

On co-operation by states not party to the International Criminal Court

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Abstract

Before the International Criminal Court (ICC) came into being, world public attention was focused on issues such as the significance of the Court's establishment, the importance of implementing international criminal justice and the time when the Rome Statute could enter into force. Once the Court was established, attention naturally turned to practical issues, such as whether it would be able to operate normally and perform its historic mission. The question of whether the ICC can operate effectively and perform its mission largely depends on the scope and degree of co-operation provided to it by states. This co-operation concerns not only states party to the ICC but also non-party states. This article offers to explore the obligation of non-party states to co-operate under international law, the prospects of their co-operation and the legal consequences of non-co-operation. The author suggests that beyond the general principle of the law of treaties according to which treaties are binding only on states parties, when viewed in the light of other general principles of international law, co-operation with the ICC is no longer voluntary in nature, but is instead obligatory in the sense of customary international law. Therefore, while a state may not have acceded to the ICC, it may still be subject to an obligation to co-operate with it in certain cases.

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On 11 April 2002 the number of states that had ratified the Rome Statute exceeded the number required for its entry into force,¹ thus enabling the International

Criminal Court (ICC) formally to be established on 1 July 2002.² The creation of a worldwide permanent international criminal court could be described as one of the most significant events in the history of contemporary international relations and international law. It reflects the real status quo in the world since the fall of the Berlin Wall and the end of the Cold War between the Eastern bloc and the West in 1989–91, and is a specific achievement in the development of international criminal law and international human rights law. It will also inevitably have a far-reaching impact on the development of the international order and of international law in general.

Before the ICC came into being, world public attention was focused on issues such as the significance of the Court's establishment, the importance of implementing international criminal justice and the time when the Rome Statute could enter into force. Once the Court was established, however, attention naturally turned to practical issues, such as whether it would be able to operate normally and perform its historic mission.

For the ICC to operate normally and be effective, certain fundamental conditions have to be fulfilled. Besides an adequate financial budget and professional personnel, another indispensable factor is state co-operation. The ICC differs from national courts in that it has neither a police force under its own jurisdiction nor its own armed forces. While it seems particularly powerful because it can issue indictments and pursue the criminal responsibility of international criminal suspects on a worldwide scale, it cannot take judicial action, such as executing arrests of defendants charged in indictments. In addition, in the course of investigating, trying cases and executing judgments, the ICC has to rely on the co-operation of states in areas such as assistance in investigation and evidence-gathering, making arrests, transferring the accused and executing judgments. It could therefore be said that whether the ICC can operate effectively and perform its mission will depend largely on the scope and degree of co-operation provided to it by states.

The state co-operation required by the ICC is all-dimensional in that it needs the co-operation of both large and small states; it needs the co-operation of the European states and that of Asian, African, and other states; and it needs the co-operation both of state parties and of states not party to it (hereinafter "non-party states"). Of course, the ICC hopes to acquire the necessary co-operation of all the relevant states in the course of its judicial investigations and trials. Whether states can satisfy the requests of the Court for co-operation should be considered as the key to its success.

1 Article 126 of the Rome Statute of the ICC provides that: "This Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations." On 11 April 2002, nine states ratified or acceded to the Statute of the ICC, raising the number of states that had ratified or acceded to it from 57 to 66 at one stroke. For the names of the specific states, see the *ICC Monitor*, the newspaper of the NGO Coalition for the International Criminal Court, Issue 28, November 2004, at <<http://www.iccnw.org>> (last visited 1 March 2006).

2 For the background to the establishment of the ICC, see <<http://www.un.org/international-law/icc>> (last visited 1 March 2006).

The issue of co-operation with the Court is a very practical one that concerns state sovereignty. This article will mainly discuss the obligation of non-party states to co-operate with the ICC from the dual perspective of theory and practice.

The obligation of non-party states to co-operate under international law

Treaties are binding in principle only on state parties. For non-party states, there is neither harm nor benefit in them (*pacta tertiis nec nocent nec prosunt*). Therefore, according to the general principle of the law of treaties as embodied in the Vienna Convention on the Law of Treaties, the obligation of non-party states to co-operate differs from that of state parties.

In the Rome Statute, the provisions on the obligation to co-operate differ for state parties and non-party states. Article 86 of the Statute is a general provision concerning state co-operation and judicial assistance. In accordance with this provision, “States Parties shall, in accordance with the provisions of this Statute, co-operate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.”

Article 87(5) is a provision on co-operation by non-party states with the ICC. It stipulates that the 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.”

Only state parties are obligated to co-operate. This corresponds to the general principles of treaty law. Article 35 of the Vienna Convention on the Law of Treaties, adopted on 23 May 1969, clearly provides that “An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.” Article 34 of the said Convention also clearly provides that a treaty does not create either obligations or rights for a third state without its consent. This is also one of the general principles of treaty law.

That is precisely why the Rome Statute makes different provisions for state parties and for non-party states on the issue of state co-operation. To state parties the ICC “is entitled” to present “co-operation requests” and they are obliged to “co-operate fully” with it in ICC investigations and prosecutions of crimes. But as for non-party states, the ICC only “may invite” them to “provide assistance” on the basis of an ad hoc arrangement.³ The word “invite” shows that co-operation by non-party states with the ICC is in the legal category of co-operation of a “voluntary nature” alone.

The above are general principles and provisions of international treaty law. However, co-operation with the ICC in particular by non-party states may, if

3 Article 87(5) of the Rome Statute.

analysed in terms of the authority of the UN Security Council, the jurisdiction of the ICC or the general principles of international law, be an obligation of a mandatory nature in certain specific cases.

The UN Security Council and the ICC

Non-party states may in certain cases have a mandatory obligation to co-operate with the ICC, due primarily to the relationship between the UN Security Council and the ICC and to the authority of the Security Council under the UN Charter. The authority of the UN Security Council is closely linked to the Rome Statute's provisions laying down the ICC's jurisdiction.

Article 1 of the Rome Statute stipulates that the role of the ICC shall be “complementary to national criminal jurisdictions” (the “complementarity principle”). Part 2 of the Statute gives a further description of the Court's specific system of jurisdiction. Its main points include the following provisions:

- (1) The jurisdiction of the Court shall be limited to the most serious international crimes of concern to the international community as a whole, that is, the crime of genocide, crimes against humanity, war crimes and the crime of aggression.⁴
- (2) A state which becomes party to this Statute thereby accepts the jurisdiction of the Court with respect to the said crimes; a state not party may accept by declaration the exercise of jurisdiction by the Court with respect to the crime concerned.⁵
- (3) The Court may exercise jurisdiction as long as the state on the territory of which the crime occurred, or the state of which the person accused of the crime is a national, is party to the Rome Statute or is a state not party thereto that has accepted the Court's jurisdiction. The Court has jurisdiction, however, over all cases referred to it by the Security Council.⁶
- (4) There are three trigger mechanisms for the Court's jurisdiction, namely (i) a state party refers a case to the Prosecutor; (ii) the UN Security Council refers a case to the Prosecutor under Chapter VII of the UN Charter; or (iii) the Prosecutor himself or herself initiates an investigation on the basis of relevant material.⁷
- (5) The ICC shall determine that a case is inadmissible where the case is being investigated or prosecuted by a State which has jurisdiction over it, or where the person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the ICC is not permitted under its Statute.⁸

4 Ibid., Article 13.

5 Ibid., Article 12, para. 3.

6 Ibid., Article 12, paras. 1–2.

7 Ibid., Articles 13–15.

8 Ibid., Articles 1 and 17.

Thus for the ICC to exercise its jurisdiction, not only can the Court Prosecutor trigger the investigation and prosecution mechanism, but state parties and the UN Security Council can also do so by referring situations to the ICC in which one or more crimes have occurred. Since the states, whether party to the Rome Statute or not, are all essentially members of UN agencies, when the UN Security Council refers a case to the Court for investigation and prosecution, it involves the UN member states. In other words, it involves the obligation to co-operate of both state parties and states not party to the ICC.

