

Current and Future Scenarios for Arrest and Surrender to the ICC

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I. Premise

On 13 October 2005, Pre-Trial Chamber (PTC) II decided to unseal the five warrants of arrest issued in the situation of Uganda.¹ The warrants were requested by the Prosecutor of the International Criminal Court (ICC) on 6 May 2005 and issued under seal by PTC II on 8 July 2005 against Joseph Kony and four other senior leaders of the Lord's Resistance Army (LRA), charged with crimes against humanity and war crimes committed in Uganda since July 2002.² The Chamber also issued requests for arrest and surrender of the five LRA commanders named in the warrants and decided that they would be transmitted by the Registrar of the ICC to the government of Uganda. While one of the persons sought by the Court had meanwhile died, the other four still remain at large. These were the first warrants of arrest issued by the ICC since the Statute entered into force on 1 July 2002.

On 17 March 2006, Mr. Thomas Lubanga Dyilo, a Congolese national, was the first person to be transferred to the ICC, following his arrest in Kinshasa, the capital of the Democratic Republic of the Congo (DRC). The warrant of arrest against Lubanga Dyilo had been issued under seal by PTC I on 10 February 2006. He is charged of war crimes committed in the territory of the DRC since July 2002.

Against this factual background, the present paper analyses the cooperation scheme for arrest and surrender to the ICC under the Statute by confronting it with the current (and other foreseeable) scenarios. In this context, the State referrals – in relation to which arrest warrants have actually been issued – and referrals by the Security Council are discussed separately.

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¹ Pre-Trial Chamber II, *Decision on the Prosecutor's Application for Unsealing of the Warrants of Arrest* (ICC-02/04-01/05-52), of 13 October 2005, available at: <http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-52_English.pdf>.

² The Chamber found that "there are reasonable grounds to believe" that Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen and Raska Lukwiyi, "ordered the commission of crimes within the jurisdiction of the Court". See *Warrant of Arrest for Dominic Ongwen* (ICC-02/04-01/05-57); *Warrant of Arrest for Okot Odhiambo* (ICC-02/04-01/05-56); *Warrant of Arrest for Raska Lukwiyi* (ICC-02/04-01/05-55); *Warrant of Arrest for Vincent Otti* (ICC-02/04-01/05-54); *Warrant of Arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005* (ICC-02/04-01/05-53). These documents, as well as the other documents further referred to in the text, are available on the page of the site of the ICC related to the situation in Uganda: <http://www.icc-cpi.int/cases/current_situations/Uganda.html>.

II. The Cooperation Scheme for Surrender to the ICC Under the Statute

One can hardly overstate the importance of arrest and surrender to the ICC for the Court's exercise of its functions and the fulfillment of its purposes under the Statute, which does not allow trials *in absentia*.³

According to the Statute, a person may come before the ICC in three different ways: first, following the surrender of the person to the Court; second, upon the person's voluntary appearance; and, thirdly, pursuant to a summons to appear.⁴ The voluntary appearance of a person charged by the Court is a very unlikely, if not wholly unforeseeable, event. The prospect that a person would comply with a summons to appear is almost as exceptional.⁵ In most, if not all, cases, therefore, the presence of a person before the Court will be secured only by surrender of that person to the Court pursuant to a warrant of arrest.

Under Article 58, paragraph 1, of the Statute, "[a]t any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that: (a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and (b) The arrest of the person appears necessary: (i) To ensure the person's appearance at trial, (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings, or (iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances."

Being a body without "arms" and "legs", the ICC cannot, in principle, directly enforce its warrants of arrest, but has to rely on the cooperation of States (or international organizations or other entities).⁶ Thus, Article 58, paragraph 5, provides that "[o]n the basis of the warrant of arrest, the Court may request the provisional arrest or the arrest and surrender of the person under Part 9". Part 9 of the Statute, through Articles 86-102, lays down the cooperation scheme for arrest and surrender to the ICC as well as for other forms of cooperation with the Court. Articles 86-88 provide for a general obligation to cooperate with the Court, while

³ Art. 63, para. 1, of the Statute provides that: "The accused shall be present during the trial."

