22 De Meester and others (n 21) 367.
24 For a thorough analysis of this and other remedies in the proceedings of the Court and the ad hoc Tribunals, see: Pitcher (n 23).
25 The case of Lubanga will be thoroughly discussed at paragraph 5 of the present Chapter.
Based on Article 21(3) of the Statute, which requires the ICC to exercise its jurisdiction in accordance with internationally recognized human rights standards, the Chamber found that the Court has the power to stay proceedings (that is, to stop exercising jurisdiction), when unfairness to the accused has ‘rupture[d] the process to an extent making it impossible to piece together the constituent elements of a fair trial’. In subsequent decisions the Court elaborated further on the circumstances under which a stay if proceedings can be imposed. It found that not every breach of the rights of suspect/accused warrants a halt to the trial, in that a stay of proceedings is a ‘drastic’ and ‘exceptional’ remedy. As a consequence, it may only be resorted to in case of ‘gross violations’ of the rights of the accused.

4. The right to liberty in the course of the investigation

4.1 From the preliminary examination to the investigation

Chapter III has described the two stages of the Court’s investigation, the preliminary examination and the actual investigation. A brief recap is in order here. As has been seen, upon the receipt of a referral by a State or the UN Security Council, a declaration under Article 12(3), or a communication

26 Prosecutor v. Thomas Lubanga, AC Judgment (n 17) 35-39; Pitcher (n 23) 12.
27 Prosecutor v. Thomas Lubanga, AC Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled “Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU”, ICC-01/04-01-06-2582, 8 October 2010, 55.
29 See paragraph 3 of Chapter III.
pursuant to Article 15 of the Statute, the Prosecutor starts a ‘preliminary examination’ of the situation at hand in order to determine whether there is a ‘reasonable basis’ to open an investigation. To this end, pursuant to Article 53(1) of the Statute, s/he must consider whether the alleged crimes fall within the jurisdiction of the Court, whether the possible cases arising from the investigation would be admissible under Article 17, and whether an investigation would serve the interests of justice. Upon the conclusion of the preliminary examination, should the Prosecutor find the existence of a reasonable basis to proceed, s/he will open a formal investigation (with the authorization of the Pre-Trial Chamber when necessary\textsuperscript{30}). At any time after the initiation of the investigation, the Prosecutor may apply to a Pre-Trial Chamber for a warrant of arrest or a summons to appear against an individual, which will be executed by national authorities.

4.2 The legal basis for the deprivation of liberty

Article 58 of the Statute sets out the procedure to issue an arrest warrant or summons to appear.\textsuperscript{31} In order to issue an arrest warrant, the judges must be satisfied that: a) there are reasonable grounds to believe that the person has committed the crimes charged,\textsuperscript{32} and b) that detention is necessary for one of the following alternative reasons: (i) to ensure the person’s appearance at trial (i.e., risk of flight); (ii) to ensure that the person does not obstruct or

\textsuperscript{30} Article 15(3) of the Rome Statute.
\textsuperscript{31} Under Article 58(7) of the Rome Statute, a summons to appear is an alternative to the arrest warrant and can be issued when the Pre-Trial Chamber believes that the summons is sufficient to ensure the person’s appearance at trial.
\textsuperscript{32} Article 58(1)(a) of the Rome Statute.
endanger the investigation or the Court proceedings; (iii) to prevent the person from continuing with the commission of crimes.\textsuperscript{33}

Under Article 89, the Pre-Trial Chamber transmits the request for arrest and surrender ‘to any State on the territory of which [the] person may be found and shall request the cooperation of that State in the arrest and surrender of such a person’.\textsuperscript{34}

Article 59, regulating arrest and surrender proceedings in the custodial State, sets forth a procedure aimed at complying with international human rights standards. In particular, it contains obligations for States, rights for the arrested person and the procedure to be followed by national judges to grant interim release.\textsuperscript{35} Under Article 59(2), the requested State shall immediately take steps to arrest the person in question in accordance with its laws and the ICC Statute. The arrested person ‘shall be brought promptly before the competent judicial authority in the custodial state which shall determine, in accordance with the law of that state that a) the warrant applies to that person, b) the person has been arrested in accordance with the proper process, c) the person’s rights have been respected’.

As has been noted, in this way national judges become ‘guardians’ of the lawfulness of the arrest.\textsuperscript{36} There are, however, two main questions that this regime leaves unanswered. The first one relates to the role and powers of national judges in case they determine that a State has failed to

\textsuperscript{33} Article 58(1)(b) of the Rome Statute.
\textsuperscript{34} Importantly, after the execution of the arrest, the person is also entitled to the assistance of counsel under Rule 117(2) RPE, which reads: ‘at any time after arrest, the person may make a request to the Pre-Trial Chamber for the appointment of counsel to assist with proceedings before the Court and the Pre-Trial Chamber shall take a decision on such request’.
\textsuperscript{35} De Meester and others (n 21) 318.
comply with Article 59(2). For example, if they establish a manifest violation of the person’s rights in the execution of the arrest or an illegality in the detention, what are the remedies that national judges can provide to the suspect? Can they permanently release him/her? So far this issue has not arisen in the practice of the Court. Scholars, however, tend to respond in the negative, stressing that the obligation to surrender the person to the Court must prevail and be fulfilled pursuant to Article 59(4).\(^{37}\)

This brings us to the second question, concerning the role of the Court with respect to violations committed by national authorities executing arrest warrants on its behalf. When national judicial authorities fail to rule on such violations, an arrested person may bring up the issue before the Court. Therefore, the question arises as to whether the ICC is competent to address and provide a remedy for such violations.\(^{38}\) This matter will be addressed thoroughly in section 5 of the present Chapter.

4.2.1 Provisional arrest

Under Article 92(1) of the Statute, the Court may request the provisional arrest of a person pending presentation of the formal request for surrender. Unlike the Prosecutor of the ad hoc Tribunals,\(^{39}\) thus, the ICC Prosecutor

\(^{37}\) De Meester and others (n 21) 329; Sluiter (n 9) 469; Christopher K Hall, ‘Article 59’ in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn, Beck/Hart 2008) 1152; contra see Mohamed M El Zeidy, ‘Critical Thoughts on Article 59(2) of the ICC Statute’ (2006) 4 Journal of International Criminal Justice 448, 455, according to whom ‘a violation of the person’s right may sometimes result in a decision by the competent authorities to release the person in question’.

\(^{38}\) El Zeidy (n 37) 457; see generally: Sluiter (n 9).

\(^{39}\) Rule 40 of the ICTY and ICTR RPEs. According to it, the Prosecutor may request a State, as a matter of urgency, to arrest a suspect ‘provisionally’ and place him/her into custody. Subsequently, Rule 40bis enables the Prosecutor to request a judge to order the transfer and provisional detention in the premises of the Tribunal of a person arrested by a
does not have the autonomous power to request States the provisional arrest of an individual in urgent cases in the absence of a warrant of the Chamber. In other words, at the ICC, provisional arrest is merely ‘a tool of cooperation that deviates from the ordinary situation where a state is requested to arrest and surrender’ and, as such, is always based on the existence of an arrest warrant.

4.3. Prosecutorial discretion in relation to the right to liberty

4.3.1 Discretion in relation to the time frame of the investigation

The ICC Prosecutor has a considerable discretion with respect to the time frame of the investigation. At the preliminary examination stage, the Prosecutor has no formal investigative powers, and consequently, no duty of care about the individuals that will be targeted by the investigation. At the same time, there is no involvement of the Pre-Trial Chamber in supervising the Prosecutor’s activities or safeguarding the rights of those people who might become future suspects. There is no time limit for a preliminary examination and the Prosecutor can keep evaluating the situation and the relevant national proceedings for years. This was the case of the preliminary examination of the situation in the Central African Republic (CAR), which went on for over two years. The CAR government referred the situation on its territory in December 2004 but the investigation did not commence until May 2007. Similarly, Ivory Coast made a declaration pursuant to Article State pursuant to Rule 40.
12(3) of the Statute in 2003, but the Prosecutor requested authorization from the Pre-Trial Chamber to start an investigation only in 2011.⁴₀

With the commencement of the investigation, duties and powers of the Prosecutor are (to a certain extent) clearly defined by Article 54 of the Statute. Paragraph 1, letter c) of Article 54 imposes upon the Prosecutor the duty to respect the rights of persons arising under the Statute. As has been seen, at any time after the initiation of the investigation, the Prosecutor may apply to a Pre-Trial Chamber for a warrant of arrest or a summons to appear against an individual. It is important to note that the Statute does not impose a time limit on the Prosecutor for the completion of the investigation and for approaching the Pre-Trial Chamber with a request for an arrest warrant. In the situation in the Democratic Republic of Congo (DRC), the first arrest warrant against Lubanga was issued after two years from the commencement of the investigation in June 2004. As a matter of fact, this system ‘leaves wide discretion and has the advantage to permit an investigation without any ‘obstacles’, especially the intervention by a defense lawyer’.⁴¹

4.3.2 Discretion in relation to the designation of suspects

In order to make considerations about the responsibility of the Prosecutor towards an individual, it is important to clarify the steps that lead the Prosecutor to focus on a specific person as the subject of the investigation. In this respect, it is essential to distinguish between the notion of a

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‘situation’ brought to the attention of the OTP with a referral or a communication, and that of a ‘case’ against an individual developed by the Prosecutor in the course of the investigation.

Albeit the Statute does not define these concepts, they have assumed great importance in the practice of the Court. The Pre-Trial Chamber clarified the distinction in the following terms. According to the judges, situations ‘are generally defined in terms of temporal, territorial and in some cases personal parameters’ (…) and ‘entail the proceedings envisaged in the Statute to determine whether a particular situation should give rise to a criminal investigation as well as the investigation as such’. Cases, on the other hand, ‘comprise specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects’ and ‘entail proceedings that take place after the issuance of a warrant of arrest or a summons to appear’.42

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

It is submitted that the definition of a case given by the Court is in some way artificial. This is because, in practice, the OTP will most likely focus on individuals long before a legal case in the sense of Article 58 exists.43 The regulations of the OTP clarify that allegations against one or

43 Kai Ambos, ‘Preliminary Considerations: The Object of Reference of the Complementarity Test (Situation–Case–Conduct)’, *The Colombian Peace Process and the*
more specific individuals are bundled during the course of the investigation. Under Regulation 34 of the Regulations of the Court, a joint team of the OTP will review the information and evidence collected during the investigation and will ‘determine a provisional case hypothesis (or hypotheses) identifying the incidents to be investigated and the person or persons who appear to be the most responsible’. Such case hypothesis will include ‘a tentative indication of possible charges, forms of individual criminal responsibility and potentially exonerating circumstances’.

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

[t]he Office will develop a Case Selection Plan which identifies in broad terms the potential cases within the situation. Initially, the Plan will be based on the conclusions from the preliminary examination stage, including the potential cases identified therein. As investigations within a situation proceed, the Office will gradually develop one or more provisional case hypotheses that meet the criteria set out in this policy paper.\textsuperscript{44}

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

\textsuperscript{44}OTP, ‘Draft Policy Paper on Case Selection and Prioritisation’ (2016) 7.
internal policy, that involves neither the defense nor the Court’. As a matter of fact, the Statute does not even use the word ‘suspect’, but only that of ‘accused’ at Article 61(9).

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

In sum, it is useful to distinguish between a case in a strict legal sense, which arises after the issuance of an arrest warrant or a summons by the Pre-Trial Chamber, and a case in a broader sense, which commences at the moment the Prosecutor directs her/his investigative efforts towards a specific individual. Early on, the Court clarified that the ‘the principle of a fair trial applies not only to the case phase – on issuance of a warrant of arrest or a summons to appear – but also prior to the case phase’, where

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46 Zappalà (n 12) 1182 (footnote 3).

47 Ambos (n 43) 38.
‘there is no defendant as such, given that no individual has been issued with a warrant of arrest or a summons to appear’.48

5. Challenges to the jurisdiction of the Court in Lubanga, Katanga and Gbagbo

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

5.1 The context of the cases

So far, three defendants have challenged the jurisdiction of the Court alleging violations of their habeas corpus rights: Thomas Lubanga49 and Germain Katanga50 in the situation in the Democratic Republic of the

48 Situation in the DRC, PTC I Decision on the Prosecution’s Application for Leave to Appeal the Chamber’s Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04, 31 March 2006, 35-36.
Congo (DRC), and Laurent Gbagbo\textsuperscript{51} in the situation in Ivory Coast. Both of these situations were referred to the Court by the accused’s state of nationality, that is, the very State that was supposed to exercise its jurisdiction over the persons in question.

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

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

letter and purpose of the Rome Statute has been discussed at length among scholars,\(^{52}\) and goes beyond the scope of this Chapter. However, when addressing *habeas corpus* rights of defendants, it is important to keep in mind the ‘friendly’ relationship between the Court and the referring State.

Finally, in the cases in question, defendants had already been in the custody of national authorities when the Prosecutor applied for an arrest warrant to the Pre-Trial Chamber. Both Lubanga and Katanga had been initially arrested in relation to the killing of 9 MONUC peacekeepers on 25 February 2005.\(^{53}\) Katanga was arrested by Congolese authorities the very day after the incident, on 26 February 2005,\(^{54}\) whereas Lubanga was captured nearly one month later on 19 March 2005. Following their apprehension, both had been kept in detention and subsequently charged with additional and very serious crimes such as genocide and crimes against humanity. The Prosecutor’s request for arrest on behalf of the Court, therefore, came after ten and seventeen months of detention in national prisons respectively. Similarly, Gbagbo was arrested by forces loyal to the newly elected president Ouattara in April 2011 and detained in various

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\(^{54}\) Prosecutor v. Germain Katanga, Defence Motion, 2 July 2009 (n 50) 12.
locations before the issuance of an arrest warrant by the Pre-Trial Chamber on 23 November 2011 and his transfer to the Court one week later.\footnote{Prosecutor v. Laurent Gbagbo, Defence Corrigendum, 29 May 2012 (n 51), 8, 30 and 41.}

5.2 The content of the challenges

Defendants complained that their initial detention by national authorities had been completely unlawful and motivated by political reasons. They lamented several violations of their basic rights by local authorities, such as being deprived of their liberty in the absence of an arrest warrant, without being informed of the charges against them, and being denied prompt access to a lawyer. Gbagbo’s Defence also alleged grave physical ill-treatment, abuses, and torture.\footnote{Ibid., 20.} As a consequence, defendants requested the Court to take responsibility for the above violations and dismiss its jurisdiction.\footnote{The scenario of a state that arrests or detains a suspect unlawfully before surrendering him/her to the ICC has been thoroughly discussed by Christophe Paulussen in his doctoral thesis on the issue of the male captus bene detentus doctrine before the ICC: Christophe Paulussen, \textit{Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court} (Intersentia 2010); see also: Karel De Meester, \textit{The Investigation Phase in International Criminal Procedure}, vol 71 (Intersentia 2015).}

This request was based on two arguments, which will be considered below.

5.2.1. Alleged prosecutorial misconduct

Defendants complained of the Prosecutor’s violation of the statutory duty of care about the suspect because, by the time they became target of the ICC investigation, the Prosecutor must have been aware of the violations characterizing their detention before national authorities, but did nothing to
stop them. Quite the contrary: s/he took advantage of them for her/his own investigations.

The core argument of defendants’ submissions is that, once the accused becomes a principal suspect in the case and therefore a target of the activities of the Prosecutor, a duty of care towards him/her arises by virtue of Articles 54(1)(c), 67(1)(c) and 21(3) of the Statute.58 The first article obliges the Prosecutor to ‘fully respect the rights of persons’ during an investigation; the second endows the accused with the right to be tried without undue delay, and the third one is the overarching principle according to which every activity of the Court must be in compliance with internationally recognized human rights.

A crucial issue that defendants had to face, therefore, was determining at which point in the investigations the Prosecutor's attention was drawn to them and they became suspects in the case. As has been seen, the Statute and the Rules do not regulate the matter and the Prosecutor has no obligation to formalize the moment in which a person becomes a suspect. Moreover, we have also seen how, in the view of the Court, a case in a legal sense arises only with the application of an arrest warrant by the Prosecutor. Katanga’s Defence tried to show the limitations of this narrow view:

In the time preceding the issuing of an arrest warrant by the ICC there was an increase in interest in the accused by the ICC. This is not a black and white situation. The successful application for a warrant of arrest would be an artificial point to measure the beginning of participation by the ICC in the situation of the accused. At some point

58 Prosecutor v. Germain Katanga, Defence Motion, 2 July 2009 (n 50) 90.
during the preceding period of growing interest in the accused there was a formulation of intention on the part of the OTP to treat the accused as a principal suspect in the case concerning Bogoro. It is at that point that the prosecutor assumes a duty of care towards the accused, whatever his status in the DRC.\(^{59}\)

Along these lines, defendants endeavoured to show that they had become target of the investigation long before the request of the prosecutor of an arrest warrant to the Pre-Trial Chamber. They did so by quoting public statements and interviews of OTP staff released at the early stages of the investigation (and even during the preliminary examination) in which they explicitly referred to the fact that the Prosecution was monitoring the accused.\(^{60}\)

At the same time, defendants claimed that the Prosecutor must have been fully aware of their unlawful conditions of detention. They reported visits of the Prosecutor’s staff to their countries and meetings held between Prosecution representatives and national authorities that must have informed the OTP of their status. As Katanga’s Defence put it:

The Prosecutor ought to have been in possession of sufficient information, in this particular case, to be aware that the accused’s detention in the DRC was inconsistent with international human rights standards. The fact that the arrest of the accused was not founded on evidence; that he had not been promptly brought before a judicial authority; that he had been kept in detention for an unreasonable time

\(^{59}\) ibid., 80.

\(^{60}\) Prosecutor v. Laurent Gbagbo, Defence Corrigendum, 29 May 2012 (n 51) 236–238.
without any suggestion of a trial; that he was still in detention but with no reasonable prospect of a speedy trial; that he was deprived of the assistance of counsel while interviewed – these were all matters which ought to have been manifest to a Prosecutor acting diligently in his investigations of the accused, the activities of the DRC for admissibility, and on the basis of documents and information received from the DRC with respect to proceedings within the DRC.\textsuperscript{61}

In the Lubanga case, the Prosecutor’s knowledge about the defendant’s conditions of detention before national authorities was explicitly admitted by the Prosecutor himself. In submitting further information and materials to the Pre-Trial Chamber to complement his request of arrest and surrender, the Prosecutor stated that:

The DRC proceedings against, among others, Thomas Lubanga Dyilo are the subject of serious and increasing criticism. The arrest of TLD by the DRC authorities took place in the context of international pressure, arising from the reaction to the killing of UN (MONUC) peacekeepers on 25 February 2005 [the so called Ndoki incident] (…) To the extent that information is available to the Prosecution, neither at the time of his arrest nor later has evidence emerged that clearly links TLD to the Ndoki incident (…) This situation has resulted in increased criticism from international NGOs, alleging that the detention of TLD and the other leaders of the political e/o military groups may be irregular\textsuperscript{62}

\textsuperscript{61} Prosecutor v. Germain Katanga, Defence Motion, 2 July 2009 (n 50) 84.
\textsuperscript{62} Prosecutor v. Thomas Lubanga, Prosecution’s Submission, 25 January 2006 (n 53) 8–11.
He then moved on to quote a report from Human Rights Watch documenting the breaches of international standards of due process by the DRC authorities in arresting the suspects of the Ndoki incident. Apparently, the Prosecutor’s only concern with respect to these allegations was the fact that they ‘may result in the DRC authorities soon being prepared to release TLD’. Hence, he claimed, the urgency of the issuance of an arrest warrant by the Pre-Trial Chamber. Regrettably, Lubanga’s Defense did not mention this in its motion challenging the jurisdiction of the case (although, with the benefit of hindsight, this probably would not have made much difference).

Finally, in light of the argument above, defendants alleged that the situation of unlawful detention in their home country enabled their transfer to the Court, and that the Prosecutor and national authorities collaborated closely to this end. The government of their state wanted them to be prosecuted before the ICC out of internal political calculations, while the Prosecutor, on his side, was more than willing to take up their cases and take advantage of the readiness of local authorities to cooperate. Once again, they supported their allegations with circumstantial evidence: public statements of government officials expressing deference towards the Court's expectations and decisions; Prosecution's representatives expressing their preference for a trial before the ICC; NGOs reports suggesting that state authorities in the DRC have been keeping individuals in detention without charge merely for the benefit of the ICC (Katanga); the fact that the local prosecutor charged the accused with different crimes from those under the Rome Statute in order to enable the Court to step in; the fact that the ICC

63 ibid.,12.
Prosecutor waited a long time before requesting the issuance of an arrest warrant to the Pre-Trial Chamber.

With respect to the latter criticism, it has to be noted that, after the opening of an investigation in the DRC, the Prosecutor waited almost three years before approaching the Chamber with a request for a warrant against Lubanga and Katanga. Defence counsels pointed out that, in the meantime, the suspects were kept in unlawful detention by local authorities and, therefore, the Prosecutor had a duty to act with speed and diligence in requesting their transfer to the Court once he had determined that there were reasonable grounds to believe that they had committed crimes.

5.2.2 Court’s responsibility as the last forum of adjudication

Defendants argued that - irrespective of the negligence of the Prosecutor and her/his collusion with the government of their state - the Court should take responsibility for the violations of their rights committed by national authorities and dismiss its jurisdiction. Borrowing from the ICTR jurisprudence, Katanga’s Defence used the concept of ‘constructive custody’. According to this notion, once the warrant of arrest is issued, the accused falls under the constructive custody of the ICC with the consequence that ‘any continuing illegality becomes the shared fruit and responsibility of the DRC and the ICC’65. This is because the prior state of detention of the accused ‘serves the interests of, enables, and is in fact being taken advantage of by the ICC for the purpose of the accused eventual

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64 See further at paragraph 5.4.
65 Prosecutor v. Germain Katanga, Defence Motion, 2 July 2009 (n 50) 101.
transfer to the ICC”. The very fact that serious violations occurred, therefore, obliges the Court to review and supervise such violations without the need to conduct any inquiry into issues of knowledge and duty of care of the Prosecutor.

Both Lubanga and Katanga’s Defence quoted the Barayagwiza jurisprudence of the ICTR, according to which, once it has been established that the human rights of the accused have been violated, it is irrelevant who is responsible for this violations and the accused must be afforded with a remedy. Finally, defendants proposed a reading of Articles 55 and 59 consistent with this view. As has been seen, Article 55 endows the accused with the right not to be subject to arbitrary arrest and detention with respect to an ‘investigation under this Statute’, whereas Article 59 regulates arrest and surrender proceedings in the custodial State and mandates the latter to ensure that due process rights of defendant are respected.

With regard to Article 55, defendants invited the Court to adopt a broader interpretation of the terms ‘investigation under this Statute’, encompassing all the proceedings whose purpose is to bring the person before the Court, including those pertaining to the custodial State. This interpretation would allow the widening the scope of the accused’s protection and of the Court’s review of violations committed by national authorities.

As far as Article 59 is concerned, defendants noted how this provision is drafted on the assumption that the accused would be at large, as local judicial authorities are mandated to review the respect of defendants’

66 ibid., 102.
68 Prosecutor v. Laurent Gbagbo, Defence Corrigendum, 29 May 2012 (n 51) 256–257.
rights *in the execution* of the request of the Court to arrest and surrender.\(^69\) As Gbagbo’s Defence pointed out, however, defendants cannot be stripped of their protection from unlawful arrest on the pretext that they were already in detention at the time of execution of the procedure prescribed by the Court.\(^70\) Unlawful arrest proceedings occurred *prior* to the application for a warrant of arrest to the Court constitute a violation of Article 59(2) of the Statute. In such cases, therefore, the arrest to be taken into account by the Court in supervising the activities of national authorities is the one that took place in the context of national proceedings, and not the one executed on behalf of the Court. Doing otherwise would create inequality between persons already in custody at the time the Prosecutor initiates proceedings, who would not be afforded statutory protection, and persons at large, towards whom the guarantees of Article 59 would apply.\(^71\)

5.3 The Court’s decisions on the challenges to its jurisdiction

In its first decision on a challenge to the jurisdiction of the Court, the Appeals Chamber defined human rights law as an all-encompassing yardstick against which the provisions of the Statute and the proceedings of the Court must be measured, in accordance with Article 21(3) of the Rome Statute:

> Human rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court. Its provision must be

\(^{69}\) Prosecutor v. Germain Katanga, Defence Motion, 2 July 2009 (n 50) 104; Prosecutor v. Laurent Gbagbo, Defence Corrigendum, 29 May 2012 (n 51) 258–260.

\(^{70}\) Prosecutor v. Laurent Gbagbo, Defence Corrigendum, 29 May 2012 (n 50) 258–260.

\(^{71}\) ibid.
interpreted and more importantly applied in accordance with internationally recognized human rights; first and foremost, in the context of the Statute, the right to a fair trial, a concept broadly perceived and applied, embracing the judicial process in its entirety.\(^{72}\)

With respect to the right to a fair trial, the Chamber firmly stated the non-derogable, absolute nature of this right:

Where fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial. Justice could not be done. A fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped.

The adamant tone of these initial statements led to hope that the Court would assume a full responsibility for the situation of defendants appearing before it. Implicitly, this approach seemed to deny any possible contextualization and adaptation of fair trial rights in light of the special circumstances under which the Court operates. Yet, ICC judges have constantly dismissed the arguments brought forward by defendants in their challenges to the jurisdiction of the Court.\(^{73}\)

\(^{72}\) Prosecutor v. Thomas Lubanga, AC Judgment, 14 December 2006 (n 17), 37.

\(^{73}\) Katanga’s challenge was dismissed because it was filed too late, see Prosecutor v. Germain Katanga, AC Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled “Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings”, ICC-01/04-01/07 OA 10, 12 July 2010.
According to their view, Article 59 cannot be applied to the period of time before the receipt by the custodial state of the request for arrest and surrender by the Court ‘even in cases where the person may already have been in the custody of that state, and regardless of the grounds for any such prior detention’. From this reasoning it is clear that the Court considers the successful application for a warrant of arrest as the point to measure the beginning of its participation in the situation of the accused and, therefore, its responsibility towards him/her. Violations of *habeas corpus* rights occurred prior to this moment can be supervised by the Court only upon the proof of ‘concerted action’ between an organ of the Court (i.e., the Prosecutor) and national authorities in the commission of such violations.

Violations of fundamental rights, however serious, can be said to constitute an abuse of process only insofar as they can be attributed to the Court. This means that they have to be i) either directly perpetrated by persons associated with the Court; ii) or perpetrated by a third person in collusion with the Court. Conversely, when a violation of the suspect’s fundamental rights, however grave, is established, but demonstrates no such link with the Court, the exceptional remedy of relinquishment of jurisdiction/staying of the proceedings is not available.

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75 ibid., 92.
Six years earlier, the same Pre-Trial Chamber adopted a less categorical view by stating that, even in cases where no concerted action is established, ‘the abuse of process doctrine constitutes an additional guarantee of the rights of the accused’. At the same time, however, the Chamber recalled that this doctrine ‘has been confined to instances of torture or serious mistreatment [emphasis added] by national authorities of the custodial State in some way related [emphasis added] to the process of arrest and transfer of the person to the relevant international criminal tribunal’.  

In all the above-mentioned cases the Court found no evidence that the arrest and detention of the accused prior to the issuance of the ICC arrest warrant was the result of any concerted action between the Prosecutor and local authorities. The Court clarified that ‘mere knowledge’ on the part of the Prosecutor of the investigations carried out by national authorities is no proof of his involvement in the way they are conducted or in the means applied therein. In the same vein, the mere fact that the Prosecutor was in contact with local authorities throughout the period of the preliminary examination and the investigation is not enough to demonstrate his/her complicity in the detention of the accused.  

