

# Quelle: <sup>4</sup> International Prosecution of Human Rights Crimes

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## Prosecuting International Crimes at the National and International Level: Between Justice and Realpolitik

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### I. Introduction

The International Criminal Court (ICC) in The Hague is the first permanent, treaty-based international criminal court in the history of mankind. It was established on July 17, 1998, by more than 120 states adopting the so-called Rome Statute of the ICC at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. Till March 1, 2006, 100 states ratified and 139 signed the Statute.<sup>1</sup> The Statute entered into force on July 1, 2002, and by February 1, 2006, 1732 "communications" from 103 different countries reporting alleged crimes in 139 countries have been received.<sup>2</sup>

Only in three cases has a formal investigation according to Article 53 of the Statute been opened.<sup>3</sup> Two of these cases (Uganda and Democratic Republic of Congo) have been referred to the Prosecutor by States Parties on the basis of Article 13 (1) (a), 14 ICC Statute, and one (Darfur, Sudan) has been referred by the Security Council on the basis of Article 13 (1) (b).<sup>4</sup> A third state referral by the

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<sup>1</sup> For an updated list of signatures and ratifications, see the official ICC webpage at <http://www.icc-cpi.int/asp/statesparties.html>; see also <http://www.iccnw.org/countryinfo/worldsignsandratifications.html> and [http://web.amnesty.org/pages/icc-signatures\\_ratifications-eng](http://web.amnesty.org/pages/icc-signatures_ratifications-eng). On the historic event of the 100th ratification, see the statements on <http://www.iccnw.org/100th/index.html>.

<sup>2</sup> See Office of the Prosecutor (OTP), *Update on Communications*, press release of February 10, 2006, [http://www.icc-cpi.int/organs/otp/otp\\_com.html](http://www.icc-cpi.int/organs/otp/otp_com.html). According to the *Report on Activities of the Court*, as of September 16, 2005 1497 communications were submitted (ICC-ASP 4/16, Assembly of State Parties Fourth Session, p. 7, [http://www.icc-cpi.int/library/asp/ICC-ASP-4-16\\_English.pdf](http://www.icc-cpi.int/library/asp/ICC-ASP-4-16_English.pdf)).

<sup>3</sup> See for this and the following information in the OTP press release, *supra* note 2.

<sup>4</sup> Security Council Resolution 1593 (2005), adopted by a vote of 11-0, 4 abstentions (Algeria, Brazil, China, United States).

Central African Republic remains under analysis as well as a situation brought before the Court by a declaration of acceptance of jurisdiction from a Nonstate Party (Ivory Coast) pursuant to Art. 12 (3) ICC Statute. Thus, none of the three investigations currently under way is a *proprio motu* investigation, i.e., in none of these investigations did the Prosecutor act ex officio on the basis of the powers assigned to him by the states parties by way of Article 15, relying on information submitted as “communications” by crime victims (channeled through the UN or other organizations, see Article 13 (1) (c), 15 ICC Statute). We will come back to this question.

## II. Initiating an Investigation proprio motu

This brings us to the role of the Prosecutor in the procedural system of the ICC. From the very beginning of the ICC negotiations, the so-called, like-minded states wanted an independent and strong prosecutor, comparable to the prosecutor in national criminal justice systems who—of course!—possesses the power to initiate investigations ex officio (*von Amts wegen*).<sup>5</sup> Clearly, there was strong resistance against such a *proprio motu* power of the prosecutor on the part of major powers, above all, the US, but also China and India. At that time, the Clinton administration was suffering Independent Counsel Kenneth Starr’s investigation into the Lewinsky affair and was, therefore, highly sensitive to any independent prosecutor who could unpredictably press charges at any time.

In the light of these conflicting views, the best compromise that could be reached was to provide for an early judicial control of the prosecutorial investigations and this was the origin of the so-called Pre-Trial Chamber, modeled after the French *Chambre d’Accusation* and the US Grand Jury. This Chamber intervenes at a very early stage in case of a *proprio motu* investigation, namely, if the Prosecutor concludes, “there is a reasonable basis to proceed with an investigation.” (Article 15 (3) ICC Statute). This intervention takes place much earlier than in national criminal proceedings, e.g., in the German *Zwischenverfahren*. While this may prompt criticism from a prosecutorial perspective, the alternative to political control of the Prosecutor, for example, by the Security Council (and thereby by the US), was a worse scenario. In the end, the Security Council won a triggering competence (Article 13 (b)) and the right to suspend an investigation or prosecution for renewable 12-month periods (Article 16). Yet, while the momentousness of the occasion may explain the restrictions imposed on the ICC Prosecutor during the pretrial phase it does not explain why the Prosecutor has not invoked his explicit *proprio motu* powers so far.

Despite the previously mentioned, huge number of communications sent to the ICC, not even one has triggered a formal investigation per Article 53 of the Stat-

<sup>5</sup> See, e.g., the *Freiburg Declaration on the Position of the Prosecutor of a Permanent International Criminal Court*, in L. Arbour et al. (eds.), *The Prosecutor of a permanent ICC* (2000), pp. 667 et seq. (printed versions in English, French, Spanish and German).

ute. According to a recent information by the Office of the Prosecutor (OTP),<sup>6</sup> 80% of these communications were found to be manifestly outside the jurisdiction of the Court; in 5% of the communications the Court lacked temporal jurisdiction (Art. 11)<sup>7</sup> for events occurring before July 1, 2002, the date the ICC Statute went into effect; in 24% the allegations did not fall within the subject-matter jurisdiction, i.e., they did not refer to genocide, crimes against humanity, or war crimes (Art. 5–8);<sup>8</sup> 13% concerned alleged crimes outside the personal or territorial jurisdiction (Art. 12);<sup>9</sup> and, last but not least, 38% of the communications were manifestly ill-founded, e.g., involving general conspiracy claims without specific details or expressing concerns about local or national politics.