⁴ See Art. 60 of the Statute on "Initial proceedings before the Court".

⁵ A summons to appear shall be only issued when deemed sufficient to ensure the person's appearance, in accordance with Art. 58, para. 7, which is so worded: "As an alternative to seeking a warrant of arrest, the Prosecutor may submit an application requesting that the Pre-Trial Chamber issue a summons for the person to appear. If the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that the person committed the crime alleged and that a summons is sufficient to ensure the person's appearance, it shall issue the summons, with or without conditions restricting liberty (other than detention) if provided for by national law, for the person to appear."

⁶ The same goes for the Court's orders for seeking evidence.

States parties' obligations in relation to the Court's requests for arrest and surrender are detailed and further specified in Articles 89-92.⁷

The Statute sets out an "absolute" obligation for States parties to cooperate with the requests for arrest and surrender by the Court. This means that in principle no exception may be invoked to avoid compliance with this obligation (or a breach thereof). Various proposals to the contrary – in particular, with regard to the surrender of nationals and of persons enjoying immunity under national law – were ruled out during the preparatory work of the Rome Statute. In this respect, the Statute makes a very important distinction from the obligations to comply with requests for "other forms of cooperation", which are instead subject to a number of exceptions, even if these have to be strictly construed.⁸

In addition, Article 102 explains that "[f]or the purposes of th[e] Statute", "surrender" means the delivering up of a person by a State to the Court", while "extradition" means the delivering up of a person by one State to another State". The choice of the term "surrender" as opposed to "extradition" reflects the idea – which underlies the whole scheme of cooperation under the Statute – that the transfer of a person to the Court for prosecution is essentially different in nature from the delivering up of persons by one State to another State. The difference is not, of course, in the material act of the transfer *per se*, but on the entity to which the person has to be delivered.

Much has been said in relation to the "vertical" nature of the cooperation regime provided for under the Statute, as opposed to the "horizontal" character of interstate relations. The issues underlying this – in our view, essentially theoretical – debate do not need to be addressed here. For the purposes of this essay, however, it is necessary to point out that the characterization of cooperation as "vertical" may be misleading. In fact, the Statute lays down an absolute obligation to cooperate with requests for arrest and surrender by the Court only for States that either are parties to the Statute or have accepted the jurisdiction of the Court by lodging with the Registrar of the Court a declaration under Article 12, paragraph 3, of the Statute.⁹ As a treaty-based obligation, it cannot prevail over conflicting obligations

⁷ For a general appraisal of these provisions see the contribution by Annalisa Ciampi, *The Obligation to Cooperate*, and Bert Swart, *Arrest and Surrender*, both in: A. Cassese *et al.* (eds.), *International Criminal Law: A Commentary on the Rome Statute for an International Criminal Court*, Oxford 2001, 1607-1638 and 1639-1703, respectively.

⁸ For these exceptions see Annalisa Ciampi, *Other Forms of Cooperation*, in: Cassese (note 7), 1705-1747, at 1732-1736. This is the first difference between the two forms of cooperation which is of relevance here. The second is outlined in para. IV, on the power (or lack thereof) of the Prosecutor to execute arrest warrants directly; the third in para. VI, on Security Council's referrals.

⁹ According to Art. 12, para. 3, "a State which is not a Party to this Statute [...] may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9". The Republic of Côte d'Ivoire was the first State – and to date the only one – to lodge such a declaration on 15 February 2005. This State, which signed the Statute on 30 November 1998 but has yet to ratify it, has accepted the jurisdiction of the Court with respect to crimes committed on its territory since 19 September 2002.

vis-à-vis States which are not parties to the Statute. This limitation is expressly acknowledged in Articles 90 and 98 of the Statute. Only a decision taken by the Security Council acting under Chapter VII of the UN Charter would have the effect to ensure the primacy of the obligation to cooperate with the Court over all conflicting obligations.

Moreover, – as the following paragraphs will attempt to show – the effectiveness of a cooperation regime does not necessarily depend on the number of exceptions (or absence thereof) which may be invoked by the requested State, but may well be the consequence of other – often more relevant – factors operating from outside the cooperation scheme.

