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OF INTERNATIONAL LAW

2012

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*Aleksandra Dłubak**

PROBLEMS SURROUNDING ARREST WARRANTS ISSUED BY THE INTERNATIONAL CRIMINAL COURT: A DECADE OF JUDICIAL PRACTICE

Abstract

Certain aims of international criminal justice, such as prosecution and the punishment of perpetrators of international crimes, can be achieved through the international institutions created to administer justice. However, one of the essential requirements is to ensure the suspect's presence at trial. The measures provided for in the Rome Statute to facilitate the International Criminal Court in fulfilling this condition and initiating proper proceedings include the issuance of arrest warrants and subsequent requests for arrest and surrender.

Although a binding legal obligation exists under the Rome Statute with respect to States Parties, nonetheless inter-state cooperation has proven extremely difficult to obtain. There are many reasons for this, however problems of a legal and political nature are identified as the two main areas of obstacles.

There are some measures that can be taken in order to prevent the occurrence of problems relating to arrest warrants. The Office of the Prosecutor and the Pre-Trial Chambers have certain powers that can positively affect the execution of arrest warrants. These organs aim to establish a positive cooperation network, both with the States Parties and non-Party States. By using the powers of external bodies, the ICC may attempt to establish favourable circumstances which would increase the effectiveness of arrest warrants.

INTRODUCTION

International criminal justice serves many laudable objectives. Just as the aims are diverse, so too are the means to the ends. International criminal law (ICL) is one of

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the most commonly known methods of achieving justice.¹ It has been asserted that the existence of criminalisation and punishment translates into the protection of people's rights to the highest level.² In order for ICL to perform its role, a trial must be conducted and the perpetrator has to be found guilty and punished. In turn, in order to be able to hold a trial, the accused's presence has to be secured by whatever legal means are available. Given the gravity of international crimes and the unique characteristics of the situations giving rise to their commission, arrests are necessary to ensure that the suspected person does not avoid criminal responsibility, as determined by the international criminal institutions such as the International Criminal Court (ICC or the Court).

During their ten years of judicial activity, the Pre-Trial Chambers (PTCs, singular PTC) of the ICC have issued a number of arrest warrants (AWs, singular AW) in situations of international concern. Many of the identified suspects are still at large, and their apprehension is unlikely in the near future and may even be impossible. The reasons are of a twofold nature. As will be seen below, it is a combination of law and politics that frequently render AWs ineffective.

1. THEORY AND LEGAL BASIS FOR ARREST WARRANTS WITHIN THE ROME STATUTE

1.1. Rationale and theoretical basis for arrest warrants

The Rome Statute³ (hereinafter sometimes the Statute or the ICC Statute) does not give a definition of the notion of an arrest warrant. Its meaning seems to be considered common knowledge: it may be understood as an official legal document issued by a court allowing (warranting) an arrest of a particular person. Being a "specialised type of court order"⁴ it gives rise to the possibility of legally arresting a person, i.e. depriving one of one's personal liberty.⁵

Whilst Art. 58 of the Statute lacks a detailed description of the notion, it enumerates the purposes for which an arrest warrant can be issued. These are, alternatively: to ensure the individual's presence at trial; to prevent him/her (the masculine tense will be used

¹ For a comprehensive theory on the origins of the objectives of law, including international criminal justice in relation to the International Criminal Court in particular, and the inherent tension between them; see M. Klamberg, *What are the objectives of international criminal procedure? – reflections on the fragmentation of a legal regime*, 79 *Nordic Journal of International Law* 279 (2010).

² Ch. Bassiouni, *The proscribing function of international criminal law in the processes of international protection of human rights*, 9 *Yale Journal of World Public Order* 193 (1982) p.193; I. Bantekas, *International Criminal Law*, Hart Publishing, Oxford: 2010, p. 19.

³ Rome Statute of the International Criminal Court (adopted 17 July 1998; entered into force 1 July 2002) 2187 UNTS 90.

⁴ G. Boas, J. Bischoff, N. Reid, B.D. Taylor III, *International Criminal Law Practitioner Library. International Criminal Procedure, Vol. III*, Cambridge University Press, Cambridge: 2011, p. 208.

⁵ D. Nsereko, *Cooperation with the Court on matters of arrest and surrender of indicted fugitives: lessons from the ad hoc Tribunals and national jurisdictions* in J. Doria, H.-P. Gasser, Ch. Bassiouni (eds.), *The Legal Regime of the International Criminal Court. Essays in Honour of Professor Igor Blisshchenko*, Martinus Nijhoff Publishers, Leiden: 2009, p. 976.

generically in the remaining part of this article) from hampering the investigation or the court proceedings; or to stop a suspect from committing further crimes of the same nature (i.e. crime prevention).⁶ Nsereko points out that the first reason is particularly important because it lets the accused defend himself against the charges posed by the court.⁷ When a suspect⁸ is inclined to cooperate with the Court, an AW would be unnecessary and his obligatory presence at trial⁹ may be achieved in another fashion. If there are sufficient reasons to presume that the person will voluntarily submit himself to the Court, the Prosecutor may ask the PTC to simply issue a summons to appear.¹⁰

Although neither are specifically provided for in the Statute of the ICC nor in the Rules of Procedure and Evidence¹¹ (RPE),¹² two types of arrest warrants have evolved in practice: sealed and public. The former, also known as a non-disclosure AW, is secretly transferred to selected entities, often those that have the direct opportunity to make the arrest.¹³ There are various reasons for which an AW may be sealed. Since the main purpose of arrest warrants is to capture the suspect, keeping them secret adds an element of surprise to their execution. Such was the case in *Bemba*, when the defendant was arrested in Belgium while visiting relatives the day after his AW was issued in May 2008.¹⁴ Being a few steps ahead of the person at large, who might want to avoid his responsibility, increases the chances of his apprehension by a cooperative State.¹⁵ Additionally, keeping AWs secret allows the States to take essential steps in order to locate and freeze the assets of a suspect, as occurred in the *Lubanga* case, where the defendant was already in custody at the time his arrest warrant was issued.¹⁶ To date, the majority¹⁷ of the AWs issued by the PTC have been sealed.

A sealed AW is unsealed once it is clear that the arrest has been successful – the AWs issued with respect to the situations in the Democratic Republic of the Congo (DRC), Cote d'Ivoire, and the Central African Republic (CAR) may serve as examples.

⁶ Art. 58(1)(b) of the ICC Statute.

⁷ Nsereko, *supra* note 5, p. 976.

⁸ A person becomes an accused when the Pre-Trial Chamber has confirmed the charges against them (Art. 61 of the ICC Statute).

⁹ Art. 63 of the ICC Statute.

¹⁰ Art. 58(7) of the ICC Statute. See also C. Hall, *Issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear*, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article*, Beck, München: 2008, pp. 1143-5.

¹¹ Rules of Procedure and Evidence, 9 September 2002, ICC-ASP/1/3 (Part II-A).

¹² W. Schabas, *An Introduction to the International Criminal Court*, Cambridge University Press, Cambridge: 2007, p. 261.

¹³ C. Ryngaert, *The international prosecutor: arrest and detention*, Leuven Centre for Global Governance Studies Working Paper No. 24, 2009, p. 23.

¹⁴ ICC Press Release, ICC-OTP-20080524-PR316, 24 May 2008.

¹⁵ C. Gosnell, *The request for an arrest warrant in Al Bashir. Idealistic posturing or calculated plan?*, 6 Journal of International Criminal Justice 841 (2008), p. 845.

¹⁶ Schabas, *supra* note 12, p. 260; *Lubanga*, Decision on the Prosecutor's Application for a Warrant of Arrest of 10 February 2006, ICC-01/04-01/06-8, para. 140.

¹⁷ For a statistical summary of the ICC's arrest warrants see Section 4 of this article.

Apart from making sure that the risk of abscondment is low, unsealing might also mean that certain measures to protect witnesses have already been taken.¹⁸ Ryngaert also lists a number of other reasons for which the ICC Prosecutor has decided to request the unsealing of AWs, among them for instance the risk that “the suspect may flee or seek refuge in other (neighbouring) countries, (...) which may be decreased when the international actors are officially informed of the existence of the warrant.”¹⁹

Other arrest warrants are made public straight away. Paradoxically, from the point of view of capturing the suspect, this may be also beneficial as it facilitates international cooperation and quick responses if the defendant attempts to flee.²⁰ According to Gosnell, public AWs usually indicate that the State(s) concerned are not willing to cooperate, and additional attention from the international community might be required to exert influence on them. Therefore, the Prosecutor decides to increase the chances of capturing the suspect in the long term, even though a public AW may have negative outcomes in the short term.²¹ It should be mentioned that the same applies to sealed warrants that have subsequently been made public, even in situations where they have not yet resulted in securing a suspect’s arrest, as occurred in the cases of with respect to the situation in Uganda.

The issuance of arrest warrants is linked to many objectives and values. On one hand, international criminal justice promotes values such as obtaining justice for the victims and the punishment of the perpetrators, as well as an active pursuit towards transitional justice and post-conflict reconciliation. These factors have to be carefully weighed against each other when deciding on the next step in an international prosecution. On the other hand, international criminal law has its own set of aims, related to criminal law: crime prevention, incapacitation, rehabilitation, deterrence, and retribution. But it also addresses the international aspect of crimes: national reconciliation and providing a historical record of atrocities.²² The aims of the ICC are articulated in the Preamble to the Statute and include strictly legalistic aims (such as “effective prosecution”) as well as moral ones (e.g. “peace, security and well-being of the world”). Arguably, this proves that the moral values and objectives that international criminal justice, ICL and the ICC are striving for have to be prioritised as it may be impossible to achieve them simultaneously.

The issuance of AWs, being one way of pursuing international criminal justice, may conflict with other aims. For instance, in some cases amnesties may be more effective than blindly imposing criminal justice and thus escalating a particular conflict.²³

¹⁸ *Situation in Uganda*, Decision on the Prosecutor’s Application for Unsealing of the Warrants of Arrest of 13 October 2005, ICC-02/04-01/05, para. 14.