The remaining 20% of communications (346 communications), which, according to the OTP warrant further analysis, were categorized by situation, yet the OTP does not say how many situations were identified in total. Under the title “Analysis of Situation”, it only refers to 23 situations, i.e., including those referred via communications, the (three) State referrals, the (one) Security Council referral, and the one ad hoc declaration of a Nonstate Party mentioned above.<sup>10</sup> Thus, it seems as if the OTP reduced the remaining 346 communications to 18 situations (23 minus 5). Of the total 23 situations (18 on the basis of Art. 15-defined communications), six have been dismissed; seven are labeled “basic reporting”; and ten are elevated to “intensive analysis”.<sup>11</sup> Of these 10 situations, three have led to the initiation of an investigation (DRC, Uganda and Sudan, as mentioned above); two have been dismissed (Iraq and Venezuela)<sup>12</sup>; and five remain under analysis.

<sup>6</sup> See *supra* note 2. For the management of referrals and communications in general see OTP, *Paper on some policy issues before the Office of the Prosecutor*, Annex: Referrals and Communications, [http://www.icc-cpi.int/library/organs/otp/policy\\_annex\\_final\\_210-404.pdf](http://www.icc-cpi.int/library/organs/otp/policy_annex_final_210-404.pdf).

<sup>7</sup> According to Article 11 ICC Statute the “Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute,” i.e., after July 1, 2002, or, for a state which acceded to the Statute afterwards, “on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval or accession.” (Article 11 (2), 126 (2) ICC Statute).

<sup>8</sup> According to Article 5 of the ICC Statute the Court has jurisdiction over the crime of genocide, crimes against humanity, war crimes, and the crime of aggression (the latter being subject to a definition still to be found, para. 2). Thus, “ordinary” crimes like single murder, theft or rape are outside its subject matter jurisdiction. On the crimes see K. Ambos, *Internationales Strafrecht* (2006), § 7, margin notes (mn.) 122 et seq.; id., in AIDP (ed.), *International Criminal Law: Quo vadis? Nouvelles Études Pénales* (2004), pp. 219–282.

<sup>9</sup> Art. 12 (2) limits the (formal) competence of the ICC to the territory of States Parties (subpara. (a)) or to the accused’s (correctly: suspect’s) state (subpara. (b)).

<sup>10</sup> See *supra* note 4 and text.

<sup>11</sup> The OTP (see *supra* note 2; text with footnotes 5 and 7) distinguishes between “basic reporting” (Phase II-A) and “more thorough and intensive analysis” (Phase II-B and Phase III).

<sup>12</sup> See the decisions published as an annex to OTP, *supra* note 2.

The OTP does not say which five situations these are but it can be inferred from the other pending situations that Central African Republic and Ivory Coast are included. Of the remaining three, one certainly, to the knowledge of this author, involves Colombia; the others, Afghanistan, Burundi, Iraq, or Nigeria.<sup>13</sup> Regarding the relationship between situations that originate from communications—and thus are legally based on the *proprio motu* power of the Prosecutor—and the ones that are based on the other trigger mechanisms provided for by the ICC Statute (State and Security Council referral or declaration of acceptance of jurisdiction), five of these ten situations originate from communications, two of which have been dismissed (Iraq, Venezuela) and three remain under analysis. In other words, while at least some communications (the ones grouped together in these three situations) have made it to the stage of intensive analysis, *none* has reached the stage of an investigation pursuant to Art. 53 of the ICC Statute.

The Court's disregard of the huge number of communications certainly deserves further attention and gives rise to various legal and factual questions whose analysis, however, would go beyond the scope of this paper. It is clear that some call should be made for judicial control or even for intervention by the Pre-Trial Chamber on behalf of the victims who do not see their interests sufficiently taken into account by the OTP. Be that as it may, it is difficult to understand why not even one communication (as part of a situation) initiated a formal investigation. It would certainly improve the image of the OTP and of the Court as a whole if this would happen.

Take, for example, the case of Colombia where in the decades-long conflict between insurgents, official armed forces and paramilitaries, thousands of civilians have been killed, tortured, disappeared, etc.<sup>14</sup> Although Colombia ratified the Statute as late as August 5, 2002, becoming effective on November 1, 2002 (Article 126 (2)), and, that the government suspended for seven years Article 124's provision, which gives the ICC jurisdiction over war crimes (i.e., until October 1, 2009), it would not be too difficult to find crimes against humanity committed after October 2002 on Colombian territory by Colombian nationals. In other words, if the Chief Prosecutor, the Argentinean Luis Moreno Ocampo, were willing to investigate the Colombian situation *proprio motu*, he could certainly do so. So, why has he up to now not done so? The answer to this question is closely linked to *realpolitik*, which returns us to one of the leading themes of our conference.

### III. State Cooperation in the Investigative Stage

It is important while talking about *realpolitik* in international criminal justice to take a look at the ICC cooperation regime on a more technical level. Let me first

<sup>13</sup> These were the situations, which were in Phase II (see *supra* note 11) in September 2005 (Interview with Xabier Aguirre, senior case analyst, ICC-OTP, The Hague, September 30, 2005).