5.4. A critique of the requirement of ‘concerted action’

As has been seen, the ICC judges require the proof of ‘concerted action’ between the Court and national authorities in order to take responsibility for the violations of the rights of the accused occurred prior to the issuance of

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76 Prosecutor v. Thomas Lubanga, PTC I Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Art. 19(2)(a) of the Rome Statute, ICC-01/04-01/06, 3 October 2006, 10. On this point see Paulussen (n 57) 591, 865.
77 Prosecutor v. Thomas Lubanga, AC Judgment, 14 December 2006 (n 17) 42; Prosecutor v. Laurent Gbagbo, PTC I Decision, 15 August 2012 (n 74) 109.
an arrest warrant. This approach is regrettable, as it fails to address the necessity of protecting the rights of persons who have been targeted by the Prosecutor long before the latter seeks an arrest warrant against them. Article 57 of the Statute bestows the duty to ‘provide for the protection (…) of persons who have been arrested’ upon the Pre-Trial Chamber. A meaningful protection of arrested persons necessarily implies that the judges supervise the violations of suspects’ rights occurring in the course of the investigation and irrespective of a concerted action between national authorities and the Prosecutor, which should nonetheless be considered as an ‘aggravating factor’. 78

The Court should consider introducing the concept of prosecutorial due diligence 79 next to the one of concerted action. In particular, a duty of due diligence should be imposed on the Prosecutor when s/he becomes aware of national proceedings involving a person whom s/he has targeted for the purpose of the ICC investigation. The case of Kajelijeli at the ICTR represents an interesting precedent in this respect.

Following a request of provisional detention by the Prosecutor, Kajelijeli had been held in custody by the Benin authorities for 85 days without charge and without being brought promptly before a judge prior to his transfer to the ICTR. According to the Appeals Chamber, by making a request for provisional detention, 80 the Prosecution claims to be in possession of ‘reliable information which tends to show that [the person]

78 Melinda Taylor and Charles Chernor Jalloh, ‘Provisional Arrest and Incarceration in the International Criminal Tribunals’ (Social Science Research Network 2013) 331.
80 Rule 40 ICTR RPE.
may have committed a crime over which the Tribunal has jurisdiction’ under Rule 2 of the ICTR RPE, which defines the status of ‘suspect’ before the Tribunal.\(^81\) Thus, it is from this moment that the Tribunal’s provisions pertaining to the rights of suspects become applicable, and the duty of diligence of the Prosecutor arises.\(^82\) In this respect, the Chamber clarified that, by setting the Tribunal proceedings in motion with a request for a provisional detention, the Prosecutor shares a legal responsibility with national authorities that ‘the case proceeds to trial in a way that respects the rights of the accused’.\(^83\) According to the Chamber ‘this flows from the rationale that the international division of labour in prosecuting crimes must not be to the detriment of the apprehended person.’\(^84\)

It is submitted that a similar conception of prosecutorial diligence should inspire the ICC judges. Admittedly, there is a substantial difference in the legal framework of the ICC which can arguably make it harder for the Court to trace the exact moment in which the Prosecutor becomes responsible for an individual. As has been seen, the ICTR and ICTY Prosecutors have the autonomous power to request States the provisional arrest of individuals in urgent cases pursuant to Rule 40 of their RPE. In the above-discussed case law, the violations of the defendant’s rights had been committed by national authorities that had been requested to provisionally arrest a suspect by the ICTR Prosecutor. Within this legal framework, thus, considering the detention in a State as being ‘at the behest’ of the Tribunal is relatively easy. The same cannot be said about the ICC, whose founding

\(^{82}\) ibid, 217.
\(^{83}\) ibid, 220.
\(^{84}\) ibid.
instruments do not envisage a similar power for the Prosecutor and whose Statute does not contain a definition of ‘suspect’. A viable way to obviate this problem would be requiring the Prosecutor to communicate to the Pre-Trial Chamber the names of the persons that the investigation is targeting, especially when they happen to be detained by national authorities in the context of national proceedings.

6. Interim release

By interim release is meant the temporary release of an accused, upon specified conditions, for an extended period of time pending trial or judgment. The right to interim release emanates from the presumption of innocence, according to which the person is presumed innocent until proven guilty. If the accused is presumed innocent until it is otherwise proven, restriction to liberty prior to the final sentence must be exceptional and subject to the principles of necessity and proportionality. In other words, liberty is the norm and detention must be the exception.

As has been seen, this fundamental rule is enshrined in many international human rights instruments. Under Article 9(3) ICCPR, for example, ‘[i]t shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment’. Accordingly, it has been observed that

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85 See Article 9 UDHR; Article 9(3) ICCPR; Article 5(3) ECHR; Article 7(1)(b) ACHPR; Article 7(5) ACHR.
international human rights law favours release pending trial, although it may not strictly require it under all circumstances.\footnote{Zeegers (n 10) 191.}

Despite the unambiguous requirements under human rights law, before international criminal tribunals interim release has always been the exception. As one commentator has vividly put it ‘[i]nterim release is the Loch Ness monster of international criminal justice: much discussed, rarely seen’.\footnote{Havneet Kaur Sethi, ‘Lawful Unlawfulness: The (non)-Practice of Interim Release at the International Criminal Court as a Political Measure in Contravention of International Human Rights’ (Academia.edu) 1.} The Statutes of the \textit{ad hoc} Tribunals did not contain any provision on pre-trial release. This omission has been explained with the exceptional characteristics of international criminal trials, such as the gravity of the crimes allegedly committed by the accused, the likelihood of retaliations against victims and witnesses, the risk that the accused would flee to escape a lengthy prison sentence, and the unavailability of \textit{in absentia} proceedings.\footnote{Karim AA Khan, ‘Article 60’ in Otto Triffterer (ed), \textit{Commentary on the Rome Statute of the International Criminal Court} (2nd edn, Beck/Hart 2008) 1159–1160.} In addition, Rule 65(B) of the Tribunals RPE used to provide that interim release could only be granted in ‘exceptional circumstances’, thus, making continued custody the rule instead of the exception.

It was only in 1999 (at the ICTY) and in 2002 (at the ICTR) that the judges amended Rule 65 so as to allow defendants to request interim release pending trial. With respect to the ICTY, commentators have noted that ‘increased co-operation with the successor states in Former Yugoslavia (and with SFOR and KFOR) has been the main factor in mitigating the initially restrictive attitude towards release pending trial’,\footnote{John O’Dowd, ‘Decision on Motion by Momir Talić for Provisional Release – Commentary’ in André Klip and Göran Sluiter (eds) \textit{Annotated Leading Cases of International Criminal Tribunals}, Vol. VII: The International Criminal Tribunal for the}
the Tribunal to be more receptive to international human rights standards.\textsuperscript{90} Be that as it may, the excessive length of pre-trial detention before the \textit{ad hoc} Tribunals has been harshly criticized by scholars and practitioners, who have denounced that this practice is in contrast with internationally protected human rights.\textsuperscript{91}

Certainly, the exceptional circumstances and challenges faced by the ICTY and ICTR are equally present before the ICC. The drafters of the Rome Statute, however, departed from the precedent of the \textit{ad hoc} Tribunals. The Rome Statute codifies the presumption of innocence in Article 66. According to the first paragraph of this provision ‘[e]veryone shall be presumed innocent until proved guilty before the Court’, and, pursuant to the second paragraph, ‘[t]he onus is on the Prosecutor to prove the guilt of the accused’; finally, paragraph three states that [i]n order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt’. Moreover, the Statute expressly provides that accused persons may be released pending trial both at the national level and, upon their transfer to the Court, before the Pre-Trial Chamber.

6.1 Release before national authorities

Article 59(3) of the Statute provides that the arrested person has the right to apply to national authorities for interim release pending surrender to the

\textsuperscript{90} John O’Dowd (n 89) 100.
\textsuperscript{91} Sluiter (n 9) 461.
Court. Subsequent paragraph 4 creates a presumption in favour of custody by making detention the norm unless there are ‘urgent and exceptional circumstances to justify interim release’. 92 Moreover, this provision mandates national judges to take into account ‘the gravity of the alleged crimes’ and the existence of the ‘necessary safeguards’ to ensure that the custodial State is capable of surrendering the person to the Court.

From this language, it appears that the Statute looks with suspicion to the possibility that national authorities release the person sought by the Court. The criteria applicable by the national authority appear more restrictive than those governing the ICC’s power to grant interim release.93 Moreover, they appear even more limiting than the ‘exceptional circumstances’ rubric previously contained in the Rules of Procedure and Evidence of the ad hoc Tribunals.

The Pre-Trial Chamber must be notified of any request for interim release and, before rendering a decision, the national authority must give ‘full consideration’ to its recommendations, including any on measures to prevent escape.94 Moreover, the Chamber can request periodic reports on the status of the interim release.95

In reaching a determination on interim release, national judges are not entitled to review the warrant of arrest issued by the Pre-Trial Chamber. Article 59(4) prohibits national authorities to consider whether the warrant of arrest was properly issued in accordance with Article 58(1)(a) and (b). This means that national judges cannot determine whether or not the detainee has committed a crime within the jurisdiction of the Court, neither

92 Khan (n 88) 1162.
93 See further paragraph 6.2.
94 Article 59(5) of the Rome Statute and Rule 117(4) RPE.
95 Article 59(6) of the Rome Statute and Rule 117(5) RPE.
can they establish that the detention of the person is necessary to ensure his/her presence at trial, or to prevent the person to obstruct on-going investigations and proceedings, or to impede him/her from leaving this matter in the exclusive competence of the Court. Rule 117(3) RPE complement this provision by providing that the arrested person shall bring any challenge as to the issuance of the warrant directly to the Pre-Trial Chamber. To date, two defendants, Bemba and Ngudjolo, have requested interim release before national authorities with no success.\footnote{Prosecutor v. Jean-Pierre Bemba, Defence Application for Interim Release, ICC-01/05-01/-8, 23 July 2008, 8-10; Prosecutor v. Mathieu Ngudjolo, PTC I Decision on the Application for Interim Release of Mathieu Ngudjolo Chui, ICC-01/04-01/07, 27 March 2008, 4.}

6.2 Release before the Court

After the suspect has been surrendered to the Court by the custodial State, s/he shall appear promptly before the Pre-Trial Chamber pursuant to Rule 121 RPE. At this first appearance, the person has the right to apply for interim release.\footnote{The person may also apply for interim release after her/his initial appearance, either in addition to or independent of the request made at the initial appearance, see Alena Hartwig, ‘Pre-Trial Detention of the Suspect’ in Christoph Safferling (ed), \textit{International criminal procedure} (OUP 2012) 299.} Article 60 aims to provide the detainee with an early opportunity to contest his or her arrest and sequential detention and sets out the conditions for a continued deprivation of liberty. Pursuant to the second paragraph of this provision, in order to grant interim release, the Court must decide whether the conditions that justified the arrest of the person under Article 58(1) continue to be met. In other words, the Court shall consider whether A) reasonable grounds to believe that the person has committed the
crimes charged persist;\textsuperscript{98} B) detention continues to be necessary in order to (i) to ensure the person’s (re)appearance at trial; or (ii) prevent the obstruction of the proceedings; or (iii) prevent the commission of further crimes.\textsuperscript{99} These reasons are formulated in the alternative, so that only one of them suffices to justify provisional detention.

Interim release can be granted with or without conditions. The latter are listed at Rule 119 RPE and may include limitations upon travel to certain places and contact with victims and witnesses, prohibition to undertake certain professional activities and the obligation to reside in a specific place.

Article 60(3) and Rule 118(2) RPE, mandate the Pre-Trial Chamber to review its ruling on release or detention at least every 120 days on the request of the person or the Prosecutor. The basis of the review is a change in the circumstances under which the original decision under Article 60(2) was taken. Therefore, like requests for interim release pursuant to Article 60(2), the review involves an assessment of the persistence of the conditions for detention under Article 58(1), albeit less thoroughly.\textsuperscript{100}

The Rome Statute enshrines also a separate ground under which detainees may be released. Pursuant to Article 60(4), the Pre-Trial Chamber ‘shall ensure that a person is not detained for an unreasonable period prior to trial due the inexcusable delay of the Prosecutor’. If such delay occurs, the Court ‘shall consider’ releasing the person. This means that an unreasonably lengthy detention can constitute an additional factor granting

\textsuperscript{98} Article 58(1)(a) of the Rome Statute. 
\textsuperscript{99} Article 58(1)(b) of the Rome Statute. 
\textsuperscript{100} Zeegers (n 10) 251.
the release of an accused, independent from the grounds provided under Article 60(2).\textsuperscript{101}

The requirement that the unreasonable length of detention must be due to an unreasonable delay of the Prosecutor has been criticised by some scholars, who have noted that, under human rights law, the assessment of existence of unreasonable period of detention is not made dependent upon this condition.\textsuperscript{102} In a recent judgment, the Appeals Chamber clarified that, when the unreasonable duration of the detention is not dependent on the Prosecutor’s behaviour, Article 60(4) is not the appropriate legal basis to release defendants.\textsuperscript{103} Conversely, this can be done in the context of a periodic review on detention under Article 60(3), interpreted in light of ‘internationally recognised human rights’ pursuant to Article 21(3) of the Statute.\textsuperscript{104} According to the judges, however, the lapse of time in detention cannot be considered on its own to be a changed circumstance within the meaning of Article 60(3) of the Statute. Rather, it is one of the factors that need to be considered along with the persistence of the risks listed in Article 58(1) ‘in order to determine whether, all factors being considered, the continued detention stops being reasonable and the individual accordingly needs to be released’.\textsuperscript{105} In other words, the unreasonableness of the period of detention prior to trial cannot be determined in the abstract, but must be assessed on the basis of the circumstances of each case.\textsuperscript{106}

\begin{flushleft}
\textsuperscript{101} ibid 273.
\textsuperscript{102} Sluiter (n 9) 464.
\textsuperscript{104} ibid., 43.
\textsuperscript{105} ibid., 44-45.
\textsuperscript{106} ibid., 45.
\end{flushleft}
6.3 Cooperation of States as a *condicio sine qua non* for interim release

Having no territory of its own, the Court must rely on States that are willing to accept the released person on their territory and enforce the conditions imposed by the Court. Pursuant to Regulation 51 of the Regulations of the Court, for the purposes of a decision on interim release, the Pre-Trial Chamber shall seek observations from the host State and from the State to which the person seeks to be released. Such consultations are a crucial moment of the interim release process, as the Court needs to know whether that State is willing to accept the person on its territory and whether it can provide guarantees of the person’s attendance at trial.\(^{107}\)

In this respect, it is useful to remind that the Rome Statute does not impose an obligation on States Parties to accept provisionally released persons on their territories. As has been seen in Chapter II, this area of cooperation is left to voluntary agreements (the so called ‘framework agreements’) to be concluded by the Court and States.\(^{108}\) Equally, pursuant to Article 47(1) of the Headquarters Agreement with the Host State, the Netherlands are only obliged to facilitate the transfer of a released detainee to another State, but not to accept the person on their territory.\(^{109}\)

Regrettably, only Belgium has entered into an agreement on interim release with the Court so far.\(^{110}\) This agreement is not public. According to the an ICC press release, it ‘regulates the procedure for the interim release of an ICC detainee and in particular formalizes the necessary consultations

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\(^{107}\) Schabas (n 21) 727.
\(^{108}\) See Chapter II, paragraph 3.1.5.
\(^{110}\) ibid.
of the Court’s Registry with the Belgian authorities.’ However, the Court has made clear that:

the Agreement, far from witnessing to an unconditional availability and willingness on the part of the Kingdom of Belgium to accept that detainees from the Court be released on its territory or, even less, establishing an obligation on their part to do so, makes such acceptance explicitly conditional upon an assessment to be made ‘au cas-par-cas’ on the basis of the specific appreciation that the Belgian authorities may make of a given case.

The existence of a framework agreement with a State, therefore, does not automatically guarantee that the latter will accept provisionally released persons on its territory should the need arise. Their role, thus, is limited to regulating the applicable procedures for enforcing release only after the State in question has consented to it.

It has rightly been argued that ‘the most problematic aspect of the ICC’s approach to interim release relates to the role of state guarantees in its decisions on this issue’. As will be seen, in fact, the practice of the Court so far shows that there can be no interim release without a prior

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113 Zeegers (n 10) 266.
114 ibid 281.
identification of a State willing to receive the accused. In this respect, it is worth noting that the Court is more likely to grant release to defendants outside of their countries of origin, as these are often politically unstable and geographically far removed from The Hague. Moreover, as defendants are likely to benefit from connections and support in their home countries, release in a different State might be considered to be a factor that mitigates the risk of flight.

6.3.1 The denial of interim release in *Bemba*

On 23 May 2008, Pre-Trial Chamber III issued a warrant of arrest against Jean-Pierre Bemba, a Congolese national charged with war crimes and crimes against humanity for his actions as military commander in the Central African Republic in 2002 and 2003. On 24 May 2008, Bemba was arrested in Belgium and, on 3 July 2008, he was surrendered to the seat of the Court.

Since his first appearance before the Trial Chamber on 4 July 2008, Bemba made three applications for interim release, all of which were denied.\(^{115}\) On 29 June 2009, after the charges against Bemba had been confirmed,\(^{116}\) the Single Judge Ekaterina Trendafilova held a hearing ‘for


\(^{116}\) Prosecutor v. Jean-Pierre Bemba, PTC II Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo,
the sake of considering any issue related to the pre-trial detention of Mr. Bemba’.  

At the hearing the Defence requested the interim release of Mr. Bemba, citing in support ‘changed circumstances’. The said circumstances included: (i) that the charges confirmed against the defendant significantly reduced his responsibility and consequently, if convicted, he would face a lighter sentence, (ii) that he would never abscond because of his personal security situation, (iii) that Bemba’s one year detention would be deducted from a possible sentence, thus reducing the likelihood of him absconding, (iv) his readiness to cooperate with the Prosecutor and to surrender voluntarily, and (v) the change in his financial situation due to his seizure and freezing of all of his assets.

In light of these changed circumstances, the Defence requested Pre-Trial Chamber to revisit the conditions that formed the previous 14 April 2009 decision and that Bemba be released to one of the following States, namely, Belgium, France, or Portugal. In the 14 April decision the Single Judge had held that the continued detention of Bemba appeared necessary, as she assessed the risk of absconding as likely. Interestingly, a further circumstance that weighted against Bemba’s release was the fact that ‘none of the countries seemed willing to accept the applicant if conditionally released and accordingly they offered no guarantees which ensure the

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118 Later, in a related filing, the Defence requested that Germany, Italy, and South Africa be added to the list of States that Bemba wished to be released to. See Prosecutor v. Jean-Pierre Bemba, Defence Request, ICC-01/05-01/08-433 dated 2 July 2009.
applicant’s appearance at trial’. In light of this, the Single Judge had stated that:

[The Court] ibi on the cooperation of States, without which the applicant’s trial might be compromised. Moreover, in Boskoski, the ICTY Appeals Chamber upheld the finding of the Trial Chamber when it considered that the failure of the Croatian government to ‘issue guarantees of the Appellant's appearance for trial’, combined with other factors, ‘weigh[ed] heavily’ against his provisional release. These reasons justify a cautious approach by the Single Judge.

In its novel decision of 14 August 2009, the Single Judge reversed her position. At the outset, she recognized that the ICC Statute must be interpreted and applied in accordance with internationally recognized human rights standards, as provided for in Article 21(3) of the Statute. Moreover, she recalled that the review of her former decision would continue to be guided by the fundamental principle that ‘deprivation of liberty [before a sentence of conviction] should be an exception and not a rule’. Subsequently, the Judge went on to consider the events that took place since 14 April 2009 that she deemed worthy of a reassessment. Based on the defendant’s good behaviour in detention, his demonstrated willingness to cooperate with the Court and his strong family ties, the Judge

120 ibid., 49.
121 Prosecutor v. Jean-Pierre Bemba, PTC II Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa, ICC-01/05-01/08, 14 August 2009.
122 ibid., 36-37
found that the continued detention of Mr. Bemba was no longer necessary to ensure his appearance at trial pursuant to Article 58(1)(b)(i) of the Statute. As a consequence, he had to be released.

The implementation of the decision, however, was deferred pending a further decision of the Judge on the set of conditions to be imposed on Bemba, on the State to which he had to be released, and on all necessary arrangements. It is interesting to note that, this time, the Judge placed less emphasis on the circumstance that States had not provided guarantees of accepting the defendant in case of a conditional release. On the contrary, she emphasized that:

The decision on interim release ultimately rests with the Single Judge, who is mandated to examine the prerequisites for any deprivation of liberty, based on the law exclusively and the specific circumstances of the case. The fact that States may have not provided guarantees cannot weigh heavily against Mr Jean-Pierre Bemba’s release. Neither are conditions of ‘guarantees’ proposed by the States a prior indispensable requirement for granting interim release; rather they provide assurance to the Single Judge.

The Prosecutor appealed the decision, arguing against the ‘two-tiered’ approach adopted by the Pre-Trial Chamber. According to the Prosecutor, identifying a State willing to accept the person concerned as well as to

123 ibid.,78
124 ibid.,88
enforce conditions imposed by the Court is an essential prerequisite to granting conditional release.126

On 2 December 2009, the Appeals Chamber unanimously upheld the appeal.127 On the one hand, it found that the Pre-Trial Chamber disregarded relevant facts in finding that a substantial change of circumstances warranted the interim release of Bemba. On the other hand, it specified the conditions required to grant interim release. According to the Chamber:

in order to grant conditional release the identification of a State willing to accept the person concerned as well as enforce related conditions is necessary. Rule 119 (3) of the Rules of Procedure and Evidence obliges the Court to seek, inter alia the views of the relevant States before imposing or amending any conditions restricting liberty. It follows that a State willing and able to accept the person concerned ought to be identified prior to a decision on conditional release.128

Pragmatically, the Chamber acknowledged that the ICC ‘is dependent on State cooperation in relation to accepting a person who has been conditionally released as well as ensuring that the conditions imposed by the Court are enforced’. Therefore, in the absence of such cooperation, ‘any decision of the Court granting conditional release would be ineffective’.129

126 ibid.
128 ibid., 106.
129 ibid., 107.
In practice, the ICC has raised the individuation of a State willing to receive the accused to the status of a ‘quasi-requirement’ for release. The unavoidable consequence is that the onus to find such State is put on defendants, failing which their application for release will be rejected. According to Havneet Kaur Sethi, with this approach, ‘the ICC has perverted the issue of interim release into a political as opposed to legal one’. By denying interim release based on States’ lack of cooperation, the Court has politicised itself, in that States decisions ‘are sometimes arbitrary, capricious and contingent on policies of changing governments’.

It must be noted that this is not the only possible interpretation of the Statute. Even though the ICC’s legal framework does not explicitly oblige States to accept provisionally released defendants on their territory, Article 93(1)(l) of the Statute stipulates that States Parties shall comply with requests by the Court to provide, in relation to investigations or prosecution, ‘any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court’. It could be argued that hosting a provisionally released accused would be part of ‘facilitating the investigation and prosecution of crimes’ and that Article 21(3) of the ICC Statute requires an expansive interpretation in order to avoid potential human rights violations.

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130 De Meester (n 57) 921.
131 Sethi (n 87) 4.
132 ibid.
133 Van Regemorter (n 112).
6.3.2 Interim release for offences against the administration of justice

The first and – so far, only – case in which defendants have been granted interim release before the Court relates to offences against the administration of justice allegedly committed in connection with the *Bemba* case. On 20 November 2013, the Pre-Trial Chamber II issued arrest warrants against Bemba, two lawyers of his legal team (Aimé Kilolo Musamba and Jean-Jacques Mangenda Kabongo) and two of his political associates (Babala Wandu and Narcisse Arido) for their alleged responsibility in corrupting witnesses.\(^\text{134}\)

Several applications for interim release were filed. On 26 September 2014, in its decision requesting observations from States,\(^\text{135}\) the Pre-Trial Chamber considered that the duration of the suspects’ detention made it necessary for the Pre-Trial Chamber to proceed *motu proprio* to the review the state of detention, in particular ‘in light of the paramount need to ensure that the duration of pre-trial detention shall not be unreasonable’.\(^\text{136}\) The Pre-Trial Chamber requested that the relevant States submit observations on ‘the possible conditional release of the suspects to their territory’ and their ability to enforce the conditions of Rule 119 (1) RPE.\(^\text{137}\) Interestingly, all of the requested States refused. Belgium raised the lack of legal framework for the implementation of such release,\(^\text{138}\) while the DRC noted their inability to

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\(^{136}\) ibid., 3.

\(^{137}\) ibid., 5.

\(^{138}\) Prosecutor v. Jean-Pierre Bemba et al., PTC II Decision on the “Demande de Mise en
prevent the accused from committing new offences. On the other hand, France, the UK and the Netherlands signalled their opposition to accepting the accused without any further explanation.

This notwithstanding, on 21 October 2004, Judge Tarfusser ordered the release of Kilolo to Belgium, of Mangenda to the UK, of Babala to the DRC and of Arido to France. Unfortunately, all the comments given by the States are confidential, and, thus, it is not possible to speculate on the reasons why they changed their mind. The Judge only conditioned the release of the suspects to the signature of a document stating their commitment to appear when summoned and to the indication of their address, this being sufficient to ensure their appearance at trial. Since no additional conditions were imposed, the Judge found no need ‘to further consult with the relevant States’.

Liberté Provisoire de Maître Aimé Kilolo Musamba”, ICC-01/05-01/13-259, 14 March 2014. As has been seen, in March 2014, Belgium and the ICC signed an agreement on interim release. Such agreement, however, does not establish an obligation on Belgium to accept that detainees from the Court be released on its territory but makes such acceptance conditional upon an assessment conducted by Belgian authorities on a case by case basis. In fact, even after the conclusion of this agreement, Belgium continued to oppose the release of the suspects because it would be easy for them to leave the country and because they could not legally monitor their communications. See Van Regemorter (n 112).


141 Their release was motivated by the excessive length of their pre-trial detention under Article 60(4) of the Statute, see Prosecutor v. Jean-Pierre Bemba et al., PTC II Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, ICC-01/05-01/13-703, 21 October 2014.

142 Van Regemorter (n 112).

143 ibid., 6.
The four suspects were subsequently released from the custody of the ICC (with the exception of Jean-Pierre Bemba, who remained in detention in connection with the on-going main case against him). It must be noted that all suspects requested to be released either to their home country (Belgium for Kilolo and the DRC for Babala), or to countries where they had a legitimate right to return (the UK for Mangenda and France for Arido). Undoubtedly, this is a factor that must have had an important weight in the decision of the Court.

On 29 May 2015, the Appeals Chamber reversed and remanded to the Trial Chamber the decision ordering the interim release of the four accused. However, the Chamber found that, taking into account the length of time that has passed since their release, it would not be in the interests of justice for the suspects to be re-arrested. Accordingly, on 17 August 2015, the Trial Chamber ordered the continued release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido with a number of conditions, including to be present in The Hague at their trial.

144 Prosecutor v. Jean-Pierre Bemba et al., PTC II Decision on “Mr Bemba’s Request for Provisional Release”, ICC-01/05-01/13-798, 23 January 2015.
145 Arido, a national of the Central African Republic, held a ‘document provisoire de séjour’ of the French Republic, whereas Mangenda, a national of the Democratic Republic of the Congo, was the holder of a visa expiring in August 2015 for the United Kingdom.
147 ibid., 57.
7. Conclusion

This Chapter has examined the impact of States cooperation on the right to liberty of suspects and accused. The drafters of the Statute made sure to protect the right to liberty before the Court in accordance with the provision of human rights treaties. The assumption was that, under such an advanced legal framework, individuals would not have to fear violations of their basic rights in the proceedings of the Court.\textsuperscript{149} However, this Chapter has shown that the safeguards enshrined in the Statute are not always sufficient to ensure the actual respect of the right to liberty of defendants due to the structural characteristics of the ICC and the mode in which cooperation plays out in practice.