¹⁹ Ryngaert, *supra* note 13, pp. 23-24.

²⁰ *Ibidem*, p. 24.

²¹ Gosnell, *supra* note 15, p. 845.

²² Bantekas, *supra* note 2, p. 29.

²³ Among other ways of achieving justice are truth commissions, amnesties, and financial aid for weak societies; *ibidem*, p. 14. The international community might not even need a trial, as sometimes an indictment may have sufficient effects for the communities concerned; *Cf.* Ryngaert, *supra* note 13, p. 20.

However, the arrest warrants are indispensable if the ICC is to achieve its objectives. Thanks to them the legalistic aims can be realised and lawful punishment administered. Since AWs often automatically follow an indictment, it is clear that the effectiveness and successful execution of AWs is of crucial importance.²⁴ It may be argued that in practical terms they initiate the Court proceedings.²⁵

In order to increase the chances of arresting a suspect, the ICC Statute provides for the obligation of States to cooperate with the Court in matters concerning arrest warrants and the surrender of persons.²⁶ However, the lack of ICC enforcement powers makes it wholly dependent on the changing interests of States (especially political interests) and their cooperation. It thus depends on the States whether the values and objectives of international criminal law and justice will be realised and respected²⁷ in a particular case, or whether they will “remain elusive”.²⁸ As a result, whereas the obligation to cooperate is the ICC’s strongest point, its lack of enforcement powers undermines it significantly.²⁹

1.2. The legal framework concerning arrest warrants

1.2.1. Pre-issuance: prosecutorial discretion and policy considerations

The Prosecutor and the Office of the Prosecutor (OTP) enjoy wide discretion in determining whether a particular situation will be addressed in front of the ICC (Art. 53 ICC Statute), and also which person(s) will be prosecuted. If it chooses not to investigate, for whatever reason, the OTP is arguably in the position of having decisive power over the administration of justice in such situations.³⁰

Moreover, a range of policy considerations have to be taken into account.³¹ An important question is the timing for issuing an AW. This is directly related to the duration of a conflict, which is a problem particular to the ICC compared to the previously established *ad hoc* tribunals, which were established as an internationally-sanctioned reaction to an ongoing conflict. Again it should be stressed that AWs may, depending on the circumstances, either improve the relations between conflicting

²⁴ B. Swart, *Arrest and surrender*, in A. Cassese, P. Gaeta, J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. II, Oxford University Press, New York: 2002, p. 1640.

²⁵ Boas et al., *supra* note 4, p. 209.

²⁶ Art. 89(1) of the ICC Statute.

²⁷ G. Sluiter, *The surrender of war criminals to the International Criminal Court*, 25 *Loyola Los Angeles International and Comparative Law Review* 605 (2002-2003), p. 606; A. Cassese, *On the current trends towards criminal prosecution and punishment of breaches of international humanitarian law*, 9 *European Journal of International Law* 2 (1998), p. 13.

²⁸ Ryngaert, *supra* note 13, p. 4.

²⁹ W. Burke-White, *Proactive Complementarity: the International Criminal Court and national courts in the Rome System of International Justice*, 49 *Harvard International Law Journal* 53 (2008), p. 65.

³⁰ A.M. Danner, *Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court*, 97 *American Journal of International Law* 510 (2003), p. 521.

³¹ See generally, M.R. Brubacher, *Prosecutorial discretion within the International Criminal Court*, 2 *Journal of International Criminal Justice* 71 (2004), pp. 80-84.

parties by causing the person sought by a warrant to make some concessions during peace negotiations, or inflame the conflict by weakening the political stability of the region.³² Ryngaert therefore suggests that before AWs are issued, already during peace negotiations the OTP should address the matters related to the AW's execution. The timing of the application for an arrest warrant may also derive from purely practical reasons, such as giving the OTP more time to prepare the case, especially if the suspect is already in detention, as in the *Lubanga* case.³³

Naming the right addressee of the AW may also be of crucial importance for the future peace process. The general guideline stemming from the Rome Statute itself is that the Prosecutor should focus on those persons who can be held responsible for the commission of the most serious international crimes, so that the gravity requirement is met.³⁴ However, capturing persons who may be highly placed in the hierarchy of a State, especially incumbent officials, has proven extremely difficult. This was recognised by the Office of the Prosecutor in its policy paper from 2003, where the overall interests of an entire case is stressed.³⁵ This is also in line with the suggestions of scholars, who point out advantages of such targeting less important officials, e.g. the higher likelihood of States being willing to sacrifice them,³⁶ which may increase the Court's legitimacy for prosecuting further crimes in the same region.³⁷

The OTP, when filing a formal application to the PTC in accordance with Art. 58 of the ICC Statute, has to ensure that three requirements are met. Turone suggests that, *a contrario* from Art. 53(2), a request for an arrest warrant is only allowed when there are reasonable grounds to believe there was or has been a crime within the Court's jurisdiction committed by the suspected person;³⁸ there are no reasonable grounds to believe that the case is inadmissible; and it conforms to the interests of justice. In complying with these parameters, the prosecutorial discretion varies, reaching the widest range with reference to the 'interests of justice.'³⁹ Additionally, the Prosecutor's application for an AW should contain, *inter alia*, the relevant data on the suspect, a summary of the facts and evidence⁴⁰ as well as the reasons for the application (Art.

³² Ryngaert, *supra* note 13, pp. 28-30.

³³ Schabas, *supra* note 12, p. 264.

³⁴ Preamble paras. 4-5, Art. 5, Art. 17(1)(d) of the ICC Statute.

³⁵ Office of the Prosecutor, *Paper on some policy issues before the Office of the Prosecutor* (2003), <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Policies+and+Strategies/Paper+on+some+policy+issues+before+the+Office+of+the+Prosecutor.htm>, (accessed 29 January 2013).

³⁶ Ryngaert, *supra* note 13, p. 26.

³⁷ Gosnell, *supra* note 15, pp. 847-8.

³⁸ According to the Regulations of the OTP, this is supposed to be "based on [a] solid factual and evidentiary foundation", Regulation 53, *Regulations of the Office of the Prosecutor* (2009) ICC-BD/05-01-09.

³⁹ G. Turone, *Powers and duties of the Prosecutor*, in: A. Cassese, P. Gaeta, J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary, vol. II*, Oxford University Press, New York: 2002, pp. 1172-4.

⁴⁰ The amount of the evidence disclosed to the PTC has been a subject of discussion in *Lubanga*, where the PTC required the Prosecutor to provide additional information; *Lubanga*, 2006, p. 9.

58(2)). Turone describes the application for an AW as “a sort of provisional indictment” in which the Prosecutor reveals his intention to prosecute the case.⁴¹

1.2.2. The Court’s powers to issue arrest warrants

The Prosecutor’s application for an AW undergoes the first stage of judicial review when the AW reaches the Pre-Trial Chamber.⁴² The Chamber reviews it in accordance with Art. 58(1) of the Rome Statute, which identifies the test to be applied: a certain standard of proof suggesting that a crime within the Court’s jurisdiction has been committed by the suspected person and the necessity of the arrest. These requirements are exhaustive⁴³ and no additional obligations are provided in the Regulations of the OTP.⁴⁴

The first element is the existence of “reasonable grounds,” and the evidentiary standard at this stage is lower than during the confirmation of the charges or, of course, during the trial. Nevertheless, this level cannot be abstractly evaluated with respect to the ICC standards only. If the Court wants to ensure that the suspect is detained, it should look at the evidentiary standard of the State to which the AW will be directed for execution.⁴⁵ This entails certain consequences. Firstly, if the national authorities are not satisfied with the background information provided, this can serve them as an excuse to refuse cooperation. Secondly, this implies that close cooperation and the exchange of information should exist both between the OTP and PTC, as well as between the Court itself and the States, so that the ICC is aware of the requirements laid down by the respective national laws. Thirdly, the Court’s organs must be future-oriented in every procedural step they take in order to maximise the likelihood of the successful apprehension of the suspect and bringing him to trial. Additionally, the issuance of AWs may be slowed down if the Prosecutor has not provided sufficient information regarding the suspect’s criminal responsibility. The PTC needs to be supplied with strong grounds to justify the deprivation of personal liberty⁴⁶ in order to comply with Art. 21(3), which refers to internationally recognised human rights. Therefore, the PTC may ask for additional evidence at this point.

The arrest must appear necessary in order to ensure the presence of the accused at trial, which in national jurisdictions means no less than to prevent that person from fleeing.⁴⁷ Another reason to arrest might exist if the person could obstruct the proceedings or interfere with the investigation. The rationale behind all these reasons is of preventive nature.

⁴¹ Turone, *supra* note 39, pp. 1177-8.

⁴² Boas *et al.*, *supra* note 4, p. 209.

⁴³ S. Zappalà, *Rights of persons during an investigation*, in A. Cassese, P. Gaeta, J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. II, Oxford University Press, New York: 2002, p. 1198.

⁴⁴ Hall, *supra* note 10, p. 1136.

⁴⁵ Swart, *supra* note 24, p.1691. This obligation stems in particular from Art. 91(2)(c) of the ICC Statute.

⁴⁶ Boas *et al.*, *supra* note 4, p. 183; Sluiter, *supra* note 27, p. 617.

⁴⁷ Sluiter, *supra* note 27, p. 619.

If the conditions of Art. 58 are fulfilled, this automatically means that the PTC will issue an AW. Hall observes that there is no space for judicial discretion for either political or ideological reasons.⁴⁸ Therefore, when the application meets the legal requirements, the Registry is to prepare a request to the custodial State for the arrest and surrender of the suspect,⁴⁹ the route to which is opened up by Art. 58(5). The PTC in *Lubanga* clearly stated that it is the Chamber itself that can transfer the request for arrest and surrender for further action, doing so through the Registry.⁵⁰ It denied the Prosecutor's continuing initiative in this respect and marked this moment as commencing the AW execution stage.