The authority of the UN Security Council is derived from the UN Charter. By virtue of Article 25 of the UN Charter, all decisions made by the UN Security Council are binding upon all UN member states. Consequently the UN Security Council can, when it refers to the ICC a criminal case related to the maintenance of world peace, ask all UN member states to co-operate in the Court's process of investigating that case. Owing to the nature of the UN Security Council, such requests are binding upon all UN member states. There are already cases to show the influential role of the UN Security Council in the ICC and of its requests for co-operation with the Court.

In view of the war crimes and crimes against humanity that had occurred in the Darfur region of Sudan, the International Commission of Inquiry submitted a report to the UN Secretary-General on 25 January 2005. In it the Commission recommended that the Security Council refer the situation in Darfur to the ICC, because "the Sudanese judicial system is incapable and the Sudanese government is unwilling to try the crimes that occurred in the Darfur region and to require the perpetrators to assume the accountability for their crimes".⁹

After receiving the report the UN Security Council, acting under Chapter VII of the UN Charter, adopted Resolution 1593 on 31 March 2005, in which it decided to "refer the situation in Darfur since 1 July 2002 to the ICC Prosecutor".¹⁰ The Security Council further decided "that the Government of Sudan and all other parties to the conflict in Darfur shall co-operate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to co-operate fully".¹¹

The adoption of Resolution 1593 concerning the situation in Darfur was the first case in which the Security Council triggered the ICC's investigation mechanism in accordance with Article 13(b) of the Statute. While Sudan is the state concerned by the enforcement of that resolution, it is not party to the ICC. Although it expressed opposition to the Security Council resolution,¹² it must as a

9 "Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General", 25 January 2005, at <http://www.un.org/News/dh/sudan/com_inq_darfur.pdf> (last visited 1 March).

10 Security Council Resolution 1593 of 31 March 2005, para. 2.

11 Ibid.

12 *Beijing Evening News*, 1 April 2005, p. 8.

UN member state nevertheless abide by the provisions of the UN Charter and obey the Security Council resolution by co-operating with the Court.

The statement in Resolution 1593 “that the Government of Sudan and all other parties to the conflict in Darfur shall co-operate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution” clearly shows that all non-party states, including Sudan, must co-operate with and assist the ICC accordingly.

The rights and obligations of non-party states are related to the UN Security Council and to its treaty mechanisms. In accordance with the principle of “complementary jurisdiction” in the Rome Statute, any state concerned may challenge the jurisdiction of the ICC. If Sudan opposes the investigation and prosecution by the ICC and can prove that it is actually willing and able to exercise jurisdiction in accordance with that principle, the ICC will not have jurisdiction. However, discussion of the principle of “complementary jurisdiction” per se has implied that as it requires non-contracting states to submit to the procedures provided for in the Rome Statute and to act accordingly, those states are also required to comply with the obligations in the Statute. This could be said to be a new development of the traditional legal principle that “a treaty does not create obligations and rights for a third state”.

The obligation to respect and ensure respect for international humanitarian law

States not party to the ICC are obliged to co-operate with it not only in instances of referrals by the UN Security Council but also under the provisions in the Geneva Conventions whereby states must “respect and ensure respect” for international humanitarian law (IHL).

The crimes under ICC jurisdiction fall into the category of the most serious international crimes, including war crimes. As stated in Article 8 of the Rome Statute, “war crimes” means “[g]rave breaches of the Geneva Conventions of August 12, 1949”. There is therefore a close link, in terms of war crimes, between the Rome Statute and the 1949 Geneva Conventions.

Nearly all the states of the world have meanwhile ratified or acceded to the 1949 Geneva Conventions,¹³ which have indisputably become a part of customary international law. Article 1 common to those Conventions and the corresponding Article 1 in Protocol I thereto lays down the obligation to respect and ensure respect for IHL: “The High Contracting Parties undertake to respect and to ensure respect for the present Convention [Protocol] in all circumstances.” Therefore, in accordance with this provision, the contracting states must not only respect, but must also ensure respect for, the Geneva Conventions and Protocol I.

13 As at 31 March 2005, 191 states had ratified or acceded to the 1949 Geneva Conventions. See <www.icrc.org> (last visited 1 March).

Because it emphasizes the special nature of the IHL legal system, which has no commitments that take effect on the basis of reciprocal relations, this provision has the particular meaning of requiring non-contracting states to cooperate. Whereas the reciprocity clauses in international law are binding upon every state party only when their obligations are observed by the other state parties, the absolute nature of IHL standards means that they are obligations that must be assumed vis-à-vis the entire international community, and every member of the international community is entitled to demand that these rules be respected.

The International Court of Justice (ICJ) said in its 27 June 1986 decision in the *Nicaragua* case that: “There is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to “respect” the Conventions and even “to ensure respect” for them “in all circumstances,” since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression.”¹⁴

Hence Common Article 1 is based on customary law and ensures that every state, regardless of whether it has ratified a treaty or not, has obligations that must be assumed. It was precisely on this theoretical basis that the ICJ said, “The United States is thus under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four Geneva Conventions”.¹⁵

Since the United States distributed military operations manuals to the Nicaraguan anti-government military forces (Contras), encouraging them to take action that was contrary to general IHL principles, it obviously went beyond its negative responsibility not to encourage violations of humanitarian law, because the obligation to respect and to ensure respect for IHL is a dual obligation incumbent on all states. “Respect” means that states must do everything possible to ensure that their organizations and all others within their scope of jurisdiction respect the rules of international humanitarian law. “Ensuring respect” means that all states, regardless of whether they are parties to a conflict or not, must take all possible steps to ensure that all persons, and particularly the parties to that conflict, respect those rules.

The repeated calls by the absolute majority of member states of the UN Security Council and UN General Assembly and the states party to the four Geneva Conventions of 1949 for application of the principles of Common Article 1, asking third states to oppose actions taken by Israel in the Israeli-occupied territories that violate the provisions of those Conventions, are based on that very obligation of all states to “ensure respect” for IHL “in all circumstances”.¹⁶

14 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. the United States of America)*, Merits, Judgment, ICJ Reports 1986, p. 114, para. 220.