7.1 Right not to be subject to arbitrary arrest and detention

The legal framework of the Statute on the right not to be subject to arbitrary arrest and detention is based on the assumption of a clear separation between national proceedings and proceedings of the Court, which often does not correspond to reality. In view of the complementary nature of the Court and the interpretation of the rules of admissibility adopted by the judges,\textsuperscript{150} the distinction between national proceedings and Court’s proceedings might not always be so clear-cut. As shown in the analysis of the selected case studies, ICC defendants have been unlawfully detained by national authorities pursuant to a national investigation that has been closed


\textsuperscript{150} See Chapter III, paragraph 5.2.
by the State on behalf of the Court. The detention at the national level related to crimes that fell within the jurisdiction of the Court and were allegedly committed in the context of the situation investigated by the ICC Prosecutor. The unlawful detention of the suspects started after the commencement of the Court’s investigation (albeit before the issuance of an arrest warrant against them) and ceased only with the surrender of the suspects before the Court.

In addition, the steps that lead the Prosecutor to focus on a specific person as the subject of the investigation are largely unregulated, in that practices on designating suspects are a matter of unpublished internal policy, which involve neither the Defence nor the Court. There is no significant judicial oversight of the Prosecutor’s activities until the issuance of an arrest warrant or a summons to appear, and thus, no protection of the rights of the persons targeted by the investigation until that moment. This lack of protection is exacerbated by the great discretion with which the Prosecutor is endowed with respect to the time frame of the investigation. As has been seen, there is no deadline by which the Prosecutor must complete a preliminary examination over a situation and, after the commencement of the investigation, there is no deadline by which s/he must apply for an arrest warrant to the Pre-Trial Chamber.

The ICC’s choice to acknowledge its responsibility towards defendants only starting from the issuance of an arrest warrant is regrettable. This Chapter has advocated for the imposition of a duty of diligence on the Prosecutor when s/he becomes aware of national proceedings involving a person whom s/he has targeted for the purpose of the investigation. This duty of diligence and transparency should be clearly spelled out in the Statute, along with specific rules governing the
cooperation between the Prosecutor and states before the issuance of an arrest warrant against a person who is already in the custody of national authorities. Melinda Taylor and Charles Jalloh have exhaustively elaborated on the content of this duty, arguing, in particular, that the Prosecutor should notify the presence of detained suspects to the Pre-Trial Chamber.\footnote{Taylor and Jalloh (n 78) 333.} This would indeed represent a viable way to more carefully supervise the cooperation of the Prosecutor with national authorities for the purpose of transferring suspects to the Court, and would enable the judges to better assess the timeliness with which the Prosecutor requests the issuance of an arrest warrant. The latter should request an arrest warrant from the Chamber in a timely manner, and should be held accountable in case s/he does not do so without providing a valid justification.

7.2 Interim release

The Court’s rulings in the \textit{Bemba} cases demonstrate that the respect of the right to be released pending trial can only be effective when States agree to cooperate with the ICC. Without the identification of a State willing and able to implement the release of an accused, such release is not possible. In other words, State guarantees are a ‘quasi-requirement’ for interim release before the ICC. It must be emphasized that, so far, the lack of States guarantees has never been deemed as the \textit{only} reason justifying the continued detention of an accused. In reversing the Pre-Trial Chamber decision to release Bemba, the Appeals Chamber censored the substantial change of circumstances found by the Single Judge prior to assessing the weight that the absence of a State willing to receive Bemba had on the
actual implementation of the release. There is a strong impression, however, that, had there been a State willing to enforce the conditions imposed by the Chamber, the outcome of the decision might have been different.

It has rightly been observed that, in the current situation, the protection of the rights of the accused is conditioned upon ‘highly uncertain factors’, such as States’ willingness to receive accused persons,152 and that ‘a person’s liberty should not depend on practical arrangements.’153 It is therefore imperative that the Court makes the signature of interim release agreements with States a priority, in order to have a considerable number of them available before issuing a decision on release.154 Although the existence of framework agreements does not per se guarantee that States will accept provisionally released persons when the need arises, having a number of them in place does increase the likelihood that more defendants will be released pending trial before the Court.

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Chapter V

THE IMPACT OF COOPERATION ON THE EQUALITY OF ARMS

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1. Introduction

This Chapter considers equality of arms with regard to access to cooperation from the Defence. First, the Chapter explains the meaning of the principle of equality of arms under international human rights law. It then briefly highlights the challenges in the interpretation and application of this principle before international criminal tribunals, in view of the specific context in which they operate. Subsequently, it moves on to explore the institutional and the procedural dimension of equality at the ICC. Section 4 assesses the institutional position of the Defence in the framework of the Court and the specific modalities for the appointment of counsel envisaged by the Rome Statute.

Sections 5, 6 and 7 are concerned with the procedural dimension of equality, in view of the difficulties encountered by the Defence in obtaining the necessary assistance from national authorities for the preparation of its
case. Section 5 investigates whether the Statute endows the Defence with adequate means to conduct its own investigations and how the Court has interpreted the right to on-site investigations by the Defence. Section 6 assesses the way in which the Statute purports to remedy to the inequality between the parties by imposing specific investigative obligations on the Prosecutor and by envisaging the assistance of the Pre-Trial Chamber with requests for cooperation of the Defence. Section 7 provides a brief account of the ICC disclosure system and considers whether the Prosecutor’s disclosure obligations can adequately balance the general disadvantage of the Defence in securing States cooperation.

2. The principle of equality of arms in human rights law

The term ‘equality of arms’ originated in the context of the ECtHR jurisprudence on the right to a fair trial under Article 6 of the Convention. While elaborating on the notion of due process of law, the Court clarified that the principle of equality of arms ‘is only one feature of the wider concept of fair trial’. As such, this principle underpins some of the minimum rights listed by paragraph 3 of Article 6 of the Convention, in particular, the right to have adequate time and facilities for the preparation of the defence and the right to examine or have examined prosecution

witnesses and defence witnesses under the same conditions.\textsuperscript{2} According to the Court:

In criminal trials, where the prosecution has all the machinery of the state behind it, the principle of equality of arms is an essential guarantee of the right to defend oneself. The principle of equality of arms ensures that the defence has a reasonable opportunity to prepare and present its case on a footing equal to that of the prosecution. Its requirements include the right to adequate time and facilities to prepare a defence, including disclosure by the prosecution of material information. Its requirements also include the right to legal counsel, the right to call and examine witnesses and the right to be present at the trial. This principle would be violated, for example, if the accused was not given access to information necessary for the preparation of the defence, if the accused was denied access to expert witnesses, or if the accused was excluded from an appeal hearing where the prosecutor was present.\textsuperscript{3}

In the landmark case of \textit{Dombo Beheer v. the Netherlands}, the Court summarised the concept of equality of arms in the oft-cited maxim according to which equality of arms mandates that ‘each party must be afforded reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent’.\textsuperscript{4} It follows that

\begin{itemize}
  \item \textsuperscript{2} Negri (n 1) 21, 22.
  \item \textsuperscript{3} ECtHR, Foucher v. France, App. No. 22209/93, Judgment of 18 March 1997, cited by Fedorova (n 1) 46.
\end{itemize}
equality of arms is not constructed as a positive right, but rather, as a negative one, requiring a level playing field and a ‘minimal guarantee’ of adequate time and facilities to present one’s defence. The above dictum has been often reiterated in the case law of the Court and has provided guidance to other international tribunals in the development of this concept.

Moreover, under the ECtHR jurisprudence, equality between the parties is also an inherent feature of adversarial proceedings, based on the notion of the trial as a contest between two parties. The right to an adversarial trial means that ‘both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party’. In this respect ‘various ways are conceivable in which national law may secure that this requirement is met’, but ‘whatever method is chosen, it should ensure that the other party will be aware that observations have been filed and will get a real opportunity to comment thereon’.

Finally, it must be noted that the ECtHR examines the effect of violations of equality of arms on the fairness of the proceedings as a whole and only if the applicant has suffered an actual prejudice arising from the procedural inequality.

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6 Negri (n 1) 21, 22.
10 Fedorova (n 1) 40, 41.
3. Equality of arms in international criminal proceedings

Equality of arms between the Prosecution and the Defence is a central principle of modern international criminal justice. Due to the specific context in which international criminal tribunals operate, however, the practical implementation of the principle of equality of arms is far from being unproblematic. In this respect, it has rightly been observed that ‘the dependence on state cooperation for virtually every investigative effort’ is ‘one of the most crucial factors that make the international criminal tribunals different from their domestic counterparts’.\(^\text{11}\) It is precisely due to this structural characteristic of international trials that ensuring equality before them is a daunting task.

Equality in international criminal proceedings can be addressed under the two inter-related perspectives of institutional equality and procedural equality. Since the Nuremberg trials, great institutional disparity between the Defence and the Prosecution is ‘inherent’ in the distribution of power contemplated by the founding instruments of international tribunals.\(^\text{12}\) To be fair, such institutional inequality finds (at least one) explanation in the different mandate of these organs. Whereas the Prosecutor has a clear mission to investigate and prosecute the persons allegedly responsible for international crimes and, to this end, is given specific powers and independent resources as an independent organ of international tribunals, the Defence’s role is substantially different and its capacity to collect evidence is limited in scope and tailored to react to the


Prosecution’s case. A further consequence of institutional inequality is the traditional disparity in resources (both human and financial) between Defence and Prosecution.

Some of the fundamental choices underpinning the procedure of international criminal tribunals are also problematic from an equality perspective. International trials are clearly inspired by the adversarial model, in that the parties need to gather evidence in order to build and present their case at trial. Like the Prosecutor, the Defence has two ways to carry out its investigations: a direct execution of investigative measures on the territory of a State (on-site investigations) or a request for assistance to States and non-state actors. The assistance of national authorities is indispensible for both. However, for the Defence, obtaining the cooperation it needs to build its case is often much more difficult than it is for its counterpart. As has been noted in the context of the ICTY, Defence efforts to obtain cooperation from States, NGOs and international organizations have proven to be ‘one of the most enduring challenges’ since the International Militaries Tribunals. The practice of the ad hoc Tribunals has shown that State cooperation with the Defence has been far less forthcoming in comparison to cooperation with the Prosecutor.

Undoubtedly, States non-cooperation can affect the Prosecution as well as the Defence. However, it has rightly been observed that, the former, being an official organ of the criminal tribunal with certain coercive powers of its own, is better equipped to enter the territory of uncooperative States, whereas the same is almost always impossible for the Defence.\textsuperscript{16} In this respect, it is interesting to mention a partially different view, according to which the lack of official institutional standing of the Defence could sometimes constitute an advantage, the so-called ‘tourist advantage’.\textsuperscript{17} When the security situation allows for it, in fact, Defence counsel can consider accessing the territory of States as a private citizen (that is, with a mere tourist visa) in order to visit the relevant locations and conduct interviews with potential witnesses.

3.1 The interpretation of equality by international criminal tribunals

Although the founding instruments of international criminal tribunals do not incorporate it as such, the case law of international courts and the ensuing doctrine widely acknowledge equality of arms to be a key element of the right to fair trial.\textsuperscript{18} Although the focus of this Chapter (and of this study) is on the ICC, any consideration on the principle of equality of arms must be


\textsuperscript{17} Conversation with Professor Göran Sluiter.

\textsuperscript{18} Fedorova (n 1) 30; Jarinde T Tuinstra, \textit{Defence Counsel in International Criminal Law} (TMC Asser Press 2009) 145.
made in light of the landmark jurisprudence of the ICTY on the subject. Due to the fundamental importance of the Tadić case, it is worth dedicating a paragraph to this ruling.

3.1.1 The landmark Tadić case at the ICTY

The Tadić case is the seminal decision when it comes to equality of arms in relation to cooperation. The Defence had lamented the violation of the accused’s right to a fair trial due to the lack of cooperation of the Republika Srpska with the Defence. Specifically, whereas most defence witnesses were Serbs still residing in the Republika Srpska, which refused any form of cooperation with the ICTY, Prosecution witnesses were Muslims residing in countries in Western Europe and North America whose governments cooperated fully with the Tribunal. 19

The Appeals Chamber dismissed the Defence’s complaint. In adopting the interpretation of equality given by the ECtHR, the Tribunal’s judges held that this principle ‘obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case’. 20 In particular, they considered that, under human rights law, the principle of equality of arms is designed to provide guarantees that are procedural in nature, and that human rights instruments are ‘silent as to whether the principle extends to cover a party’s inability to secure the attendance at trial

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of certain witnesses where fault is attributable, not to the court, but to an external, independent entity’.\(^{21}\)

Moreover, it considered that equality of arms must be given ‘a more liberal interpretation’ before the Tribunal due to the unique characteristics of this court. Unlike domestic courts, which can benefit from the ‘the extensive enforcement powers of the State’ to control matters that can affect the fairness of the trial, the Tribunal is entirely reliant on the cooperation of States and does not have the power to compel them to cooperate through enforcement measures.\(^{22}\) Accordingly:

\[
\text{[t]his principle means that the Prosecution and the Defence must be equal before the Trial Chamber. It follows that the Chamber shall provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case.}\(^{23}\)
\]

Since the Defence itself had acknowledged that the Trial Chamber had done everything in its power to assist it with requests for cooperation, and that no evidence existed that the judges had failed to assist the accused when seized of a request to do so, the Appeals Chamber dismissed the appeal. In short, the ICTY held that in case the assistance of the Tribunal proves to be ineffectual, in that the party, despite that assistance, is still unable to obtain the evidence sought, that is a matter outside of the scope of the principle of

\(^{21}\) ICTY, Prosecutor v. Dusko Tadić (n 20) 50. Notably, the Chamber remarked that ‘there is nothing in the ECHR case law that suggests that the principle is applicable to conditions, outside the control of a court, that prevented a party from securing the attendance of certain witnesses’.

\(^{22}\) ibid., 51.

\(^{23}\) ibid., 52.
equality of arms as a principle of procedural equality. Undoubtedly, this interpretation pays little attention ‘to the very real question of the substantive inequality that exists between parties’ and ultimately results in a reduced human rights protection.

3.1.2 Equality of arms at the ICC

The Rome Statute does not explicitly mention equality of arms, but codifies the principle at Article 67, enshrining the rights of the accused at trial. According to it, the accused is entitled to ‘a public hearing, having regard to the provisions of the Statute, to a fair hearing conducted impartially, and to [certain] minimum guarantees, in full equality [emphasis added]’. Pursuant to paragraph 1, letter b) of this provision, the accused must be granted ‘adequate time and facilities for the preparation of the defence’, as well as the possibility to communicate freely with counsel of his/her choosing in confidence. Moreover, according to subsequent letter e), the accused has the right ‘to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her’.

Unlike the ICTY, the ICC has not elaborated thoroughly on the concept of ‘equality of arms’ before it. However, its understanding of the principle might be grasped from some of its decisions. It appears that the ICC endorses the interpretation of equality as confined to procedural equality. According to the Pre-Trial Chamber:

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24 McIntyre (n 13) 272.
Fairness is closely linked to the concept of “equality of arms”, or of balance, between the parties during the proceedings. As commonly understood, it concerns the ability of a party to a proceeding to adequately make its case, with a view to influencing the outcome of the proceedings in its favour.\(^\text{26}\)

In a subsequent decision, the Court stressed that ‘a fact-sensitive evaluation will be required whenever unfairness is alleged, since it will be impossible to create a situation of absolute equality of arms [emphasis added]’.\(^\text{27}\)

However, the Court seemed to be more willing to interpret this principle in favour of the accused. According to it, the minimum guarantees enshrined in Article 67 of the Statute ‘must be generously interpreted, so as to ensure the defence is placed insofar as possible on an equal footing with the prosecution, in order to protect fully the right of the accused to a fair trial’.\(^\text{28}\)

With respect to the requirement of ‘adequate time and facilities for the preparation of the defence’ under Article 67(1)(b), the Court has the obligation to take ‘the measures within its power’ that are necessary to ensure this right. Moreover, the assessment of the adequacy of the facilities for the defence will be conducted against the extent of the facilities at the disposal of the Prosecution, ‘since it will in general be necessary and desirable to rectify significant disparities’.\(^\text{29}\)

\(^{26}\) Prosecutor v. Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen, PTC II Decision on Prosecutor’s Application for Leave to Appeal in part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under Article 58, ICC-02/04-01/05-20, 19 August 2005, 30.

\(^{27}\) ibid.

\(^{28}\) Prosecutor v. Thomas Lubanga, TC I Decision on Defence’s Request to Obtain Simultaneous French transcripts, ICC-01/04-01/06, 14 December 2007, 18.

\(^{29}\) ibid., 19.
In light of the above, although the judges have not stated so explicitly, it seems reasonable to conclude that, consistent with the interpretation of human rights bodies and that of the ad hoc Tribunals, the ICC has adhered to a basic procedural equality which satisfies the minimum requirements of the fair trial norms by entitling both parties to the same access to the powers of the Court and the same right to present their case.

4. Balancing inequality at the institutional level

The Rome Statute does not include the organization of defence services in its legal framework. According to Article 34 of the Statute, the Court is composed of four organs: the Presidency, the Pre-Trial, Trial and Appeals Divisions, the OTP, and the Registry. Legally speaking, therefore, the Defence is not an organ of the Court.

Admittedly, this is nothing new. Starting with the Nuremberg and Tokyo Tribunals, international courts have always failed to set up the necessary structure to ensure the realization of defence rights (with the significant exception of the Special Tribunal for Lebanon established in 2007). In contrast, those same instruments spell out in great detail the institutional role of the other organs of the tribunals, namely, the Prosecution, Chambers, and the Registry.


31 Borrowing the words of the president of the International Criminal Defence Attorneys Association: ‘the institutional basis for a truly independent body of defense lawyers is very much lacking in the Statutes of these courts, even though the rights of the accused are clearly articulated on paper’ Elise Groulx, ‘Equality of Arms: Challenges Confronting the Legal Profession in the Emerging International Criminal Justice System’ (2010) 2010 Revue Quebecoise de Droit International 21, 21, 22; see also: Jalloh (n 30) 787.
As Charles Jalloh has pointed out, this failure is mainly due to sovereignty concerns and to the traditional prerogative of states to prosecute international crimes committed on their territory or by their nationals:

In an environment in which international prosecution efforts must be justified, legalized, and legitimated for state consent to be given, concerns for defence rights have largely been overshadowed by prosecution concerns. This is particularly true given that the defence routinely challenges, both within and outside of these trials, the legality and the legitimacy, of the tribunals purporting to assert jurisdiction over the defendants.32

Similarly, Elise Groulx described how the international pressure to end impunity led to focus the attention on the prosecutorial perspective and on the compensation of victims. Accordingly:

[the system was built very rapidly without including the legal profession in an organized and continuous manner, in the design of the system – or looking critically at the methods of protecting the rights of individuals accused of committing heinous crimes.33

The Rules of Procedure and Evidence and the Regulations of the Court, however, provide a legal basis for the provision of institutional support for defendants, in an effort to fill in the omissions in the Statute. In particular, Rule 20 sets out the ‘responsibilities of the Registrar relating to the rights of

32 Jalloh (n 30) 787.
33 Groulx (n 31) 23.
the Defence’ and mandates the Registrar to, *inter alia*, provide support, assistance and information to all defence counsel and professional defence investigators, and equip the Defence with the adequate facilities for the performance of its duties.\(^{34}\) Furthermore, Rule 20(2) states that the Registrar must carry out its duties, including the Registry’s financial administration, in such a manner that the independence of the Defence is upheld.

The following subparagraphs address how the Registry has developed such mandate in practice with the creation of the Counsel Support Section and the Office of Public Counsel for the Defence. Moreover they provide an account on how the appointment of defence counsel works before the ICC.

4.1 Support structures for defence services: the OPCD

At the ICC, the institutional support for defendants operates through two main channels: the Counsel Support Section (CSS) – a unit created within the Registry, with the task of providing logistical and administrative support to both defence and victims’ counsel – and the Office of Public Counsel for the Defence (OPCD), a permanent unit of the Court, which falls within the Registry only for administrative purposes, but is otherwise a wholly independent office.\(^{35}\) Significantly, both the CSS and the OPCD are financially dependent on the Registry, and, unlike the OTP, do not enjoy the autonomy to determine their operational budget.

\(^{34}\) Rule 20 (1)(b) and (e) RPE.

\(^{35}\) Support for victims and their legal representatives is provided by the Victims Participations and Reparations Section (VPRS), attached to the division of the Court Services and the Office of Public Counsel for Victims (OPCV), the counterpart of the OPCD mandated to provide legal support and advice to victims and legal representatives.
The CSS was created by the Registrar in 2009. It manages the List of Counsel eligible to practice before the ICC and provides training and support for counsel on the list; it also administers the legal aid scheme of the Court on behalf of the Registrar. The most significant effort to remedy an imbalance between the prosecution and the Defence in terms of institutionalization, however, is represented by the creation of the OPCD. The latter was established in accordance with Regulation 77 of the Regulations of the Court, which mandates the Registrar to establish and develop an Office of Public Counsel for the Defence for the purposes of: i) representing and protecting the rights of the defence during the initial stages of the investigation; ii) providing legal advice and research to defence teams and defendants; iii) advocating for the general interests of the defence in connection with internal and external policies and agreements.\footnote{Regulation 77 of the Regulations of the Court, paragraphs (1), (4) and (5).} OPCD members work independently\footnote{Pursuant to Regulation 114 of the Regulations of the Registry ‘the members of the Office shall not receive any instructions from the Registrar in relation to the discharge of their tasks as referred to in regulations 76 and 77 of the Regulations of the Court’.} and are governed, in the exercise of their duties, especially as regards respect for confidentiality, by the Code of Professional Conduct for Counsel. The OPCD is the voice of the Defence before the ICC and serves the purpose of fostering the principle of equality of arms at an institutional level. Moreover, it represents a significant advancement to the practice of the Court’s predecessors, where no formal structure existed to represent the interests of the Defence.\footnote{At the ICTY the general interests of the defence were represented by an external partner of the Tribunal, the Association of Defense Counsel at the ICTY (ADC-ICTY).}
4.1.1 Representing the Defence at the initial stages of the investigation

Regulation 77(4) of the Regulations of the Court entrusts the OPCD with the protection of the rights of the defence both during the preliminary examination under Rule 47(2) RPE, and during the formal investigation pursuant to Article 56, governing the proceedings concerning a ‘unique investigative opportunity’. Moreover, OPCD may be appointed to serve as ad hoc counsel for the general interest of the defence ‘when the interests of justice so require’ pursuant to Regulation 76(1) and (2).

4.1.2 Assistance to defence teams

As mentioned, the OPCD assists defence teams and defendants with legal advice and research pursuant to Regulation 77(5) of the Regulations of the Court. In the absence of any further elaboration by the Court’s legal instruments, the 2010 Report of the Registry provides the most insightful information regarding the actual contents of this task.39

According to it, the OPCD provides new defence teams with manuals and memoranda, which enables them to acquaint themselves with the complex legal framework and jurisprudence of the Court. Subsequently, the defence teams may also request the OPCD to conduct research into legal and procedural issues arising in their case.40 Through these activities, the OPCD seeks to create a ‘collective defence memory’ and ‘resource centre’. Moreover, it endeavours to achieve an equality of arms between individual

39 ICC Registry, ‘Behind the Scenes: the Registry of the ICC’ (2010), available at: https://www.icc-cpi.int/iccdocs/PIDS/docs/behindTheSce.pdf. The section on the OPCD has been written by Xavier-Jean Keïta, Principal Counsel OPCD and Melinda Taylor, Legal Advisor OPCD.
defence teams and prosecution teams, which are assisted by a separate appellate and legal advisory section.\textsuperscript{41}

The Report further explains that, through its access to all public decisions and transcripts, the OPCD has compiled various legal digests on specific subject matters (such as victim participation, oral decisions on trial procedures etc.) which it updates on a regular basis and disseminates to all defence teams to ensure that they are familiar with the most recent legal precedents issued in other cases. Moreover, by virtue of its insight into all the proceedings before the ICC, the OPCD has been invited by different Chambers to file observations concerning the development of protocols regulating the system of disclosure between the parties, which could have significant ramifications for all future defence teams.\textsuperscript{42}

The relationship between OPCD and external counsel is a very delicate one. As the Registry has emphasized, ‘the OPCD is not a public defender’s office per se, it exists to supplement rather than replace the role of external defence counsel’.\textsuperscript{43} On the one hand, the OPCD must be careful not to interfere with the strategy of individual defence teams, which are ultimately responsible for the contents of defence filings and submissions. On the other hand, the OPCD must avoid the possibility of conflicts of interest arising from assistance provided to different defence teams. As a result, the ‘OPCD does not provide any advice or assistance in relation to factual issues, nor does it seek or receive instructions from the defendants’.\textsuperscript{44} In the situation in Libya, however, the Pre-Trial Chamber

\textsuperscript{41} ibid.
\textsuperscript{42} ibid.
\textsuperscript{43} ibid.,69.
\textsuperscript{44} ibid.
appointed counsel from the OPCD to represent Saif al-Islam Gaddafi, upon a request of the defendant.45

4.1.3 Representing the Defence in ICC policies

In this capacity, the OPCD represents the rights of the Defence in deliberations regarding ICC policies and procedures, so as to ensure that they are formulated in a manner which is consistent with fair trial rights. For example, the OPCD has provided input on issues related to intermediaries, victim participation and legal aid. Additionally, the OPCD engages with external partners, namely NGOs and States, to promote awareness on defence-related issues, such as the importance of equality of arms and the role of defence counsel.

4.2 The right to counsel in the Rome Statute

The Rome Statute foresees the right to counsel both at the investigation stage and after an arrest or a summons have been issued (case stage). However, there is no general right to counsel at the investigation stage, as this is limited to the questioning proceedings. Conversely, after a person has been arrested or has appeared voluntarily, his/her right to counsel is guaranteed throughout all procedural stages following arrest.46

The relevant provisions are the following. Article 55(2)(c), guarantees to all persons who are under investigation by the Prosecutor and who are to be questioned the right ‘to have legal assistance of the person’s choosing, or (…) to have legal assistance assigned to him or her, in any case where the interests of justice so require’. Questioning must be carried out in the presence of counsel ‘unless the person has voluntarily waived his or her right to counsel’. 47

Pursuant to Rule 117(2) RPE, at any time after the arrest, the person may make a request to the Pre-Trial Chamber for the appointment of counsel to assist with proceedings before the Court. Once a person has been charged with a particular crime or crimes within the jurisdiction of the Court, his or her status shifts from that of a suspect to an accused. According to Article 67(1), in the determination of any charge the accused shall be entitled to, inter alia, b) communicate freely with counsel of his/her own choosing; and d) conduct the defence in person or through legal assistance of his/her own choosing, or to have legal assistance assigned by the Court in case s/he lacks sufficient means to pay for it.

The Rome Statute, thus, enshrines the principle that a defendant may freely choose counsel to represent them, provided that the counsel in question meets certain qualifications. 48 Rule 21(2) RPE provides that defendants may choose counsel from a list maintained by the Registrar, or can choose any ‘other counsel who meets the required criteria and is willing to be included in the list’. Pursuant to Regulation 73(2) of the Regulations of the Court, however, duty counsel may be appointed by the Registrar ‘if any person requires urgent legal assistance and has not yet secured legal

47 Article 55(2)(d) of the Rome Statute.
48 See Rule 22 RPE.
assistance, or where his or her counsel is unavailable’. In appointing duty
counsel, the Registrar must take into account the wishes of the person, and
the geographical proximity of, and the languages spoken by, the counsel.