<sup>14</sup> See most recently Human Rights Watch, *World Report 2006*, Events of 2005, Colombia, pp. 179–186, <http://hrw.org/wr2k6/wr2006.pdf>.

make some general remarks about interstate cooperation versus state cooperation with international criminal tribunals before then coming to some practical problems.

#### 1. Enforcement of International Criminal Law, Vertical Cooperation, and Obligation to Cooperate

International Criminal Law (ICL) can be enforced *directly* (direct enforcement model) by international criminal courts or *indirectly* (indirect enforcement model) by national courts.<sup>15</sup> One can only speak of direct enforcement of ICL in a *genuine* sense if the concerned international tribunals have supranational powers to enforce their own rulings and decisions, such as arresting alleged criminals or carrying out investigative procedures on sovereign territory. This can only be envisaged in the case of occupant tribunals such as the ones in Nuremberg and Tokyo as well as the Special Tribunal for Iraq; however, their powers are nonetheless limited to the occupied territory.<sup>16</sup>

As a rule, international tribunals depend on the cooperation with national states, not only for prosecution of international core crimes, but also for the execution of sentences.<sup>17</sup> International tribunals are, thus, to quote Kern's famous metaphor of the international criminal law judicial system, "a head without arms."<sup>18</sup> From this perspective, there is, in the genuine sense mentioned above, no direct implementation of ICL because the organs in charge of direct implementation established by international law depend on the "indirect enforcement model" in order to function properly.<sup>19</sup>

It is thus evident that there must also be precise rules and principles on cooperation between international tribunals and states. In principle, the same rules governing cooperation (extradition, other legal assistance, and assistance in the execution of sentences) apply as in interstate cooperation concerning criminal matters. However, great attention has to be paid to the major differences, which do exist regarding cooperation terminology, prerequisites, and procedures. Concerning the rules on cooperation, it is worth pointing out that the correct term is *vertical cooperation* to describe the relationship between supranational, international organiza-

<sup>15</sup> G. Werle, *Principles of International Criminal Law* (2005), mn. 195 et seq.; M. C. Bassiouni, *Introduction to International Criminal Law* (2003), pp. 18 et seq. and 333 et seq.

<sup>16</sup> Cf. A. Ciampi, in A. Cassese, P. Gaeta and J. R. Jones (eds.), *The Rome Statute of the ICC, A Commentary, Vol. 2* (2000), pp. 1711 et seq.

<sup>17</sup> C. Kreß et al., in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (1999), part 9, mn. 1 et seq.; A. Ciampi, *supra* note 16, pp. 1607 et seq.; B. Swart, in A. Cassese, P. Gaeta and J. R. Jones (eds.), *supra* note 16, pp. 1589 et seq.

<sup>18</sup> E. Kern, *Gerichtsverfassungsrecht* (1965), p. 227 with regard to the relationship between the prosecutor and the police.

<sup>19</sup> Cf. M. C. Bassiouni, *supra* note 15, pp. 18 et seq. and 388 et seq.

tions, and states.<sup>20</sup> Vertical cooperation differs from the *horizontal cooperation* between equal sovereign states,<sup>21</sup> in that there is no general international law-based obligation to cooperate, but, rather, such cooperation depends on the sovereign decision of the state concerned.<sup>22</sup> Interstate cooperation entails many preconditions, which have to be fulfilled, such as the principle of reciprocity and the consideration of certain other obstacles, which jeopardize its efficiency.<sup>23</sup> The goal of an efficient (regional), horizontal, cooperative system should be the reduction of these obstacles.

In a vertical cooperation regime cooperation does not, at least theoretically, depend on the sovereign decision of the states concerned, but these are, as a general rule, obliged to cooperate. Thus, the Ad hoc Tribunals established by the UN Security Council can direct binding requests and orders to the Member States of the UN. Their *duty to cooperate* is required by the Security Council Resolution (Art. 25 UN Statute) that established the Statutes and provided for a duty to cooperate in Art. 29 of the ICTY Statute and Art. 28 of the ICTR Statute.<sup>24</sup> These Statutes themselves do not contain any grounds for refusal of cooperation; equally, national rules and international conventional obligations, which are opposed to the

<sup>20</sup> *Prosecutor v. Blaskic*, ICTY Case No. IT-95-14-AR108bis., App. Judgment of October 29, 1997, paras. 47 and 54. More detailed regarding the vertical character of cooperation G. Sluiter, *International criminal adjudication and the collection of evidence* (2002), pp. 82 et seq.; G. Sluiter, in H. Fischer, C. Kreß and S. R. Lüder (eds.), *The Rules of Procedure and Evidence on Cooperation and Enforcement* (2001), pp. 688 et seq.; B. Swart, *supra* note 17, pp. 1592 et seq.; J. Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut* (2003), pp. 10 et seq. (about cooperation with interstate organizations Art. 87 (6) ICC Statute).