15 *Ibid.*

16 See UN Security Council Resolution 681 (1990), 20 December 1990, para. 5; UN Security Council Resolutions ES-10/2, 25 April 1997, ES-10/3, 15 July 1997, and ES-10/6, 9 February 1999, and the report by the chairman of the Meeting of Experts on the Four Geneva Conventions that was held in Geneva on 27–28 October 1998.

The provision in Common Article 1 on ensuring respect means that states can take action when the rules of IHL are violated. This may also be construed from Article 89 of Additional Protocol 1, which reads, “In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter.” Its scope of application is therefore very broad, in that it not only promotes the realization of the IHL rules but also requires a response to behaviour that violates IHL. While such action must be taken on the basis of co-operation with the United Nations and full respect for the UN Charter, the obligation to take action is obviously very important. And while it clearly permits third states to take action, it also logically provides the obligation to co-operate when serious violations of the Geneva Conventions need to be pursued.

While legal obligations are created on the basis of the principle that it is necessary to “ensure respect” “in all circumstances,” it is still not very clear from the four Geneva Conventions which steps states should take and through which procedures. However, one of the objectives of establishing the ICC is to pursue serious violations of the 1949 Geneva Conventions. States not party to the ICC but party to the Geneva Conventions are obliged to “ensure respect” “in all circumstances”; this includes the extended obligation to co-operate with the ICC. In any event, the obligation to co-operate should be understood as requiring non-party states at least to make an effort not to block actions taken by the ICC to punish or prevent serious violations of the Geneva Conventions.

To counter the war crimes and crimes against humanity that occurred in the Darfur region of Sudan, the UN Security Council adopted Resolution 1593 on the premise of having determined that the Sudanese legal system was unable and the Sudanese government was unwilling to try the crimes concerned, and thus deciding to refer the situation in Darfur to the ICC. Resolution 1593 was adopted by a vote of 11 in favour, none against, and four abstentions.¹⁷ The four states that abstained included China and the United States. These two states are not party to the ICC, but are permanent members of the UN Security Council with veto power. While they have their own stance with regard to the ICC and the particular status of the war crimes and crimes against humanity that have occurred in the Darfur region of Sudan, neither of them blocked the adoption of the resolution to address the need for the ICC to prevent or punish those crimes. In a certain sense, this was also a performance of their obligation to “ensure respect” for the rules of IHL.

The prospects of co-operation by states not party to the ICC

What are the prospects of co-operation by states not party to the ICC? The ICC naturally hopes that all states will co-operate fully and unconditionally with it and

¹⁷ Security Council Resolution 1593 (2005), 31 March 2005, para. 2.

provide it with the necessary assistance so that it can perform the mission entrusted to it by the international community. However, from the point of view of states, it is evident that in providing any assistance to the ICC, they would first have to give full consideration to their own national sovereignty and security. Indeed, the states not party to the ICC have not yet ratified the Rome Statute just because of their concern that ratification would infringe on their national sovereignty.

The experience of the two ad hoc UN Tribunals hitherto has shown that obtaining the co-operation of non-party states will be a challenge to the normal operation and development of the ICC.

Practical issues in co-operation by states not party to the ICC

The work of the ICC has already begun. All eighteen Court judges were elected on 7 February 2003 in accordance with the procedure provided for in the Rome Statute, and they all have taken up their official posts in The Hague;¹⁸ Chief Prosecutor Luis Moreno-Ocampo and the Deputy Prosecutors began working proactively after taking office in March 2003.¹⁹

The dynamic role of the Chief Prosecutor is the key to triggering the prosecuting procedures of the whole Court. Formal investigations into the situation in the Democratic Republic of Congo²⁰ and northern Uganda,²¹ referred to the ICC in accordance with Article 14 of its Statute, were for instance opened by the Office of the Prosecutor on 23 June and 29 July 2004 respectively.

The mandate of the Office of the Prosecutor is, in short, to investigate and prosecute “the crime of genocide”, “crimes against humanity” and “war crimes” in accordance with the rules laid down in the Statute. While state parties and the UN Security Council also play a role in the trigger mechanism, they can, as provided for in the Rome Statute, only submit a request in respect to “a situation”.²² Specific issues relating to that situation, such as whether there is a “crime”, whether a “prima facie case” has been established and whether the request needs to be placed on file for investigation and prosecution, all need to be determined by the Chief Prosecutor. This means that the authority of the Chief Prosecutor in that mechanism is more specific and more important. In the judicial system of a state, police work and prosecution work are separate, assigned to two different authorities. In the ICC, however, the Office of the Prosecutor assumes

18 For the backgrounds of all eighteen judges and the status of work since they took office, see Hans-Peter Kaul, “Construction site for more justice: The International Criminal Court after two years”, *American Journal of International Law*, Vol. 99, No. 2, April 2005, pp. 370, 375–79.

19 ICC Press Release, “Election of the Prosecutor – Statement by the President of the Assembly of States Parties, Prince Zeid Ra’ad Al Hussein”, 25 March 2003.

20 ICC Press Release, “Prosecutor receives referral of the situation in the Democratic Republic of Congo”, 19 April 2004; ICC Press Release, “The Office of the Prosecutor of the International Criminal Court opens its first investigation”, 23 June 2004.

21 ICC Press Release, “Prosecutor of the International Criminal Court opens an investigation into northern Uganda”, 29 July 2004.

22 Article 13 of the Rome Statute.

responsibility both for prosecution and for investigation (the police function). The Prosecutor must therefore also have extensive contacts with the state in order to conduct investigations and to ensure the execution of arrest warrants, and so on.

The Office of the Prosecutor is divided into three branches: the Division of Jurisdiction, Complementarity and Co-operation (JCCD); the Investigation Division; and the Prosecution Division. Pursuant to the requirements of Articles 15 and 53 of the Statute, the duties of the JCCD are to conduct in-depth analyses of the facts of situations referred to, and within the scope of jurisdiction of, the ICC, and to provide recommendations concerning the areas of jurisdiction, the complementarity principle and co-operation for the situations under investigation and analysis. The Investigation Division is charged with opening investigations and is divided internally into a number of investigation groups, including various consultants with professional knowledge of issues such as military affairs, politics and economics. The Prosecution Division comprises prosecution and appeals lawyers, and their duty is to bring cases to the Court and to try them.²³

Under the Rome Statute the Chief Prosecutor is obliged to evaluate particular cases, including pre-investigation evaluations of the facts of crimes. After the UN Security Council adopted Resolution 1593 on 31 March 2005, requiring the ICC to try the crimes that had occurred in the Darfur region of Sudan and demanding that the criminal responsibility of the perpetrators be pursued, ICC Chief Prosecutor Moreno-Ocampo took the necessary steps on 1 April 2005 concerning ways to implement the UN Security Council resolution, and expressed his willingness to engage in and seek co-operation with the states and international organizations concerned, including the United Nations and the African Union (AU).²⁴

Since the ICC is located in the Netherlands, far from the states such as Uganda, Congo and Sudan in which the crimes occurred, the investigation and evidence-gathering the Court has to conduct requires co-operation from the local states concerned, and the Prosecutor needs to work together with the local police forces. Although the Security Council has already adopted Resolution 1593, the Prosecutor and the ICC itself will be faced with a very difficult situation if Sudan, as a state not party to the ICC, and the third states of the AU and the United Nations will not provide the assistance and support the Court wishes to have. Evidently the continued support of the Security Council is also indispensable. The way in which the ICC copes with the situation in Darfur will unquestionably have a major influence on the future development of the Court.