4.2.1 Appointment of ad hoc counsel as a means to balance inequality

As has been seen, as soon as it is decided to open an investigation, the OTP
may send over a team of investigators to interview potential witnesses and
collect evidence with the assistance of local authorities. Whilst prosecutorial
teams work on a case for years before requesting the issuance of an arrest
warrant and have a very detailed knowledge of the situation concerned,
defence lawyers become involved in cases on an individual basis and only
after the warrant has been issued.\(^49\)

Proceedings taking place prior to the issuance of an arrest warrant
may affect the case against the future defendant in various ways. The Rome
Statute, thus, creates a new type of counsel (the so called ad hoc counsel),
appointed to represent the general interests of the Defence at a very early
stage of the investigation, where no suspect has yet been identified or
charged. The need for such representation stems from the unique and novel
jurisdiction of the Court, which is exercised not only over individual cases,
but also over situations.\(^50\) Importantly, proceedings taking place in the
context of a situation, such as those regarding victim participation or
evidentiary issues – each of which involve the participation of the

\(^{49}\) Traditionally, from the Defence’s point of view, the proceedings become relevant after a
suspect is identified and the Prosecutor needs to carry out an investigative act that requires
the presence of counsel, such as the interrogation of the suspect pursuant to Article 55(2)(c)
of the Rome Statute.

\(^{50}\) Dieckmann and Kerll (n 46) 109.
Prosecutor – may affect the cases against individual accused yet to be identified by the Court.\textsuperscript{51}

As will be seen in the following sub-paragraphs, the Statute empowers the Pre-Trial Chamber to appoint \textit{ad hoc} counsel both during the preliminary examination and during the formal investigation. By appointing \textit{ad hoc} defence counsel to represent the general interests of the future accused, the Court’s legal instruments strive to ensure equality of arms throughout the proceedings, and ultimately to protect the fairness of any resulting cases against individuals.\textsuperscript{52}

4.2.1.1 The preliminary examination

At the preliminary examination stage the Prosecutor analyses the reliability of the information received through a referral or a communication. In this stage, the Prosecutor is not explicitly granted investigative powers. However, pursuant to Article 15(2) of the Statute s/he might decide to receive ‘testimonies’ at the seat of the Court.

Rule 47(2) RPE foresees a potential role for \textit{ad hoc} counsel for the Defence when there is a serious risk that it might not be possible for the testimony to be taken subsequently. In such case, the Prosecutor ‘may request the Pre-Trial Chamber to take such measures as may be necessary to ensure the efficiency and integrity of proceedings and, in particular, to appoint counsel or a judge from the Pre-Trial Chamber to be present during the taking of the testimony in order to protect the rights of the Defence’. In

\textsuperscript{51} ibid.
\textsuperscript{52} ibid; War Crimes Research Office, ‘Protecting the Rights of Future Accused During the Investigation Stage of International Criminal Court Operations’ (2008) 2.
this instance, Regulation 77(4) of the Regulations of the Court mandates that *ad hoc* counsel be selected among the members of the OPCD.

It is difficult to assess what role defence counsel might actually have at such an early stage of proceedings. The Prosecutor is not investigating but merely evaluating the reliability of the information received in order to decide whether or not to start an investigation, and a suspect will normally not yet have been identified. As is the case with Article 56 (see below), the purpose of this provision is to make sure that the evidence will be available at the confirmation hearing and at trial, should the Prosecutor decide to rely on it.

However, information under Article 15(2) is most likely to be used for the purpose of the hearing in which the Pre-Trial Chamber authorizes the commencement of the investigation pursuant to Article 15(4). Given the different standard of proof, the distinct purpose of Article 15 hearing, and the limited ways in which information can be gathered at this stage, it may not be possible to obtain it in a form that would render it admissible for subsequent proceedings.

### 4.2.1.2 The investigation

Once the investigation commences, the Court may appoint *ad hoc* counsel to represent the interests of the defence in case of a ‘unique investigative opportunity’ under Article 56 of the Statute, and when ‘the interest of

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justice so requires’ pursuant to Regulation 76(1) of the Regulations of the Court. In the latter case, counsel may be chosen either from the list maintained by the Registry pursuant to Rule 21 RPE, or from the OPCD.55 The following subparagraphs consider each of these situations.

4.2.1.3. Unique investigative opportunity

Article 56 of the Statute provides for a mechanism to protect the rights of the future defendant in relation to the collection of evidence that is not likely to be available in the future. According to this provision, when the Prosecutor comes across a ‘unique opportunity to take testimony or a statement from a witness, or to examine, collect or test evidence’, s/he has a duty to inform the Pre-Trial Chamber, which may take the necessary measures to ‘ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the Defence’.

Article 56(2) sets forth a non-exhaustive list of measures that the Pre-Trial Chamber may take. From a Defence perspective, the most important is the one envisaged by letter d), according to which the Pre-Trial Chamber may i) authorize counsel for the person arrested or appeared in response to a summons to ‘participate’, or ii) in case there has not yet been such an arrest or appearance, or counsel has not been designated, appoint another counsel to ‘attend and represent the interests of the Defence’.

As can be seen, thus, this provision protects the rights of future accused both at the situation stage, where a suspect has not been yet identified, and at the case stage, following the arrest or the appearance of

55 Regulation 76(2) of the Regulations of the Court.
the person. The presence of counsel serves the purpose of ensuring that the evidence taken during the investigation will be admissible at trial.\textsuperscript{56}

It must be stressed that, where counsel is appointed in the absence of an arrest or designation of counsel by the person, counsel may have no actual client.\textsuperscript{57} This means that the future accused may not be available for to give instruction to counsel and discuss a defence strategy with him/her. In this case, thus, counsel protects the ‘general interests of the Defence’, rather than the rights of a specific defendant.\textsuperscript{58} What is more, in this situation conflicts of interests are likely to arise. As explained by Gallant:

several persons, some with conflicting defences, may have evidence given against them during a single “unique investigative opportunity”. Where the targets of the investigation are clear, separate counsel may be appointed for each potential accused. The court, however, may not know in advance the identity of those against whom evidence will be given. For this reason, “defence” counsel may be placed in the position of attempting to protect the interests of more than one potential accused, who at later stages may try to blame each other for the alleged crimes.\textsuperscript{59}


\textsuperscript{57} Gallant (n 46) 23.

\textsuperscript{58} Safferling (n 56) 662.

\textsuperscript{59} Gallant (n 46) 23–24.
Christoph Safferling, however, has highlighted the important function that defence counsel still serves in this context, which is making sure that proceedings are conducted in accordance with the ‘rule of law’, meaning that counsel has the function to guard over issues such as the adherence to procedural provisions, the legitimacy of investigatory measures, and the coordination of several national legal orders and the ICC.  

In the situation of the Democratic Republic of the Congo (DRC), Pre-Trial Chamber I appointed an attorney pursuant to Article 56, following the Prosecutor’s notification of a ‘unique investigative opportunity to carry out forensic examinations’ to be carried out by the Dutch Forensic Institute.  

In the case against Dominic Ongwen (Situation in Uganda), Article 56 has been used before the confirmation of charges in order to take the testimony of two potential witnesses. The latter, in fact, had been subjected to pressure that, according to the Pre-Trial Chamber, may have resulted in the witnesses being no longer willing to testify before the Court or in the genuineness of their testimony being tainted.

4.2.1.4 Ad hoc counsel in the interest of justice

In a number of occasions, the Pre-Trial Chamber appointed ad hoc counsel to represent the interests of the defence because it deemed it necessary in

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60 Safferling (n 56) 662–666.
61 Situation in the DRC, PTCI Decision on the Prosecutor’s Request for Measures under Art. 56, ICC-01/04-21, 26 April 2005.
62 Prosecutor v. Dominic Ongwen, PTC II Decision on the “Prosecution application for the Pre-Trial Chamber to preserve evidence and take measures under article 56 of the Rome Statute”, ICC-02/04-01/15, 23 March 2016.
the interest of justice pursuant to Regulation 76(1) of the Regulations of the Court. The reasons for the appointment were various.

In the situation in the DRC, the Chamber appointed a second lawyer as *ad hoc* defence counsel for the purpose of responding to applications from victims seeking to participate in the proceedings pursuant to Rule 89(1) RPE. This provision provides that victims wishing to participate in proceedings before the Court must submit a written application to the Registrar, and that copies of all such applications will be provided to the Prosecutor and the Defence, who shall be entitled to reply. Although this rule does not expressly require the appointment of *ad hoc* counsel, the Chamber deemed it necessary to use its power under Regulation 76(1) of the Regulations of the Court to represent and protect the interests of the defence during the application proceedings of Rule 89 RPE, so as to respond to victims’ applications.

In the situation in Darfur, Pre-Trial Chamber I appointed defence counsel to respond to the *amicus curiae* observations submitted by Louise Arbour and Antonio Cassese pursuant to Rule 103(1) RPE, which states that the Chamber may ‘invite or grant leave to a State, organization or

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63 Situation in the DRC, PTC I Decision on Protective Measures Requested by Applicants 01/04-1/dp, ICC-01-04-73, 21 July 2005, 5. Article 68(3) of the Statute provides that ‘where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial’.

64 Following the rationale endorsed by Pre-Trial Chamber I, Pre-Trial Chamber II also appointed *ad hoc* counsel to represent the interests of the Defence by responding to victims’ applications to participate in the Uganda situation, see Situation in Uganda, PTC II Decision on Legal Representation, Appointment of Counsel for the Defence, Protective Measures and Time-limit for Submission of Observations on Applications for Participation, ICC-02/04-01/05-134, 1 February 2007.

65 Situation in Darfur, Sudan, PTC I Decision Inviting Observations in Application of Rule 103 RPE, ICC-02/05-10, 24 July 2006.
person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate’.

With respect to the case stage, the Chamber deemed it necessary to appoint an \textit{ad hoc} counsel where the person was not represented by defence counsel (for example, because the person was still at large).\footnote{Dieckmann and Kerll (n 46) 124.} In the case against Joseph Kony et al. (situation in Uganda), Pre-Trial Chamber II initiated \textit{proprio motu} proceedings under Article 19(1) of the Statute to determine the admissibility of the case.\footnote{Prosecutor v. Joseph Kony et al., PTC II Decision Initiating Proceedings under Article 19, Requesting Observations and Appointing Counsel for the Defence, ICC-02/04-01/05-320, 21 October 2008.} In inviting the Republic of Uganda, the Prosecutor and particular victims to submit their observations on admissibility, the Chamber also appointed \textit{ad hoc} counsel arguing that: ‘in the present circumstances, where none of the persons for whom an arrest warrant has been issued is yet represented by a defence counsel, appointment of counsel for the defence (…) is in the interest of justice’.\footnote{ibid., 8.}

Finally, it is worth mentioning that in the above situations the Pre-Trial Chamber has appointed \textit{ad hoc} counsel both from the list of attorneys maintained by the Registrar (list counsel) and from OPCD lawyers.\footnote{Dieckmann and Kerll (n 46) 112–115; War Crimes Research Office (n 52) 25–47.}

\section*{4.2.2 Limits and scope of \textit{ad hoc} counsel’s mandate}

The lack of detailed provisions concerning \textit{ad hoc} counsel in the legal texts of the Court gave rise to controversies and confusion with regard to the scope of \textit{ad hoc} counsel’s mandate in each of the above-mentioned
circumstances. The lawyers appointed as *ad hoc* counsel interpreted their mandate as being much broader than intended by the Pre-Trial Chamber.

In the situation of DRC, the appointed counsel made a submission challenging not only the existence of a unique investigative opportunity, but also making ‘preliminary remarks on issues of jurisdiction and admissibility’. The Chamber held that *ad hoc* counsel for the defence had no procedural standing to challenge the jurisdiction of the Court and the admissibility of the case pursuant to Article 19(2)(a) of the Statute, as this can only be made by an accused person against whom a warrant of arrest or a summons to appear has been issued.

Similarly, the appointed counsel in the Darfur situation, rather than filing a response to the *amicus curiae* observations, submitted a request that the Pre-Trial Chamber determine questions of jurisdiction and admissibility prior to take any further action with respect to the situation in Darfur. The Pre-Trial Chamber rejected the request for the same reasons adopted in the previous finding in the DRC situation. A few weeks later, noting the Prosecutor’s expressed intention to visit 14 individuals in custody on Sudanese territory, appointed counsel requested that the Pre-Trial Chamber permit him to attend those meetings and, more generally, allow defence counsel to attend all proceedings in the situation in Darfur relating to ‘questioning, interviewing witnesses and victims, witness confrontations’

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70 Situation in the DRC, PTC I Decision following the Consultation on the Prosecutor’s Submission on Jurisdiction and Admissibility, ICC-01/04-93, 10 November 2005, 2-3 (summarizing the confidential submission received by defence counsel).
71 ibid., 4.
72 Situation in Darfur, Sudan, Ad hoc Counsel for Defence Conclusions aux fins d’Exception d’Incompétence et d’Irricevibilité, ICC-02-05-20, 9 October 2006.
73 Situation in Darfur, Sudan, PTC I Decision on the Submissions Challenging Jurisdiction and Admissibility, ICC-02/05-34-tENG, 22 November 2006.
and so on. The Defence further requested that the Chamber order the Prosecution to inform it of any envisaged proceedings and to invite it to attend and participate therein. In denying this request, the Chamber clarified that the mandate of *ad hoc* counsel is ‘strictly restricted’ by the terms of his/her appointment and does not extend automatically to other proceedings at the pre-trial stage set out in the Statute and the Rules.

Finally, in Prosecutor v. Joseph Kony et al., the Pre-Trial Chamber did not appoint counsel for the situation, but rather for the case against the four defendants, who remained at large. Counsel contended that the terms of the mandate as outlined in the decision of the Chamber were very broad and ambiguous. He claimed that the decision mandated him to ‘represent’ the four defendants. Thus, all defendants were in fact his clients within the meaning of Article 2(2) of the Code of Professional Conduct for counsel. The foreseeable conflict of interest resulting from the representation of four defendants in the same criminal proceedings constituted a breach of Article 12 of the Code of Conduct (governing impediments to representation) and thus also endangered the rights of each of the defendants to be represented effectively.

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74 Situation in Darfur, Sudan, Ad Hoc Counsel Application Requesting the Presence and Participation of the ad Hoc Counsel for the Defence During Proceedings that the OTP will Undertake in Sudan, ICC-02-05-41-tEN, 18 December 2006.
76 Prosecutor v. Joseph Kony et al., PTC II Decision initiating proceedings under article 19, requesting observations and appointing counsel for the Defence”, ICC-02/04-01/05-320, 21 October 2009.
78 Article 2(2) Code of Conduct provides that “[i]n this code (...) ‘client’ refers to all assisted or represented by counsel”.
79 Prosecutor v. Joseph Kony et al., Defence Counsel’s Submission, 18 November 2008 (n
The matter was settled by the Appeals Chamber on 16 September 2009.\(^8^0\) It clarified the difference in the mandate of counsel appointed to represent suspects individually, as his clients, as opposed to the mandate of counsel appointed to represent more generally the interests of the Defence. It held that the mandate of the latter is of a *sui generis* nature’, in that:

In circumstances where the suspects are at large and counsel is appointed to represent their interests generally in proceedings, such counsel cannot speak on their behalf. A client and counsel relationship does not exist between them, and counsel does not act for or as agent of the suspects. Counsel’s mandate is limited to merely assuming the defence perspective, with a view to safeguarding the interests of the suspects in so far as counsel can, in the circumstances, identify them. The provisions of the Code of Conduct regarding representation are therefore not directly applicable to such counsel.\(^8^1\)

4.3 Final remarks

The foregoing session has examined two aspects of institutional equality before the Court: the role of the support structure for the defence services and the appointment of *ad hoc* counsel to safeguard the general interests of the Defence at the early stage of the investigation.

\(^7^7\) 33.
\(^8^0\) Prosecutor v. Joseph Kony et al., AC Judgment on the Appeal of the Defence against the ‘Decision on the admissibility of the case under Article 19(1) of the Statute’ of 10 March 2009, ICC-02/04-01/05-408, 16 September 2009. This judgment upheld the PTC II Decision on the Admissibility of the Case under Article 19(1) of the Statute, ICC-02/04-01/05-377, 10 March 2009.
\(^8^1\) ibid., 56.
Whilst the creation of the OPCD is a significant step in the direction of remedying the imbalance between the Prosecution and the Defence, the latter still lacks the institutional autonomy, powers and visibility enjoyed by the Prosecution. As the Principal Counsel and Legal Advisor of the OPCD pointed out, the Defence does not have the power to enter into agreements with States and organizations for cooperation, cannot formulate its budget needs and lobby States for funding requests, and it is not represented in the committees which decide upon the legal and administrative policies of the Court.\(^{82}\) The lack of financial autonomy is particularly troublesome, as the ability to determine and manage the budget is crucial to an office’s independence.\(^{83}\)

For reasons of space, the session could not delve into the debate on the possible structural solutions to this problem. Here it suffices to say that practitioners are divided among those who support the establishment of a ‘Defence Office’ as a fifth organ of the Court, enjoying the same institutional status of the OTP, and those who believe that defence issues would be better addressed by an external body such as an ICC Defence Bar, similar to the Association of Defence Counsel Practising before the ICTY (ACD-ICTY).\(^{84}\)

The possibility of appointing an \textit{ad hoc} counsel to represent the general interests of the Defence is another major achievement of the Rome Statute in the protection of equality of arms. As has been seen, the Court considers the appointment of \textit{ad hoc} counsel to be ‘in the interest of justice’ both when suspects have not yet been identified at the situation stage, and

\(^{82}\) Keïta and Taylor (n 39) 71.

\(^{83}\) IBA Report, ‘Fairness at the International Criminal Court’ (2011) 34.

\(^{84}\) ibid 32–33; see also IBA Report, ‘Towards an ICC Association of Counsel’ (2015).
when identified suspects remain at large and do not appear before the Court following the issuance of an arrest warrant against them. However, the mandate of *ad hoc* counsel is extremely confined. The Court has consistently interpreted the general interests of the defence as limited to the specific issue that justified the appointment of counsel. As a result, *ad hoc* counsel cannot exceed the scope of their appointment by asserting the general defence interests of possible future accused persons.

**5. Defence on-site investigations in the Rome Statute: a legal vacuum**

The Statute does not rule out independent fact-finding by the Defence. In principle, the Defence is free to conduct its own investigation, for it cannot be required to rely exclusively on the investigative activities of the Prosecutor, despite their necessary objectivity.²⁸⁵ As has been argued, ‘no proper criminal justice system puts its faith solely in the Prosecutor to get things right, nor in the judges to understand perfectly the points for both sides in every case’.²⁸⁶ Thus, the adequate time and facilities for the preparation of the defence necessarily implies adequate resources for defence teams to conduct independent investigations at the scene of the alleged crimes and collect evidence.

The possibility for the Defence to investigate on the territory of States where crimes were committed is essential. As Kay and Swart have pointed out, visits to the crime scene are ‘necessary to familiarize the lawyer

with the areas that feature in the evidence of the case, to check the accuracy of evidence relied upon by the prosecution, and to search for evidence that is relevant to the defence’.\(^{87}\)

Despite the crucial importance of on-site investigations, however, the Statute is at best unclear regarding the right of the Defence to conduct them. Pursuant to Article 99(4), the direct execution of measures on the territory of States is *lex specialis* within the general cooperation regime of Part 9, to be applied under the strict terms and conditions set out in that provision. Accordingly, the Prosecutor may only perform non-coercive investigative acts on the territory of States, such as voluntary interviews and visits to public sites. Article 99(4) however, does not provide the Defence with a similar possibility, as it is framed exclusively from a prosecutorial perspective.\(^{88}\) It has been argued that ‘since even the Prosecutor does not automatically have the right to investigate on the territory of a State Party, it is hard to see how the Defence would have such a right in the absence of any specific or implicit provision to that effect’.\(^{89}\) The practice of the ICC, however, indicates that Defence investigations in the field occur in nearly all cases and that defence attorneys usually consider this to be an essential part of their tasks.\(^{90}\)

Moreover, despite the absence of any explicit reference in the Statute of the ICC, the need for Defence investigations is implicitly

\(^{87}\) ibid 1423–1424.


\(^{90}\) This was also the case at the ad hoc Tribunals, see: Jenia Iontcheva Turner, ‘Defense Perspectives on Law and Politics in International Criminal Trials’ (2007) 48 Va. J. Int’l L. 529, 554.
acknowledged by the Rules of Procedure and Evidence, particularly, at Rule 20 dealing with the responsibilities of the Registrar relating to the rights of the Defence. According to its letter b), the Registrar shall, inter alia, ‘provide support, assistance, and information to all defence counsel appearing before the Court and, as appropriate, support for professional investigators necessary for the efficient and effective conduct of the defence’. Elaborating on this Rule, Regulation 119(1)(a) of the Regulations of the Registry provides that the Registrar shall ‘assist counsel and/or his or her assistants in travelling to the seat of the Court, to the place of the proceedings, to the place of custody of the person entitled to legal assistance, or to various locations in the course of an on-site investigation. Such assistance shall encompass securing the protection of the privileges and immunities as laid down in the Agreement on the Privileges and Immunities of the Court and the relevant provisions of the Headquarters Agreement [emphasis added].’

5.1 Privileges and immunity of Defence counsel

As has been seen in Chapter I, Article 48 of the Statute, setting out the privileges and immunities of the Court, stipulates that defence counsel ‘shall be accorded such treatment as is necessary for the proper functioning of the Court’, in accordance with the APIC.91 The APIC largely compensates for the inequalities contained in the Statute with respect to privileges and immunities of defence counsel. Expanding upon the provisions of Article 48, the Agreement attributes to defence counsel and his/her assisting

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91 Article 48(4) of the Rome Statute. It is also important to note that the Statute makes no reference to the protection of the persons assisting counsel and investigators.
persons a set of privileges and immunities ‘to the extent necessary for the independent performance of their functions’; by so doing, the Agreement attributes to defence counsel prerogatives that are similar to those of the Deputy Registrar, the staff of the OTP and the staff of the Registry as stipulated in Article 16 of the Agreement.

According to Article 18(1) of the APIC, counsel and assisting persons are given personal immunity from arrest and detention, as well as functional immunity from prosecution in respect of words spoken or written and all acts performed in their official capacity. Importantly, they also enjoy inviolability of papers and documents relating to the exercise of their functions, and the right to communicate with their clients in whatever form. The ability to communicate with their clients in confidence and maintain the confidentiality of their files and channels of communication is particularly important during the investigation stage of the proceedings, when counsel and client are located in different countries. Finally, defence counsels are exempt from immigration restrictions and inspection of personal baggage; they are also granted fair treatment of currency and exchange, and repatriation facilities in times of crisis.

Art. 18(2) provides that, upon appointment, counsel shall be provided with a certificate signed by the Registrar for the period required for the exercise of her/his functions. Even though the document in question is referred to as a certificate, it provides the same protections as those contained in the laissez-passer which is issued for the Prosecutor and

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92 Article 18 of the APIC.
The ability to travel freely to the region where the crimes occurred as well as to other destinations where potential witnesses might be located is essential for the performance of the counsel’s function. This right to travel, however, does not automatically entail the freedom of movement within a State to collect evidence and interview witnesses. Thus, it does not compensate for the absence of a legal basis for defence on-site investigations in the Statute. This has been referred to as ‘the most important inequality of arms’.  

5.2 The support of the Registry to defence teams

According to the Report of the Bureau on cooperation of the ASP released in November 2009, ‘most of the instances of cooperation and assistance requested to States by the Registry on behalf of the Defence are related to defence investigative missions in the field’. Practically, the support of the Registry consists of requests for visa for counsel and members of their teams to national authorities in order to enable them to travel to the respective countries, issuance of notes verbale to facilitate defence missions to meet witnesses in prisons, issuance of official certificates under Article 18 of APIC etc.

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97 ibid.
According to the Report, once they are in the field, ‘defence counsel and their teams receive the same security, logistical and administrative assistance as Court staff. Such assistance is primarily provided by the Court's field offices, but also by UN offices and States’. More recently, the issue of cooperation with the Defence was thoroughly addressed by a Briefing Paper annexed to the Report of the ASP Bureau on Cooperation of 21 November 2014. At the outset, the paper emphasizes that:

[i]n order to respect the principles of fair trial and equality of arms enshrined in the Rome Statute, it is crucial importance that defence teams can effectively obtain cooperation from States and international organizations in the conduct of their activities, as the Office of the Prosecutor does, notwithstanding the fact that the Defence is not listed in article 34 of the Rome Statute as being an organ of the Court.

The paper moves on to consider the assistance of the Registry to defence teams, which covers three main areas:

(a) Facilitating the work of the Defence by inter alia ensuring that their privileges and immunities will be respected, organizing their travels to different States, facilitating their meetings with government officials, liaising with States to transmit, respectfully of the applicable procedures, their various requests (i.e. requests for obtaining information,

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98 ibid.
documentation, visit to specific places, interview of witnesses, including of detained persons);
(b) Liaising with States in order to encourage the signature of interim and provisional release agreements, as well as sending ad hoc requests in the absence of such agreement;
(c) Liaising with States to request their assistance in order to facilitate the appearance and the protection of Defence witnesses.\(^{100}\)

In practice, the assistance of the Registry to Defence on-site investigations consists in: i) preparing ‘the necessary certificate under the signature of the Registrar enabling counsel to benefit from the relevant privileges and immunities during the period required for the exercise of their functions in accordance with article 18 of the APIC and Article 25 of the Headquarters Agreement’;\(^{101}\) (ii) coordinating with the competent authorities via note verbale on upcoming missions of the Defence unless a specific arrangement was agreed upon with the State.;\(^{102}\) and (iii) providing necessary travel arrangements, such as requesting UN security clearance, requesting assistance from the UN (for example with MONUSCO flights), arranging for visas to travel to The Hague or the field, etc.\(^{103}\)

In order to obtain the cooperation of a State Party, the Defence teams have to respect the general provisions rules set forth by Article 87 of the Rome Statute and Rule 176 of the RPE. In this respect, the Registry may advise the defence teams on which States accept direct requests from defence teams. The Registry also assists by following up with requested

\(^{100}\) ibid., 5.
\(^{101}\) ibid., 7(b).
\(^{102}\) ibid., 7(c).
\(^{103}\) ibid., 7(d).
States to monitor the status of implementation of these requests. According to the Briefing Paper, in 2013, the Registry transmitted 11 requests on behalf of the Defence and conducted 85 follow-up activities on Defence requests across situation countries.¹⁰⁴

5.3 Impossibility to conduct on-site investigations in Darfur

The Banda and Jamus case arises out of the situation in Darfur, Sudan. As has been seen, the Government of Sudan refused to engage with the Court in any way, denying access to its territory to any person connected with the Court, including the Prosecution.¹⁰⁵ Not only has the Bashir government refused to let either the Prosecutor or Defence teams on its territory, but it went so far as obstructing the work of the Court, criminalizing cooperation with it by individuals (such as potential witnesses) and NGOs.

Mr Banda and Mr Jamus are rebel commanders, enemies of the government of Omar al-Bashir, charged with crimes arising from an attack against the African Union Mission in Sudan (AMIS) at the Haskanita Military Group Site (MGS Haskanita). On 16 June 2010, the defendants appeared voluntarily before the Court in response to summonses to appear issued under seal on 27 August 2009 and unsealed on 15 June 2010. The charges against them were confirmed on 7 March 2011.