<sup>21</sup> Cf. B. Swart, *supra* note 17, pp. 1590 et seq.; G. Sluiter 2002, *supra* note 20, pp. 81 et seq.; K. Ambos, *Finnish Yearbook of International Law* 1998, pp. 413 et seq.; W. Schomburg and O. Lagodny, *Internationale Rechtshilfe in Strafsachen*, 3rd ed. (1998), introduction, mn. 45–46; J. A. Vervaele and A. Klip, *European cooperation between Tax, Customs and Judicial Authorities* (2002), pp. 35 et seq.; C. Kreß in H. Grützner and P. G. Pötz (eds.), *Internationaler Rechtshilfeverkehr in Strafsachen*, 63. Ergänzungslieferung (2004), preliminary remarks to III 26, mn. 205 et seq.; C. Kreß et al., *supra* note 17, part 9, mn. 3; P. Wilkitzki, *International Criminal Law Review* 2002, p. 198; J. Meißner, *supra* note 20, pp. 10 et seq. and 275 et seq.

<sup>22</sup> K. F. Nagel, *Beweisaufnahme im Ausland* (1988), p. 72; H. Grützner, in M. C. Bassiouni and V. Nanda (eds.), *A Treatise on International Criminal Law* (1973), pp. 234 et seq.; B. Swart, *supra* note 17, pp. 1590 et seq.

<sup>23</sup> Cf. B. Swart, *supra* note 17, pp. 1590 et seq.; M. C. Bassiouni, *supra* note 15, pp. 333 et seq.; G. Sluiter 2002, *supra* note 20, pp. 81 et seq.; J. Meißner, *supra* note 20, pp. 12 et seq.

<sup>24</sup> Cf. A.-L. Chaumette, *International Criminal Law Review* 2004, pp. 357 et seq. Bilateral agreements on cooperation, like the ones between the USA and the ICTY/ICTR, are therefore superfluous since UN Member States only have to establish the prerequisites for cooperation in their domestic law (cf. G. Sluiter 2002, *supra* note 20, pp. 63 et seq.; J. Godinho, *Journal of International Criminal Justice* 2003, pp. 502 et seq.; contra R. Kushen, *Journal of International Criminal Justice* 2003, pp. 517 et seq.).

Statutes, cannot, in principle, be regarded as grounds for refusal.<sup>25</sup> In case of non-compliance with the duty to cooperate, the UN Security Council can impose sanctions on the violating state.<sup>26</sup>

During the negotiations for the ICC Statute, the states, which adopted a rather critical position towards the ICC, pleaded for a cooperation regime based on the traditional horizontal law of mutual assistance, while the like-minded states proposed a new form of cooperation taking into account the sui generis position of the ICC.<sup>27</sup> As a result, the ICC Statute now contains a mixed regime of cooperation that is, on the one hand, less vertical than the one of the Ad hoc Tribunals, but, on the other hand, goes beyond a merely horizontal cooperation.<sup>28</sup> This is because the ICC cooperation regime is based on an international law treaty, which must reconcile the above-mentioned conflicting interests and, to be sure, was not imposed by the UN Security Council. In principle, the *duty to cooperate* provided for in Art. 86 of the ICC Statute first of all presupposes the states' ratification of this treaty or at least a conclusion of an ad hoc agreement according to Art. 87 (5) of the ICC Statute.<sup>29</sup> Therefore, a distinction has to be made between the general duty to cooperate of the *State Parties* and a limited one of *Nonstate Parties*. Furthermore, the duty to cooperate is linked with the investigations of the Prosecutor (*Anklagebehörde*), because it is a prerequisite for the authorization of an investigation by the Pre-Trial Chamber according to Art. 15 (4) or the decision to investigate according to Art. 53 (1) ICC Statute.<sup>30</sup>

There are also a few *grounds for refusal of cooperation* to be considered. For example, the surrender of a person can be postponed if the ICC has not yet made its admissibility decision (Art. 17 (1) (c), Art. 20 (3) ICC Statute), or if a dispute over the case's admissibility pursuant to Art. 18, 19 is pending (Art. 95 ICC Stat-

<sup>25</sup> Cf. *Prosecutor v. Blaskic*, *supra* note 20, paras. 26, 47, 54 and 63; see also Art. 25, 103 UN Statute; C. Kreß, *supra* note 21, III 27, mn. 57; B. Swart, *supra* note 17, pp. 1592 et seq.; A. Ciampi, *supra* note 16, pp. 1610–11; A. Cassese, *International Criminal Law* (2003), pp. 357 et seq.; G. Sluiter 2002, *supra* note 20, pp. 47 et seq., 139 et seq.

<sup>26</sup> *Prosecutor v. Blaskic*, *supra* note 20, paras. 26–31, 33–37 and ICTY/ICTR rules 7–11, 59 (b) and 61 (e).

<sup>27</sup> For more details on the negotiations, see P. Mochochoko, in R. S. Lee (ed.), *The International Criminal Court* (1999), pp. 305 et seq.; C. Kreß, *European Journal of Crime, Criminal Law and Criminal Justice* 1998, pp. 449 et seq.; C. Kreß et al., *supra* note 17, part 9, mn. 4.

<sup>28</sup> See C. Kreß, *supra* note 21, preliminary remark to III 26, mn. 206 for examples of horizontal and vertical elements; B. Swart, *supra* note 17, pp. 1594 et seq.; C. Kreß et al., *supra* note 17, part 9, mn. 5; K. Ambos, *supra* note 21, pp. 413 et seq.; J. Meißner, *supra* note 20, pp. 275 et seq.; G. Sluiter 2002, *supra* note 20, pp. 82 et seq.; P. Caeiro, in V. Moreira et al. (eds.), *O Tribunal Penal Internacional e a ordem jurídica portuguesa* (2004), pp. 69–157 at p. 70.