Just before the UN Security Council asked the ICC to investigate the Sudan case, another African state that had not yet ratified or acceded to the ICC, Côte d'Ivoire, took the initiative of accepting the jurisdiction of the ICC pursuant to Article 12(3) of the Statute.²⁵ Whether the Côte d'Ivoire government did so in

23 Kaul, above note 18, p. 373.

24 Ibid.

25 ICC Press Release, "Registrar confirms that the Republic of Côte d'Ivoire has accepted the jurisdiction of the Court", 15 February 2005.

order to refer a situation to the ICC or to ask the Prosecutor to come and initiate an investigation is still not very clear. But it is certainly interesting that a state not party to the ICC has taken that initiative and accepted the Court's jurisdiction without any outside pressure.

Co-operation is a particular and very practical issue. In view of the experience of the International Criminal Tribunal for the former Yugoslavia (ICTY) in terms of co-operation, it seems that the ICC might not find it easy in practice to obtain the co-operation of non-party states.

Implementing co-operation through national legislation

In order to co-operate with the ICC a state must pass national legislation enabling its legal provisions to be brought into line with those of the Rome Statute.

In the development of international criminal law to date, quite a few international bodies exercising criminal jurisdiction have been created, such as the ICTY, the International Criminal Tribunal for Rwanda (ICTR), the Special Tribunal for Sierra Leone, and the ICC itself. Although they were all established in different ways and the jurisdiction differs from one to another, they have one thing in common, namely that none of them has its own armed forces or police. In other words, they all need the co-operation and support of states in order to discharge their mandate. However, the manner of establishment of such a judicial body means much in obtaining co-operation from the states, as the following two examples of the ICTY and the ICC will show.

The ICTY was established by the UN Security Council through the adoption of Resolutions 808 and 827 in 1993 under Chapter VII of the UN Charter. Because of the Council's authority, the universality of the UN and the nature of the applicable rules as part of customary international law,²⁶ co-operation was not really an issue for the ICTY, which, in theory, has the great advantage that all member states of the UN must co-operate with it and give it their support.

The establishment of the ICC was first discussed by the UN General Assembly in 1994 on the basis of the International Law Commission's draft. The draft was discussed in depth by the Preparatory Committee on the Establishment of an International Criminal Court (PrepCom) and finally adopted at a diplomatic conference held in Rome in July 1998. Since the Rome Statute is an international legal document that had to be ratified by the statutory number of states to enter into force, there is automatically a distinction between state parties and non-party states, and their obligations to co-operate also differ.

As mentioned above, state co-operation with the international criminal judicial organs requires the adoption of national legislation. Generally speaking,

26 "[I]n the view of the Secretary-General, the application of the principle *nullum crimen sine lege* requires that the International Tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise." Report of the Secretary-General, UN Doc. S/25704, para. 34.

national law has always played a decisive role in the international criminal justice system, particularly with regard to conditions for judicial assistance, the procedures for submitting and executing assistance requests and so on. When the UN Security Council established the ICTY, it asked states to draft or amend their related national laws for the purpose of performing their co-operation obligations.

Article 29 of the ICTY Statute stipulates that “States shall co-operate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.” UN Security Council Resolution 827 adopted for the establishment of the ICTY provides specifically that

[A]ll States shall co-operate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and ... consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute.

Because of the authority of the Security Council under the UN Charter and the binding nature of its resolutions, more than twenty states had enacted national legislation in just under three years after the establishment of the ICTY.²⁷ These states included France, the United Kingdom, the United States, Russia, Germany, Australia, New Zealand, Italy, Poland and Croatia.²⁸ In their legislation, for example in Australia, co-operative relations with the ICTY were simply pursuant to the judicial interaction between them and other states.²⁹

Since the ICTY’s jurisdiction is limited to “serious violations of international humanitarian law committed in the territory of the former Yugoslavia”, co-operation by the states of the former Yugoslavia is of the utmost importance. On 14 December 1995, as a result of the efforts of the international community, Bosnia and Herzegovina, Croatia and Yugoslavia signed the General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Agreement);³⁰ Yugoslavia signed the agreement on its own behalf and on behalf of the Republika Srpska. Since these parties had all played an active role in the

27 1996 *Yearbook of the International Criminal Tribunal for the Former Yugoslavia* (hereinafter *ICTY Yearbook*), chapter V, “State co-operation”, p. 226.

28 For the texts of the laws adopted by these states on co-operation with the ICTY, see *ibid.* and 1995 *ICTY Yearbook*.

29 “Judicial assistance to the International Tribunal shall be furnished in accordance with the applicable provisions relating to judicial assistance in criminal cases in Australia”, Australia, *International War Crimes Tribunals Legislation 1995* (unofficial translation), Section Two, “Judicial assistance”. See 1995 *ICTY Yearbook*, p. 233.

30 Article XIII (4) of Annex 6 (Agreement on Human Rights) of the Dayton Agreement provides that “All competent authorities in Bosnia and Herzegovina shall co-operate with and provide unrestricted access to the organizations established in this Agreement of International Tribunal for the Former Yugoslavia; and any other organization authorized by the UN Security Council with a mandate concerning human rights or humanitarian law.” See 1996 *ICTY Yearbook*, Chapter V, “State co-operation”, p. 229.

armed conflict in the territory of the former Yugoslavia, this document is particularly important for the issue of co-operation. The Dayton Agreement does in fact stress, particularly in Article IX and in Article X of Annex 1-A, that all signatories have agreed to promote the peace and security of the region and promised to co-operate with the ICTY.³¹

“Extradite or prosecute” (*aut dedere, aut judicare*) is a principle generally accepted and commonly used in the course of judicial assistance for the purpose of combating international crimes. Its basic meaning is that if the requested state refuses extradition on certain grounds, it should refer the case to its competent authorities for prosecution in accordance with the request of the requesting state. The practice of the ad hoc Tribunals is not governed by the “extradite or prosecute” principle. While the ICTY has “concurrent jurisdiction” with national courts, it has “primacy” along with “concurrency”.³² States thus have to enact legislation prescribing that in the course of judicial proceedings against a person, once the state receives a transfer request from the International Tribunal for the said person for the same crime, it must suspend its national judicial proceedings and give primary consideration to the Tribunal’s request. For instance, the laws of Bosnia and Herzegovina on co-operation with the ICTY specifically state that regardless of the stage of a trial of a criminal case in the national courts of Bosnia and Herzegovina, as long as the ICTY submits a request for the defendant, the Supreme Court of Bosnia and Herzegovina is required to suspend the trial and transfer that defendant to the Tribunal. Germany has similar provisions,³³ and Duško Tadić, the defendant in the first case of the ICTY, was accordingly transferred to The Hague at the request of the ICTY while being tried in Germany’s national courts.³⁴

31 Article IX of the Dayton Agreement declares that “The Parties shall co-operate fully with all entities involved in implementation of this peace settlement, as described in the Annexes to this Agreement, or which are otherwise authorized by the United Nations Security Council, pursuant to the obligation of all Parties to co-operate in the investigation and prosecution of war crimes and other violations of international humanitarian law.” Article X of Annex 1-A, entitled “Agreement on the military aspects of the peace settlement” calls for the full co-operation of the parties “with all entities involved in implementation of this peace settlement, as described in the General Framework Agreement, or which are otherwise authorized by the United Nations Security Council, including the International Tribunal for the former Yugoslavia”. See *1995 ICTY Yearbook*, p. 321.