¹⁰⁴ ibid., 9.
Faced with the total obstruction of the Khartoum Government, the Defence requested a temporary stay of the proceedings due to the impossibility of accessing the territory of Sudan for the purpose of defence investigations. Although the lack of cooperation targeted both the Prosecution and the Defence, the impact of such non-cooperation on the latter was more serious. This is because the OTP had the possibility to conduct the major part of its investigations outside the country. A report of the OTP of 2006 indicates that the Prosecutor had conducted 70 witness interviews in other countries, in addition to screening numerous additional witnesses and documents and consulting with experts.

Conversely, although the Defence had identified numerous potential witnesses who were believed to reside in Darfur, it was unable to travel there to conduct interviews or to identify and locate other potential witnesses. Accordingly, the Defence submitted that it would have been unable to obtain the attendance and examination of defence witnesses under the same conditions as the Prosecution witnesses. In the Defence’s view, the Prosecution witnesses based outside Sudan would provide a narrow view of the contested facts, one based solely on the perspective of the AMIS personnel who were within the base when it was attacked. Conversely, gathering contrary evidence on these key aspects would have been

110 ibid., 18.
impossible for the Defence, due to the volatile security situation and the active obstruction of the Government of Sudan.

According to the Defence, the minimum guarantee of ‘adequate facilities’ for the preparation of the Defence under Article 67(1)(b) of the Statute ‘grants [it] the right to all resources and access which are necessary to prepare the defence for trial. This necessarily implies a right to carry out defence investigations at the scene of the alleged crimes.’

Equally, the right to obtain the attendance of witnesses pursuant to Article 67(1)(e) must necessarily imply a right to investigate: without first being able to investigate, and hence to identify and interview witnesses, the Defence would never be able to obtain the attendance of witnesses’.

Finally, counsel submitted that, within the ICC regime, any investigative difficulties experienced by the Defence should, in part, be offset by the Prosecution’s duty under Article 54(1) of the Statute to investigate incriminating and exonerating circumstances equally and to ensure that such investigations are effective. However, because of Sudan’s stance against the Court and the Prosecution’s inability to investigate in the country, the OTP has only been able to discharge part of its Article 54 obligations by focusing its investigations on a limited part of the incriminating circumstances of the case, without undertaking any investigations into the exonerating circumstances.

111 ibid., 26.
112 ibid., 30.
5.3.1 The Trial Chamber’s Decision: there is no right to on-site investigations

The Trial Chamber, however, rejected this interpretation on the ground that ‘the investigation and prosecution of the most serious crimes of international concern should not become contingent upon a state’s choice to co-operate or not co-operate with the Court’.\(^{113}\) It reiterated that the direct execution of requests for assistance on the territory of a State is \textit{lex specialis} to be applied under the terms and conditions of Article 99(4) of the Statute. Therefore, in the Chamber’s view, Part 9 of the Statute does not foresee ‘an absolute and an all-encompassing right by the prosecution and the defence to on-site investigations’.\(^{114}\)

Accordingly, ‘the Chamber should not automatically conclude that a trial is unfair, and stay proceedings as a matter of law, in circumstances where States would not allow defence (or prosecution) investigations in the field even if, as a result, some potentially relevant evidence were to become unavailable.’\(^{115}\) Therefore, when on-site investigations are impossible, the Court needs to be satisfied that the accused has been provided with adequate facilities for the preparation of his/her Defence and the opportunity to obtain the attendance of witnesses on his/her behalf ‘by means \textit{other than} on-site investigations [emphasis added]’\(^{116}\).

Once again, the Chamber imposed on the Defence the particularly burdensome requirement of ‘specificity’. According to the judges, ‘the


\(^{114}\) Ibid., 99.

\(^{115}\) Ibid., 100.

\(^{116}\) Ibid.
unavailable evidence must be identified with sufficient specificity by the defence in light of the information available to it at [the] stage’.\(^{117}\) The Defence, however, failed to properly substantiate the claim that lines of defence and exculpatory evidence would have become available had it been allowed to enter the Sudan. As a consequence, the high threshold set out for a stay of proceedings was not met.\(^ {118}\)

With respect to this remedy, the Chamber stressed its exceptional character. A stay of proceedings can be resorted to only where the Chamber is convinced that the situation motivating the request for the stay cannot be resolved at a later stage or cannot be cured during the Chamber’s conduct of the trial.\(^ {119}\) At that moment, a stay would have been unjustified, in that ‘the Chamber may take into consideration the difficulties encountered by the defence when weighing the entirety of the evidence at the end of the trial, in order to resolve any unfairness towards the accused’.\(^ {120}\)

In a situation like that of Sudan, the only hope for the Defence seems to be the assistance of the Prosecutor. Although the judges acknowledged that it’s ultimately the witnesses’ choice to speak or not with the Defence, ‘given the difficulties experienced by the defence to conduct on-site investigations, the prosecution should spare no efforts to secure defence access to these individuals’.\(^ {121}\) The Chamber, thus, encouraged the Prosecution to do more than ‘just put the scenario to them and let them decide’.\(^ {122}\)

\(^{117}\) ibid., 102.
\(^{118}\) ibid., 101-102.
\(^{119}\) ibid., 12.
\(^{120}\) ibid., 102.
\(^{121}\) ibid., 128.
\(^{122}\) ibid., 128.
This approach is questionable. Without the visiting the crime scene, the Prosecution did not have the opportunity to conduct a thorough investigation into both incriminating and exonerating circumstances equally.\textsuperscript{123} As a result, it can be argued that, in this case, contrary to what the Chamber held, the lack of cooperation prejudiced the Defence in a manner that cannot be remedied at trial.

6. Defence access to cooperation

The Statute does not mention a Defence’s ‘power’ to directly request assistance to States and international organizations, similar to the one granted to the Prosecutor. In practice, however, the Defence sends requests for cooperation to States and non-state actors exactly as its counterpart. The reasons for the difficulties encountered by the Defence are various. At the outset, it must be reminded that the Defence is not an organ of the Court. Whereas Article 86 imposes an obligation on States Parties to cooperate with the Court with respect to investigations and prosecutions, the Court consists of four organs and the Defence is not one of them. Requests for assistance coming from the Defence, thus, are often disregarded by national authorities, or they are executed less diligently than those coming from the Prosecutor.\textsuperscript{124}

Moreover, as pointed out by a prominent defence attorney before the ICTY, many national civil law jurisdictions may not be familiar with the


concept of defence investigations, which is a typical feature of the adversarial model, and, therefore, might not be prepared to respond to the Defence’s requests for assistance. At a closer look, however, the reasons of the defence disadvantage in international criminal trials are mostly political. Unlike the Prosecutor, defence counsels are not perceived to act on behalf of the international community, but merely on behalf of their client, with whom they are often associated. As has been seen, some States do not wish to assist certain defendants, given their political positions in the past, as they are perceived as a threat after a regime change.

The drafters of the Statute made considerable efforts to expand the dimension of the Defence into the investigation process of the Prosecutor. On the one hand, they imposed upon the Prosecutor the duty to investigate incriminating and exonerating circumstances equally pursuant to Article 54(1)(a) of the Statute. On the other hand, they envisaged a strong role for the Pre-Trial Chamber in the supervision of the activities of the Prosecutor and in assisting the Defence with its requests for cooperation.

6.1 Prosecutorial impartiality

Article 54(1)(a) of the Statute mandates the Prosecutor with the ambitious mission to ‘establish the truth’. In order to do that, s/he must ‘extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so,  

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125 Wladimiroff (n 15) 248.
126 ibid 246; Fedorova (n 1) 187; Kay and Swart (n 86) 1424–1425.
investigate incriminating and exonerating circumstances equally [emphasis added]’. 127

In addition to the obligation to disclose the exculpatory evidence that s/he happens to find, 128 thus, the ICC Statute places upon the Prosecutor the ‘burden’ to actively look for the exonerating circumstances that might help the Defence in constructing its case. The obligation to investigate exculpatory evidence is a distinctive feature of the ICC. It does not exist in the legal system of the ad hoc Tribunals, where the Prosecutor is merely required to disclose exculpatory material, but not to actively search for it. 129

Ideally, therefore, the Prosecutor is not simply a ‘party’ to the proceedings, but s/he is supposed to act as an ‘impartial organ of justice’. 130 One commentator has observed that, as a consequence of this obligation upon the Prosecutor, the Defence need to prepare its distinct ‘case’ would be reduced, in that it would have the possibility to request the Prosecutor to take investigative measures on its behalf and, in case of refusal, request the Pre-Trial Chamber to order such measures. 131

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127 See Morten Bergsmo and Peter Kruger, ‘Article 54’ in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn, Beck/Hart 2008) 1078, noting that this provision builds ‘a bridge between the adversarial common law approach to the role of the Prosecutor and the role of the investigating judge in certain civil law systems’, finding a ‘[w]orkable solution to the problem of potential inequality between the resources of the Prosecutor and of the suspect or accused’.

128 See further at paragraph 7.

129 Rule 68 of the ICTY and ICTR RPE mandates the Prosecutor to disclose, as soon as practicable ‘any material, which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of the Prosecution evidence’.


131 Håkan Friman, ‘The Rules of Procedure and Evidence in the Investigative Stage’ in Horst Fischer, Claus Kress and Sascha Rolf Lüder (eds), *International and National...
Those on the Defence side, however, do not share this optimism. As noted by Kay and Swart, Article 54 enshrines a mere ideal and, ‘[o]nce a prosecution is commenced, to achieve a balance for both sides is a counsel of perfection that it would be folly to expect will be delivered’. More recently, Caroline Buisman has analysed the practice of the OTP with respect to the obligation in discussion, with disheartening conclusions.

6.2 The role of the Pre-Trial Chamber in assisting the Defence

The Pre-Trial Chamber has an important role in the protection of the Defence in the pre-trial phase. Section 4 of this Chapter has analysed the critical role played by the Chamber when the Prosecutor considers that an investigation presents a unique opportunity to collect evidence that may not be available for the trial in the future. The present paragraph addresses the role of the Pre-Trial Chamber in assisting defendants with requests for cooperation to States and international organizations.

Initially, defence teams send their requests for assistance directly to States. The early practice of the Court, however, has shown that such requests are often ignored, prompting counsel to request the assistance of the Registry, which, as has been seen, is responsible for providing support

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*Prosecution of Crimes Under International Law: Current Developments* (Arno Spitz 2001). He notes, however, that, given the adversarial nature of the confirmation hearing and the trial, ‘the option of preparing a “defence case” still remains’.

132 Kay and Swart (n 86) 1425–1426.
133 Buisman (n 123).
134 Pursuant to Article 56(1)(b) and 3(a) of the Statute, the Chamber may take all the necessary measures, both at the request of the Prosecutor or on its own initiative, to ensure the efficiency and the integrity of the proceeding and to protect the rights of the Defence. See paragraph 4.2.1.2.1 of this Chapter.
and information to defence teams practicing before the Court. The Registry then transmits the Defence’s request with a cover letter or note verbale to the relevant State or organization. If Registry-backed requests are ignored, counsel then turns to the Pre-Trial Chamber. It has rightly been noted that without some form of judicial involvement at the investigation stage, an accused would be incapable of effectively collecting evidence and preparing his/her defence.

Article 57(3)(b) of the Statute empowers the Chamber to assist the person arrested or summoned with the preparation of his/her defence. It states that, upon the request of an arrestee or a person who has appeared pursuant to a summons, the Chamber may, ‘issue such orders, including measures such as those described in article 56, or seek such cooperation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence.’ This power is meant to balance the situation of the Defence with that of the Prosecution in the collection of evidence, ensuring some degree of equality of arms and giving effect to the right of the accused, pursuant to Article 67(1)(b) of the Statute, to have adequate time and facilities for the preparation of his or her defence.

The possibility of the Defence to request an order for cooperation from the Pre-Trial Chamber is particularly useful in preparation for the confirmation hearing. After confirmation and the transfer of the case to the Trial Chamber, the Defence will still be entitled to request cooperation orders from the Trial Chamber, which, pursuant to Article 61(11) of the

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135 IBA Report (n 83) 36.
136 ibid.
137 Guariglia and Hochmayr (n 56) 1108.
138 See paragraph 4.2.1.3 of this Chapter.
139 Guariglia and Hochmayr (n 124) 1123–1124.
Statute, ‘shall be responsible for the conduct of subsequent proceedings and may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings.’

6.2.1 The threshold requirements

The possibility of requesting an order from the Court is subject to various threshold requirements, which are set out in Rule 116(1) RPE. This provision stipulates that the Pre-Trial Chamber shall issue an order or seek cooperation under Article 57(3)(b) where it is satisfied that: (a) such an order would facilitate the collection of evidence that may be material to the proper determination of the issues being adjudicated, or to the proper preparation of the person’s defence; (b) sufficient information to comply with Article 96(2) of the Statute has been provided. Moreover, pursuant to Rule 116(2) RPE, the Chamber has the discretion to seek the Prosecutor’s view before granting the order, since s/he might have already collected the evidence sought by the Defence.

The requirement under letter a) is the one of ‘relevance’. It refers to the evidence sought by the Defence and is meant to provide a bar against frivolous requests. At the same time, however, the drafters of the Rules were conscious of the fact that only limited information might be available to counsel before obtaining the cooperation sought and, therefore, intentionally left the threshold relatively low, as is suggested by the use of the conditional form.\textsuperscript{140} The relevance requirement has not been particularly controversial so far and, at the time of writing, no Defence request under Article 57(3)(b) has been denied by the ICC for lack of relevance.

\textsuperscript{140} Friman (n 131) 200.
The requirement under letter b) is the one of ‘specificity’. It refers to the way in which Defence requests must be formulated and to their content. The Defence seeking the cooperation order has to provide sufficient information to comply with Article 96(2) of the Statute, according to which the request should, inter alia, contain a concise statement of the assistance sought, as much detailed information as possible about the location or identification of any person or place that must be found or identified, and a concise statement of the essential facts underlying the request, along with the reasons and details of any procedure to be followed.

The reason for this requirement is twofold. First, it is necessary to enable the Court to make a request for cooperation in accordance with the provisions of Part 9 of the Statute, while, at the same time, it enables the requested government or entity to identify the material sought. Second, it is meant to avoid the so-called ‘fishing expeditions’, meaning requests for overly broad categories of investigative acts to be conducted that are lacking sufficient information such as names, dates, places, etc. The case law of the court has shown how these requirements have been interpreted.

6.2.2 The ‘necessity’ requirement

In the case against Katanga and Ngudjolo, the Defence requested that the Pre-Trial Chamber seek cooperation from the DRC under Article 57(3)(b) of the Statute, in order for it to collect information material to the

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142 Newton (n 14) 410.
preparation of the Defence.\textsuperscript{143} The Pre-Trial Chamber rejected the request in relation to three items sought by counsel.\textsuperscript{144} Despite the absence in Rule 116 RPE of any reference to a requirement concerning the necessity of the Court’s cooperation request on behalf of the Defence, the Chamber considered the issuance of an order not to be necessary at that stage.\textsuperscript{145} This decision is particularly important as it was the first one concerning the application of Article 57(3)(b) of the Statute.

According to the Chamber, some documents sought by the Defence were ‘likely to be in the possession or control of the Prosecutor’ and, therefore, the Defence should have first approached him pursuant to Rule 77 RPE.\textsuperscript{146} This Rule governs the ‘inspection of material in possession or control of the Prosecutor’, and states that the latter shall allow the Defence to inspect any evidence which is material to the preparation of the Defence or is intended for use by the Prosecutor for the purpose of the confirmation hearing or at trial.

As to another item sought by the Defence concerning the execution of the warrant of arrest against Katanga, the Chamber explained that, since ‘the Registry is the competent organ of the Court for the execution of the Court’s warrants of arrest’, the Defence could file a motion requesting the Chamber to order the Registry to provide the relevant information.\textsuperscript{147} Since the necessity requirement was not met, the Chamber did not enter into the

\begin{footnotes}
\footnote{Prosecutor v. Germain Katanga and Mathieu Ngudjolo, Defence Application pursuant to Article 57(3)(b) of the Statute to Seek the Cooperation of the Democratic Republic of Congo (DRC)’ICC-01/04-01/07-371-Conf-Exp., 7 April 2008.}
\footnote{The content of these items is confidential.}
\footnote{Prosecutor v. Germain Katanga and Mathieu Ngudjolo, PTC I Decision on the ‘Defence Application pursuant to Article 57(3)(b) of the Statute to Seek the Cooperation of the Democratic Republic of Congo (DRC)’, ICC-01/04-01/07, 25 April 2008.}
\footnote{ibid., 6.}
\footnote{ibid., 7.}
\end{footnotes}
analysis of whether the conditions of specificity and relevance were satisfied.\textsuperscript{148}

The Court considered the necessity requirement as additional to those prescribed by Rule 116(1) RPE, but did not give an explanation for this interpretative choice. Presumably, it did so on the basis of the letter of Article 57(3)(b) itself, which enables the Court to seek such cooperation ‘as may be necessary’, and the case law of the ICTY and ICTR. Indeed, the \textit{ad hoc} Tribunals have consistently required the party requesting an order for cooperation to show a sufficient prior effort to obtain the material sought independently.\textsuperscript{149} Judge Anita Usacka filed an interesting dissenting opinion.\textsuperscript{150} According to her:

the conclusion of the majority that the specific information requested could be obtained from another source is not only not supported by the record, but also sets the threshold too high for granting a cooperation request, and appears to create an unnecessary additional requirement for article 57(3)(b) requests. The conclusion of the majority seems to

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\item \textsuperscript{148} ibid., 7.
\item \textsuperscript{150} Prosecutor v. Germian Katanga and Mathieu Ngudjolo, Partly Dissenting Opinion of Judge Anita Ušacka to the PTC I Decision on the ‘Defense Application pursuant to Article 57(3)(b) of the Statute to Seek the Cooperation of the Democratic Republic of Congo (DRC)’, ICC-01/04-01/07, 25 April 2008.
\end{itemize}
\end{footnotesize}
be that if there is any other source of the information besides the State, the Defence is not entitled to seek cooperation from a State.\textsuperscript{151}

This ‘additional requirement’ created by the majority unduly infringes on the suspect’s right to have adequate facilities for the preparation of his defence pursuant to Article 67(1)(b) of the Statute.\textsuperscript{152} In particular, she highlighted that imposing a mandatory requirement for the Defence to seek its evidence from the Prosecution prior to turning to the Chamber contrasts with the purpose of Rule 116(2) RPE, according to which the Pre-Trial Chamber has the discretion – and not the obligation - to seek the view of the Prosecutor before granting the order. The discretion accorded to the Chamber in deciding whether to involve the Prosecution serves the purpose of protecting the right of the Defence not to reveal its strategy. As Judge Ušacka put it: ‘if the Defence is required to seek its evidence from the Prosecution prior to making a cooperation request, it renders rule 116(2) meaningless’.\textsuperscript{153}

Judge Ušacka’s reasoning is particularly convincing given the fact that the Chamber had dealt with the Defence’s application on an \textit{ex parte} basis, given the sensitive nature of some of the documents sought.\textsuperscript{154} Moreover, the Defence had already requested the documents concerned from the Prosecution twice, receiving no response.\textsuperscript{155}

\textsuperscript{151} ibid., 3.
\textsuperscript{152} ibid., 5.
\textsuperscript{153} ibid.,13
\textsuperscript{154} Prosecutor v. Germain Katanga and Mathieu Ngudjolo, PTC I Decision, 25 April 2008 (n 145) 4.
\textsuperscript{155} Prosecutor v. Germian Katanga and Mathieu Ngudjolo, Partly Dissenting Opinion of Judge Anita Ušacka (n 150) 13.
More broadly, Judge Ušacka took issue with the obligation that the majority’s decision imposed on the Defence to request the information from an organ of the Court before approaching the Chamber for an order on cooperation from States. As she remarked: ‘[t]he majority’s solution does not appear to take into account that even if the Prosecution and the Registry provide information relevant to these items, it would not satisfy the Defence’s interest in also receiving the DRC’s version of the information’.  

Accordingly, the purpose of Rule 116 RPE would be that of granting the Defence the possibility of ‘seek[ing] the same information from several sources in order to compare or corroborate’.  

Subsequently, the necessity of an order of the Court on behalf of the Defence was debated in the *Banda* and *Jamus* case (situation in Darfur, Sudan). Interestingly, this requirement was given a particular interpretation in connection with the phase of the proceedings in which the order of the Chamber was sought, i.e., prior to the confirmation hearing.  

Defence counsel had filed an application pursuant to Article 57(3)(b) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of Sudan. To that end, the defence had made various attempts to secure the cooperation of Sudan both by way of a request to the Registry and requests directly

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156 ibid., 22.  
157 ibid., 23.  
159 Prosecutor v. Abdallah Banda and Saleh Mohammed Jerbo, Defence Application pursuant to Article 57(3)(b) of the Statute for an Order for the Preparation and Transmission of a Cooperation Request to the Government of the Republic of the Sudan, ICC-02/05-03/09-95, 10 November 2010.
addressed to the Republic of Sudan, all of which had been unsuccessful. The Single Judge, however, deemed an order of the Chamber not necessary at that stage ‘in particular in light of the strategy pursued by the Defence in respect of the forthcoming confirmation hearing’.\textsuperscript{160} In fact, the Defence had filed a joint submission with the Prosecutor stating that it would have not objected to the charges nor presented evidence for the purpose of the confirmation hearing.

This decision is regrettable. The Pre-Trial Chamber has unduly restricted the scope of Rule 116(1) RPE, which makes no distinction between the confirmation hearing and the trial for the purpose of assisting the Defence in obtaining cooperation from States. Moreover, this reading of Article 57(3)(b) of the Statute infringes upon the Defence’s right to freely choose a strategy in the presentation of its case. It has been rightly argued that ‘agreeing not to challenge the charges at the confirmation of charges stage does not mean the defence is conceding the allegations and that it will not challenge the charges when the case goes to trial’.\textsuperscript{161}

Following the confirmation of the charges on 7 March 2011,\textsuperscript{162} the Defence reiterated its request to the Trial Chamber.\textsuperscript{163} In rejecting the request, the Chamber further clarified the content of the necessity requirement.\textsuperscript{164} Endorsing the Pre-Trial Chamber’s finding in the \textit{Katanga

\textsuperscript{160} Prosecutor v. Abdallah Banda and Saleh Mohammed Jerbo, PTC I Decision, 17 November 2010 (n 158) 3.
\textsuperscript{161} Fedorova (n 1) 209.
\textsuperscript{162} Prosecutor v. Abdallah Banda and Saleh Mohammed Jerbo, PTC I Corrigendum of the Decision on the Confirmation of Charges, ICC-02/05-03/09, 7 March 2011.
\textsuperscript{163} Prosecutor v. Abdallah Banda and Saleh Mohammed Jerbo, Defence Application pursuant to Article 57(3)(b) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of the Sudan, ICC-02/05-03/09-145 and public annexes A to F, 11 May 2011.
\textsuperscript{164} Prosecutor v. Abdallah Banda and Saleh Mohammed Jerbo, TC IV Decision on “Defence Application pursuant to articles 57(3)(b) & 64(6)(a) of the Statute for an order for
and Ngudjolo case, the Chamber definitively established that an order pursuant to Article 57(3)(b) of the Statute can be deemed ‘necessary’ only when the following two conditions are met: i) the Defence has exhausted all the other possibilities to seek the cooperation from the State, such as direct contact with the local authorities and the assistance of the Registry; ii) the Defence has explored possible alternatives, short of a request for cooperation to the State, such as approaching the Prosecutor, taking into account her/his obligation to ‘investigate incriminating and exonerating circumstances equally’ pursuant to Article 54(l)(a) of the Statute.165 The Banda and Jamus decision is very important and will be thoroughly analysed in the following paragraphs.

6.3 The Defence’s request for assistance in Banda and Jamus

As has been seen, Banda and Jamus are charged with the crimes arising from the attack against the African Union Mission in Sudan (AMIS) at the Haskanita Military Group Site (MGS Haskanita).166 For the preparation of its case, the Defence requested the assistance of the Trial Chamber in order to let a defence team enter the territory of Sudan for carrying out on-site investigations and locate and interview witnesses.167 To that end, the defence had previously made various attempts to secure the cooperation of

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165 ibid., 26, 31.
166 See paragraph 5.3 of this Chapter.
167 Prosecutor v. Abdallah Banda and Saleh Mohammed Jerbo, Defence Application, 10 November 2010 (n 158).
Sudan both by way of a request to the Registry and requests directly addressed to the Republic of Sudan, all of which had been unsuccessful.\textsuperscript{168}

A great part of the defence strategy hinged on the proof that the attack on MGS Haskanita was in fact lawful, and that the AMIS is not a peacekeeping mission in accordance with the UN Charter.\textsuperscript{169} Accordingly, the Defence submitted that, ‘[i]n order to carry out even the most basic investigation into this case, it is essential that the Defence visit [a number of] locations’ in the vicinity of Haskanita and other sites of AMIS bases in Darfur.\textsuperscript{170} As the Defence pointed out, ‘inevitably, a significant number of witnesses to the attack, to the events leading up to the attack and to the broader situation in the region are still located in the vicinity of Haskanita’.\textsuperscript{171} Similarly, ‘[i]t is likely that witnesses to the activities of AMIS at these bases still reside in the vicinity of these bases.’\textsuperscript{172} Finally, the Defence requested access to the camps for internally displaced persons within Sudan, since it had ‘reasons to believe’ that persons who witnessed the Haskanita attack and who could offer evidence relating to the operation of AMIS bases in Darfur could be found at these camps.\textsuperscript{173} Importantly, the

\textsuperscript{168} On 21 September 2010, the Registry replied to the Defence. It indicated that ‘taking into account the volatile security situation” it was not in a position to provide the requested assistance.’ See Defence Application, 10 November 2010 (n 159) 7; On 24 September 2010, the Defence wrote to the Sudanese embassy in The Hague to request permission to visit Sudan in order to investigate the Defence case. The Embassy refused to accept this letter and it was returned to the Defence un-opened, see Defence Application, 10 November 2010 (n 159) 8 and 9. Subsequently, The Sudanese Ambassador to The Netherlands informed the Defence team members that he was under instructions from his government not to accept any communications or documentation related to proceedings before the Court, including letters from the Defence, see Defence Application, 10 November 2010 (n 159) 16.

\textsuperscript{169} ibid., 30-31.

\textsuperscript{170} ibid., 30-33.

\textsuperscript{171} ibid., 30.

\textsuperscript{172} ibid., 31.

\textsuperscript{173} ibid., 32.
Defence noted that it could not provide further information, as revealing its strategy in advance of trial would be detrimental to the accused.\textsuperscript{174}

In a different application, the Defence requested the Chamber’s assistance in acquiring several documents from the African Union.\textsuperscript{175} As an international organization, the African Union itself is not a party to the Rome Statute and is not under an obligation to cooperate with the Court. As has been seen, however, the Court may ask any intergovernmental organization to provide information or documents under Article 87(6) of the Rome Statute.