<sup>29</sup> Thereto G. Sluiter 2002, *supra* note 20, pp. 68 et seq.; A. Ciampi, *supra* note 16, pp. 1615 et seq.; C. Kreß and K. Prost, in O. Triffterer, *supra* note 17, Art. 87, mn. 18 et seq.; G. Palmisano, in F. Lattanzi and W. A. Schabas (eds.), *Essays on the Rome Statute* (1999), pp. 402 et seq.

<sup>30</sup> OTP, *supra* note 6, p. 10.

ute).<sup>31</sup> Also, the non-compliance regime regarding the duty to cooperate varies for State Parties and Nonstate Parties. In case of a failure to cooperate, the ICC may make a finding to that effect and refer the matter to the Assembly of State Parties or, where the Security Council referred the matter to the Court, to the Security Council (Art. 87 (7) and Art. 112 (2) (f)).<sup>32</sup> In the case of Nonstate Parties, the ICC can also address the matter to the Assembly of States or if need be, to the Security Council, although without a declaratory judicial finding as mentioned above.

## 2. Cooperation in Practice

If one moves from this theoretical framework to the practical questions involved, the first thing the Prosecutor must know is with whom to cooperate. This question should, among others, be dealt with in *national cooperation laws* of the States Parties but up to now only few of them have implemented such legislation and, basically, only those where the commission of international crimes is not very likely, e.g., the member States of the European Union and Canada.<sup>33</sup> Thus, the Prosecutor, in practice, will be confronted with the situation in which he wants to investigate a certain State but this State does not provide for a proper legal framework regarding cooperation with the ICC. This is the case in all African states where currently investigations are under way, and for this reason the Prosecutor must seek specific separate agreements with these states to define the cooperation rules.

Various practical problems arise independently of the existence of cooperation legislation. A quite telling example refers to the question of transport and movement within the country concerned. While a team of investigators may more or less easily get from The Hague to the capital of a state under investigation, internal transport must be organized with the help of local authorities in order, for example, to get the necessary authorization to buy or rent a car and travel all over the country. While bureaucratic problems may be overcome with patience and insistence, lack of security for the investigators may completely hinder an investiga-

<sup>31</sup> For more examples and references see K. Ambos, *supra* note 8, § 8, mn. 65, 79.

<sup>32</sup> Cf. C. Kreß, in O. Triffterer, *supra* note 17, Art. 86, mn. 1 et seq.; A. Ciampi, *supra* note 16, pp. 1608 et seq.; C. Kreß and K. Prost, *supra* note 29, Art. 87, mn. 32 et seq.; G. Sluiter 2002, *supra* note 20, pp. 67 et seq. Concerning the special position of the Security Council, see G. Palmisano, *supra* note 29, pp. 416 et seq.; P. Gargiulo, in F. Lattanzi and W. A. Schabas (eds.), *supra* note 29, pp. 100 et seq.

<sup>33</sup> Cf. Amnesty International on implementation at <http://web.amnesty.org/pages/icc-implementation-eng>. According to the report *International Criminal Court: The failure of States to enact effective implementing legislation* (AI Index: IOR 40/019/2004), September 1, 2004, to August 23, 2004 only 36 out of 94 States Parties have enacted legislation implementing any of their obligations under the Rome Statute. According to the *ICC Monitor*, Issue 32, May 2006, p. 5, up to January 2006 40 of the 100 State Parties have enacted some form of legislation implementing the Rome Statute. 30 States enacted (substantive) "complementarity legislation" and 32 cooperation legislation. 37 States have some form of "draft complementarity legislation" and 27 "draft cooperation legislation". 33 have no complementarity legislation whatsoever, and 41 lack any form of cooperation legislation.

tion. The Sudanese government, for example, expressed various times its general unwillingness to cooperate with the ICC in the Darfur investigation,<sup>34</sup> and upon the first ICC mission's arrival at the beginning of March, the Minister of Justice made clear that it would not get to Darfur.<sup>35</sup> At the initial stage of the investigation the Sudanese government even threatened the Prosecutor, "If you send an investigation team you may already prepare a second one because the first one will not survive." Thus, it is clear that any investigation of this sort requires military support either by local or multinational peacekeeping forces to overcome the logistical and security problems. At the end of the day, detaining a suspect is a police or military task as the experience in the former Yugoslavia shows.

Against this background, it is understandable that the Prosecutor hesitates to make use of his *proprio motu* powers under Article 13 (c), 15 ICC Statute. While a state referral under Article 13 (a), 14 implies the willingness of the referring state to cooperate—otherwise, it would not make sense for the state to ask the Prosecutor for an investigation—and a Security Council referral under Article 13 (b) is backed by the authority of the Security Council and its powers under chapter VII of the UN Charter,<sup>36</sup> in the case of a *proprio motu* investigation, the Prosecutor is basically acting on its own and can only rely on the support of those who submitted the information within the meaning of Article 15 (2), i.e., the victims themselves or (their) NGOs.

From the perspective of the state concerned, a *proprio motu* investigation will most certainly be regarded as an intrusion into its internal affairs, as an unfriendly act, and the state will do everything possible to frustrate such an investigation. This scenario is also true for Colombia where, on the one hand, as mentioned above, crimes within the jurisdiction of the ICC have been and are being committed but, on the other hand, the government does everything to avoid a formal ICC investigation. Still, for all these important considerations of realpolitik one must not lose sight of the actual objective of the ICC, viz., "to put an end to impunity for the perpetrators" of international (core) crimes (Preamble ICC Statute, para. 5). This ultimate objective can certainly not forever be postponed for reasons of realpolitik. This leads us to the question of how the ICC can—despite the resistance of certain States or governments—ensure a proper investigation.