1.2.3. Procedural safeguards for cooperation with respect to the Court's request to arrest and surrender

It is observed in the literature that the ICC represents a unique mixture of horizontal and vertical regimes.⁵¹ As far as the cooperation mechanism is concerned, the ICC Statute employs the vertical model.⁵² It is precisely this fact that creates certain safeguards ensuring the effectiveness of arrest warrants, which are included in a number of provisions of the Statute.

After the issuance of an arrest warrant, the Court may either request selected entities or, if the AW is made public, may generally ask all State Parties (SPs) to arrest and surrender the suspect.⁵³ SPs are legally obliged to follow such a request. Generally, the execution of the ICC's request is regulated in Part 9 of the Statute,⁵⁴ with the key Art. 89. Note that it does not use the word "order" to describe the obligatory nature of the Court's request. Instead it talks only of a "request for the arrest and surrender of a person," perhaps suggesting voluntary compliance and a more horizontal approach.⁵⁵ However, the provision becomes much stricter when it describes its desired effect: "States Parties *shall*, in accordance with the provisions of this Part and the procedure under their national law, *comply* with requests for arrest and surrender" (Art. 89(1) *in fine*, emphasis added).

Art. 102 of the Statute provides another method for facilitating cooperation. By distinguishing between extradition ("delivering up of a person by one State to another as provided by treaty, convention or national legislation") and surrender ("delivering up of a person by a State to the Court, pursuant to this Statute"), Art. 102 definitively eliminates the grounds for refusal to cooperate if a traditional extradition was requested,

⁴⁸ Hall, *supra* note 10, p. 1138.

⁴⁹ Boas *et al.*, *supra* note 4, p. 208.

⁵⁰ *Lubanga*, 2006, para.117.

⁵¹ R. Rastan, *Testing co-operation: the International Criminal Court and national authorities*, 21 Leiden Journal of International Law 431 (2008), p. 432.

⁵² *Ibidem*; see also C. Krefß, K. Prost, *Surrender of persons to the Court*, in O. Triffterer (ed.), *Commentary of the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article*, Beck, München: 2008, pp. 1539-1540.

⁵³ With respect to the three cooperation regimes under the ICC Statute, see generally, Sluiter, *supra* note 27, pp. 609-610.

⁵⁴ Cf. Swart, *supra* note 24, p. 1677.

⁵⁵ Rastan, *supra* note 51, p. 433.

for which it has been positively praised.⁵⁶ As a result, provisions prohibiting the rendition of a State's own nationals for the purposes of extradition,⁵⁷ as well as the political offence exception and the double criminality requirement⁵⁸ are invalid in relation to the ICC. The Court therefore moved away from extradition models to the extent necessary to ensure the coherent interpretation of domestic laws of States in accordance with the Statute, without requiring changes in national laws.⁵⁹

Art. 92 also safeguards the execution of AWs by placing provisional arrest at the Court's disposal. Foreseen as an appropriate measure in urgent cases, provisional arrest allows the ICC to require the arrest of a person before the obligatory documents supporting a normal request for arrest and surrender are sent. This may be seen as a way of obtaining more time to gather the necessary documents, and in fact the OTP normally asks the Court to request a provisional arrest before issuing the formal request for arrest and surrender.⁶⁰ The arrival of supporting documents must occur within 60 days following a provisional arrest (Rule 188 RPE). Upon the expiry of that period without the issuance of an official AW, the suspect provisionally arrested may be released (Art. 92(3)). However, the wording of the provision suggests that a corresponding arrest warrant should be issued before.⁶¹

Unfortunately, notwithstanding this supra-state cooperation regime between the Court and SPs, the enforcement mechanisms available to the ICC are limited.⁶²

2. THE INFLUENCE OF ARREST WARRANTS ON SELECTED AREAS OF INTERNATIONAL LAW AND INTERNATIONAL CRIMINAL LAW

2.1. Obligations of States Parties

2.1.1. Complementarity issue

One of the reasons for which AWs may remain outstanding is the negative attitude of States affected by their issuance. The issue of complementarity is raised here. The key problem is well described by Benvenuti:

⁵⁶ D. Rinoldi, N. Parisi, *International co-operation and judicial assistance between the International Criminal Court and States Parties*, in F. Lattanzi, W. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court, vol. I*, Il Sirente, Fagnano Alto: 1999, p. 347; B. Swart, *International cooperation and judicial assistance. General problems*, in A. Cassese, P. Gaeta, J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary, vol. II*, Oxford University Press, New York: 2002, p. 1596.

⁵⁷ Schabas, *supra* note 12, p. 265.

⁵⁸ Sluiter, *supra* note 27, pp. 638-9; see generally Swart, *supra* note 24, pp. 1648-54.

⁵⁹ Especially if the purpose of surrender and extradition is the same, i.e. removing a person from one State's jurisdiction to another. Swart, *supra* note 24, p. 1680, 1697.

⁶⁰ Ryngaert, *supra* note 13, p. 27.

⁶¹ Swart, *supra* note 24, p. 1692.

⁶² Kreß, Prost, *supra* note 52, p. 615; see more in Section 3.1 herein.

These States are usually the most connected with the crime (territorial State, nationality State, detention State) and consequently they are precisely those whose cooperation is essential to effective prosecution. Why would these States, genuinely unwilling to carry out investigation or the prosecution, be subsequently cooperative with the Court?⁶³

Due to the principle of complementarity, the SPs are primarily obliged to prosecute, and only if they are unwilling, unable or inactive,⁶⁴ within the meaning of Art. 17, does the Court take over jurisdiction. This is essentially linked to the admissibility of a case. Should the Court decide that a State is inactive, unwilling or unable to prosecute, the case is admitted. Arguably, the decisive factor is whether there are or have been proceedings carried out in the national state.⁶⁵ When an AW is issued, the suspect may bring a claim on the basis of *ne bis in idem* to the national court (Art. 89(2)). This court is obliged to consult with the ICC to check whether it has ruled on admissibility. Only if the admissibility proceedings are pending or they have not yet taken place (Art. 95), may the surrender and, in the latter case, even the arrest be delayed.⁶⁶ Most notably, this is the current status of the AW issued against Saif Gaddafi, execution of which was postponed until the admissibility challenge is decided.⁶⁷ Therefore, in order to ensure that the suspect is surrendered to the Court, the PTC should preferably decide upon admissibility at an earlier stage. Given that there is a chance to preliminarily assess admissibility when the OTP's application for issuance of an AW is examined, the Court's decision in *Lubanga* deserves mentioning. The judges in that case decided that "an initial determination on whether the case (...) falls within the jurisdiction of the Court and is admissible is a prerequisite to the issuance of a warrant of arrest",⁶⁸ strengthening their previous approach in *Kony* of simply "being satisfied (...) and without prejudice to subsequent determination, the case (...) appears to be admissible."⁶⁹ This is a positive development which eliminates the challenges to arrest requests which could take place under Art. 95 of the Statute.

Notwithstanding, there are still problems related to complementarity, particularly visible in the *Situation in Uganda*. After Uganda had referred itself to the ICC, hopes for its cooperation were high. However, in 2008 (three years after the Kony AW was issued) the Government of Uganda established the High Court, which was to independently

⁶³ P. Benvenuti, *Complementarity of the International Criminal Court to national criminal jurisdictions*, in F. Lattanzi, W. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court*, vol. I, II Sirente, Fagnano Alto: 1999, p. 50.

⁶⁴ With respect to the common omission of inactivity as a factor, see D. Robinson, *The mysterious mystery of complementarity*, 21 Criminal Law Forum 67 (2010); cf. also, I. Stegmüller, *Complementarity thoughts*, 21 Criminal Law Forum 159 (2010).

⁶⁵ Robinson, *supra* note 64, pp. 68-72.

⁶⁶ Rinoldi, Parisi, *supra* note 67, pp. 350-1.

⁶⁷ *Gaddafi and Al-Senussi*, Decision on the postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to Article 95 of the Rome Statute of 1 June 2012, ICC-01/11-01/11-163.

⁶⁸ *Lubanga*, 2006, para. 18.

⁶⁹ *Kony*, Warrant of Arrest for Joseph Kony of 8 July 2005, amended 27 September 2005, ICC-02/04-01/05, para. 38.

try persons indicted by the ICC.⁷⁰ In such an event, obviously questions concerning complementarity and the *ne bis in idem* principle specifically arose, and it is difficult to avoid the suspicion that it could have been an act designed to remove the ICC's jurisdiction. Significantly, in September 2009, the Appeals Chamber confirmed that the case is admissible.⁷¹ It still cannot be excluded, however, that once proceedings against the suspects commence in Uganda, the ICC will have to drop the investigation and permit trial there.

Burke-White suggests a solution to the problem of complementarity. Instead of spending resources on trying to bring a case in the Court, he proposes the notion of "proactive complementarity," which would exploit the mechanisms inherent in the Statute in the opposite direction. Since the Statute confirms the State's duty to investigate in the first place, then, according to Burke-White, "the ICC can and should encourage, and perhaps even assist, national governments to prosecute international crimes".⁷² If the Court adopts this approach, there will be fewer AWs issued and there is a chance that they will become more effective, because the international efforts could concentrate on a smaller number of existing cases. This could indeed be a promising approach. However, it would not solve the problem of allegations against the highest officials in situations when they still hold incumbent positions and have direct influence over the State's policy of prosecutions. Moreover, the OTP for now seems to have chosen a completely opposite path in its policies, and instead of increasing the chances of a prosecution in national courts, self-referrals are promoted.⁷³ This can pose problems for the ICC. If the Court is incapable of obtaining the suspects even in case of self-referrals, this may have potential negative effects on both its image and legitimacy among the international community.

2.1.2. Conflicting obligations

There is a significant possibility that a State to which the ICC has directed as request for arrest and surrender may find itself in a situation where it has to choose between conflicting obligations. Firstly, such a State may be simultaneously requested to arrest and transfer the sought-after person to another State, which may be either a SP or a non-Party State to the Statute. Secondly, there may be some other international obligations that the requested State is bound by, and which may prevail over the Court's request.