32 Article 9 of the Statute of the International Criminal Tribunal for the Former Yugoslavia on “Concurrent jurisdiction” provides that the International Tribunal and national courts shall have concurrent jurisdiction, but the International Tribunal shall have “primacy” over national courts.

33 Article 19 of Bosnia and Herzegovina’s Law on Cooperation with the International Criminal Tribunal (Decree with Force of Law on Extradition at the Request of the International Tribunal) provides that “In the case of one or more criminal proceedings being conducted in the Republic against the same accused person for whom the extradition request has been submitted, the Supreme Court shall suspend the criminal proceedings for those acts in favour of the criminal acts referred to in Article 1 of the Decree (in the ICTY). See *1995 ICTY Yearbook*, p. 337.

34 Germany’s “Law on co-operation with the International Tribunal in respect of the former Yugoslavia”, Article 2, stipulates as follows: Status vis-à-vis criminal proceedings in the Federal Republic of Germany (1) At the Tribunal’s request, criminal proceedings involving offences which fall within its jurisdiction shall be transferred to the Tribunal at any stage. (2) Should a request pursuant to paragraph 1, be submitted, no proceedings may be conducted against any person for an offence falling within the jurisdiction of the Tribunal for which they are standing or have stood trial before that Tribunal. (*Ibid.*, p. 345)

In order to ensure the authority of the ICTY and the validity of its orders, more specific laws were also enacted. For instance, Article 9(I) of the Dayton Peace Agreement's Annex 4 on the Constitution of Bosnia and Herzegovina states that any person who has been convicted of a crime, been prosecuted, or not responded to the Tribunal after being indicted by the ICTY is excluded from being a candidate for any government department post in Bosnia and Herzegovina.³⁵

In contrast, the ICC has no such advantage with regard to national legislation. Article 88 of the Rome Statute provides that "States Parties shall ensure that there are procedures available under their national law for all of the forms of co-operation which are specified under this Part." This provision is general and, moreover, is addressed to state parties alone. There are no such requirements for states not party to the Rome Statute.

The ICC is a permanent international criminal judicial organ that can bring charges on a worldwide basis for war crimes, crimes against humanity, the crime of genocide and the crime of aggression.³⁶ So not only are its requests for co-operation not limited to the states on whose territory the crime(s) in question occurred, but it is also very likely to submit requests for assistance in investigation and evidence gathering to knowledgeable informants in other states concerned that are not party to its Statute. In this case the requests could involve evidence controlled by the said states that originates in the area of the secret service or intelligence authorities. All this makes co-operation by states not party to the ICC seem even more important and sensitive.

Co-operation in investigation and evidence gathering

Co-operation by states with the ICC is specific in practice, with one party conducting the investigation and evidence gathering.

Investigation is also an indispensable procedure of the ICC in placing cases on file for investigation and prosecution, and independent and effective investigation by the Prosecutor is a prerequisite for the performance of its functions. Since the ICC per se has no means of enforcement, it has to rely on the co-operation of the local states concerned.

In accordance with the present system of criminal assistance between states, the judicial authorities of all states can generally exercise judicial authority only within the territory of their own state, and requests for judicial assistance should be executed by the judicial authorities of the requested state. If the judicial officers of the requesting state need to execute on-site requests in the requested state or conduct investigations and gather evidence directly within its territory, they need the prior permission of the requested state and may not violate its laws or take coercive measures. In the course of investigations, arrangements by and the presence of officials of the requested state are generally required.

35 See *1996 ICTY Yearbook*, chapter V, "State co-operation", p. 228.

36 See Article 13 of the Rome Statute on the "Exercise of jurisdiction" of the ICC.

However, the importance of the crimes under the jurisdiction of the ICC means that their investigation involves highly sensitive issues. If the presence of the national competent authorities is permitted during the investigation, the persons being investigated will feel pressured, and this will affect the objectivity and credibility of the investigation results. The investigators or prosecutors of international judicial authorities on criminal matters consequently hope that the relevant national authorities will recuse themselves, so that they can conduct independent investigations. In which case, should the ICC Prosecutor be unconditionally permitted to conduct on-site investigations within the territory of state parties in order to facilitate the legal proceedings, or should the consent of the states concerned be obtained in advance? In this respect there is a very big difference between the ICC and the ICTY.

Article 29 of the ICTY Statute specifically stipulates that all states shall comply without undue delay with any request for assistance issued by a trial chamber of the ICTY, including the identification and location of persons, the taking of testimony and the production of evidence, the service of documents, the arrest or detention of persons and the transfer of the accused to the International Tribunal. Conversely, Article 86 of the Rome Statute requires “full co-operation”, which implies that state parties must do everything possible to perform their obligation to co-operate, but also includes the phrase “in accordance with the provisions of this Statute”, which requires that it be construed together with other provisions of the Rome Statute on co-operation.

The ICTY is an organ established by the UN Security Council under Chapter VII of the UN Charter, on the basis of a particular situation at the time. Thus UN member states have a mandatory obligation to co-operate which originates in the lofty status of the UN Charter and the responsibility and authority of the UN Security Council in maintaining world peace and security. The UN Security Council therefore plays a critical role of the utmost importance in the co-operation obligations assumed by states.

This is precisely why Bosnia and Herzegovina is taking a particularly proactive stance toward the judicial activities of the ICTY within its territory. It has reached a special agreement on co-operation issues with the ICTY’s Office of the Prosecutor of the ICTY, offering ICTY staff free access to Bosnia and Herzegovina to conduct investigations and gather evidence.³⁷ Article 13 (4) of Annex 6 to the Dayton Agreement, on human rights, specifically provides that all competent authorities in Bosnia and Herzegovina shall co-operate with and provide unrestricted access to the organizations established in this Agreement; any international human rights monitoring mechanisms established for Bosnia and Herzegovina; the supervisory bodies established by any of the international agreements listed in the Appendix to this Annex; the International Tribunal for the Former Yugoslavia; and any other organization authorized by the U.N. Security Council with a mandate concerning human rights or humanitarian law.³⁸

37 See 1996 *ICTY Yearbook*, chapter V, “State co-operation”, p. 232.

38 *Ibid.*, p. 228.

The ICTY Statute stipulates that “The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.”³⁹ So when the ICTY goes to other states to execute search warrants, it collects and investigates trial-related documents with local co-operation. While such on-site investigations are generally conducted with the co-operation and participation of the local authorities, the Tribunal holds that due to the “primacy” provided for in the ICTY Statute, such on-site investigations require neither the advance consent of the states concerned nor the presence of the local state authorities.