<sup>34</sup> See, for example, <http://www.alertnet.org/thenews/newsdesk/MCD344183.htm>.

<sup>35</sup> See "ICC delegation to visit Sudan's Darfur," *Sudan Tribune*, February 27, 2006, [http://www.sudantribune.com/article.php3?id\\_article=14271](http://www.sudantribune.com/article.php3?id_article=14271).

<sup>36</sup> In Resolution 1593, *supra* note 4, the Security Council limits the powers of the ICC: "6. Decides that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State."

#### IV. Possible Pressure Exercised on States Not Willing to Cooperate

At this point the most important question is what pressure could be exercised on states that are not willing to cooperate with the ICC. First of all, as stated above, an obligation to cooperate only exists with regard to State Parties (Article 86 ICC Statute). Nonstate Parties can only, in the absence of an ad hoc agreement under Article 87 (5) ICC Statute, be obliged to cooperate by a Security Council resolution because of its binding character on all UN member states pursuant to Article 25 UN Charter. In any case, regarding States under an obligation to cooperate, the only legal way to achieve their compliance is to refer the non-cooperation issue—after a statement to that effect by the Court—to the Assembly of State Parties (Article 87 (5) (b), (7), Article 112 (2) (f)). It is then up to the State Parties to decide what measures are adequate to ensure compliance. In case of a Security Council referral, as for example in the Darfur case, the matter can, as mentioned above (III. 1.), also be referred to the Security Council (Article 87 (5) (b), (7)).

While this is certainly the best possible compliance regime within the framework of a treaty-based international criminal court, it shares the problems of any compliance regime in international law. While various theoretical enforcement mechanisms are available, e.g., the use of economic aid inducements and diplomatic economic sanctions, freezing the assets of indicted war criminals, offering individual cash rewards, and, last but not least, the use of military force to effect apprehension,<sup>37</sup> in practice any of these mechanisms proves highly controversial.

Apart from that, the fact that we are dealing with non-cooperation in investigations in crimes committed on the territory or even by the forces of certain Third World states makes things more complicated. Would it really be feasible, for example, for the EU to exercise economic pressure on “unwilling” African States in times of debt reduction and the fight against global poverty? If the EU were to cut down development aid because a state does not cooperate with the ICC, it would come into conflict with its development policy. One might even induce the current US administration into the comfortable position of arguing against the ICC as an antidevelopment Court with the EU only supporting (financially) cooperative States and the US, in contrast, financially benefiting from non-cooperation. These quite superficial considerations show, on the one hand, that economic pressure can be counterproductive, and, on the other hand, that the issue of non-cooperation requires more sophisticated solutions, which certainly are not easy to find.

#### V. Complementarity and Criminal Justice Systems

According to the principle of complementarity the ICC “complements” the domestic criminal justice systems with regard to the prosecution of genocide, crimes

<sup>37</sup> Cf. A. Wartanian, *Georgetown Journal of International Law* 2005, pp. 1302 et seq.; M. P. Scharf, *DePaul Law Review* 2000, pp. 938 et seq.

against humanity, and war crimes. In fact, the ICC steps back if the state, “which has jurisdiction,” investigates the crimes seriously and punishes those responsible. Para. 10 of the Preamble outlines this principle and various provisions for the state, the most important of which is Article 17 (see also Articles 1, 18 and 19). The underlying rationale of the principle is that, on the one hand, it is the primary task of states to prosecute international crimes, especially if committed on their territory; on the other hand, an international criminal court, even if willing, will never be able in terms of prosecutorial capacity to substitute for states in this task. The ICC’s role, thus, is in principle limited to monitoring or supervising national systems and eventually supporting them in their national prosecutions. This is clearly expressed in the initiative by some states to establish a “justice rapid response capacity” of the ICC in order to help willing but unable states to carry out their own prosecutions.<sup>38</sup> This is, overall, a convincing approach, not only for reasons of realpolitik—the territorial state is “closer” to the facts and the evidence, for example—but also because the ultimate objective of the prosecution of international crimes is not only the prevention of impunity in the concrete cases (the *human rights aspect*), but also the improvement of the criminal justice systems concerned as a whole (the *judicial reform aspect*). In other words, the question of the prosecution of serious human rights violations by the territorial State itself is linked to the question, for example, of judicial reform, rule of law, and better access to justice.

The ultimate goal is to achieve a system governed by the rule of law that provides access for all citizens, independent of their social status. Clearly, this is the broader perspective of governance and judicial reform that encompasses the human rights aspect. Indeed, human rights proceedings should be a vehicle for better judicial systems; the human rights question cannot be limited to international crimes alone. It affects other “normal” cases in all areas of the legal system.