6.3.1 The Court’s decisions

In addressing the Defence’s requests, the Trial Chamber developed a test for evaluating them. The Chamber considered that it might seek cooperation from a State or an international organization on behalf of the Defence when the requirements of (i) specificity, (ii) relevance, and (iii) necessity have been met.\textsuperscript{176}

The Trial Chamber rejected the Defence request to seek cooperation from the Government of Sudan due to lack of specificity. Defence counsel had requested that defence investigators be allowed to visit ‘a non-

\textsuperscript{174} ibid., 34.
\textsuperscript{175} Prosecutor v. Abdallah Banda and Saleh Mohammed Jerbo, Defence Application, 11 May 2011 (n 163).
\textsuperscript{176} Prosecutor v. Abdallah Banda and Saleh Mohammed Jerbo, TC IV Decision, 1 July 2011 (n 164); Prosecutor v. Abdallah Banda and Saleh Mohammed Jerbo, TC IV Decision on Defence Application pursuant to Articles 57(3)(b) and 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the African Union, ICC-02/05-03/09-170, 1 July 2011 (not public); Prosecutor v. Abdallah Banda and Saleh Mohammed Jerbo, TC IV Public redacted Decision on the second defence’s application pursuant to Articles 57(3)(b) and 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the African Union, ICC-02/05-03/09, 21 December 2011.
exhaustive list of localities in Darfur and other regions of Sudan’ in order to interview persons that were ‘likely’ to still be located in the conflict area.\textsuperscript{177} According to the Chamber, far from providing the information required under Article 96(2)(b) of the Statute, the Defence had required a ‘permission to undertake an open-ended expedition to the Sudan in order to find out whether there might be something or someone potentially useful to the defence case’.\textsuperscript{178}

Importantly, the Chamber criticized the Defence for having made ‘an indiscriminate request to execute all measures unhindered and unmonitored by the Government of Sudan or any agency of the State’.\textsuperscript{179} Recalling that the general regime applicable to the execution of requests for assistance under Part 9 of the Statute presupposes the execution by state authorities, and that on-site investigations are strictly subject to the conditions under Article 99(4), the Chamber clarified that, even in the circumstances contemplated in the latter provision, ‘measures sought need to be specific enough to allow for the consultations required therein’.\textsuperscript{180}

Since the condition of specificity required in Rule 116(1)(b) RPE was not met, the Chamber did not deal with the condition of relevance under Rule 116(1)(a). However, it deemed useful to express some observations on the requirement of ‘necessity’, which it derived from the wording of Article 57(3)(b) of the Statute, according to which the Chamber

\textsuperscript{177} Prosecutor v. Abdallah Banda and Saleh Mohammed Jerbo, TC IV Decision, 1 July 2011 (n 164) 22.
\textsuperscript{178} ibid., 22.
\textsuperscript{179} ibid., 23.
\textsuperscript{180} ibid., 23.
may seek such cooperation ‘as may be necessary’.\textsuperscript{181} This part of the decision has been addressed in the previous paragraph.

The Trial Chamber equally rejected the Defence request to seek the cooperation of the African Union.\textsuperscript{182} It found that only some of the documents the Defence sought to obtain had been identified to the requisite standard, while others had ‘not been sufficiently identified’ so as to meet the requirement of specificity, since they referred to broad categories of documents without any type of limitation, be it temporal or otherwise.\textsuperscript{183}

Moreover, while the Chamber was satisfied that the Defence had exhausted the steps to obtain the cooperation from the African Union, it considered that it had not explained which steps, if any, it had undertaken to explore whether the documents in question or documents of similar value could be obtained from the Prosecutor. The Chamber thus concluded that the defence should first attempt to obtain these documents in accordance with Rule 77 RPE, before seeking the assistance of the Chamber. Upon a second application by the Defence,\textsuperscript{184} the Chamber reversed its finding in relation to some documents sought by counsel.\textsuperscript{185}

\textsuperscript{181} ibid., 24ss.
\textsuperscript{182} Prosecutor v. Abdallah Banda and Saleh Mohammed Jerbo, TC IV Decision on Defence Application pursuant to Articles 57(3)(b) and 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the African Union, ICC-02/05-03/09-170, 1 July 2011 (not public), as referred to by Prosecutor v. Abdallah Banda and Saleh Mohammed Jerbo, TC IV Public redacted Decision, 21 December 2011 (n 176).
\textsuperscript{183} Prosecutor v. Abdallah Banda and Saleh Mohammed Jerbo, TC IV Decision 1 July 2011 (n 164) 18-20.
\textsuperscript{184} Prosecutor v. Abdallah Banda and Saleh Mohammed Jerbo, Second Defence Application pursuant to Articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the African Union, ICC-02/05-03/09-234, 20 October 2011.
\textsuperscript{185} Prosecutor v. Abdallah Banda and Saleh Mohammed Jerbo, TC IV Public redacted Decision, 21 December 2011 (n 176).
6.4 Final remarks

The above examined case law makes clear that orders under Article 57(3)(b) of the Statute may be issued only when the Defence has already identified the specific evidence (such as one or more documents, material items or potential witnesses) that it needs. Requests are deemed ‘specific’ only when they identify with sufficient clarity the documents or the persons sought. This makes it impossible for the Defence to make use of Article 57(3)(b) to conduct investigations in an ordinary sense, that is, to access the State’s territory and search for potential witnesses and material evidence. In other words, orders under Article 57(3)(b) cannot operate as a legal basis for on-site investigations by the Defence.

The specificity requirement is particularly burdensome in the pre-trial phase, where there has not yet been any disclosure from the Prosecutor and defence investigations aimed at identifying and interviewing potential witnesses might be essential to challenge the Prosecutor case at the confirmation hearing. However, the specificity requirement is in line with the general regime of the ICC investigations, according to which on-site investigations are confined within the strict limits of Articles 99(4) and 96 of the Statute.\textsuperscript{186}

The necessity requirement is not contained in the ICC Statute and Rules. The Court derived it from the letter of Article 57(3)(b) of the Statute according to which the Pre-Trial Chamber may seek such cooperation on behalf of the Defence ‘as may be necessary’. In the Court’s interpretation, the necessity requirement relates to the order of the Chamber, which has to

\textsuperscript{186} See Chapter II, paragraph 3.1.3.
be the last available option for the Defence. In other words, the defence needs to show that all its attempts to obtain the specific information or documents - a direct request to the State, a request to the State through the Registry, or a request to the Prosecutor - have been unsuccessful.

This is in contrast with the wording of the Statute and the Rules. As opposed to the legal instruments of the *ad hoc* Tribunals, the ICC Statute and Rules do not contain any reference to the ‘sufficient prior effort’ condition. Article 57(3)(b) should be interpreted in light of Rule 116 RPE, according to which the Chamber must be satisfied that its order ‘would facilitate the collection of evidence’. Arguably, the drafters of the Statute purposely lowered the threshold in view of the experience and difficulties for the Defence before the *ad hoc* Tribunals in obtaining cooperation from States.

Instead, the approach adopted by the Court seems to create a heavy burden on the already disadvantaged Defence. The requirement that an order of the Chamber ‘would facilitate the collection of evidence’ is sufficiently broad and leaves room for a decision to be taken on a case-by-case basis. The necessity of an order of the Chamber may depend on the situation. For example, if the evidence sought is in possession of the Prosecutor, but the Defence does not want to give her/him any insight into its strategy, then an order of the Chamber might be necessary. Another aspect that must be taken into account is the relationship between the State and the Court and, in particular, the relationship between the government in power and the defendant. Asking the Defence to exhaust all possible efforts to obtain cooperation from a State whose government is notoriously hostile to the accused might be unfair and excessively time consuming for the Defence.
7. Disclosure of evidence

A traditional principle governing adversarial criminal proceedings is that the Prosecution must disclose to the Defence the evidence on which it is planning to rely. The disclosure of evidence is central to the fairness of proceedings and is an inherent component of the principle of equality of arms. Under the constant jurisprudence of the ECtHR, Article 6(1) of the Convention mandates that ‘the prosecution authorities (…) disclose to the defence all material evidence in their possession for or against the accused’. 187 This duty, however, is not absolute, but must be counterbalanced with other competing interests, such as the security of States and the need to protect witnesses. 188

The Rome Statute incorporates the guiding principles enshrined in human rights law and provides for a detailed mechanism for the disclosure of incriminating and exonerating evidence. In view of the difficulties encountered by the Defence in approaching States and international organizations with requests for cooperation (both directly and through an order of the Pre-Trial Chamber), the disclosure of exculpatory evidence might be the only instrument at the disposal of the Defence to counterbalance the greater advantage of the Prosecution, achieving ‘some kind of equality of arms’. 189 The prosecutorial duty to disclose must be seen in conjunction with another distinctive feature of ICC investigations, that is,

the Prosecutor’s positive obligation to investigate exonerating and incriminating circumstances equally pursuant to Article 54 of the Statute.\textsuperscript{190}

7.1 The legal framework on disclosure

The disclosure occurs prior to the confirmation hearing and the trial. Article 61(3) of the Statute and Rule 121(2) RPE mandate the Pre-Trial Chamber to guide the disclosure prior to the confirmation hearing, providing the assistance to the parties upon request. Specifically, the OTP has to prepare a ‘document containing the charges’, together with a list of the relevant evidence.\textsuperscript{191} Rule 76(1) states that ‘[t]he Prosecutor shall provide the defence with the names of witnesses whom the Prosecutor intends to call to testify and copies of any prior statements made by those witnesses’.

Further, Rule 77 RPE requires the Prosecutor to provide to the Defence the access to any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, \textit{which are material to the preparation of the defence}\textsuperscript{192} or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person [emphasis added]. Pursuant to Article 64(3)(c), after the confirmation hearing, documents and information not previously disclosed (that is,\textsuperscript{193}

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\textsuperscript{190} Article 67(2) of the Statute; Rules 76-79 and 121(2)(c) RPE, see Sabine Swoboda, ‘The ICC Disclosure Regime – A Defence Perspective’, \textit{Criminal Law Forum} (Springer 2008) 451, footnote 8, noting that these provisions literally require that all evidence ‘be disclosed between the Prosecution and the person’.

\textsuperscript{191} Article 61(3)(a) of the Rome Statute; Rule 121(3) RPE and Regulation 51 of the Regulations of the Court.

\textsuperscript{192} On the broad interpretation of this requirement given by the Court see Alex Whiting, ‘Disclosure Challenges at the ICC’ in Carsten Stahn (ed), \textit{The Law and Practice of the International Criminal Court} (Oxford University Press 2015) 1010–1013.
incriminating evidence not relied upon for the purpose of the confirmation hearing but which will be used at trial)\textsuperscript{193} will be shared among the parties under the Trial Chamber’s oversight.

There is a significant difference in the regime governing the disclosure of incriminating and exonerating evidence. Under Article 67(2), the latter consist in evidence which ‘shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence’, and must be disclosed ‘as soon as practicable’ (i.e., before the confirmation hearing). Moreover, incriminating and exonerating evidence must be disclosed in two separate categories.\textsuperscript{194}

7.2 Limits to disclosure

The right of the accused to the disclosure of evidence might need to be balanced against other competing interests, such as national security, the need of protecting victim and witnesses and the duty not to jeopardise ongoing investigations.\textsuperscript{195}

Pursuant to Article 68(5) and Rule 81(4) RPE, the Prosecutor can withhold disclosure if the latter would lead to the ‘grave endangerment of the security of a witness or his or her family’. Similarly, Rule 81(2) RPE allows the prosecution to apply to the Chamber \textit{ex parte} if disclosure ‘may prejudice further or ongoing investigations’. However, if the Prosecution subsequently wishes to use the information at the confirmation hearing or trial, adequate disclosure must be provided.

\textsuperscript{193} ibid 1010.
\textsuperscript{194} Swoboda (n 190) 451.
\textsuperscript{195} Negri (n 4) 561.
Article 54(3)(e) of the Statute provides that the Prosecutor may ‘agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents’. This provision serves as an incentive for cooperation, allowing State actors, international organizations and other informants to provide vital information to the Prosecutor without fearing for their safety.196 It is important to stress that Article 54(3)(e) allows the Prosecutor to use confidential evidence only as ‘springboard evidence’, i.e., solely for generating further evidence that will be subject to the above-seen rules of disclosure. A similar norm is contained in Article 18(3) of the Negotiated Relationship Agreement between the Court and the UN, which authorizes the UN and the Prosecutor to agree that documents and information be provided confidentially and that ‘such documents or information shall not be disclosed to other organs of the Court or to third parties, at any stage of the proceedings or thereafter, without the consent of the United Nations.’

Finally, Article 72 allows a state to intervene if it learns that information is about to be disclosed that it believes would ‘prejudice its national security interests’. To date, there is no public information available on the use of this provision. As has been observed, this is not surprising, as States will generally intervene before sensitive information might come in the possession of the Prosecutor.197

196 Swoboda (n 190) 467.
197 Whiting (n 192) 1017.
7.3 Disclosure at the investigation stage in *Bemba* and *Mbarushimana*

The *Bemba* case (situation in the CAR) and the *Mbarushimana* case (situation in the DRC) are interesting examples of the efforts made by the judges to ensure equality of arms in the investigation phase through disclosure.

Jean-Pierre Bemba was arrested in Belgium pursuant to a warrant of arrest issued by the Pre-Trial Chamber on 24 May 2008. Following his surrender to the Court, his Defence filed an application for interim release, which was denied by Single Judge of the Pre-Trial Chamber III. In the ensuing appeal of the decision of the Single Judge, the Defence observed that the Prosecutor’s application for the arrest warrant and the Prosecutor’s subsequent submissions had not been made available to the Defence, and this had precluded it from putting forward sufficient material facts or full arguments to rebut the grounds upon which the Prosecutor had requested the arrest. Accordingly, the Defence requested the Appeals Chamber to reverse the denial of Bemba’s interim release based on the lack of full disclosure to the Defence of the information relied upon by the Single Judge to justify his detention.

Despite the absence of an express regime for disclosure in relation to applications for interim release in the legal texts of the Court, the Appeals Chamber interpreted the Statute in accordance with internationally

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recognised human rights pursuant to Article 21(3)\textsuperscript{201} and the relevant jurisprudence of the European Court of Human Rights (ECtHR). In particular, it considered that:

in order to ensure both equality of arms and an adversarial procedure, the defence must, to the largest extent possible, be granted access to documents that are essential in order effectively to challenge the lawfulness of detention, bearing in mind the circumstances of the case.\textsuperscript{202}

Ideally, therefore, the arrested person should have all such information at the time of the initial appearance before the Court. This would allow him/her to effectively challenge the deprivation of his/her liberty as soon as s/he is in detention at the Court.\textsuperscript{203} The Chamber, however, observed that ‘the right to disclosure in these circumstances is not unqualified’ and that ‘the nature and timing of such disclosure must take into account the context in which the Court operates’, which includes the imperative of protecting victims and witnesses, and the need to safeguard on-going investigations.\textsuperscript{204}

At the outset, the Chamber observed that a number of annexes to the Prosecutor’s application for the warrant of arrest and the Prosecutor’s further submission had been reclassified as public by the Signe Judge, who took every step to ensure that the information would be disclosed expeditiously and when it was safe to do so.\textsuperscript{205} Given the proximity of the Prosecutor’s application for the warrant to the actual transfer of the

\begin{flushleft}
\textsuperscript{201} See Chapter IV, paragraph 3.1.
\textsuperscript{202} Prosecutor v. Jean Pierre Bemba, AC Judgment (n 200), 32.
\textsuperscript{203} ibid.
\textsuperscript{204} ibid.,33.
\textsuperscript{205} ibid. 35-38.
\end{flushleft}
defendant to the Court, the efforts by the Single Judge to ensure disclosure of the information, the need to protect victims and witnesses and the duty to render a decision without delay, in the circumstances of the case the Single Judge did not err.206

The Mbarushimana case builds largely upon the findings of the Appeals Chamber in Bemba. On 11 October 2010 Mbarushimana was arrested in France pursuant to an arrest warrant of the Pre-Trial Chamber.207 Before the defendant’s surrender to the Court, the Defence filed a Request for Disclosure,208 whereby it requested the Chamber to order the Prosecutor to immediately disclose the information forming the basis for the Prosecutor’s application for an arrest warrant, as well as other material broadly concerning his case.209 According to the Defence, the requested material was necessary to enable the Defence to: (i) challenge the admissibility of the case pursuant to Article 19(2)(a) of the Statute; (ii) challenge the validity of the warrant of arrest pursuant to Rule 117(3) RPE; and (iii) apply for interim release upon Mr Mbarushimana’s first appearance.210

The Prosecutor opposed the request arguing that the Statute and the Rules do not foresee any disclosure before the surrender of a suspect to the

206 ibid., 39-40.
207 Prosecutor v. Callixte Mbarushimana, PTC I Warrant for Arrest against Callixte Mbarushimana, ICC-01/04-01/10-2, 28 September 2010.
209 These information referred to certain intercepted communications that were mentioned by the Prosecutor in a television interview, any material upon which the Prosecutor had relied to direct the investigation against certain armed groups to the exclusion of others, and any supporting documentation that accompanied the referral of the situation from the DRC government, see ibid., 4-8.
210 ibid.,14,13,16.
In support of his position, the Prosecutor argued that ‘the disclosure of non-public information to a suspect at a time when the Court has no means of control over him could raise grave security issues’, especially with respect to on-going investigations and information that could identify potential witnesses who, at the preliminary arrest stage, have not been given full protective measures.\textsuperscript{212}

The Pre-Trial Chamber dismissed the objections of the Prosecutor and partially granted the Defence’s request. Recalling the Bemba jurisprudence, it confirmed the Defence’s right to access documents essential for the purpose of applying for interim release, challenging the validity of the arrest warrant and the admissibility of the case.\textsuperscript{213} However, the Chamber took into account the sensitive nature of such advanced disclosure and limited the scope of some of the disclosed material. In particular, the disclosure of the supporting documentation that accompanied the referral of the situation from the DRC government was made subject to the confidentiality obligations of the Prosecutor and the need to protect the ‘national security interests of the State from which such documents originated’.\textsuperscript{214}

7.4 Post-confirmation disclosure: the Lubanga case

Throughout the investigation of the situation in the DRC, the Prosecution gathered more than 50\% of its evidence by way of confidentiality

\textsuperscript{211} Prosecutor v. Callixte Mbarushimana, Prosecution’s Response to the "Defence Request for Disclosure", ICC-01/04-01/10, 5 January 2011, 12(a).
\textsuperscript{212} ibid., 12(b)-(c).
\textsuperscript{214} Ibid., 18.
agreements pursuant to Article 54(3)(e) of the Statute and Article 18(3) of the NRA.\textsuperscript{215} It was not until several months after the charges against Lubanga had been confirmed that the Prosecution announced that ‘a comparatively high proportion of the materials that comprise the DRC collection were obtained on the condition of confidentiality’, including a considerable amount of potentially exculpatory evidence.\textsuperscript{216} For this reason, it was unable to disclose the evidence to the Defence or even to the Chamber, as the information provider (i.e., MONUSCO and other organizations) had not consented to disclosure.

The Trial Chamber took the view that the trial could not proceed under these conditions, finding that the ‘trial process had been ruptured to such a degree that it [was] impossible to piece together the constituent elements of a fair trial’.\textsuperscript{217} The Chamber observed that Article 53(3)(e) was only intended to be used in ‘highly restricted circumstances’ with the sole purpose of ‘generating new evidence’, but that the Prosecutor had used that provision extensively and inappropriately.\textsuperscript{218} While the Court recognized that there is a potential conflict between Articles 54(3)(e) and 67(2) of the Statute, it also stressed that if the Prosecutor had entered into Article 54(3)(e) agreements only in appropriate circumstances, the tension between the two articles would be ‘negligible’.\textsuperscript{219}

\textsuperscript{215} Prosecutor v. Thomas Lubanga, Transcripts of Hearing (Open Session), ICC-01/04-01/06-T-52-ENG, 13: 12-22 (Transcript, 1 October 2007).
\textsuperscript{216} Prosecutor v. Thomas Lubanga, Prosecution’s Submission regarding the Subjects that Require Early Determination: Trial Date, Languages to be Used in the Proceedings, Disclosure and E-Court Protocol, ICC-01/04-01/06-951, 11 September 2007, 22-25.
\textsuperscript{217} Prosecutor v. Thomas Lubanga, TC I Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, ICC-01/04-01/06-1401, 13 June 2008, 91-93.
\textsuperscript{218} ibid., 71-72.
\textsuperscript{219} ibid., 76.
Very importantly, the Chamber was also greatly concerned by the fact that the Prosecutor had agreed not to disclose the relevant documents to the Chamber as well, in that this had prevented it from exercising its duty to determine whether or not the non-disclosure of potentially exculpatory evidence constituted a breach of the accused’s right to a fair trial pursuant to Article 67(2) of the Statute.\textsuperscript{220} The Appeals Chamber upheld the Trial Chamber’s decision. However, it reversed the staying of the proceedings because the information provider had, in the meantime, consented to the disclosure of the information.\textsuperscript{221}

8. Conclusion

The interpretation of equality given by human rights law offers only limited guidance in assessing the actual challenges that the Defence faces at the ICC, especially those related to the institutional imbalance that exists between the Prosecution and the Defence, and those related to the dependence on States cooperation for the conduct of investigations. This Chapter has endeavoured to shed some lights on the difficulties that the lack of States cooperation causes to the Defence in the preparation of its case. The foregoing analysis shows how the dependence on cooperation makes it difficult for the Court to ensure ‘a level playing field’ in the conduct of proceedings,\textsuperscript{222} in that it is a factor that it is mostly outside of its control.

\textsuperscript{220} ibid., 92.
Faced with requests of the Defence to take a clear stance against non-cooperative States, the Court is put in a difficult position. While the Court has refused to consider the lack of cooperation with the Defence as a ground to stay the proceedings, it has come to see the prosecutorial duty of impartiality in the conduct of the investigation and the ensuing disclosure obligations as the default response to the difficulties that non-cooperation poses to the Defence.
CHAPTER VI
CONCLUSION

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1. Introduction

This dissertation has investigated the ICC cooperation law and practice in relation to defendants’ rights, and in light of the unique structural limitations and constraints that characterise the ICC’s functioning. This conclusion summarizes the main findings that have been developed in the foregoing Chapters and formulates an answer to the research questions. The central questions of this study as presented in the introduction were formulated as follows: does the unique structure of the Court influence and shape cooperation with States and international organizations? And do the law and practice of cooperation reduce the rights of the defendants before the Court?

A brief answer to these questions is that the specific context in which the ICC operates influences the way in which cooperation proceedings play out in practice, with a negative impact on the rights to liberty of suspects and accused, and on their right to equality of arms with
the Prosecution. In particular, the unique structure and jurisdiction of the ICC renders it vulnerable to the political interests of those who are expected to support it and cooperate with it for fostering different and conflicting agendas.¹ The dependence on cooperation for arresting suspects and gathering evidence in the course of the investigation makes it difficult for the Court to safeguard the right to liberty of defendants and ensure equality of arms in the conduct of proceedings, in that cooperation is a factor that it is mostly outside of the Court’s control.

The following paragraphs provide for a more detailed answer for each research question. In addition, they offer suggestions for possible avenues to further improve the ICC judges’ engagement with the structural tensions and limitations of the Court, with a view of protecting the rights of suspects and accused.

2. Cooperation regime in its context

The ICC’s institutional setting is different from that of its ad hoc predecessors. Unlike the ad hoc Tribunals, the Court is an independent international organization that was not created as a subsidiary organ of the UN Security Council. As the ICC is treaty based, its jurisdiction is limited to criminal activity committed on the territory of a State which has accepted the jurisdiction of the Court or where the person accused of the crime is a national of a State Party.

In addition, its jurisdiction is not related to one geographically limited area/conflict, but can potentially cover crimes committed in every

part of the world after the entry into force of the Rome Statute. As a consequence, the ICC mostly intervenes in the midst of a conflict, where many other political actors are involved and conflicting interests are at stake. As Richard Dicker and Elizabeth Evenson put it:

As a permanent court with potentially worldwide jurisdiction, the ICC admittedly faces more complex challenges than the ad hoc tribunals did. These courts handled geographically limited areas where the international community had forged a consensus that the horrors done to civilians had to be addressed, in part, through criminal trials. This consensus, and the focus it generated, are more difficult to sustain across several different situations, each with its own particularities.²

The jurisdictional regime of the Court is also unique, and differs from the primacy of the ad hoc tribunals. Under the principle of complementarity, genuine domestic investigations and prosecutions have priority. Pursuant to the norms governing the admissibility of cases before it,³ the Court is allowed to step in only when national authorities remain inactive towards international crimes or, where there are domestic proceedings, those authorities appear unwilling or unable to genuinely conduct them. In the absence of an autonomous enforcement system, however, complementarity reveals the conceptual paradox⁴ by which the Court depends on the

³ Article 17ss of the Rome Statute.
cooperation of States that are ‘inactive’, ‘unwilling’ or ‘unable’ to prosecute international crimes. The analysis of the above structural features led to two main findings, which will be discussed in the following sub-paragraphs.

2.1. The real weakness of ICC cooperation lies in its politics

The Court’s practice over the years has shown that, regardless of the cooperation norms enshrined in the Statute, the effectiveness of the investigations is largely dependent on whether the broader interests of the requested State coincide with those of the Court, and, should that fail, on the support of the international community. As a consequence, there is only an indirect correlation between the mechanism by which the investigation was triggered and the degree and quality of States cooperation with the ICC Prosecutor.

Most of the Court’s investigations were triggered by the request of States Parties where the alleged crimes had been committed, namely the Democratic Republic of the Congo, Uganda, Central African Republic (twice), Mali, and Ivory Coast. In these instances, the Prosecutor has focused the investigation exclusively on non-state actors (i.e. rebels),

5 See also: Annalisa Ciampi, ‘Legal Rules, Policy Choices and Political Realities in the Functioning of the Cooperation Regime of the International Criminal Court’ in Olympia Bekou and Daley Birkett (eds), Cooperation and the International Criminal Court: Perspectives from Theory and Practice (Brill 2016) 16, noting the correspondence between the notions of ‘inability/unwillingness’ to prosecute and ‘inability/unwillingness’ to cooperate.

6 For a similar conclusion, see also: ibid 7.

7 The investigation into the situation in Ivory Coast was technically opened at the Prosecutor’s initiative under Article 15 of the Statute in 2011; however, the engagement of the Court in the country was prompted by a declaration of the government accepting the jurisdiction of the Court under Article 12(3) in 2003. This situation, thus, is de facto a self-referral.
adversaries of the self-referring government, which, in turn, has generally been cooperative with the investigation.

Conversely, the Court has faced insurmountable obstacles in the situations referred by the Security Council (Sudan and Libya) and in one instance of investigation started *proprio motu* by the Prosecutor (Kenya),\(^8\) where the government in power fiercely opposes the Court’s intervention. Acting on behalf of the Security Council, the OTP has focused almost exclusively on government actors and the Security Council’s enemies,\(^9\) namely, the sitting head of Sudan, President Omar Al Bashir, and the former dictator of Libya, Muammar Gaddafi, with their entourage.\(^10\) The situation in Kenya presents many similarities with that of Sudan. Despite the Prosecutor’s efforts to target both sides of the conflict, due to a clever anti-ICC move in domestic politics,\(^11\) the Prosecutor’s investigation ended up focusing on the President of the country, Ururu Kenyatta, and his deputy William Ruto.

In 2014, the Prosecutor was left with no choice but to ‘hibernate’ all the investigations concerning Sudan, and, between 2013 and 2016, all the cases in the Kenya situation were terminated. The investigation in Libya is

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\(^8\) On 27 January 2016, Pre-Trial Chamber I granted the Prosecutor’s request to open an investigation *proprio motu* in the situation in Georgia, in relation to crimes against humanity and war crimes within the jurisdiction of the Court in the context of an international armed conflict between 1 July and 10 October 2008. Since this investigation is still at the earliest stage, it has not been included in the present study.

\(^9\) The Darfur investigation, however, has targeted both sides of the conflict. In 2010, the Pre-Trial Chamber unsealed summons to appear for three rebel commanders, Abu Garda, Abdallah Banda and Saleh Jerbo, allegedly responsible for attacks on African Union peacekeepers.

\(^10\) Curiously, the non-cooperation of Libyan and Sudanese authorities is due to opposite reasons. In one case (Sudan), the ICC investigation targets the regime in power, which not surprisingly refuses to be judged by an international court; in the other case (Libya), the newly established government is eager to prosecute and try the exponents of the former regime without interferences from the international community.