The first situation is directly dealt with by Art. 90 of the Statute, and the solution is linked to the previously discussed problem of admissibility. Again, as long as the PTC

⁷⁰ Case information sheet – The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen (2010), <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0204/Related+Cases/ICC+0204+0105/Background+information/> (accessed 29 January 2013).

⁷¹ *Kony*, 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.

⁷² Burke-White, *supra* note 29, p. 56.

⁷³ W. Schabas, *Complementarity in practice: some uncomplimentary thoughts*, 19 Criminal Law Forum 5 (2008), p. 9.

has ruled the case admissible and in doing so has taken all the relevant information into consideration, the ICC's request is given priority over another SP's request (Art. 90(2)). A delay may occur if the proceedings on admissibility are pending (para. 3).

Although only SPs are addressees of Article 90(2), which stems from the principle of *pacta tertiis nec nocent nec prosunt*, para. 4 of this provision deals with the situation when a second request comes from a non-Party to the Statute. Priority is given to the Court only if the requested State is under no binding international obligation to extradite and the ICC has admitted the case. When admissibility has not yet been decided upon, the requested State is free to proceed with the competing request (para. 5). It is also allowed to make its own decision on compliance with the duty to extradite (para. 6). The same solution as regards the request for extradition by a non-Party State is suggested in the Statute to resolve the problem of conflicting requests for the same person, but for different conduct.

This provision visibly favours the obligations towards the ICC,⁷⁴ and it is hoped that this will be reflected in reality. Extradition agreements very often contain a provision giving the requested State a choice as to which request should be obeyed in the event of conflicting requests. Hence, theoretically it is very easy to give preference to the ICC's request and execute an AW.⁷⁵ Some authors are not so positive however. Problems may arise in a situation where a "chain of requests" has taken place, and the person sought by the Court may have already been extradited to a requested State by another State.⁷⁶ On the other hand, the ICC may not proceed with the request for surrender if the SP would have to act inconsistently with its international obligations (Art. 98(2)).

The Prosecutor should arguably sometimes put pressure on the custodial State to choose surrender to the ICC over extradition. This may be necessary to ensure that the SP gives priority to the ICC's request. A territorial State requesting extradition might not itself be interested in prosecuting the perpetrators, and they might request their extradition in order to shield those persons from international prosecution. This brings up the problem of conflicting interests in international criminal justice. Therefore, the OTP should make full use of its diplomatic skills, obtaining the strong support of the international actors.⁷⁷

2.2. Obligations of non-Party States

2.2.1. Acceptance of jurisdiction *ad hoc* and agreements with non-Party States

The *pacta tertiis* principle bears particular relevance in relation to AWs issued for nationals of those States which remain outside ICC jurisdiction. It creates an obvious limitation to the Court's ability to administer justice, especially in a case when many international crimes have been committed in a non-Party State, or a suspect sought for

⁷⁴ Rinoldi, Parisi, *supra* note 67, p. 355.

⁷⁵ Sluiter, *supra* note 27, p. 630.

⁷⁶ See generally, Swart, *supra* note 24, p. 1681.

⁷⁷ Ryngaert, *supra* note 13, pp. 45-7.

arrest flees to such a country. However, the Statute provides for certain measures that allow the Court to cooperate with such non-Party States.

First of all, a non-Party State may accept the ICC's jurisdiction *ad hoc* on the basis of Art. 12(3). This may be necessary when either an SP has referred a situation, or the Prosecutor has initiated an investigation *proprio motu* (Art. 13). The latter indeed took place in 2003, when Côte d'Ivoire submitted a declaration accepting the ICC's jurisdiction.⁷⁸ Subsequently, an AW in *Gbagbo* was issued under seal⁷⁹ in November 2011, and was unsealed once the suspect was transferred to the ICC a week later by the Ivorian authorities. Gbagbo's prompt apprehension not only highlighted the willingness of Côte d'Ivoire to allow the investigations, but also its commitment to execute the ICC's decisions. As Art. 12(3) provides for a duty to cooperate in accordance with Part 9 of the Rome Statute, Côte d'Ivoire was bound by the provisions therein, including the key Art. 89. It has so far fulfilled its obligations towards the ICC, and time will show whether this state of affairs will continue, in particular with respect to other prosecutions that follow.⁸⁰ While this example is promising, there are no other instances to compare to it. Nevertheless, it is striking that a non-Party State may be more willing to closely cooperate with the Court than a SP.

Apart from the *ad hoc* acceptance of jurisdiction, Art. 87(5)(a) provides that "[t]he Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State, or any other appropriate basis."⁸¹ Since the Court does not have the necessary enforcement powers and it is for its members to implement such arrangements, an invitation to provide assistance on an *ad hoc basis* is issued by the Court on behalf of the SPs.⁸² This means that even though an agreement may be signed, the Court cannot ensure its effectiveness and relies on the SPs to use the means at their disposal instead. On the other hand, according to para. (b), in the case of non-cooperation the matter may be referred to the Assembly of States Parties (ASP), which discusses it and can possibly agree on measures to be taken by the SPs individually towards the non-cooperating third State.⁸³ Additionally, it should be noted that agreements under Art. 87(5) may not be as effective as acceptance of jurisdiction under Art. 12. Whilst the latter obliges the third State to comply with Part 9 of the Statute in its entirety, the former provides the non-Party State with the freedom to establish the limits of cooperation offered to the

⁷⁸ The Declaration, available at <http://www.icc-cpi.int/NR/rdonlyres/9CFE32D1-2FCB-4EB4-AC-A0-81C2343C5ECA/279844/ICDEENG7.pdf>, (accessed 16 January 2013), was later reconfirmed in 2010 and 2011.

⁷⁹ *Gbagbo*, Situation in the Republic of Côte d'Ivoire, Warrant of Arrest for Laurent Koudou Gbagbo of 23 November 2011, ICC-02/11-01/11-1.

⁸⁰ The OTP announced that more cases are being investigated. OTP Statement of 30 November 2011.

⁸¹ Art. 87(5)(a) of the ICC Statute. Notably, Art. 87(6) creates the same competence to enter into agreements with international organisations.

⁸² G. Palmisano, *The ICC and third states*, in F. Lattanzi, W. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court, vol. I*, Il Sirente, Fagnano Alto: 1999, p. 406.

⁸³ *Ibidem*.

ICC. Thus the obligations of arrest and surrender may be excluded from the scope of assistance, and the Court does not have the authority to impose them.⁸⁴

There are however other options available as a remedy in such situations. Firstly, SPs are free to rely on extradition agreements which bind them and third States, both multilateral and bilateral. Through these they may request the extradition of a suspect in order to try them for the international crimes committed.⁸⁵ Even though this might not be successful, and the requested State may refuse extradition, such an internationally visible State action may put the non-cooperative State under international pressure. As a result they may feel forced either to prosecute the case themselves or in some circumstances (albeit unlikely) to surrender the suspect to the ICC.⁸⁶

Secondly, the OTP may exploit “cooperation frameworks” existing in a particular situation⁸⁷ on the basis of Art. 54(3)(c) and (d) of the Statute. According to these provisions, “the Prosecutor may seek cooperation of any State” and enter into such “arrangement or agreements” as may be necessary to improve the prospects of cooperation, as long as they are consistent with the Statute. The OTP may make an informal international deal with States involved in the prosecution of international crimes, whether SP or non-Party State.⁸⁸ This may be particularly helpful if there are bilateral extradition agreements in force between State A (making a deal with the OTP) and State B (where a suspect is located). However, AWs against such persons must be issued from both of these States. The crux of such a deal is usually that the OTP promises for a certain time not to seek enforcement of an AW against a person from State A, if this State in turn uses its powers to apprehend another suspect from State B.⁸⁹

Such an exchange of favours could increase the Court’s ability to prosecute, but simultaneously it prioritises certain crimes and suspects over others. It is also highly dependent on the prevailing political climate.

2.2.2. Security Council’s referral

The Security Council (SC) holds a very special position in the ICC regime. Being a part of the United Nations (UN), the SC not only has a unique role, as it holds enforcement powers, but its relationship with the Court adds special legitimising features to the ICC as an international organisation. Because the decisions of the SC taken under Chapter VII of the UN Charter are binding on the members of the UN by virtue of Art. 25 and Art. 48,⁹⁰ the scope of the ICC jurisdiction may be considerably stretched not only over SPs, but also over non-Party States. According to Art. 13(b)

⁸⁴ Swart, *supra* note 56, p. 1617.

⁸⁵ Swart, *supra* note 24, p. 1686.

⁸⁶ *Ibidem*, p. 1687.

⁸⁷ Ryngaert, *supra* note 13, p. 15.

⁸⁸ *Ibidem*.

⁸⁹ *Ibidem*.

⁹⁰ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (hereinafter the UN Charter).

of the Rome Statute, the SC can refer *any* situation to the Prosecutor and the ICC is allowed to exercise jurisdiction over it. This means that even if the situation concerns a non-Party State, the OTP is free to investigate and the State concerned has to obey the duties imposed on them by the SC in the referring resolution. Arguably, they may even exceed the scope of obligations to cooperate inherent in Part 9 of the Statute.⁹¹ Additionally, it seems that in the event of a conflict between the SC's decisions and the Rome Statute, the former would be binding on the SPs, as it originates from the UN Charter and therefore enjoys precedence over other treaty obligations.⁹² These powerful competences of the SC with respect to the ICC are generally perceived to enhance cooperation,⁹³ although the reality does not seem to confirm this perception. Not only has the Court's experience been beset with problems, but the difficulty of reaching consensus within the SC also demonstrates that referrals may prove problematic. It does nevertheless eliminate the need for the additional agreements previously discussed, and an SC referral suffices to establish a duty to cooperate.