#### VI. Problems with Universal Jurisdiction and the German Solution

The above-mentioned phrasing, “which has jurisdiction,” in Article 17 ICC Statute is very broad. Indeed, taking the wording seriously, any form of jurisdiction, including all forms of extraterritorial jurisdiction and especially universal jurisdiction, is covered. Thus, even a state, which has no genuine link to the situation,

<sup>38</sup> See the *Justice Rapid Response Feasibility Study* (October 2005), produced at the request and the support of the governments of Finland, Germany, Liechtenstein, Sweden, Switzerland, and the United Kingdom; see also K. Ambos, *supra* note 8, § 8, mn. 16. In the fifth meeting on Justice Rapid Response (JRR) group the value of JRR as an international cooperation mechanism was emphasized and the following practical steps were introduced: 1. Focal Points, 2. Rosters, 3. Training, 4. Standard operating procedures, 5. Cooperation among interested parties, 6. Ultimate coordination of JRR, 7. Promoting participation (cf. *Chair’s Conclusions of the Venice Conference on Justice Rapid Response*, June 15–17, 2006).

could claim jurisdiction on the basis of universal jurisdiction if the crime was an international core crime.<sup>39</sup> As a consequence, this state would have primacy over the ICC with regard to the crime in question. Concretely speaking, in the Pinochet case, where various states, inter alia Spain and Germany, invoked the principle of universal jurisdiction to prosecute Pinochet before their national courts, these States would have primacy over the ICC. This is indeed the interpretation taken by the OTP<sup>40</sup> and by the International Commission of Inquiry on Darfur.<sup>41</sup>

The latter case makes clear that such a broad interpretation of Article 17 ICC Statute may generate counterproductive results. First, it would increase instead of diminish the tensions between states that claim universal jurisdiction in Pinochet-like cases and those which consider the exercise of extraterritorial jurisdiction in such cases as an intervention in internal affairs. Secondly, it would leave the ICC virtually without cases since all the crimes within the subject matter jurisdiction of the ICC fall, *per definitionem*, under universal jurisdiction and could therefore be prosecuted by states instead of the ICC. For these reasons, the official German view is more restrictive with regard to Article 17 ICC Statute, interpreting “which has jurisdiction over it” as referring to the traditional forms of jurisdiction, i.e., jurisdiction based on the principles of territoriality, (active and passive) personality, and the protective principle.<sup>42</sup> The German law implements this approach with a peculiar substantive-procedural combination of norms. The substantive law, i.e., the German Code of International Criminal Law (*Völkerstrafgesetzbuch*, or VStGB)<sup>43</sup>, provides in Section 1 for a broad principle of universal jurisdiction stating that:

This Act shall apply to all criminal offences against international law designated under this Act, to serious criminal offences<sup>44</sup> designated therein even when the offence was committed abroad and bears no relation to Germany.

<sup>39</sup> See on the rationale and scope of universal jurisdiction K. Ambos, *supra* note 8, § 3, mn. 93 et seq.

<sup>40</sup> See F. de Gurmendi, Chef de Cabinet and Special Advisor to the Prosecutor, interview with the author, The Hague, September 27, 2005.

<sup>41</sup> *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General pursuant to Security Council Resolution 1564 of September 18, 2004* (2005), para. 616: “The ICC should defer to national courts other than those of Sudan which genuinely undertake proceedings on the basis of universal jurisdiction”; see also M. Delmas-Marty, *Journal of International Criminal Justice* 2006, p. 6.

<sup>42</sup> On these principles see K. Ambos, *supra* note 8, § 3, mn. 1 et seq.

<sup>43</sup> For a translation in several languages (English, Arabic, Chinese, Spanish, French, Greek, Russian, Portuguese), see [http://www.jura.uni-goettingen.de/k.ambos/Forschung/laufende\\_Projekte\\_Translation.html](http://www.jura.uni-goettingen.de/k.ambos/Forschung/laufende_Projekte_Translation.html).

<sup>44</sup> In German law the term “serious criminal offence” (*Verbrechen*) is used to denote criminal offences (*Straftaten*) that are punishable with not less than one year of imprisonment. Mitigating (and aggravating) circumstances—as regulated for instance in Section 8 Subsection (5)—are to be disregarded in this respect (Section 12 German Criminal Code). As a result, all criminal offences in the VStGB are “serious criminal offences” with the sole exception of the criminal offences in Sections 13 and 14.

This norm is the broadest possible solution and reflects the German view, also held in Rome, that for core crimes such as crimes against humanity, genocide, and war crimes, the principle of universal jurisdiction must apply. However, for practical reasons or, again, *realpolitik* (inter alia, pressure by the Federal Prosecutor’s Office, or *Generalbundesanwaltschaft*), a restriction of this broad substantive principle had to be found and therefore Section 153f of the German Code of Criminal Procedure (*Strafprozessordnung*, or StPO) was created. This complex norm<sup>45</sup> reads as follows:

(1) In the cases referred to under Section 153c Subsection (1), numbers 1 and 2 [extraterritorial crimes], the public prosecution office may dispense with prosecuting an offence punishable pursuant to Sections 6 to 14 of the Code of Crimes against International Law, if the accused is not present in Germany and such presence is not to be anticipated. If in the cases referred to under Section 153c Subsection (1), number 1, the accused is a German, this shall however apply only where the offence is being prosecuted before an international court or by a state on whose territory the offence was committed or whose national was harmed by the offence.

(2) In the cases referred to under Section 153c Subsection (1), numbers 1 and 2, the public prosecution office can, in particular, dispense with prosecuting an offence punishable pursuant to Sections 6 to 14 of the Code of Crimes against International Law, if

1. there is no suspicion of a German having committed such offence,
2. such offence was not committed against a German,
3. no suspect in respect of such offence is residing in Germany and such residence is not to be anticipated and
4. the offence is being prosecuted before an international court or by a State on whose territory the offence was committed, whose national is suspected of its commission or whose national was harmed by the offence.

The same shall apply if a foreigner accused of an offence committed abroad is residing in Germany but the requirements pursuant to the first sentence, numbers 2 and 4, have been fulfilled and transfer to an international court or extradition to the prosecuting State is permissible and is intended.