\(^11\) See Chapter II, paragraph 4.3.3.
still on-going, but the arrest warrant against Saif Gaddafi remains outstanding.

In light of this overview, one cannot fail to notice that, if the government of the situation country opposes the ICC intervention, the Prosecutor’s investigation has a very high probability to be derailed. In this context, the support of the Security Council and, more generally, of the international community, is crucial. So far, however, the latter has been lacking. The Security Council has maintained a disappointing inaction towards the ICC’s several denounces of non-compliance by Libya and Sudan. Equally, the political priorities of the international community are volatile and shifting. Inevitably, its willingness to enforce the Court’s cooperation requests is informed by political calculations: if the interests of the Prosecutor in having certain alleged perpetrators arrested are not in line with those of the international community, cooperation from the latter will hardly be forthcoming.

Certainly, this has serious repercussions on the effectiveness and credibility of the Court. However, the notion of effectiveness cannot be entirely separated from those of perceived legitimacy and fairness. It is submitted that any discourse on procedural fairness towards the accused at the ICC must be seen in the context of a state-dominated enforcement system, where the ICC investigations and prosecutions are tied to a political process. In this respect, the most problematic aspect is that of selectivity of prosecutions. As can be seen, referrals of conflict situations by States

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12 The expression ‘international community’ is used here to refer to States Parties and non-party to the Rome Statute supporting the Court outside of the framework of the Security Council. Moreover, it includes other international and regional organizations such as the European Union.

Parties and the Security Council have ultimately resulted in one-sided prosecutions, which, to a great extent, reflect the preferences of the referring actor.\textsuperscript{14} At the same time, the laudable efforts of the Prosecutor to carry out an even-handed investigation using her \textit{proprio motu} powers in Kenya have been thwarted by domestic politics.

2.2 The division of labour between the Court and States is critical to the fairness of proceedings

The disputes over the admissibility of cases before the Court reflect the broader dynamics pertaining to: i) the relationship between suspects and the State exercising jurisdiction under complementarity (which, in the majority of the cases, is the suspects’ State of nationality), ii) the relationship between the latter and the Court. In particular, the relationship between the suspects and their government, along with the wider political situation of the country, determines whether the latter will be cooperative with the Court.

The practice of the ICC in the last 14 years shows that cooperation, admissibility and defendants’ rights issues are closely intertwined, and that the interpretation and application of the principle of complementarity (i.e., rules of admissibility) by the organs of the Court have a great impact on the position of defendants before it. This study has analysed the following two scenarios.

First, in the aftermath of a regime change, States may refuse to cooperate with the Court because they are eager to try the ICC suspects

\textsuperscript{14} Tiemessen (n 1) 2.
themselves, as part of a post-conflict political transition. In these instances, States may exploit their prerogatives under Articles 17 and 19 of the Statute (governing admissibility proceedings) so as to circumvent their obligation to cooperate. This has been the case of Libya, where the newly established government opposes the investigation of the Court over the suspects Saif Gaddafi and Abdullah Al-Senussi, exponents of the recently overthrown regime of Muammar Gaddafi. As has been seen, Libya’s refusal to surrender Gaddafi and Al-Senussi, combined with the misuse of its prerogatives under the complementarity regime, resulted in gross violations of the suspects’ rights, who have been (and still are) unlawfully detained in Libya throughout the legal battle between Libya and the Court over where they should be tried.\textsuperscript{15}

Second, there is the scenario in which States exercising jurisdiction under complementarity have welcomed the intervention of the Court, and have agreed to see persons who allegedly committed crimes on their territory tried in The Hague. This has been addressed within a broader criticism of the prosecutorial policy of ‘positive complementarity’, by which the OTP has legitimised and encouraged a ‘partnership’ between the Office and the States concerned by the complementarity evaluation, aimed at facilitating cooperation. In many instances this policy resulted in States ‘self-referring’ the situations on their territory and being quite cooperative with the Prosecutor. This, however, has come to the price of directing the investigation towards persons disfavoured by their self-referring

\textsuperscript{15} In the case of Al-Senussi, the battle has been ultimately settled in favour of Libya. The Appeals Chamber found the case inadmissible, stating that Libya has demonstrated a genuine will and ability to prosecute Al-Senussi, see Chapter III, paragraph 4.2.2.1.
government, whose rights had been violated in the context of national proceedings.

In these instances, proceedings under Articles 17 and 19 of the Statute have been used primarily as an instrument of protection of defendants’ rights. Specifically, defendants made use of their prerogatives under the complementarity regime to challenge the division of labour between their State of nationality and the Court, and what they claimed was an unlawful partnership between the ICC Prosecutor and their government.

The Court has adopted an interpretation of complementarity that is very accommodating towards the interests of States. In the first scenario, ICC judges validated Libya’s late and abusive admissibility challenges through a narrow interpretation of Article 95 of the Statute and, by so doing, they legitimised Libya’s postponement of its surrender obligations. Most importantly, the Appeals Chamber clarified that the admissibility evaluation of the Court does not encompass an assessment of whether domestic proceedings respect defendants’ rights, but it is limited to ascertain whether a State is willing genuinely to investigate or prosecute.\footnote{The Court has left the door open for it to declare a case admissible before it only if the State has ‘egregiously’ breached the rights of the accused.} According to the judges, doing otherwise would amount to consider the ICC as a human rights court, sitting in judgment over domestic legal systems to ensure that they are compliant with international standards of human rights, a role which is clearly not envisaged by the Rome Statute.

In the second scenario, despite the fact that national proceedings were on-going against the suspects, the Court has found the cases to be admissible due to the ‘inaction’ of the State concerned, i.e., the DRC. In the Lubanga case, such inactivity has been found based on a very narrow
interpretation of the meaning of ‘case’ for the purpose of the Statute (the case investigated by the DRC authorities did not encompass the same conduct which was the subject of the case before the Court); in Katanga, the inactivity of the DRC originated from its decision to close its national investigation and relinquish its jurisdiction to the benefit of the Court. By so doing, the judges have *de facto* sanctioned the policy of ‘positive complementarity’ of the Prosecutor and have refrained from questioning the most problematic aspects of the practice of consensual burden sharing between the OTP and national authorities.

3. The impact of cooperation on defendants’ rights

The second part of the study has addressed the impact that cooperation occurring in the above context has on the rights of suspects and accused. In particular, it has analysed the Statute’s provisions on the right to liberty and the right to equality of arms, as well as the Court’s practice regarding allegations of violations of these rights brought forward by some defendants.

This part revealed the close inter-relation existing between international human rights law and international criminal law, and has highlighted the importance of human rights jurisprudence before the ICC. However, it has also shown that there are still problematic issues concerning the interpretation and application of human rights before the ICC. Although the legal framework set forth by the Statute represents an improvement if compared to the *ad hoc* Tribunals, the current legal regime fails to ensure a complete protection of the rights to liberty and equality of arms, due to the structural characteristics of the ICC and the mode in which cooperation
plays out in practice. In this respect, one can certainly argue that ‘[t]he ICC as an international organization is not fully equipped to implement some human rights that were originally tailored to states’. The following sub-paragraphs will briefly summarise the key findings of this study in relation to each of the selected rights and suggest possible avenues for improvement.

3.1. The right to liberty

3.1.1 A case for introducing a duty of care/diligence on the Prosecutor

As has been seen, the ICC considers the successful application for a warrant of arrest as the point to measure the beginning of its participation in the situation of the accused. As a consequence, under the current jurisprudence, the ICC is willing to acknowledge its responsibility towards defendants only after the issuance of an arrest warrant against them. Violations occurred prior to this moment can be supervised by the Court only if they result from a ‘concerted action’ between the Prosecutor and national authorities.

On the face of it, this approach may appear unproblematic. After all, one may wonder why the ICC should be deemed responsible for violations committed by national authorities prior to the issuance of an arrest warrant against certain individuals and, thus, in the context of national proceedings that have nothing to do with those of the Court. At a closer look, however, the criterion of ‘concerted action’ fails to address the necessity of protecting the rights of persons who have been targeted by the Prosecutor long before

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the latter seeks an arrest warrant against them. This assertion can be best understood if one considers the following structural characteristics of the Court’s proceedings.

First, the legal framework of the Statute on the right to liberty (Articles 55(1)(d) and 59 of the Statute) is based on the assumption of a clear separation between national proceedings and proceedings of the Court, which often does not correspond to reality. In view of the complementary nature of the Court and the above-seen interpretation of the rules of admissibility adopted by the judges, the distinction between national proceedings and Court’s proceedings might not always be so clear-cut. ICC investigations do not take place in a vacuum, and the activities of the Court cannot always be separated from those of the States. More often than not, the ICC is involved in situations of on-going conflict where crimes continue to be committed while local authorities are taking measures to deal with them. In some of the situations before the Court (DRC, CAR, Ivory Coast) the opening of an ICC investigation took place in the context of on-going national criminal proceedings, which had to do with incidents falling within the broader situation investigated by the Court.

As shown with the analysis of the selected case studies, ICC defendants have been unlawfully detained by national authorities pursuant to a national investigation that has been closed by the State on behalf of the Court. The detention at the national level related to crimes that fell within the jurisdiction of the Court and were allegedly committed in the context of the situation investigated by the ICC Prosecutor. The unlawful detention of the suspects started after the commencement of the Court’s investigation (albeit before the issuance of an arrest warrant against them) and ceased only with the surrender of the suspects before the Court.
Second, the steps that lead the Prosecutor to focus on a specific person as the subject of the investigation are largely unregulated, in that practices on designating suspects are a matter of unpublished internal policy, which involve neither the Defence nor the Court. Moreover, there is no significant judicial oversight of the Prosecutor’s activities until the issuance of an arrest warrant or a summons to appear, and thus, no protection of the rights of the persons targeted by the investigation until that moment. This lack of protection is exacerbated by the great discretion with which the Prosecutor is endowed with respect to the time frame of the investigation. As has been seen, in fact, there is no deadline by which the Prosecutor must complete a preliminary examination over a situation and, after the commencement of the investigation, there is no deadline by which s/he must apply for an arrest warrant to the Pre-Trial Chamber.

It is submitted that the Court should seriously consider introducing the concept of prosecutorial due diligence next to the one of concerted action. In particular, a duty of due diligence should be imposed on the Prosecutor when s/he becomes aware of national proceedings involving a person whom s/he has targeted for the purpose of the ICC investigation. As has been seen, the case of Kajelijeli at the ICTR represents an interesting precedent in this respect.

Ideally, this duty of diligence and transparency should be clearly spelled out in the Statute, along with specific rules governing the cooperation between the Prosecutor and States before the issuance of an arrest warrant against a person who is already in the custody of national states.

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18 Melinda Taylor and Charles Chernor Jalloh, ‘Provisional Arrest and Incarceration in the International Criminal Tribunals’ (Social Science Research Network 2013) 333; Svaček (n 17) 220–221.
authorities. Melinda Taylor and Charles Jalloh have exhaustively elaborated on the content of this duty, arguing, in particular, that the Prosecutor should notify the presence of detained suspects to the Pre-Trial Chamber. This would indeed represent a viable way to more carefully supervise the cooperation of the Prosecutor with national authorities for the purpose of transferring suspects to the Court, and would enable the judges to better assess the timeliness with which the Prosecutor requests the issuance of an arrest warrant against detained individuals. The Prosecutor should request an arrest warrant from the Chamber in a timely manner, and should be held accountable in case s/he does not do so without providing a valid justification.

3.1.2 Prioritizing framework agreements

Departing from the precedent of the ad hoc Tribunals, the Rome Statute enshrines an advanced protection of the rights of defendants to be released pending trial. The Statute’s legal framework is consistent with international human rights law, according to which detention prior to trial should be the exception and not the rule.

In practice, however, the effectiveness of this right is by no means guaranteed. Under the Rome Statute, the general obligation of cooperation on States Parties is confined to the ‘investigation and prosecution of crimes’, and does not extend to accommodate accused on release. In other words, the Statute does not obligate States to accept provisionally

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19 Taylor and Jalloh (n 18) 333.
20 Articles 86 and 87(7) of the Rome Statute.
released defendants on their territory. Therefore, in the current legal framework, individuals who fulfil the substantive requirements for being released may remain in detention merely because of the lack of State cooperation. The Appeals Chamber acknowledged that the ICC ‘is dependent on State cooperation in relation to accepting a person who has been conditionally released’; therefore, in the absence of such cooperation, ‘any decision of the Court granting conditional release would be ineffective’.22 This reasoning amounts to considering the identification of a State willing to accept the person concerned as an essential prerequisite to granting conditional release,23 in violation of the legal framework of the Statute which does not foresee such a condition.

Given this situation, it is imperative that the Court intensifies its efforts to convince States, including the Host State, that they should accept provisionally released persons on their territory.24 On 10 April 2014 the Court has signed the first – and, as of today, only – interim release agreement with Belgium, and has claimed that it is seeking to conclude agreements with other countries as well. It must be reminded that interim release agreements do not establish an obligation on the part of the signatory State to accept detainees. Rather, they make such acceptance conditional upon an assessment to be made on a case by case basis by national authorities.

The existence of an agreement, thus, does not guarantee that the State will accept a released person in a given case. However, they seem to

22 See Chapter IV, paragraph 6.3.1
be the only available step in the direction of making interim release before the Court a reality. Moreover, they do facilitate the judicial process and provide legal certainty regarding the conditions of stay of the individual on the territory of the receiving States. Therefore, the Court should make the signature of framework agreements with States a priority, in order to have a considerable number of them available before the need arises and avoid situations where a defendant cannot be released pending trial merely because of the lack of State cooperation.25

3.2 The right to equality of arms

The concept of equality of arms originated in the context of the ECtHR jurisprudence on the right to a fair trial under Article 6 of the Convention. Under the jurisprudence of the Court, this principle evokes a broad notion of overall fairness, which is not dissimilar to the abstract common law notion of due process.26 As a result, the ECtHR and the other human rights bodies have removed from equality any substantive content or sense of evenness in powers or status between the parties, and have endorsed a more limited notion of procedural equality.27

The international criminal tribunals (including the ICC) have adhered to this jurisprudence. Accordingly, the minimum requirement of a fair trial is satisfied when the Prosecution and the Defence are entitled to the

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27 ibid.
same access to the powers of the Court and the same right to present their case at trial. In other words, equality of arms is only ‘inside the courtroom’, in that it does not apply to conditions that are outside of the Court’s control. This understanding of equality offers only limited guidance in assessing the actual challenges that the Defence faces at the ICC, especially those related to the institutional imbalance that exists between Prosecution and Defence, and those related to the dependence on States cooperation for the conduct of investigations.

3.2.1 Institutional support for the Defence and the role of ad hoc counsel

The Rome Statute does not include a Defence Office in its legal framework. The creation of the Office for Public Counsel for the Defence (OPCD) within the administrative structure of the Registry, therefore, is a significant step in the direction of remedying the institutional imbalance between the Prosecution and the Defence. The latter, however, still lacks the institutional autonomy, powers and visibility enjoyed by the OPT. It has rightly been argued that ‘the difference in access to international pressure/leverage (…) represents the most significant structural limitation on equality of arms in the system of international justice.’

This situation persists at the ICC. Specifically, the Defence does not have the power to enter into cooperation agreements with States and international organizations, it cannot formulate its budget needs and lobby States for funding requests, and it is not granted institutional avenues to denounce non-cooperation with Defence teams or promote the interests of States and international organizations, it cannot formulate its budget needs and lobby States for funding requests, and it is not granted institutional avenues to denounce non-cooperation with Defence teams or promote the interests of

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the accused (for example, by advocating for provisional release and acquittal arrangements with States).²⁹

This study has also examined the role of the so-called *ad hoc* counsel, a new type of counsel introduced by the Rome Statute that can be appointed by judges to represent the general interests of the Defence at a very early stage of the investigation, where no suspect has yet been identified or charged. As has been seen, the lack of detailed provisions concerning *ad hoc* counsel in the legal texts of the Court gave rise to controversies and confusion with regard to the scope of *ad hoc* counsel’s mandate. In particular, the lawyers appointed as *ad hoc* counsel interpreted their mandate as being much broader than intended by the Pre-Trial Chamber, which has consistently conceived the general interests of the defence as limited to the specific issue that justified the appointment of counsel. As a result, *ad hoc* counsels were prevented from exceeding the scope of their appointment by asserting the general interests of possible future accused persons.

3.2.2 Equality of arms in accessing States cooperation

It has rightly been observed that it is in the framework of pre-trial investigations that the parties are the most unequal.³⁰ Traditionally, inequality goes in favour of the Prosecution and to the detriment of the Defence, in that the Prosecutor has superior investigative resources and

²⁹ ibid 264, noting, however, that ‘the point should not be overstated as this again is at least partly a function of [defence attorneys’] roles in the system of international criminal justice as independent contractors working only to advance the interests of their clients’.

often benefits from greater cooperation from local governments in accessing evidence and witnesses. This premise, however, does not always hold true, especially at the ICC. In practice, the question of cooperation hinges on the implications of the arrest warrants for the State concerned. As a result, either the Prosecution or the Defence can be hampered in their work depending on whether the State favours or disfavours the defendant.

As has been seen, the ICC Prosecutor often benefits from States self-referrals. So far, the latter have concerned situations in which the ICC tries defendants who are disfavoured by the self-referring government, which, in turn, has generally provided a good amount of cooperation with the Prosecutor. However, there are also the situations in which the ICC intervention has been imposed by the Security Council or the proprio motu initiative of the Prosecutor. In two of these situations (Sudan and Kenya) the ICC is trying members of the government, which, not surprisingly, has refused any cooperation.

One would think that, in these instances, the State-supported Defence would be given better access to evidence than the Prosecutor, which would be the one to suffer from a disadvantage and unequal treatment. To a certain extent, this is true. However, the practice has shown that States usually try to derail the ICC investigation or prosecution all together. In other words, their goal is not supporting one side over the other, but rather, de-legitimising the Court’s proceedings in their entirety so as to bring them to a halt.

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32 Jalloh and Di Bella (n 26) 280.
In this respect, the *Banda* and *Jamus* case in the situation of Sudan was very illustrative. Although the Prosecution was also impeded access to Sudan’s territory and obstructed in its work, these impediments prejudiced the Defence more than its counterpart. Whilst the OTP had the possibility to conduct the major part of its investigations outside the country, the Defence argued that it could not build its case without accessing the crime scenes.

The Court has been firm in maintaining that ‘the investigation and prosecution of the most serious crimes of international concern should not become contingent upon a state’s choice to co-operate or not co-operate with the Court’ and that there is not ‘an absolute and an all-encompassing right by the prosecution and the defence to on-site investigations’. States non-cooperation with the Defence, therefore, does not automatically prejudice the fairness of the trial, and thus, does not constitute a ground for a stay of proceedings. According to the Court, the inability of the Defence to conduct on-site investigations due to obstructive behaviour by State authorities can be remedied later at trial by the disclosure obligations of the Prosecutor.

This study has also scrutinised the Court’s practice in assisting the Defence with its investigations. As has been seen, the Pre-Trial Chamber has the power of issuing orders for assisting the Defence with requests for cooperation to States and international organizations, provided that such requests are relevant and sufficiently specific. According to the Chamber, Defence requests are ‘specific’ only when they identify with utmost clarity the documents, the persons or the information sought. The specificity requirement is particularly burdensome in the pre-trial phase, where there

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33 See Chapter V, paragraph 5.3.1.
has not yet been any disclosure from the Prosecutor and defence investigations aimed at identifying and interviewing potential witnesses might be essential to challenge the Prosecutor case at the confirmation hearing.

Moreover, the Chamber deems it ‘necessary’ to issue an order only if counsel shows that all his/her attempts to obtain the documents (i.e., a direct request to the State or international organization, a request sent through the Registry, or a request to the Prosecutor) have been unsuccessful. The ‘necessity’ requirement is especially problematic, since it is not expressly envisaged by the Statute. By demanding that the Defence exhaust every possible option before turning to the Chamber, including through a request to the Prosecutor, the Court imposes a big burden on the Defence, and, the facto, obliges the Defence to reveal its strategy to its counterpart.

3.2.3 Prosecutorial impartiality and disclosure obligations cannot be the only remedy to inequality

The Rome Statute imposes on the Prosecutor the obligation to investigate ‘incriminating and exonerating circumstances equally’ and envisages a complex set of rules governing the obligation to disclose incriminating and exonerating evidence prior to the confirmation hearing and the trial. The disclosure system of the Court is an instrument at the disposal of the Defence to counterbalance the greater advantage of the Prosecution in the collection of evidence. The Court has proved to be sensitive to Defence needs, and has indeed interpreted and applied the disclosure norms of the Statute with the goal of counterbalancing the disadvantage of the Defence in accessing cooperation. In a landmark judgment in Lubanga, the Court made
clear that judges are willing to stay the proceedings to ensure defence’s access to exculpatory materials.

It must be highlighted, however, that the prosecutorial duty of impartiality in the conduct of the investigation and the ensuing disclosure obligations have come to be seen as the default response to the difficulties that the Defence experiences due to the non-cooperation of States. This approach is, to a certain extent, inevitable. It has been observed that putting an emphasis on the objective nature of the Prosecutor’s investigation has the merit of breaking the association between Prosecution and victims, and, thus, contributes to shield the Court’s proceedings from accusations of ‘victor’s justice’, increasing their legitimacy.34

Entrusting the Prosecution with the protection of the rights of the accused, however, is always risky and very difficult to implement in practice. Defence lawyers practicing before the Court are very wary and critical of this approach. The analysis of the situation of Sudan has shown that, due to Sudan’s stance against the Court and the Prosecution’s inability to investigate in the country, the OTP has only been able to focus its investigations on a limited part of the incriminating circumstances of the case, without undertaking any investigations into the exonerating circumstances.

Therefore, although there might be instances in which the Defence difficulties in accessing cooperation may be meaningfully remedied by the assistance of the Prosecutor,35 sometimes this option might simply be not available; or it might not be opportune given the circumstances of the case.

34 Fedorova (n 30) 446.
35 In these cases, introducing a right of the Defence to request investigative measures to be carried out by the Prosecution on its behalf would be a workable solution, see: ibid.
It is therefore imperative that the attention remains focused on the necessity of providing cooperation to Defence teams and on the importance of Defence investigations for the fairness of proceedings before the Court.
SUMMARY

This dissertation has investigated the ICC cooperation law and practice in relation to defendants’ rights, and in light of the unique structural limitations and constraints that characterise the ICC’s functioning. The central questions of this study as presented in the introduction were formulated as follows: does the unique structure of the Court influence and shape cooperation with States and international organizations? And do the law and practice of cooperation reduce the rights of the defendants before the Court? This research has shown that the specific context in which the ICC operates influences the way in which cooperation proceedings play out in practice, with a negative impact on the rights to liberty of suspects and accused, and on their right to equality of arms with the Prosecution. The first part of this study has set out the institutional and jurisdictional context in which cooperation plays out at the ICC, setting forth the background against which the selected rights of defendants have been subsequently assessed.

Chapter II addressed the ICC dependence on cooperation from an institutional, a normative and a political dimension. The ICC’s institutional setting is different from that of its ad hoc predecessors. Unlike the ad hoc Tribunals, the Court is an independent international organization that does not have the backing of the UN Security Council. In addition, its jurisdiction is not related to one geographically limited area/conflict, but can potentially cover crimes committed in every part of the world after the entry into force of the Rome Statute. As a consequence, thus, the ICC mostly
intervenes in the midst of a conflict, where many other political actors are involved and conflicting interests are at stake.

Having been established by a treaty, the ICC cooperation regime is ‘weak’. The Prosecutor has very limited powers to access the territory of States without their consent and the Court has no power to compel witnesses to testify before it. Moreover, the normative framework of cooperation leaves out matters that are crucial for the effective enjoinderment of defendants’ rights; most prominently, the obligation of States to allow interim released persons on their territory.

The Chapter has endeavoured to demonstrate that the real weakness of ICC cooperation proceedings does not lie in the legal framework, but rather in the political realities that inevitably condition their unfolding. In this regard, the Chapter has reflected on the concept of Prosecutorial independence in a state-dominated enforcement system, and has provided an overview of the Court’s investigations so far in connection with the actor that has prompted them (a State Party, the Security Council, or the *proprio motu* initiative of the Prosecutor). The Prosecutor has encouraged States Parties’ referrals in the expectation that the referring State would subsequently be cooperating with the investigation.

To date, five States Parties have followed the Prosecutor’s suggestion and referred to the Court the commission of crimes occurring on their territory (Uganda, DRC, CAR, Ivory Coast, Mali). In these instances, the self-referring government has generally been cooperative with the Prosecutor’s investigation. Conversely, the Court has faced insurmountable obstacles in the situations referred by the Security Council (Sudan and Libya) and in one instance of investigation started *proprio motu* by the Prosecutor (Kenya), where the government in power fiercely opposes the
Court’s intervention. Be that as it may, referrals of conflict situations by States Parties and the Security Council have ultimately resulted in one-sided prosecutions, which reflect the preferences of the referring actor.

Ultimately, this overview has shown that, regardless of the cooperation norms enshrined in the Statute, the effectiveness of the ICC investigations is largely dependent on whether the broader interests of the requested State coincide with those of the Court, and, should that fail, on the support of the international community. Regrettably, so far the latter has been lacking, and the Security Council has maintained a disappointing inaction towards the ICC’s denounces of non-compliance by Libya and Sudan.

The political priorities of the international community are volatile and shifting. Inevitably, its willingness to enforce the Court’s cooperation requests is informed by political calculations: if the interests of the Prosecutor in having certain alleged perpetrators arrested are not in line with those of the international community, cooperation from the latter will hardly be forthcoming. As a result, the Chapter concludes that, in a state-dominated enforcement system, ICC investigations and prosecutions remain tied to a political process that is, by nature, selective and often inefficient.

Chapter III has explored cooperation in connection with the jurisdictional regime of the Court. Together, these regimes represent the two fundamental pillars upon which the ICC system is based. Under the principle of complementarity, genuine domestic investigations and prosecutions have priority. The Court is allowed to step in only in case national authorities remain inactive towards international crimes or, where there are domestic proceedings, those authorities appear unwilling or unable to genuinely conduct them.
In the absence of an autonomous enforcement system, however, complementarity reveals the conceptual paradox by which the Court depends on the cooperation of States that are ‘inactive’, ‘unwilling’ or ‘unable’ to prosecute international crimes. The Chapter has examined the consequences of the ‘complementarity paradox’ for the rights of defendants and it has done so while accounting for, on the one hand, the relationship between the suspects and their State of nationality and, on the other hand, the relationship between such State and the Court.

First, it considered the position of the Libyan suspects Saif Gaddafi and Abdullah Al-Senussi, exponents of the recently overthrown regime of Muammar Gaddafi. The newly established government opposes the investigation of the Court in that it is eager to try the defendants in Libya without any interference and in violation of their basic rights. As a result, it has challenged the admissibility of the cases before the Court. As has been seen, Libya’s refusal to surrender Gaddafi and Al-Senussi combined with the misuse of its prerogatives under the complementarity regime resulted in gross violations of the suspects rights, who are still unlawfully detained in Libya. The Court, on its part, was surprisingly acquiescent towards Libya and, through a narrow interpretation of the Statute, validated its late and abusive admissibility challenges, resulting in the illegitimate postponement of the execution of Libya’s surrender obligations.

Second, the Chapter has considered the position of suspects whose State of nationality has welcomed the intervention of the Court, agreeing to have them tried before it. This scenario has been addressed within a broader criticism of the prosecutorial policy of ‘positive complementarity’, by which the OTP has legitimised and encouraged a ‘partnership’ between the Office and the States concerned by the complementarity evaluation. As has
been seen, in many instances this partnership has resulted in encouraging referrals from territorial States, followed by a careful planning on whether and how to divide labour with them. This, however, has come to the price of directing the investigation towards persons disfavoured by their self-referring government, whose rights had been violated in the context of national proceedings.