The experience of the ad hoc ICTY shows that while most states that have signed co-operation agreements with it have not attached restrictive provisions to on-site investigations, a few states have set certain prerequisites. For instance, Germany’s Law on Co-operation with the International Tribunal in respect of the Former Yugoslavia provides for members and authorized officials of the Tribunal to consult with the competent German authorities and independently conduct evidence-gathering activities such as conducting interrogations and collecting evidence from witnesses. It stipulates, however, that in these cases also, the initiation and execution of coercive measures shall remain the preserve of the competent German authorities and shall conform to German law.⁴⁰ Swiss law on “Special Assistance” provides that Tribunal Prosecutors may conduct investigations within the territory of Switzerland only after obtaining the authorization of the Federal Department of Justice and Police, and that before the Federal Department of Justice and Police grants authorization, it should consult with the local (cantonal) authorities.⁴¹

In conducting investigations and seeking evidence, the ICTY even has favourable conditions for obtaining the support of the Implementation Force (IFOR) as a third party. IFOR was established by Security Council Resolution 1031, after the Dayton Agreement had been signed. Although it was neither a party to the Dayton Agreement nor specifically obliged to co-operate with the ICTY, IFOR was in the unique position of possessing both the legal and logistic capacity to assist the Tribunal. With approximately 60,000 soldiers, it was able to do so by requiring signatories of the agreement to comply with their obligation to co-operate, and by providing security guards for ICTY investigators in Bosnia and Herzegovina and protection for staff members uncovering mass graves. In this way IFOR has made a great contribution by ensuring the smooth accomplishment of the ICTY’s investigation and evidence-gathering work in the territory of the former Yugoslavia.⁴²

As to the ICC, Article 99 of the Rome Statute provides that if the Prosecutor needs to execute requests for assistance within a state party, he or she

39 Article 18, para. 2 of the ICTY Statute.

40 Germany, Law on Cooperation with the ICTY, Article 4, para. 4; see also *1995 ICTY Yearbook*, p. 347.

41 Switzerland, Federal Order on Cooperation with the International Tribunal for the Prosecution of Serious Violations of International Humanitarian Law, Article 22. *Ibid.*, pp. 330–31.

42 For IFOR’s co-operation and support to the ICTY, see *1996 ICTY Yearbook*, p. 232.

should consult with that state in advance and observe any reasonable conditions or concerns raised by it; that is, the state's consent is a prerequisite. However, if the said state is a state on the territory of which the crime is alleged to have been committed and there has been a determination of admissibility, the Prosecutor may directly execute the request for assistance following all possible consultations with the requested state party; that is, its consent is not required.

If the ICC Prosecutor requires the prior consent of a state party to conduct an investigation within its territory and needs to observe any reasonable conditions or concerns raised by it, then the consent of a state not party to the Rome Statute is naturally and inevitably also a prerequisite, and it is even more necessary to observe any reasonable conditions raised by that state.

Coordinating international law with national law in the co-operation process

Even though states have enacted legislation for the purpose of co-operation, the practical issue of how to interpret and apply that legislation remains.

From a theoretical perspective, the ad hoc Tribunals were established by the UN Security Council under Chapter VII of the UN Charter. The UN Charter is an international treaty with constitutional significance.⁴³ Therefore, while states may not oppose in their national laws the treaty obligations of international law, and must consequently abide by treaties in the area of judicial co-operation, the requested state may have its own interpretation with regard to issues such as how to determine whether the relevant conditions are met.

In the experience of the ICTY, while many states have enacted legislation expressing willingness to co-operate, they still attach certain restrictive conditions to such legislation, which are marked by the search for ways to reconcile it with their own national legislation. While the ICTY hopes that its Statute and Rules of Procedure and Evidence will be applicable in any possible circumstances, there are very likely to be differences between the rules of the Tribunal and the national legislation of some states. To deal with such circumstances, some states have insisted on the need for their own laws to apply. For instance, Swiss legislation expressly provides that the relevant rules of the International Criminal Tribunal are applicable only on the premise that the crimes under investigation would need to be punished under Swiss criminal law.⁴⁴ German law also specifies that the pertinent articles of German law on judicial co-operation in criminal matters

43 Article 103 of the UN Charter stipulates that "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter *shall prevail*" (emphasis added).

44 Article 17 of the Federal Order on Cooperation with the International Tribunal for the Prosecution of Serious Violations of International Humanitarian Law provides that "Excluding any other condition, assistance shall be granted if the request and the attached documents demonstrate that the offence: a. falls within the jurisdiction of the international tribunal and b. is punishable under Swiss law if the measures requested by an international tribunal are coercive as provided by the law of procedure. See *1995 ICTY Yearbook*, p. 329.

apply to such co-operation.⁴⁵ Croatian law requires requests or decisions of the ICTY to be based on the ICTY's Statute and Rules of Procedure and not in contravention of the Constitution of the Republic of Croatia.⁴⁶ In contrast to the obligations to co-operate with the ad hoc Tribunals, the provisions of the Rome Statute on co-operation use more neutral and more general terms. Article 86 reads: "States Parties shall, in accordance with the provisions of this Statute, co-operate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court." The wording of this provision reflects the obligation of state parties to co-operate while at the same time not overemphasizing its mandatory nature.

In fact, co-operation with the ICC should be specific and technical in practice. For example, the key to co-operation and an important component of it is how to transfer the accused to the Court, since a trial can proceed only when the accused is present. This is indeed one of the fundamental principles of international human rights law. So once the ICC issues an indictment against a suspect, an important question to be resolved immediately is how to arrest and transfer that accused person to the Court. Thus the Court's prospects of success may be decided by the question of co-operation.

In principle, in order to ensure the operation and success of the Court, the transfer of accused to the Court by states should be a mandatory obligation not to be refused on any grounds. Moreover, since compliance with the human rights standards is in principle fully ensured by the international criminal justice system, states should not refuse transfer requests. However, if viewed from another angle – namely that since requests may involve fundamental national interests and basic principles, such as the sovereignty issue, states consider it necessary to have some reservations on certain issues, for instance that the person whose transfer is requested must not be one of its own nationals – the materials attached to the request must conform to the requested state's national procedural rules, the principle that "one may not be tried twice for the same crime" (*ne bis in idem*) must be observed and so on.

The ICTY Statute does not provide any grounds for refusing to co-operate. The states which have adopted legislation for co-operation with the ad hoc Tribunal do not explicitly list any reasons that would entitle them to refuse to co-operate. However, some states have nevertheless attached certain conditions to their co-operation with it.

45 Article 4 of Germany's Law on Cooperation with the ICTY concerning "Other mutual assistance" provides that "Should the Tribunal require the personal appearance of a person at liberty within the area where this Law is in effect as a witness for the purposes of cross examination, confrontation or investigation, the same legal means may be employed to ensure their appearance as would be permissible in the case of a summons to appear before a German court or a German public prosecutor."