To date two SC referrals have taken place – for the situations in Darfur and in Libya.⁹⁴ Neither of them has so far brought about the expected results of surrendering the suspects, and the AWs issued remain outstanding. Both resolutions, using the same wording, impose an obligation on the respective authorities:

to cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and (...) urges all States and concerned regional and other international organizations to cooperate fully with the Court and the Prosecutor.⁹⁵

The duty of cooperation with the ICC is therefore created solely on the basis of these resolutions, and does not derive from the Rome Statute. Non-Party States are thus also bound by it and are responsible for non-compliance and subject to possible measures undertaken by the SC in exercise of its powers under Chapter VII of the UN Charter.⁹⁶ This causes certain problems concerning the actual status of non-Party States, which seem to effectively be treated as *quasi*-States Parties. However, a SC referral of a situation to the ICC ought not to be understood as imposing “on all UN member States the acceptance of the jurisdiction of a permanent tribunal established by a pre-existing treaty to which not all these States are parties.”⁹⁷ Rejection of such a thesis arises especially when the SC Resolutions are vague and their addressees are not sufficiently determined.

⁹¹ Schabas, *supra* note 12, p. 252.

⁹² Art. 103 UN Charter; Rastan, *supra* note 51, p. 443.

⁹³ *Ibidem*, p. 441.

⁹⁴ Darfur: SC Resolution 1593 (2005), S/RES/1593; Libya: SC Resolution 1970 (2011), S/RES/1970.

⁹⁵ SC Res. 1593, operative para. 2; SC Res. 1970, operative para. 5.

⁹⁶ *But see* Benvenuti, *supra* note 63, p. 41; Rastan, *supra* note 51, p. 442; *see also* L. Condorelli, S. Villalpando, *Can the Security Council extend the ICC's jurisdiction?*, in A. Cassese, P. Gaeta, J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary, vol. II*, Oxford University Press, New York: 2002, pp. 571-582.

⁹⁷ G. Palmisano, *supra* note 82, p. 418.

Nonetheless, the ICC may potentially gain much from its unique relation to the SC. Arrest warrants may be subject to the binding decisions of this organ, and hence be effected quicker. They may be addressed to any State that is capable of apprehending suspects, and the ICC does not have to limit itself to its States Parties. Moreover, the Court is empowered to notify the SC of a non-cooperative State (Art. 87(5)(b) *in fine* and 87(7)) and has done so numerous times with respect to Sudan. Additionally, international attention is necessarily drawn to a SC referral, which may simply put pressure on the uncooperative State to comply with its obligations towards the ICC.⁹⁸

Although the SC Resolutions are binding, SC referrals of a situation in a non-Party State have so far proven ineffective. Whilst Libya at least filed an admissibility challenge which consequently postponed the execution of the AW for Saif Gaddafi and Al-Senussi, Sudan has been almost totally uncooperative. Since the issuance of AWs (in some cases as long as five years ago) ordering the arrest of Al Bashir and other Sudanese citizens, their execution continues to appear unlikely. For this reason, the OTP may want to try other ways of ensuring cooperation. By making “internal deals” with Sudan, the Prosecutor could offer not to pursue the immediate execution of AWs for high State officials in return for apprehending lower rank suspects sought by the ICC.⁹⁹

Such measures are not only useful to obtain suspects and proceed with prosecutions, but they also may help to secure the Court’s legitimacy. The ICC is faced with a difficult problem when the States over which it enjoys jurisdiction are not willing to cooperate and continuously oppose its actions, and this diminishes its ability to fulfil the objectives it was created for. This may cause that the ICC is perceived by the public as not successful. Therefore, the Court must ensure that its actions are visible in the international arena and a belief is created that it is impossible to avoid justice.

2.3. Immunities of high State officials whose arrest is sought

Immunities¹⁰⁰ may create a significant obstacle to the execution of AWs. Originating from customary law, they prevent the Court from exercising jurisdiction over persons who enjoy immunity protection. These are mainly heads of States and other officials who represent their States in the international arena and fulfil diplomatic functions. Since in international criminal law the perpetrator often holds an official position, immunities may bar the courts from administering justice (at least as far as incumbent officials are concerned, as they enjoy personal immunities).¹⁰¹

⁹⁸ Ryngaert, *supra* note 13, p. 14.

⁹⁹ *Ibidem*, p. 15.

¹⁰⁰ This section deals with immunities in a general way. See generally A. Dlubak, *The immunity of high state officials in relation to their individual criminal responsibility in international criminal law*, University of Wrocław Digital Library (2012), <http://www.bibliotekacyfrowa.pl/Content/38596/001.pdf>, (accessed 18 January 2013).

¹⁰¹ Personal immunity covers both official and private acts when committed prior to or whilst holding the office and ends with cessation of tenure in the office. Functional immunity, on the other hand, covers only acts committed in the official capacity that are within the normal functions and does not end with the tenure.

In response to this all-too-typical obstacle, the drafters of the Rome Statute included a specific Article to deal with immunities, namely Art. 27. There is agreement among scholars that this provision eliminates the possibility of invoking both personal and functional immunities by SPs when acting in front of the ICC. This constitutes a novel approach to this issue – by ratifying the Rome Statute, the SPs agreed to waive the immunities enjoyed by their officials if they face the Court.¹⁰²

However, it is important to note that this provision binds SPs only, and that officials of non-Party States are still entitled to immunities.¹⁰³ This argument is supported by the existence of another provision of the Rome Statute that directly relates to the problem, and which no other international source of law has dealt with in this way. Art. 98(1) explicitly mentions the issue of conflicting obligations under international law which may arise when a SP is requested to arrest and surrender a person protected by immunities by virtue of the fact that they come from a non-Party State. The ICC has to ensure that a SP is not put in a situation of conflicting obligations, and in order to achieve this the Court should “first obtain the cooperation of that third State for the waiver of the immunity.”¹⁰⁴ This procedural requirement is further strengthened in Rule 195(1) of the RPE, which enables the requested State to provide any and all necessary information to the ICC signalling that there exist contrary obligations of this kind.

Immunities still remain an extremely difficult issue with respect to non-Party States, and surprisingly for SPs too. What was envisioned as being resolved as a simple procedural matter in the Rome Statute instead poses tricky questions interlinked with politics and inter-State loyalty. The situation in Darfur serves as a painful reminder of how intricate and difficult cooperation front of the ICC can be in certain cases.

Although the wording of the SC Resolution referring the Sudanese situation to the ICC is strong and obliges Sudan and other UN Member States to assist the Court, it is not observed by its addressees. Not only Sudan, whose status as a non-Party State could serve as somewhat of an explanation, but also Malawi and Chad, i.e. ICC States Parties, have failed to cooperate with the Court and arrest Al Bashir, the sitting President.

There are voices in the literature that argue that the Sudanese President is not entitled to immunity. Some believe that the SC Resolution implicitly stripped him of this protection,¹⁰⁵ while others suggest that the referral itself changes a non-Party

¹⁰² P. Gaeta, *Official capacity and immunities*, in A. Cassese, P. Gaeta, J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. II, Oxford University Press, New York: 2002, p. 991; D. Akande, *International law immunities and the International Criminal Court* 98 *American Journal of International Law* 407 (2004), p. 420.

¹⁰³ The International Court of Justice in the case of *DRC v Belgium* issued a much-criticised (*inter alia* due to the lack of a distinction between personal and functional immunities) decision on immunities, which however should not be lost sight of. According to the Court, immunities cease to protect high state officials when they face the possibility of being prosecuted by international criminal courts; see *International Court of Justice: Arrest Warrant of 11 April 2000 (DRC v Belgium) (Judgement)* [2002] ICJ Rep 2002 p.3, para. 61 *in fine*.

¹⁰⁴ Art. 98(1) *in fine* of the ICC Statute.

¹⁰⁵ M. Ssenyonjo, *Case comment: the International Criminal Court arrest warrant decision for President Al Bashir of Sudan*, 59 *International and Comparative Law Quarterly* 205 (2010), p. 212.

State into a *quasi*-SP, which is thus bound by all the provisions of the Rome Statute, including Art. 27.¹⁰⁶ The PTC took a different approach in its recent decision against Malawi regarding its failure to cooperate with the Court. Invoking numerous sources of international law, whether binding or merely declaratory, it came to a conclusion that “customary international law creates an exception to Head of State immunity when international courts seek a Head of State’s arrest for the commission of international crimes.”¹⁰⁷ This bold statement, together with its reasoning, has been widely criticised by many scholars on various grounds. Although such a legal development would normally be greeted enthusiastically, it appears that the PTC has either gone too far or could have used a better reasoning in reaching its conclusion.¹⁰⁸

In particular, one may point PTC’s use of incorrect sources of law whilst being bound by a list contained in Art. 21(1)(a);¹⁰⁹ its failure to consider potential counter-arguments;¹¹⁰ a complete obliviousness to the purpose of Art. 98(1);¹¹¹ and finally an attempt to establish the existence of a customary rule without proving the necessary State practice (and against the clear opposition of States like Malawi or Chad). Most controversial however was the PTC’s disregard of the role of Art. 98(1), which was introduced to the Statute precisely because the drafters “deemed it necessary (...) that customary and treaty rules concerning respect for State and diplomatic immunity *are to prevail* over the duty of States Parties to implement the Court’s request for cooperation and judicial assistance”¹¹² (emphasis added). It is undisputable that a norm conflict still exists, despite the PTC’s decision to the contrary. As pointed out by Akande, the customary law rules pronounced by the Chamber might remove Bashir’s immunity in front of the ICC, but they remain active as far as the national authorities of Malawi

¹⁰⁶ D. Akande, *The legal nature of Security Council referrals to the ICC and its impact on Al Bashir’s immunities*, 7 *Journal of International Criminal Justice* 333 (2009), p. 342. Interestingly, the PTC in a recent decision denied the validity of this argument: *Al Bashir* Corrigendum to the Decision Pursuant to Article 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 of 13 December 2011, ICC-02/05-01/09-136-Corr, para. 18.

¹⁰⁷ *Al Bashir*, 2011, para. 43. See also P. Gaeta, *Does President Al Bashir enjoy immunity from arrest?*, 7 *Journal of International Criminal Justice* 315 (2009), pp. 324-5.

¹⁰⁸ C. Kreß, K. Prost, *Cooperation with respect to waiver of immunity and consent to surrender*, in O. Triffterer (ed.), *Commentary of the Rome Statute of the International Criminal Court. Observers’ Notes, Article by Article*, Beck, München: 2008, pp. 1611-1613.