The Chapter has examined the jurisprudence of the Court on admissibility, stemming from two decisions concerning the investigation in the DRC: the Pre-Trial Chamber’s decision issuing an arrest warrant against Thomas Lubanga and the Appeals Chamber’s ruling on the admissibility challenge raised by Germain Katanga. Despite the fact that national proceedings were on-going against the suspects, the Court has found the cases to be admissible due to the ‘inaction’ of the DRC. In Lubanga, such inactivity has been found due to a very narrow interpretation of the meaning of ‘case’ for the purpose of the Statute (the case investigated by the DRC authorities did not encompass the same conduct which was the subject of the case before the Court); in Katanga, the inactivity of the DRC originated from its decision to close its national investigation and relinquish its jurisdiction to the benefit of the Court.

Inter alia, the Chapter has shown that, although admissibility challenges were largely conceived as a safeguard for the protection of the sovereignty of States, in the cases where governments entertain a cooperative relationship with the Court, proceedings under Article 19 have been used primarily as an instrument of protection of defendants’ rights. The Chapter concluded that the Court has adopted an interpretation of admissibility that is extremely obsequious towards the interests of States. By so doing, they have de facto sanctioned the policy of ‘positive
complementarity’ of the Prosecutor and have refrained from questioning the most problematic aspects of the practice of consensual burden sharing between the OTP and national authorities.

The second part of the study has addressed the impact that cooperation occurring in the above context has on the rights of suspects and accused. Chapter IV addressed the impact of cooperation on the right not to be subject to arbitrary arrest and detention (i.e., habeas corpus rights) and on the Court’s practice on interim release. With respect to the former, the Chapter assessed whether the law and practice of the Court sufficiently acknowledge the position of suspects detained by national authorities throughout part of the ICC investigation, and the risks to their liberty that the division of labour between the Court and States entails.

The Chapter has found that, although the legal framework set forth by the Statute represents an improvement if compared to the ad hoc Tribunals, the actual safeguards for the right to liberty are still not sufficient in view of the structural characteristics of the ICC and the mode in which cooperation plays out in practice.

The legal framework of the Statute is based on the assumption of a clear separation between national proceedings and proceedings of the Court, which often does not correspond to reality. In addition, the steps that lead the Prosecutor to focus on a specific person as the subject of the investigation are largely unregulated, in that practices on designating suspects are a matter of unpublished internal policy. Moreover, there is no significant judicial oversight of the Prosecutor’s activities until the issuance of an arrest warrant or a summons to appear, and thus, no protection of the rights of the persons targeted by the investigation until that moment. This
lack of protection is exacerbated by the great discretion with which the Prosecutor is endowed with respect to the time frame of the investigation.

The Chapter has examined the challenges to jurisdiction raised by three accused: Thomas Lubanga and Germain Katanga in the situation in the DRC, and Laurent Gbagbo in the situation in Ivory Coast. The investigation into both of these situations had resulted from a self-referral of the accused’s State of nationality; in addition, Lubanga, Katanga and Gbagbo were all political opponents of the government that submitted the referral to the Court. In all these three cases, defendants had already been in the custody of national authorities when the Prosecutor applied for an arrest warrant against them. In challenging the jurisdiction of the Court, the defendants alleged that their initial detention by national authorities had been unlawful and motivated by political reasons. They lamented several violations of their basic rights and requested the Court to take responsibility by dismissing its jurisdiction.

In particular, they alleged serious misconduct on the part of the Prosecutor who, despite of being aware of their unlawful detention in the DRC throughout great part of his investigation and long before he applied for an arrest warrant, did not intervene to bring it to a halt. On the contrary, s/he took advantage of the situation to have them transferred smoothly before the Court upon the issuance of the arrest warrant by the Pre-Trial Chamber, and in collusion with the DRC government. Moreover and regardless of the Prosecutor’s negligence, defendants requested the Court to take responsibility for the violations of their rights based on the ‘abuse of process’ doctrine and the concept of ‘constructive custody’ borrowed from the Brayagwiza jurisprudence of the ICTR. According to this notion, once the warrant of arrest is issued, the accused falls under the constructive
custody of the ICC with the consequence that ‘ant continuing illegality becomes the shared fruit and responsibility for the DRC and the ICC’.

The judges were firm in dismissing the Defence complaints. They held that violations of defendants’ rights, however serious, can be said to constitute an abuse of process only insofar as they can be attributed to the Court and that, as a general rule, the responsibility of the Court towards a suspect begins with the issuance of an arrest warrant. Therefore, violations of *habeas corpus* rights occurred prior to that moment can be supervised by the Court only upon the proof of ‘concerted action’ between the Prosecutor and national authorities in the commission of such violations.

This approach is regrettable, as it fails to address the necessity of protecting the rights of persons who have been targeted by the Prosecutor long before the latter seeks an arrest warrant against them. Article 57 of the Statute bestows the duty to ‘provide for the protection (…) of persons who have been arrested’ upon the Pre-Trial Chamber. A meaningful protection of arrested persons necessarily implies that the judges supervise the violations of suspects’ rights occurring in the course of the investigation and irrespective of a concerted action between national authorities and the Prosecutor, which should nonetheless be considered as an aggravating factor.

This study has advocated for the imposition of a duty of diligence on the Prosecutor when s/he becomes aware of national proceedings involving a person whom s/he has targeted for the purpose of the investigation. This duty of diligence and transparency should be clearly spelled out in the Statute, along with specific rules governing the cooperation between the Prosecutor and states before the issuance of an arrest warrant against a person who is already in the custody of national authorities. Melinda Taylor
and Charles Jalloh have exhaustively elaborated on the content of this duty, arguing, in particular, that the Prosecutor should notify the presence of detained suspects to the Pre-Trial Chamber. This would indeed represent a viable way to more carefully supervise the cooperation of the Prosecutor with national authorities for the purpose of transferring suspects to the Court, and would enable the judges to better assess the timeliness with which the Prosecutor requests the issuance of an arrest warrant. The latter, should request an arrest warrant from the Chamber in a timely manner, and should be held accountable in case s/he does not do so without providing a valid justification.

As part of the analysis on the right to liberty, the Chapter has also considered the Court’s practice in relation to the right to be released pending trial. Departing from the precedent of the ad hoc Tribunals, the Rome Statute enshrines an advanced protection of this right. However, it does not obligate States to accept provisionally released defendants on their territory. Given this situation, it is imperative that the Court intensifies its efforts to convince States that they should accept provisionally released persons through the signature of a specific agreement.

It must be reminded that interim release agreements do not establish an obligation on the part of the signatory State to accept detainees. Rather, they make such acceptance conditional upon an assessment to be made on a case by case basis by national authorities. This notwithstanding, they seem to be the only available step in the direction of making interim release before the Court a reality.

Chapter V examined the equality of arms between the Prosecution and the Defence with respect to the access to States cooperation. Traditionally, inequality goes in favour of the Prosecution and to the
detriment of the Defence. This premise, however, does not always hold true, especially at the ICC, where either the Prosecution or the Defence can be hampered in their work depending on whether the State favours or disfavours the defendant. As has been seen, when the ICC intervention has been imposed by the Security Council or the *proprio motu* initiative of the Prosecutor, exponents of the government of the country are often on trial. One would think that, in these instances, the State-supported Defence would be given better access to evidence than the Prosecutor, which would be the one to suffer from a disadvantage and unequal treatment.

To a certain extent, this is true. However, the practice has shown that States usually try to derail the ICC investigation or prosecution all together. In other words, their goal is not supporting one side over the other, but rather, de-legitimising the Court’s proceedings in their entirety so as to bring them to a halt. In this respect, the case studies in the situation of Sudan were very illustrative. Although the Prosecution was also impeded access to Sudan’s territory and obstructed in its work, these impediments prejudiced the Defence more than its counterpart. Whilst the OTP had the possibility to conduct the major part of its investigations outside the country, the Defence argued that it could not build its case without accessing the crime scenes.

The Chapter has also scrutinised the Court’s practice in assisting the Defence with its investigations. As has been seen, the Court may issue cooperation requests on behalf of the Defence provided that such requests are relevant and sufficiently specific. According to the Chamber, Defence requests are ‘specific’ only when they identify with utmost clarity the documents, the persons or the information sought. The specificity requirement is particularly burdensome in the pre-trial phase, where there
has not yet been any disclosure from the Prosecutor and defence investigations aimed at identifying and interviewing potential witnesses might be essential to challenge the Prosecutor case at the confirmation hearing. Moreover, the Chamber deems it ‘necessary’ to issue an order only if counsel shows that all his/her attempts to obtain the documents have been exhausted. By demanding that the Defence exhaust every possible option before turning to the Chamber, including through a request to the Prosecutor, the Court imposes a big burden on the Defence, and, the facto, obliges the Defence to reveal its strategy to its counterpart.

Finally, the Chapter has explored the disclosure system of the Court as an instrument at the disposal of the Defence to counterbalance the greater advantage of the Prosecution in the collection of evidence. The Court has proved to be sensitive to Defence needs, and has indeed interpreted and applied the disclosure norms of the Statute with the goal of counterbalancing the disadvantage of the Defence in accessing cooperation. In a landmark judgment in Lubanga, the Appeals Chamber has made clear that, when seeking the cooperation of peacekeeping missions and local informants in the field, the Prosecutor must balance the need for confidentiality with the accused right to have access to exculpatory evidence as soon as possible.

The Chapter, however, has criticised the tendency to see the prosecutorial duty of impartiality in the conduct of the investigation and the ensuing disclosure obligations as the default response to the difficulties that the Defence experiences due to non-cooperation. Entrusting the Prosecution with the protection of the rights of the accused may be risky and very difficult to implement in practice. It is therefore imperative that the attention remains focused on the necessity of providing cooperation to Defence teams
and on the importance of Defence investigations for the fairness of proceedings before the Court.
SAMENVATTING

Dit proefschrift onderzoekt het recht en de praktijk van het Internationaal Strafhof (ICC) op het vlak van samenwerking met staten en internationale organisaties, in relatie tot de rechten van verdachten en in het licht van de unieke structurele beperkingen die het ICC karakteriseren. De vragen die centraal staan in het onderzoek, zoals in de introductie weergegeven, zijn als volgt geformuleerd: Beïnvloedt en vormt de unieke structuur van het ICC de samenwerking met staten en internationale organisaties? En beperken het recht en de praktijk van samenwerking de rechten van verdachten voor het ICC? Dit onderzoek heeft aangetoond dat de specifieke context waarin het ICC opereert de manier waarop samenwerkingsprocedures in de praktijk plaatsvinden beïnvloedt, met als gevolg een negatieve impact op het recht op vrijheid van de verdachten en op het beginsel van procedurele gelijkheid.

Het eerste onderdeel van dit onderzoek schetst de institutionele en jurisdictionele context waarin samenwerking plaatsvindt bij het ICC, als achtergrond waartegen de geselecteerde rechten van de verdachte zijn onderzocht.

Hoofdstuk II behandelt de afhankelijkheid van het ICC van samenwerking vanuit een institutioneel, normatief en politiek perspectief. Het probeert aan te tonen dat de echte zwaktes van ICC-samenwerkingsprocedures niet in het juridische kader zitten, maar juist in de politieke realiteit die de implementatie van het recht conditioneert. In dit kader heeft het Hoofdstuk gereflecteerd op het concept van procedurele vrijheid in een handhavingsregime dat door staten gedomineerd wordt en heeft een overzicht gegeven van de onderzoeksactiviteiten van het ICC tot
nu toe in de verbinding met de actoren die het onderzoek gestart hebben (een staat die partij is van het ICC, de Veiligheidsraad, of het proprio motu initiatief van de aanklager). Dit overzicht liet zien dat, ondanks de samenwerkings-normen die in het Statuut zijn vastgelegd, de effectiviteit van ICC onderzoeken vooral afhankelijk is van de vraag of het bredere belang van de Staat waarmee samenwerking wordt gezocht samenvalt met het belang van het ICC of met de steun van de internationale gemeenschap. Helaas ontbreekt de steun van de internationale gemeenschap doorgaans en de Veiligheidsraad heeft zich op teleurstellende wijze inactief getoond ten opzichte van het aan de kaak stellen van niet-naleving door Libië en Sudan. Het Hoofdstuk concludeert dat, in een handhavingsregime dat door staten gedomineerd wordt, ICC onderzoeken en vervolgingen verbonden blijven met een politiek proces dat inherent selectief en vaak ineffectief is.

Hoofdstuk III heeft het samenwerkingsregime onderzocht in samenhang met het jurisdictionele regime van het ICC. Samen vertegenwoordigen deze twee regimes de fundamentele pilaren waarop het ICC-systeem is gebaseerd. Door het principe van complementariteit hebben oprechte binnenlandse onderzoeken en vervolging prioriteit. Het ICC mag pas ingrijpen als nationale autoriteiten zich inactief tonen ten opzichte van internationale misdrijven of, in het geval er wel binnenlandse vervolging plaatsvindt, de nationale autoriteiten onwelwillend of niet in staat blijken om die vervolging oprecht uit te voeren. In afwezigheid van een autonoom handhavingsregime toont het principe van complementariteit echter vooral de conceptuele paradox waarbij het ICC afhankelijk is van de samenwerking van staten die inactief, onwelwillend of niet in staat zijn om internationale misdrijven te vervolgen. Het Hoofdstuk heeft de gevolgen onderzocht van deze “complementariteit paradox” op de rechten van
verdachten met het oog op de relatie tussen de verdachte en de staat van nationaliteit en daarnaast de relatie tussen die staat en het ICC. Allereerst werd de positie van de verdachte beschouwd wiens overheid (Libië) zich verzet tegen onderzoek door het ICC en die liever de verdachte ‘thuis’ wil vervolgen zonder inmenging door een externe juridische organisatie en in strijd met de basisrechten van de verdachte. Ten tweede heeft het Hoofdstuk de positie van de verdachte beschouwd wiens staat van nationaliteit het ingrijpen van het ICC heeft verwelkomd en heeft toegezegd om de vervolging voor het ICC te laten plaatsvinden. Dit scenario wordt behandeld binnen het bredere kader van de kritiek op het vervolgingsbeleid van “positieve complementariteit”. Middels dit beleid legitimeert en bemoedigt de Aanklager van het ICC samenwerking tussen haar/zijn bureau en de betrokken staten. Gevolg van deze samenwerking is echter dat staten het onderzoek kunnen sturen richting hen niet welgevallige personen.

Dit hoofdstuk behandelt de jurisprudentie van het ICC over de ontvankelijkheid van zaken, gebaseerd op twee uitspraken met betrekking tot het onderzoek in de DRC: de beslissing van de Voorbereidingskamer over het arrestatiebevel voor Thomas Lubanga en de beslissing van de Kamer van Beroep op de motie van niet-ontvankelijkheid van Germain Katanga. Het hoofdstuk concludeerd dat het ICC een interpretatie van ontvankelijkheid hanteert die sterk geënt is op de belangen van staten. Hiermee onderschrijft het ICC de facto het beleid van “positieve complementariteit” van de Aanklager en laat hij na om de problematische aspecten van de samenwerking tussen het Bureau van de Aanklager en staten kritisch te bezien.

Het tweede deel van deze studie behandelt de impact van samenwerking zoals hierboven beschreven op de rechten van verdachten.
Hoofdstuk IV behandelt specifiek het recht op vrijheid en het verbod van willekeurige vrijheidsberoving (i.e. *habeas corpus* rechten) en de praktijk van het ICC op het gebied van voorlopige hechtenis. Wat betreft het eerste wordt in dit Hoofdstuk bekeken of het recht en de praktijk van het ICC de positie van verdachten die gedurende het onderzoek door het ICC door nationale overheden worden vastgehouden afdoende erkent, met name wat betreft de nadelige invloed op het recht op vrijheid van deze personen.

In dit Hoofdstuk wordt geconcludeerd dat, hoewel het juridisch kader rond voorlopige hechtenis bij het ICC een enorme vooruitgang is ten opzichte van de *ad hoc* Tribunalen, de daadwerkelijke bescherming van het recht op vrijheid nog niet voldoet, gezien een aantal structurele eigenschappen van het ICC en de manier waarop samenwerking in de praktijk uitwerkt. Het juridisch kader van het Statuut is gebaseerd op de aannamen dat er een scherpe scheiding is tussen nationale procedures en de procedures bij het ICC, wat niet correspondeert met de realiteit. Ten tweede is de vrijheid van de Aanklager om het onderzoek op bepaalde personen te richten vrijwel onreguleerd, in die zin dat deze praktijk gebaseerd is op ongepubliceerd en vertrouwelijk intern beleid. Bovendien is er onvolvoende rechterlijk toezicht op het werk van de Aanklager tot het uitvaardigen van een arrestatiebevel of een oproeping, als gevolg waarvan er in die periode te beperkte rechtsbescherming is voor personen tot het onderzoek is gericht. Dit gebrek aan bescherming wordt versterkt door de grote beleidsvrijheid die de Aanklager heeft met betrekking tot het tijdpad van een onderzoek. Deze studie pleit daarom voor het instellen van een zorgplicht voor de Aanklager vanaf het moment dat de duidelijk wordt dat een persoon die onderwerp van onderzoek door het ICC is, ook onderwerp van onderzoek is in een staat.
Dit Hoofdstuk behandelt ook de praktijk van het ICC op het gebied van voorlopige hechtenis en het recht om een proces in vrijheid af te wachten. Anders dan het precedent van de ad hoc Tribunalen incorporeert het Statuut van Rome sterke bescherming van dit recht. Het verplicht staten echter niet om invrijheidgestelde verdachten te accepteren op hun grondgebied. Het is daarom van essentieel belang dat het ICC inzpanningen om landen bereid te vinden om verdachten die hun proces in vrijheid mogen afwachten te accepteren op hun grondgebied, door verdragen met staten af te sluiten hierover. De bestaande zogenaamde interim release verdragen bevatten echter geen verplichting om verdachten op te vangen, dit moet van geval tot geval door de nationale autoriteiten beoordeeld worden. Desalniettemin lijkt dit de enige vruchtbare route voor het ICC om het recht van verdachten om hun proces in vrijheid af te wachten te realiseren.

In Hoofdstuk V is het beginsel van procedurele gelijkheid tussen de vervolgende en de verdedigende partij onderzocht, in relatie tot de door staten verleende medewerking. Gewoonlijk werkt ongelijkheid ten faveure van de vervolging en in het nadeel van de verdediging. Met name bij het ICC, waar zowel de vervolging als de verdediging in zijn werk belemmerd kan worden afhankelijk van de vraag of de staat de verdediging bevoordeelt of benadeelt, blijkt deze veronderstelling echter niet altijd juist te zijn. Zoals gezien staan vaak regeringsvertegenwoordigers terecht wanneer de ICC interventie door de Veiligheidsraad of uit eigener beweging van (proprio motu) de aanklager is opgelegd. In die omstandigheden zou men verwachten dat de door de staat gesteunde verdediging betere toegang krijgt tot het bewijs dan de aanklager, die op zijn beurt degene is die zal leiden onder achterstand en ongelijke behandeling. Tot op zekere hoogte is dit het geval.
De praktijk wijst echter uit dat staten het ICC onderzoek of de vervolging gewoonlijk in zijn geheel trachten te ontsporen. Hun doel is met andere woorden niet de ene partij voorkeur te geven boven de andere, maar het de legitimeren van het proces in zijn geheel om het zo tot een stilstand te brengen. In dat licht was het onderzoek in zaken aangaande Sudan tekenend. Hoewel de vervolging eveneens de toegang tot Sudan werd belemmerd en werd gedwarsboomd in zijn werk, schaadden(bevoordeelden) deze hindernissen de verdediging meer dan de vervolging. Terwijl de OTP over de mogelijkheid beschikte een groot gedeelte van zijn onderzoek buiten de betreffende landsgrenzen te doen, pleitte de verdediging dat het de verdediging niet kon voeren zonder toegang tot de plaats delict.

Eveneens zijn in het hoofdstuk de gebruiken van het Hof onderzocht met betrekking tot het ondersteunen van de verdediging in zijn onderzoeken. Zoals gezien kan het Hof namens de verdediging een verzoek tot medewerking uitvaardigen, zij het dat een dergelijk verzoek relevant en voldoende specifiek dient te zijn. Volgens de Kamer zijn dergelijke verzoeken van de verdediging pas ‘specifiek’ wanneer de documenten, personen of gezocht informatie uiterst duidelijk/helder worden aangegeven. De vereiste specificiteit is met name in de fase voorafgaand aan het onderzoek ter terechtzitting lastig, er is nog geen openheid van de vervolging en onderzoek door de verdediging gericht op het identificeren en het horen van mogelijke getuigen kan onmisbaar zijn om de zaak van de vervolging bij de ‘confirmation hearing’ te betwisten/weerleggen. Bovendien, de Kamer acht het ‘noodzakelijk’ dat een bevel eerst wordt uitgevaardigd nadat de verdediging heeft aangetoond dat al haar pogingen de documenten te verkrijgen (zijn uitgeput/vergeefs zijn geweest). Door van de verdediging te verlangen dat zij, alvorens zich tot de Kamer te wenden,
iedere mogelijkheid uitput, waaronder het zich wenden tot de vervolging, legt het Hof een grote last bij de verdediging en wordt zij *de facto* verplicht haar strategie prijs te geven.

Tenslotte is in het hoofdstuk het openbaarmakingssysteem als instrument onderzocht dat ter beschikking van de verdediging staat teneinde tegenwicht te bieden tegen het grotere voordeel van de vervolging bij bewijsvergaring. Het Hof heeft bewezen gevoelig te zijn ten aanzien van de behoeftes van de verdediging en heeft de openbaarmakingsnormen overeenkomstig geïnterpreteerd en toegepast, met als doel het nadeel te vereffenen(tegenwicht) dat door de verdediging wordt ondervonden bij de toegang tot medewerking.

Echter in het hoofdstuk is ook de neiging bekritiseerd om de onpartijdigheid waartoe de vervolging, bij het verrichten van onderzoek en de daarmee verbonden verplichtingen tot openbaarheid, is verplicht, als standaard antwoord te zien op de moeilijkheden door de verdediging ervaren als gevolg van niet medewerking. Het kan in de praktijk riskant en lastig toepasbaar zijn de bescherming van de rechten van de verdachte aan de vervolging toe te vertrouwen. Het is ten behoeve van de gelijkheid (fairness) bij het verloop van de procedure bij het Hof dan ook noodzakelijk dat de aandacht gericht blijft op de noodzaak tot het bieden van medewerking aan verdedigingsteams en op het belang van het onderzoek van de verdediging.
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ACKNOWLEDGMENTS

Pursuing a joint PhD has been a challenging, exciting and transformative adventure. First and foremost, I would like to express my gratitude to my supervisors, Prof. Michele Caianiello and Prof. Göran Sluiter. I am deeply thankful to Prof. Caianiello for believing in me before I believed in myself, for his invaluable guidance and full engagement with my work, and for his encouragement in developing my ideas. I am greatly indebted to Prof. Sluiter for giving me the opportunity to spend two incredible years at the University of Amsterdam. I benefitted immensely from his great expertise and insightful feedback, and I am thankful for his inspiring views on my work.

Profound gratitude goes also to Sergey Vasiliev, for taking time out from his busy schedule to read my earliest drafts. His thorough and constructive feedback has been nothing short of essential in order to get on the right track.

I would like to sincerely thank the members of my committee: Prof. Silvia Allegrezza, Prof. Luca Mezzetti, Prof. Guénaël Mettraux, Prof. Harmen van der Wilt, Prof. Federico Casolari and Prof. Sergey Vasiliev, for assessing my work and for accepting to serve as committee members at such short notice.

By pursuing a joint doctorate, I had the privilege of being exposed to two lively academic environments. My heartfelt thanks go to Prof. Giulio Illuminati and the researchers of the criminal procedure department of the University of Bologna, my ‘academic home’. I am also very grateful to Prof. Tom Blom, Henna Redan, and the researchers of the criminal law
department of the University of Amsterdam, always welcoming and friendly. I am most grateful to my office mate Frederiek de Vlaming, whose cheerful smile would greet me every morning.

There is no point in distinguishing between colleagues and friends because they are the same. Krit, I will never forget how generous and kind you have been to me since day one. You took care of me when I was just a scared little Italian lost in the UvA corridors. Our phone calls, BuzzFeeds and coffee breaks made the writing process so much lighter, and my life in Amsterdam so much better. Kathryn, this thesis owes so much to your brilliant, passionate mind. But you have enriched my life in ways that go well beyond the PhD. Thank you for being true and real, for always holding space for me, and for offering me strength and courage throughout this journey. Sari, you big-hearted, creative, charismatic little one. Thank you for taking me to Puccini and for treating me with delicious cakes all around town. Thank you for your hilarious made-up words. And thank you for always supporting me in your beautiful, unique way. You are amazeballs.

Marta, che immensa fortuna poter condividere con te la strana condizione dell’ academic expact. Ma ho sempre pensato che io e te saremmo state amiche anche a Bologna o a Genova, perché mi sembra di conoscerti da sempre. Grazie per le cene, i consigli, ed il tuo grande buon senso (mi ha aiutata molto più di quanto immagini). E grazie per il Bodino. Nienke, this PhD taught us a thing or two about getting through hard times, self-knowledge, resilience and so on. I am thankful for having walked the final and steepest part of the road next to you. Thank you for sharing your wisdom with me over our Skype lunches, your empathy and sense of humour made all the difference in the final stages of the writing. Vigjilenca, your enthusiasm and energy are contagious. Thank you for inspiring me
with your life-affirming and proactive attitude, for reminding me that life is full of possibilities. For the engaging and interesting conversations that we had on pretty much everything. Kelly, thank you for saying the words I needed to hear at a particularly difficult moment of my life, and thank you for giving me the opportunity to work with you on an exciting project! Enrico, grazie per le risate, le serate, e per i lunches coi sandwiches del Laatste Kruimel.

Dries, my ‘oldest’ Dutch friend. Thank you for all our emails, dinners, and conversations until the morning hours. You are the only one who doesn’t get bored when I talk about Leonard Cohen, and the only one with whom even tax matters can be fun. Mag, grazie per la nostra amicizia intensa e sincera, sbocciata in men che non si dica. Grazie per le chiacchiere di ore in cui abbiamo sviscerato tutto il dicibile e l’indicibile come mai mi era capitato di fare. Yiran and Yuting, the sweetest flatmates one could have wished for. Thank you for making our home a warm and comfortable place to live, and thank you for the amazing Chinese food. Sabri, tra tutte le persone menzionate qui, tu sei quella che conosco da più tempo e non posso spiegare quanto sono contenta che tu e Fede siate qui oggi. Grazie per essermi stata vicino con i tuoi modi discreti e la tua grande personalità. Alle, Bea, Deni e Giuli, le mie amiche di sempre, che ho sentito vicine per tutto il percorso nonostante i kilometri che ci separavano. Alle, perché hai sempre fatto il tifo per me nel tuo modo unico e risoluto, pieno di generosità, ironia e buon senso. Bea, perché sei sempre pronta ad ascoltarmi e ridimensionare le Grandi Tragedie Percepite della mia vita con affetto e pazienza. Giuli, che hai condiviso con me le gioie e i dolori di questo dottorato, grazie per i tè, i biscotti fatti con amore, ed i consigli letterari. Deni, per tutte le risate
che sei riuscita a farmi fare nonostante me. Perché dietro le tue mille battute ho sempre sentito battere il tuo grande cuore abruzzese.

Il ringraziamento più grande va a mia madre e a mio padre, a cui dedico questo lavoro, per avermi amata e supportata incondizionatamente fin da quando sono nata.