46 The original text of Article 3 of Croatia's Law on Cooperation with the International Criminal Tribunal in respect of the Former Yugoslavia reads: "The request for co-operation or enforcement of a decision of the Tribunal shall be granted by the government of the Republic of Croatia if the request or decision is founded on appropriate provisions of the Statute and Rules of Procedure and Evidence of the Tribunal, and if it is not in contravention of the Constitution of the Republic of Croatia." See *1996 ICTY Yearbook*, p. 249.

For instance, Swiss law on co-operation with the international Criminal Tribunal stipulates that transfers must be for crimes that are within the scope of jurisdiction of the International Tribunal and that are punishable under Swiss law, that is, that the principle of “dual criminality” must be observed.⁴⁷ Italian law states that if an Italian court has pronounced a final judgment for the same fact and against the same person, it will not, under the principle that “one may not be tried twice for the same crime”, consent to deliver this person again to the International Criminal Tribunal.⁴⁸ New Zealand law on co-operation with the International Criminal Tribunal specifically provides that if a request by the International Criminal Tribunal prejudices national sovereignty or security, it is entitled to refuse to co-operate. In addition, if the steps that must be taken are not in compliance with its own laws, New Zealand may also refuse to co-operate.⁴⁹

In fact, the ad hoc Tribunals are not very satisfied with the performance by some states of their obligations to co-operate. For instance, although the ICTY indicted Ratko Mladić in 1995, it has never succeeded in arresting and bringing him to justice. In May 1996 he attended the funeral of General Đukić in Belgrade and went scot-free; on 22 May 1996 the President of the ICTY wrote a letter to the UN Security Council asking for an investigation of the Federal Republic of Yugoslavia (FRY) for non-performance of its obligation to co-operate in his arrest or prevent his leaving the territory of the said state.⁵⁰ He also expressed dissatisfaction with the negative response and failure of the FRY to execute many of the orders issued by the Tribunal to arrest and transfer persons.⁵¹ In addition, although Croatia has enacted a national law on co-operation with the International Criminal Tribunal and promised co-operation and support, it has still been unwilling to provide the relevant materials and documents in the *Tihomir Blaškić* case. In that respect, the Chief Prosecutor of the ICTY lodged a protest at the Peace Implementation Council for the Dayton Peace Agreement that was held in Florence, Italy, in 1996.⁵²

In the light of the ICTY’s experience, the provision of the Rome Statute pertaining to extraditions for state parties or non-party states prescribes that:

47 1995 ICTY Yearbook, p. 329.

48 “The Court of Appeal shall render judgment declaring that the conditions for the surrender of the accused have not been met only in any one of the following cases ... a final judgment was pronounced in the Italian State for the same fact and against the same person”, Italy, Decree-Law No. 544 of December 1993 (unofficial translation), 1994 ICTY Yearbook, p. 167.

49 “The Act contains a number of miscellaneous provisions including the following: there are a number of circumstances under which the Attorney-General may decline to comply with requests for assistance by the Tribunals, including (1) where compliance with the request would prejudice the sovereignty, security, or national interest of New Zealand.” See 1995 ICTY Yearbook, p. 349.

50 Letter of the ICTY President to the President of the Security Council of the United Nations, 22 May 1996; 1996 ICTY Yearbook, p. 231.

51 For instance, statement by Judge Antonio Cassese, President of the ICTY, at the Florence Mid-Term Conference on the Implementation of the Dayton Accord (13-14 June 1996), *ibid.*, pp. 261–64.

52 “On compliance and co-operation by the parties in the former Yugoslavia”, status report by the Office of the Prosecutor, 3 June 1996, at p. 1; *ibid.*, p. 231.

1. A State Party which receives a request from the ICC and from another State for the transfer/extradition of the same person for the same offence should notify the Court and the requesting State of that fact.
2. In the above circumstances, and where the requesting State is a State party to the Statute, the request from the Court takes priority if the Court has made a determination that the case is admissible and that determination takes into account the investigation or prosecution conducted by the requesting State. If the Court has not yet made that determination, the requested State may, at its discretion, proceed to deal with the request for extradition from the requesting State, but shall not extradite the person until the Court has determined that the case is inadmissible.
3. In the above circumstances, if the requesting State is a State not party to this Statute, the requested State, if it is not under an international obligation to extradite the person to the requesting State, shall give priority to the request from the Court, if the Court has determined that the case is admissible. Otherwise, the requested State may, at its discretion, proceed to deal with the request for extradition from the requesting State. But if the requested State is under an existing international obligation to extradite the person to the requesting State not party to this Statute, the requested State shall determine whether to deliver the person to the Court or the requesting State after considering all relevant factors.⁵³

Under this provision, if a state party receives a request for extradition from the Court and from a non-party state, the state party has an international obligation to the non-party state to extradite, but it may independently choose to extradite to either the Court or the non-party state. This differs from the “primacy” of the UN ad hoc Tribunals, showing the flexibility of the ICC towards the issue of co-operation.

On the legal consequences of non-co-operation by non-party states

While the ICC hopes that all states concerned will co-operate with the Court, one nevertheless has to ask what the consequences may be if states refuse to co-operate.

The Rome Statute stipulates that the Assembly of States Parties shall discuss and deal with, pursuant to Article 87, paragraphs 5 and 7, “any question relating to non-co-operation” between states and the ICC.⁵⁴ This provision mainly gives the ICC the authority to refer circumstances of non-co-operation by states to the Assembly of States Parties. Of course, if that non-co-operation concerns situations that have been referred by the Security Council to the ICC, the Court may refer the matter to the Security Council.

⁵³ Article 90 of the Rome Statute.

⁵⁴ Article 112.2(f) of the Rome Statute.

With regard to co-operation by states not party to the ICC, the following situation may arise. Such a state may initially agree to co-operate with the ICC, but as the case deepens and the need for co-operation becomes more specific and more sensitive, it may change its attitude and no longer be willing to co-operate with it. To address this issue, it is particularly important to clarify whether obligations to co-operate do exist. If the said state has reached an agreement with the ICC on co-operation, it has by so doing assumed international obligations to co-operate with the Court. If it fails to perform those obligations after reaching such an agreement, that state should assume state responsibility under international law. Article 87(5) of the Rome Statute that was finally adopted by states accordingly provides that: “Where a State not party to this Statute, which has entered into an ad hoc arrangement or an agreement with the Court, fails to co-operate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council”.

Thus there are referrals in both cases, but the provision on non-co-operation by state parties, unlike that on non-co-operation by other states, stipulates in addition that the ICC may “make a finding to that effect” (i.e., of the circumstances of non-co-operation) before making a referral. The distinction in this phrase shows the somewhat differing obligations, in terms of co-operation, of states parties and states not party to the Rome Statute.

While it may be said that there are only slight differences in the wording of the Statute with regard to states parties and non-party states, they are of very practical significance in that they reflect ways of dealing with the issue of non-co-operation by states. The key to resolving it lies in the following questions. When a non-party state fails to co-operate, does the ICC have competence to handle that issue? If it has, which particular organ of the ICC will do so, and which procedure should be followed? If the ICC cannot handle it, to which body should it then be referred?