¹⁰⁹ D. Jacobs, *A sad homage to Antonio Cassese: the ICC’s confused pronouncements on state compliance and head of state immunity*, <http://dovjacobs.blogspot.co.uk/2011/12/sad-hommage-to-antonio-cassese-iccs.html> (2011) (accessed 19 January 2013).

¹¹⁰ W. Schabas, *Obama, Medvedev and Hu Jintao may be prosecuted by International Criminal Court, Pre-Trial Chamber concludes*, <http://humanrightsdoctorate.blogspot.co.uk/2011/12/obama-medvedev-and-hu-jintao-may-be.html> (2011) (accessed 19 January 2013).

¹¹¹ Jacobs, *supra* note 109, <http://dovjacobs.blogspot.co.uk/2011/12/sad-hommage-to-antonio-cassese-iccs.html>; D. Akande, *ICC issues detailed decision on Bashir’s immunity (at long last) but gets the law wrong*, <http://www.ejiltalk.org/icc-issues-detailed-decision-on-bashir%E2%80%99s-immunity-at-long-last-but-gets-the-law-wrong/> (2011) (accessed 19 January 2013).

¹¹² Palmisano, *supra* note 82, p. 410; emphasis added.

(and any other SPs) are concerned.¹¹³ According to him, the Court failed to distinguish the lack of immunities from the legal ability to arrest and surrender. The former, ruled by Art. 27, applies only to the ICC as an international court, and the latter, being governed by Art. 98(1), relates to the States and their international obligations.

The Court cannot simply pretend that the problem does not exist, especially if its constitutive instrument may provide a legal solution to it. By doing so it can bring about negative consequences for the outstanding AWs, as the ICC as an international criminal justice institution will lose legitimacy in the eyes of the SPs, possibly hindering future cooperation even further. It is thus imperative that the Court tries to establish positive relations with the States concerned and aims at effectuating the AWs. Due to the difficult situation in Sudan, the preferred option of the ICC may be to exercise patience and wait until Bashir's popularity decreases and he leaves the office which grants him immunity.¹¹⁴ Such a strategy appears to have been behind the OTP's decision to issue a public AW, instead of keeping it secret and seeking to obtain the swift arrest of Bashir.¹¹⁵

The ideal scenario would be that, whenever the OTP is dealing with suspects from a non-Party State, the Court should first ensure that this State waives the immunities of their officials.¹¹⁶ Alternatively, the Security Council may use its powers under Chapter VII and lift the immunities of the suspects,¹¹⁷ although so far it has not done so and has been rather reluctant in this regard. Had either of these actions been taken, the ICC could have proceeded to transmit the AW to the chosen States in accordance with Art. 89, and without the need to worry about the possible consequences of the invocation of Art. 98.

3. POLITICAL CHALLENGES TO ISSUED ARREST WARRANTS

3.1. Enforcement of arrest warrants

Once AWs are issued, frequently the ICC is faced with inaction on the part of State addressees. In such situations, Art. 87(7) empowers the ICC to make a *finding* on non-compliance with the Court's requests and further refer it to the ASP or, where appropriate, i.e. when resulting from a referral by the SC, to refer the matter to the SC. The lack of cooperation should rise to the level of preventing it from "exercising its functions and powers" – there is no doubt that failure to arrest a suspect fulfils this requirement. Similarly, as pointed out before, Art. 87(5)(b) entitles the Court to *inform* those respective bodies (the ASP or SC) of the lack of compliance with respect to formerly concluded agreements or arrangements on cooperation.¹¹⁸

¹¹³ Akande, *supra* note 111, <http://www.ejiltalk.org/icc-issues-detailed-decision-on-bashir%E2%80%99s-immunity-at-long-last-but-gets-the-law-wrong/>.

¹¹⁴ Ryngaert, *supra* note 13, p. 11.

¹¹⁵ *Ibidem*, p. 25.

¹¹⁶ Kreß, Prost, *supra* note 108, p. 1613.

¹¹⁷ Rastan, *supra* note 51, p. 443.

¹¹⁸ C. Kreß, K. Prost, *Requests for cooperation: general provisions*, in O. Triffterer (ed.), *Commentary of the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article*, Beck, München: 2008, p. 1525.

The purpose of such a finding is to bring the matter to the attention of a plenary body which is able to discuss the problem and publicise it.¹¹⁹ It is often asserted that the ASP's possible reaction is limited mainly to "naming and shaming".¹²⁰ While it can consider questions related to non-cooperation (Art. 112(2)(f)), it does not have any direct means to enforce such cooperation.¹²¹ Officially, the Assembly's general approach to non-cooperation is to issue 'a formal response, including some public elements' and 'depending on the specifics of the case, there may be merit in pursuing an informal and urgent response as a precursor to a formal response, in particular where it is still possible to achieve cooperation.'¹²² However, the ASP does not appear to be precluded from invoking the responsibility of a State that is obliged to cooperate with the Court and fails to do so.¹²³ It should be borne in mind that both the UN and the ICC are international organisations composed of States. Bringing a matter to the ASP or the SC may thus encourage States to take some steps and measures on their own, such as imposing political pressure, conducting inter-state negotiations and diplomatic conferences, or even imposing economic sanctions in the event the non-cooperative State is a SP.¹²⁴

Unlike the ASP, the SC is supported by the extremely powerful Chapter VII of the UN Charter, and acting under its scope it can impose sanctions on non-cooperative States as well as issue legally binding orders. Additionally, if the SC has referred the situation to the ICC and thus imposed a duty to cooperate with it onto the UN Member States, an *erga omnes* obligation is created. Should one State refuse to cooperate, collective countermeasures may be undertaken by the rest of the international community since they have an interest and legal right to do so.¹²⁵

Another indirect enforcement measure is the "status conference", which may be convened by the PTCs. This was done in the cases concerning the situations in Uganda and the DRC, when the PTC expected to be updated on the current status of proceedings.¹²⁶ This gives the Court the opportunity to actively seek State cooperation, even if only by publicising the problem.¹²⁷ The Prosecutor may also utilise its discretionary powers and seek to conclude cooperation agreements with some States or international organisations (Art. 54(3)(c)), which may be necessary if the lack of relevant domestic legislation constitutes the reason for non-cooperation.¹²⁸

¹¹⁹ Schabas, *supra* note 12, p. 252.

¹²⁰ *Ibidem*.

¹²¹ Sluiter, *supra* note 27, p. 616.

¹²² ASP, Report of the Bureau on potential Assembly procedures relating to non-cooperation of 30 November 2011, ICC-ASP/10/37, para. 10.

¹²³ Kreß, Prost, *supra* note 118, p. 1526.

¹²⁴ *Ibidem*, p. 1530.

¹²⁵ *Ibidem*, p. 1526.

¹²⁶ Schabas, *supra* note 12, p. 262.

¹²⁷ M. Miraglia, *The first decision of the ICC Pre-Trial Chamber. International criminal procedure under construction*, 4 Journal of International Criminal Justice 188 (2006).

¹²⁸ Rastan, *supra* note 51, p. 441.

In fact, the ICC is aware of its need for additional support from States, and specifically the aims to achieve this. The Report of the Bureau on cooperation from the tenth ASP session includes a draft resolution on cooperation to be adopted by the ASP, which specifically stresses the need of increasing State support.¹²⁹ Moreover, the Prosecutorial Strategy for the years 2009 to 2012 states, in its fourth objective, that the OTP should “continue to enhance cooperation with States and relevant actors, in particular for the execution of arrest warrants issued by the Court.”¹³⁰ Para. 48 explicitly sets forth ways of galvanising arrest efforts. These include proactive negotiations at various levels in order to obtain enforcement of the Court’s decisions, assisting States both operationally and financially to perform operations when they lack the necessary capacity, as well as aiming to marginalise the suspects from their societies by limiting their access to funds.¹³¹

3.2. States’ reluctance to cooperate

Due to the unique nature of the ICC – as an international organisation engaged in prosecutions of often incumbent high State officials who allegedly committed atrocious crimes against the populations of their own countries – it naturally causes much controversy. Inevitably, some States refrain from assisting the Court and even purposely prevent it from exercising its functions. Such behaviour is not limited solely to the non-Party States – it frequently includes SPs as well. In fact, the example of Côte d’Ivoire offering voluntary cooperation shows that in some instances non-Party States are more eager to cooperate than SPs.

There may be more reasons for optimism if a case originates from a self-referral by a SP. Foregoing its own jurisdiction is an acknowledged method for the ICC to obtain jurisdiction over a situation, and is provided for in Art. 14 of the Statute. By issuing AWs with respect to the situations in Uganda, DRC and Central African Republic (all of which originated from the respective States) the PTCs have proven that self-referrals are legally accepted and the cases are admissible. The behaviour of those States suggests that they are interested in bringing the perpetrators of atrocities to justice, but for whatever reasons they are unable or do not want to investigate themselves, and decide to waive the requirement of complementarity.¹³² Logically, this could imply that these SPs are more likely to cooperate and assist the Court in its proceedings. According to Roper and Barria, this indeed enhances the chances of the ICC’s effectiveness, due to “the need to follow through with their referral commitment.”¹³³ This is only partly supported

¹²⁹ ASP, Report of the Bureau on cooperation of 22 November 2011, ICC-ASP/10/28, Annex I.

¹³⁰ OTP, Prosecutorial Strategy 2009-2012 of 1 February 2010, <http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf> (accessed 22 January 2013, paras. 41-47).

¹³¹ *Ibidem*, para. 48.

¹³² M. El Zeidy, *Critical thoughts on Article 59(2) of the ICC Statute*, 4 *Journal of International Criminal Justice* 448 (2006), p. 463.