(3) If in the cases referred to under Subsection (1) or (2) public charges have already been preferred, the public prosecution office may withdraw the charges at any stage of the proceedings and terminate the proceedings.

This norm provides for an exception from the principle of mandatory prosecution, which governs, in principle, German criminal procedure. While the rule of mandatory prosecution is severely weakened, some may even say undermined, by various exceptions (Sections 153, 153a, 153b, 153c, 153d, 153e, 154, 154a StPO), leaving the Prosecutor wide discretion to close or suspend an ongoing investigation, the main difference between these exceptions and the new Section 153f is that the former ones (the traditional exceptions), generally speaking, refer to less important offences but not to the most serious international crimes. Only Section 153c StPO, referred to in para. 1 of Section 153f, refers to any crime “committed abroad,” i.e., also covers, in theory, international crimes. Be that as it may, the conceptual problem of Section 153f is that it is difficult to justify an exception

<sup>45</sup> For an analysis see K. Ambos, *supra* note 8, § 3, mn. 100; more detailed, id., in *Münchener Kommentar StGB und Nebenstrafrecht*, Vol. VI, § 1 VStGB, mn. 24 et seq. (to be published 2007).

from the principle of mandatory prosecution in cases of international crimes whose prosecution is mandated by international treaty and customary law.<sup>46</sup> In addition, at least according to the dominant view, there is no remedy against the negative prosecutorial decision to abstain from an investigation or stop the investigation. This view has been confirmed by the Stuttgart Court of Appeals (*Oberlandesgericht*)<sup>47</sup> in the Rumsfeld/Abu Ghraib case analyzed in detail in this volume.<sup>48</sup> This restrictive view is difficult to sustain given the broad legal or normative evaluation to be carried out by the Prosecutor when taking a decision under Section 153f StPO. It should, therefore, be possible to submit this legal evaluation to a judicial review.<sup>49</sup>

## VII. Conclusion

The paper tried to demonstrate that the prosecution of international crimes at a supranational as well as at a national level encounters several limitations and problems, which in one way or the other can be traced to realpolitik. The ICC is still an institution in the making and cannot do away overnight with the centuries-old problems of impunity for grave human right violations. Too high expectations may prove counterproductive leading to a Court workload, which, ultimately, may lead to its failure. Thus, caution and a dose of realpolitik from some of the non-governmental friends of the court is required. At this moment, the ICC, at least the Office of the Prosecutor, operates with full capacity in its four cases and it is difficult to see how it can take more.<sup>50</sup> While from a purely legal perspective the Prosecutor might be under an obligation to prosecute, *proprio motu*, cases on the basis of Article 13 (c), 15 ICC Statute, the factual situation apparently does not allow for more cases to be investigated and, in any case, a *proprio motu* investigation encounters more problems than investigations on the basis of a state or Security Council referral. Again, while this is a problem of realpolitik and it is therefore difficult to accept for a lawyer, there is no alternative than to take into account the factual limitations, especially of an institution, which is still in the phase of construction and consolidation.

<sup>46</sup> See K. Ambos, *Archiv des Völkerrechts* 1999, pp. 318 et seq.; id., *Impunidad y derecho penal internacional*, 2nd ed. (1999), pp. 66 et seq.

<sup>47</sup> Decision of September 13, 2005, published in *Neue Zeitschrift für Strafrecht* 2006, p. 117. For a critical commentary K. Ambos, *Neue Zeitschrift für Strafrecht* 2006, pp. 434 et seq.

<sup>48</sup> See especially the contributions of W. Kaleck and F. Jessberger in this volume.

<sup>49</sup> For a more detailed discussion see K. Ambos, *supra* note 47; id., *supra* note 45, § 1 VStGB, mn. 31.

<sup>50</sup> Thus, Deputy Prosecutor Serge Brammertz stated that all investigators are working in teams spread worldwide and he cannot relinquish one of them to hold lectures in universities or other interested circles (interview with the author, The Hague, September 26, 2005).

## Addressing the Relationship between State Immunity and Jus Cogens Norms: A Comparative Assessment

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In the context of a publication on universal jurisdiction, the issue of state immunity presents an important corollary, as was noted by Judges Higgins et al. in their Separate Opinion in the International Court of Justice Arrest Warrant case who described immunity and jurisdiction as “inextricably linked.”<sup>1</sup> In the context of crimes under international law, the issue of state immunity is of topical importance due to a series of recent and ongoing decisions by national courts and the opening for signature of the United Nations Convention on the Jurisdictional Immunities of States and their Property.<sup>2</sup>

However, because the laws on state immunity and *jus cogens* norms developed separately from each other, even now, very little analysis or commentary exists on

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<sup>1</sup> Separate Opinion of Judges Higgins, Kooijmans and Buergenthal in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, ICJ Reports 2002, at para. 3.

<sup>2</sup> General Assembly, Resolution 59/38 United Nations Convention on Jurisdictional Immunities of States and Their Property, A/RES/59/38 (December 16, 2004). Room does not permit for a detailed discussion of the Convention within this article. Please refer to REDRESS' Report, *supra* first note, for a full examination of the potential impact of the Convention on this developing area of law. For further discussion on the human rights implications of this Convention, see C. Hall, *International and Comparative Law Quarterly* 2006, pp. 411–426 and L. McGregor, *International and Comparative Law Quarterly* 2006, pp. 437–446.