If the matter is referred by the UN Security Council to the Court, the ICC may inform the Security Council of the failure of the non-party state to co-operate. The Security Council has authority to deal with it in accordance with the UN Charter. If necessary, the Security Council may even consider taking the appropriate sanctions against the state(s) concerned. In all other cases, the ICC can at least refer non-co-operation to the Court’s Assembly of States Parties. However, no specific provision is made in Article 112(2)(f) as to the kind of measures the Assembly of States Parties may take upon receipt of a referral.

If a non-party state fails to co-operate with the Court, the ICC Assembly of States Parties obviously does not have the authority or capacity to censure it or ask it to assume state responsibility. Since non-party states have not ratified the Statute, they do not have any direct and binding obligation under general principles of international law. Moreover, there should be an essential difference between their rights and obligations and those of states parties to the ICC. Of course, if a non-party state has expressed a willingness to co-operate and has reached agreement with the ICC on a specific case, it has consequently incurred an

obligation to co-operate in that particular case just like the states parties. The ICC or states parties to the Court are entitled to ask it to perform its co-operation obligations.

The same principle also governs cases referred by the UN Security Council to the ICC. If the UN Security Council adopts a resolution under Chapter VII of the UN Charter, it is binding on all UN member states. All states must therefore comply, and all have obligations of co-operation. If a certain UN member state fails to co-operate, the Court can, even though that state is not party to the ICC, refer the situation to the UN Security Council, which can take the necessary steps under the relevant provisions of the UN Charter.

It should be noted, however, that the ICC differs somewhat from the two ad hoc Tribunals. Since they were established by the UN Security Council as subsidiary organs of the Council, a state may, if it refuses to co-operate with them, be held to be in non-compliance with its direct obligations under the UN Charter. The Security Council is entitled to respond directly by taking steps under Chapter VII thereof, and can go all the way to deciding to impose sanctions on such states. This authority of the Security Council authority has a legal basis and is ensured.

The ICC is not a subsidiary of the UN Security Council, nor is it an organ of the United Nations. If a case has not been referred to the Court by the Security Council, the Court has no legal grounds for referring it to the Council. Referral to the Assembly of States Parties hardly ensures any practical outcome either, for it does not enjoy the same authority as the UN Security Council and has no authority to impose sanctions on sovereign states for non-compliance.

However, the Assembly of States Parties is a *sui generis* entity. It is clear from the overall provisions in the Rome Statute that it can at least adopt resolutions on behalf of the whole Court to censure non-compliance and ask the state concerned to assume its responsibility. Resolutions by the Assembly therefore do have an effect both on states parties and on non-party states, and thus influence the latter's attitudes towards co-operation with the Court. Logically, the more states that become members of the ICC, the more influential the Assembly of States Parties would be, and the more readily it could have an effect on co-operative relations between non-party states and the Court.

Conclusion

Treaties are binding in principle only on states parties and do not create rights or obligations for non-party states. However, if viewed in the light of the general principles of international law, that is, taking into account the authority of the UN Security Council under the UN Charter, the possible referral by the Security Council to the Court and the provisions of Article 1 common to the Geneva Conventions of 1949, co-operation with the ICC is no longer voluntary in nature, but is instead obligatory in the sense of customary international law. Therefore, while a state may not have acceded to the ICC, it may still be subject to an obligation to co-operate with it in certain cases.

Article 87 of the Rome Statute provides for the Court to invite any state not party to the Statute to reach agreement on co-operation and judicial assistance on the basis of an “ad hoc arrangement”. The words “or any other appropriate basis” in that same article mean that the ways and means of co-operation by such states are quite flexible. In other words, as long as the parties concerned hold that they are appropriate, the ICC and states not party to it can pursue any means of co-operation and judicial co-operation, regardless of whether such means are official or unofficial.

Since the formal establishment of the ICC on 1 July 2002, three and a half years have passed. The international community expects the Court to start making a real entry into the trial stage. This is understandable. Yet the effectiveness and success or failure of the ICC should not be judged by the number of cases it has actually tried. It was established for the purpose of punishing international crimes, achieving conciliation between ethnic groups and maintaining world peace through justice. The “principle of complementarity” laid down in the Rome Statute reflects these objectives. So either international trials or national trials will do, provided they try and punish those who have committed international crimes. If the development of international criminal law and the deterrent effect of the ICC results in the efficient operation of national legal systems, its establishment should consequently be regarded as a success, even if it is not engaged in many trial procedures. Although the ICC has obtained the support of the entire international community, its resources and capacity are after all limited. Moreover, while the international criminal courts are able to handle certain important cases, the fight against international crime and for international justice continues to depend mainly on the national systems.

On the other hand, if those who should be held responsible for the crimes they have committed were able to evade trial and punishment owing to non-compliance by states with their obligation to co-operate, it would undoubtedly constitute a failure of the ICC and of the entire international community as well.

Co-operation by all states with the ICTY has also been largely obstructed in practice, and quite a few arrest warrants issued by the Tribunal have not been executed. It is thus obvious that even in circumstances where mandatory resolutions of the UN Security Council require states to co-operate, some of them will still place restrictions through their national laws on doing so, so co-operation with the ICC will not be smooth sailing in practice. Whereas many indictments issued by the ICTY were executed by NATO troops and UN peacekeeping forces in the territory of the former Yugoslavia, there are no such armed forces available in countries such as Uganda, Congo or Sudan. This is a very practical problem. If an arrest warrant is issued by the Court in response to a request by the Prosecutor pursuant to Article 58 of the Rome Statute, but is eventually delayed or not executed because of lack of co-operation by the states concerned, the authority of the Court will definitely be damaged.

Moreover, co-operation is a matter for both sides. This article has focused so far on the issue of state co-operation with the Court. Beside the question of co-operation by states, there is also the policy issue of whether a case will be accepted

by the ICC. For instance, Côte d'Ivoire submitted a request to the ICC pursuant to the provisions of Article 12 of the Rome Statute, asking the Court to investigate the situation there.⁵⁵ This is something outside the legislators' intent. The original idea in establishing the ICC was to put an end to "the culture of impunity". In other words, it is designed to try those who have committed crimes within its jurisdiction when the relevant national authorities would be unwilling to prosecute their own officials and especially their national leaders, such as Slobodan Milošević, or would be incapable of doing so because they were involved in armed conflicts, for instance Bosnia and Herzegovina, and Rwanda. Hence the "complementarity principle" drawn up by the ICC, which provides for the ICC to exercise jurisdiction when a state is "unwilling" or "unable" to prosecute and, as explained, is a back-up aimed at preventing persons who have committed international crimes from evading punishment.

Côte d'Ivoire is not party to the ICC. It has submitted a request to the ICC *per se* just because it is "unwilling" to prosecute. The exercise of jurisdiction by the ICC is therefore in compliance with the requirements of the Statute. But if states not party to the ICC referred to it all cases they are unwilling to prosecute but which come within its jurisdiction, that, too, would be a difficult problem to solve.

In short, the issue of co-operation by states not party to the ICC is a specific, sensitive and important practical issue that must be dealt with in each case according to the particular circumstances. Finding ways to resolve it and doing so successfully will be of the utmost importance to the development of the ICC.

55 ICC Press Release, "Registrar confirms that the Republic of Côte d'Ivoire has accepted the jurisdiction of the Court", 15 February 2005.