¹³³ S.D. Roper, L.A. Barria, *State co-operation and International Criminal Court bargaining influence in the arrest and the surrender of suspects*, 21 *Leiden Journal of International Law* 457 (2008), p. 464.

however by the experience of the Court to date, with the arrest of Bemba (although in Belgium, not the CAR), significant cooperation in the DRC situation, and a complete lack of assistance on the part of Uganda.¹³⁴ Moreover, the cases in Uganda and the DRC (perhaps with the exception of the *Lubanga* case) were declared admissible, but on the basis of unwillingness, not inability.¹³⁵ Burke-White refuses to accept Roper and Barria's thesis and firmly concludes that there is no such thing as a moral duty to pursue previous decisions taken by a referring State. As an argument against their thesis, he points out the time lapse between the referral and issuance of an AW, and the lack of knowledge on the part of referring states of the possible suspects which may in the future be sought by the ICC. States' policies may also change over time, and previous political options may disappear.¹³⁶ Additionally, self-referrals put the SP concerned in a situation of dependence on the OTP's discretionary powers, and its actions will define the SP's attitude towards future cooperation. Reluctance may result from a dispute over post-conflict resolution methods (such as amnesty). Moreover, since the OTP is free to identify possible suspects, it is not unlikely that a person from the current government may also face prosecution, which will obviously be resisted by the SP's authorities.¹³⁷ Thus a lack of cooperation can be expected.

SPs can also be unwilling to cooperate if their admissibility challenge has been ruled against them. Complementarity, which strengthens the position of SPs by giving them a chance to conduct national prosecutions, can act to the Court's disadvantage. It "could be placed in the paradoxical situation of having to depend upon the same institutional and procedural weaknesses that were deemed incapable of supporting domestic investigations and prosecutions".¹³⁸ The stigma of being deemed 'unwilling' does not necessarily encourage the State to be less unwilling when it comes to cooperation with the Court. If it indeed attempted to shield a suspect from criminal responsibility (Art. 17(2)(a)), it will not change its mind when the assessment concerning such responsibility will be administered by the Court in front of the entire international community.

As a way of finding a solution to States' reluctance to cooperate with the Court, one can look at their behaviour in the international arena. States want to act in cooperation with other States in order to achieve the best results.¹³⁹ This suggests that they are likely to influence each other and thus may impact on their interests. Moreover, through their involvement in multilateral organisations and intergovernmental institutions, powerful States are capable of imposing their opinion on others and changing the directions of those institutions.

¹³⁴ See statistical data in Section 4.

¹³⁵ Schabas, *supra* note 73, p. 18.

¹³⁶ W. Burke-White, *Bargaining for arrest at the International Criminal Court: a response to Roper and Barria*, 21 *Leiden Journal of International Law* 477 (2008), p. 478.

¹³⁷ Ryngaert, *supra* note 13, p. 13.

¹³⁸ Rastan, *supra* note 51, p. 454.

¹³⁹ Roper, Barria, *supra* note 133, pp. 458-9.

3.3. Protection of peace and justice

In its assessment of the need to protect peace and justice, the Prosecutor may conclude that no basis for prosecution exists when it would not be “in the interests of justice, taking into account all the circumstances, including the gravity of crime, the interests of victims, the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime.”¹⁴⁰ Although AWs may have already been issued and respective requests for arrest and surrender transferred to SPs, some suggest that international criminal justice “should probably be prepared to stand down when criminal prosecution becomes an obstacle to peace”.¹⁴¹ The peace negotiations in Uganda were possible explicitly because the suspects from Lord’s Resistance Army were afraid of being subjected to the ICC’s jurisdiction.¹⁴² If the parties to a conflict are willing to talk with each other, the authorities of the State concerned will inevitably be unlikely to arrest and surrender their opponents, especially if they want to put an end to the fighting. Additionally, the SPs may also have an interest in a peaceful transition to democracy. Thus they do not intend to impose too much pressure on the non-cooperative State if such pressure would or even might deteriorate the situation.¹⁴³ The OTP will essentially lack international support if it chooses to insist on surrender in specific cases.

International tribunals may be seen as a tool to end civil wars. Seeking the surrender of suspects is a way of imposing the international community’s values over warring parties. However, the very fact of establishment of an international criminal court already promotes accountability, and in such a situation the OTP has to choose whether to insist on immediate arrests or to wait until peace is restored.¹⁴⁴ This decision raises problems with respect to the selective enforcement of AWs. Selective enforcement can be a way of ensuring that some AWs are executed rather than none. It involves a careful balancing of factors such as political desirability and effectiveness.¹⁴⁵ Of course “[t]he enforcement of warrants that are deprioritised is only reported at a later stage, when the political reality is possibly more favourable.”¹⁴⁶ Even if only a less important AW is secured, it gives a clear signal to the conflicting parties that there is no escape from justice. Such a stance is supported in the OTP Policy Paper of 2007, where it is admitted that the primary role of the ICC is to ensure “lasting respect for the enforcement of international justice.”¹⁴⁷

It seems that until a conflict has ended through peaceful negotiations there is high likelihood that the OTP will not enjoy political support from the international community, and that AWs for the highest officials will remain outstanding. Apprehending

¹⁴⁰ Art. 53(2)(c) of the ICC Statute.

¹⁴¹ Schabas, *supra* note 73, p. 21.

¹⁴² *Ibidem*.

¹⁴³ Ryngaert, *supra* note 13, p. 19.

¹⁴⁴ *Ibidem*, p. 28.

¹⁴⁵ *Ibidem*.

¹⁴⁶ *Ibidem*.

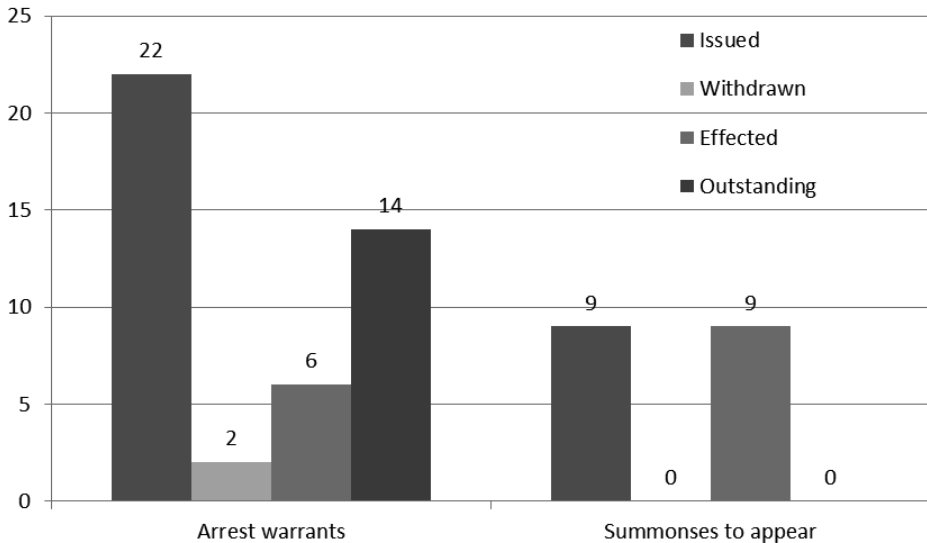
¹⁴⁷ OTP, Policy Paper on the Interests of Justice, ICC-OTP-2007, p. 7.

a suspect is easier once a conflict has ended.¹⁴⁸ Unfortunately, this also means that the ICC cannot serve as a tool for ending the conflict itself.

4. THE EFFECTIVENESS OF THE JUDICIAL PRACTICE IN THE ISSUANCE OF ARREST WARRANTS

4.1. Statistical summary of arrest warrants issued to date¹⁴⁹

The experience of issuing AWs by the PTCs has so far not been by any means consistent. It is clear however that AWs are a preferred way of getting custody of suspects. Whereas there have been only nine summonses to appear (five in the Kenya situation and three in Darfur), twenty-two AWs have been issued.¹⁵⁰ This indicates that very often it is believed that the suspects will not appear before the ICC voluntarily, or that their apprehension may cause problems. Hence the decision to issue AWs.



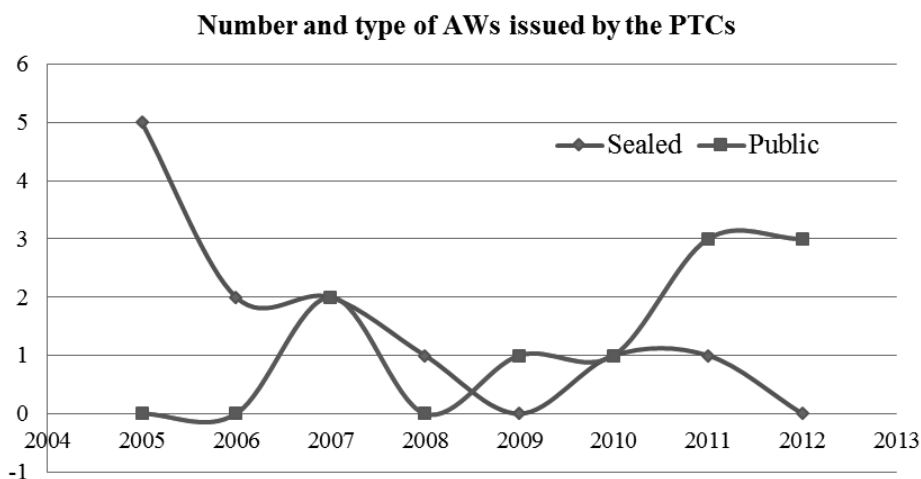
Interestingly, as reflected in Chart 1 above, the effectiveness of summonses to appear has been 100% to date, while only six AWs have resulted in successful surrender to the ICC. These constitute a 100% effectiveness rate in the CAR and Côte d'Ivoire (one AW each) and approximately a 57% success rate in the situation in the DRC (here however two AWs were issued against Bosco Ntaganda). Nevertheless, as many as fourteen AWs remain outstanding, including all cases in the situations in Uganda, Darfur and Libya.

¹⁴⁸ Roper, Barria, *supra* note 133, p. 465.

¹⁴⁹ All statistical data and charts presented herein have been compiled based on public information available on the ICC website: <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/> (accessed 27 January 2013).

¹⁵⁰ Two AWs were withdrawn following deaths of the suspects.

As far as the distinction between public and sealed AWs is concerned, the OTP has so far preferred the latter. Up until now, twelve sealed AWs have been issued, as opposed to ten public AWs.¹⁵¹ It should be noted however that this tendency is changing, as visible in Chart 2 below.



This may be related to the growing difficulty of the situations under ICC jurisdiction. Additionally, it may represent the OTP's prioritisation of international criminal justice values. As postulated above, issuing public AWs aims at more political effects, i.e. bringing about a regime change, rather than the rapid arrest of the suspects. Sealed warrants however are more successful in securing surrender – all of the suspects transferred to the Court had had this type of warrant issued against them. They have been effected within various periods of time, but generally less than a few months. Immediately after securing custody, these warrants were reclassified as public.

The unsealing of all AWs issued for Ugandan suspects took place approximately three months after issuance, when measures for the protection of victims were implemented.¹⁵² Arguably, the OTP was aware that apprehending suspects in this situation would not have been easy and an orchestrated action by the entire international community would be necessary to secure their arrest. The other instance of reclassification of an AW from sealed to public occurred in the case of *Ntaganda*, this time almost two years after its issuance without securing the arrest.¹⁵³ The PTC noted that the circumstances for issuing a sealed warrant changed (the main argument being that he was no longer fighting as a top commander) and decided to unseal it. Among other reasons invoked were suspicions that Ntaganda might have already been aware of the AW against him,

¹⁵¹ One should bear in mind that due to the nature of sealed AWs some may be unknown to the general public, yet issued in relation to certain suspects.

¹⁵² ICC Press Release of 14 October 2005, ICC-CPI-20051014-110.

¹⁵³ *Ntaganda*, Decision to Unseal the Warrant of Arrest against Bosco Ntaganda of 28 April 2008, ICC-01/04-02/06-18.

hence keeping it sealed was unnecessary. Additionally, the PTC hoped for action by the international community that would facilitate and assist the DRC in arresting and surrendering him to the Court.¹⁵⁴ Another AW in this case was issued in July 2012, this time publicly.

According to the up-to-date experience of the Court, the SC referrals (i.e. situations of Sudan and Libya) have proven extremely difficult for the ICC with regards to obtaining cooperation. None of the six persons sought via AWs have been surrendered. From the ICC's point of view, they remain at large, although in the Libyan situation the suspects have been captured and are detained by national forces.¹⁵⁵ This does not however mean that they will be transferred to The Hague for trial, especially given the Libyan challenge to admissibility.

4.2. Prospects for improvement of the effectiveness of arrest warrants

If the ICC aims at increasing the rate of positive compliance with its requests and improving international cooperation, it has to take a two-fold approach. Firstly, the Court has to be very strict with respect to its own powers and should perform them rigidly. Allowing the OTP to use its competencies to the fullest whilst respecting the letter of the law is crucial. Ryngaert stresses that "a major part of the Prosecutor's policy in relation to arrest will consist in devising strategies to convince States to comply with their legal obligation to enforce arrest warrants".¹⁵⁶ Moreover, when issuing AWs the PTCs, together with the OTP, need to try to foresee what the States' objections may be and prevent these from arising by always being one step ahead. Secondly, the Court should aim at developing cooperation networks and improving the positive and legitimate image of itself in the eyes of the international community. Those two paths consist of smaller measures (as set out below) which, when taken together, should create a single consistent policy aimed at ensuring that the perpetrators of the most atrocious crimes are brought to justice.

Setting high standards with respect to the procedure at the stage of investigation and pre-trial helps the Court to avoid unnecessary delays in obtaining compliance with its requests for arrest and surrender. Complementarity problems could be addressed early, so that States do not try to challenge the admissibility of cases. In this respect it is important that the OTP has the essential background data at its disposal. Moreover, efforts should be focused also on domestic investigations. Sometimes acceptance of a State's jurisdiction and aiding them in the exercise of it might be a better option which may render the same results, i.e. bringing the perpetrators to justice. As soon as a problematic issue is highlighted, the OTP should invite SPs to start investigating, and

¹⁵⁴ *Ibidem*, paras. 4-5.

¹⁵⁵ BBC reported the capturing of Gaddafi: <http://www.bbc.co.uk/news/world-middle-east-15804299> accessed 27 August 2012, and of Al-Senussi: <http://www.bbc.co.uk/news/world-africa-17413626> accessed 27 August 2012.

¹⁵⁶ Ryngaert, *supra* note 13, p. 59.

thus open national proceedings.¹⁵⁷ If despite such actions the State remains inactive, the possibility of rendering the case admissible in front of the ICC should then be considered.

The internal policy of the Court manifests itself also in the prioritisation of some cases over others. Sometimes the ICC, although it was created for the purpose of prosecuting highly positioned individuals, should satisfy itself with arresting lower and less influential perpetrators. This is certainly the case when the officials are protected by immunities, such as in the *Bashir* case.¹⁵⁸ Trying persons who are easier to apprehend and may not be as important for the State they come from can be more beneficial overall for the Court. These trials could serve as evidence that the crimes took place and that the officials were involved in their commission. Hence once the immunity protection ceases, subsequent trials of high State officials would be easier to conduct. Additionally, the conviction of lower level perpetrators sends a direct message to the people living within targeted States that their authorities should be urged to step down quicker.¹⁵⁹

The external efforts of the ICC should be focused on obtaining cooperation from both SPs and non-Party States. In order to ensure the successful implementation of the Statute in the domestic systems of the SPs, efforts to raise the awareness of the ICC's role should be undertaken. The SPs ought to understand the need for assisting the Court, since it is a method of enforcement of the international criminal justice system which they themselves have created.¹⁶⁰ The Court must aim at having good relationship with the territorial State. This can be achieved through outreach programmes which increase the level of domestic support for the ICC.¹⁶¹ The territorial State is the one most likely to successfully execute an AW, therefore the OTP must precisely know the suspect's location. Using tracking teams is helpful both for gathering the necessary information as well as keeping checks on the compliance level of the SPs with the cooperation requests.¹⁶² Furthermore, the ICC must directly address the State concerned and adroitly use its bargaining power, depending on the particular circumstances. There are a range of incentives that the Prosecutor can choose from, both positive and negative. Offering financial help, assisting in efforts to join international organisations, and threatening intervention or imposing travel bans are a few of these.¹⁶³

Apart from that, having a deep knowledge and understanding of the regional politics in the areas under the Court's jurisdiction is vital to choosing the right arguments and methods of negotiation. The African countries are essentially interrelated, and their leaders and authorities have more influence on each other than their colleagues from different continents. Since they often support certain movements within neighbouring

¹⁵⁷ Robinson, *supra* note 64, p. 100.

¹⁵⁸ Gosnell, *supra* note 15, p. 847.

¹⁵⁹ *Ibidem*, p. 848.

¹⁶⁰ Rastan, *supra* note 51, p. 456.

¹⁶¹ Burke-White, *supra* note 136, p. 482; Ryngaert, *supra* note 13, p. 12.

¹⁶² Ryngaert, *supra* note 13, pp. 34-5.

¹⁶³ *Ibidem*, pp. 21-2.

countries, it may be beneficial for the ICC to exploit these relationships. Whilst supporting the national law-enforcement institutions, the OTP could organise inter-state police operations to act on the territory of the States concerned.¹⁶⁴ Burke-White suggests for example that in order to capture suspects from Uganda, the Court should make a deal with Sudan or the DRC, offering to delay some prosecutions against their officials. Once the Ugandan conflict is over, the ICC will have a stronger position in the SC with respect to Sudan as a non-Party State.¹⁶⁵

As a final resort in the external efforts of the ICC, other international organisations could be addressed. Not only they do have additional bargaining powers and a unique negotiating position, but also in the exercise of their mandate they are often allowed to enter the non-cooperative country and arrest the suspects sought by AWs.¹⁶⁶ The SC is not to be forgotten, as it can aid the Court in many respects when requested. Among the measures available are not only urging the States to cooperate, but also the authorisation of peacekeeping missions and mandating forces to arrest suspects.¹⁶⁷

Finally, publicising the problems that the Court is dealing with and stressing the ways in which the international community can help increases the awareness of the ICC's activities. Choosing the strongest arguments in the course of announcing and describing the crimes committed¹⁶⁸ should have a crucial impact on the States.

CONCLUSIONS

While the Rome Statute provides for certain solutions, the States have learned to exploit its weaknesses if cooperating with the ICC is not in their interests. The key role belongs to the OTP. It not only fulfils the prosecutorial duties by identifying the perpetrators and focusing the Court's attention on particular cases, but perhaps most importantly acts as a diplomatic representative of the Court in the early stages of investigations. Whereas it may be said that the OTP's role seems mainly political, its actions are controlled by the PTCs, therefore it always has to conform to the law which binds it. The Pre-Trial Chambers ensure that the law is respected and that the necessary evidence is provided. These two institutions of the Court balance each other in their functions and offer a system of checks and influences so that the goals of international criminal justice are met by both respecting legal requirements and taking appropriate political actions.

Therefore, in order to enhance the effectiveness of AWs, the ICC as an organisation should follow a two-fold approach. In its internal matters it should always obey the letter of law, whilst recognising the diplomatic functions of the OTP. Additionally, it is

¹⁶⁴ *Ibidem*, p. 9.

¹⁶⁵ Burke-White, *supra* note 136, pp. 480-1.

¹⁶⁶ Ryngaert, *supra* note 13, p. 15, 38.

¹⁶⁷ Rastan, *supra* note 51, p. 444.

¹⁶⁸ Burke-White, *supra* note 136, p. 479.

vital to assess the particular circumstances of each situation and interpret them wisely in order to prioritise certain cases. Externally, the Court ought to focus its activities on maintaining and enhancing a positive image as a legal institution, and simultaneously it should work on increasing the level of inter-state cooperation.

If the next decade of the ICC's judicial practice is to be more fruitful and successful, the suspects sought by the AWs should be captured and their trials commenced. AWs should not be left outstanding for too long, as the Court risks losing its legitimacy as an institution protecting the values of international criminal justice.