III. The First Scenario: Surrender to the ICC in the Absence of Implementing Legislation

Article 88 of the Statute provides that “States Parties shall ensure that there are procedures available under their national law for all the forms of cooperation [...]”. Six years after the entry into force of the Statute, however, the status of implementing legislations is far from satisfactory, at least under two different respects. First of all, out of 100 States which ratified the Statute, less than 30 have enacted and put into force implementing legislation.¹⁰ Secondly – but not less importantly – almost all contain provisions of substantive criminal law for the purpose of making criminal under national law the crimes within the ICC’s jurisdiction, but only a few national laws contain provisions to ensure compliance with the Court’s requests for cooperation.

As is well known, the Statute does not mandate enacting of implementing legislation in relation to the crimes within the jurisdiction of the Court (in accordance with Articles 5-8); it merely recalls “the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes” (sixth paragraph of the Preamble). The complementarity regime, however, creates an “incentive” for the exercise of national jurisdiction in relation to the crimes provided for in the Statute. In particular, if a State fails to have domestic penal legislation covering one or more of the crimes within the jurisdiction *ratione materiae* of the Court, it may well be contended, and it may be simple for the Court to determine, that such State is unable to carry out its proceedings due to the unavailability of its national judicial system. For a State to secure its “ability” to prosecute, these crimes have to be provided under national law for the purpose of national prosecutions.

With regard to cooperation, the Statute explicitly sets out an obligation for all States parties to ensure that there are national procedures available for complying with requests made by the ICC. For the purpose of this essay, it is not necessary to

¹⁰ A constant update on legislation enacted or in the process of being drafted for the purpose of implementing the Rome Statute, is available on the site of the Coalition for the International Criminal Court: <<http://www.iccnw.org>>.

address the question whether Article 88 merely restates the general principle of international law according to which a State cannot invoke the provisions of its national law (or lack thereof) in order to exclude its international responsibility,¹¹ or whether this provision lays down an obligation of conduct. Whether ratification of the Statute, when it is not accompanied by the enactment of implementing legislation, does or does not constitute *per se* a breach of the Statute, the absence of implementing legislation will prove in most, if not all, cases a major obstacle to compliance with requests for arrest and surrender by the Court.

First of all, national laws do not usually allow judicial cooperation in the absence of a normative basis, especially when the cooperation sought implies resort to coercive measures, such being always the case in extradition proceedings. For this purpose, provisions for delivering up of persons to foreign States pursuant to a request for extradition do not apply in principle to requests for arrest and surrender by the ICC.

State practice in relation to cooperation requests by the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) is illustrative of the kind of problems States encounter when they receive a request for arrest by an international tribunal in the absence of *ad hoc* implementing legislation. In the *Tadić* case,¹² for instance, the ICTY exercising its right to primary jurisdiction, requested Germany to defer to its competence on 8 November 1994. Germany suspended the proceedings carried out against *Tadić* by its national authorities, but could not comply with the Tribunal's request for surrender until April 1995, after the law implementing the ICTY Statute entered into force. A similar occurrence happened in relation to a request for arrest and surrender addressed to the United States (US) by the ICTR, in the *Ntakirutimana* case: in 1997, a US district court denied the request for surrender to the ICTR on the grounds that a proper treaty basis for the surrender of the accused did not exist.¹³ It is likely that the ICC would encounter similar difficulties, should it address requests for arrest and surrender to a State which has not enacted implementing legislation, a possibility which is all but remote, in view of the current status of implementing legislation referred to above.

Moreover, in the case of the ICC, the argument against the application by analogy of procedures provided for under national laws for delivering up persons to other States is even more compelling, in the light of the terminological choice of the Statute of the term "surrender" – as opposed to "extradition" – to indicate the delivering up of persons to the Court enshrined in Article 102 of the Statute. The rationale of the differentiation between the two concepts is – of course – to facilitate the surrender of persons sought by the ICC, without incurring in the tradi-

¹¹ For the view that Art. 88 merely spells out an obligation of result, which would be however imposed on the States parties to the Statute, see *Cia mpi* (note 7), at 1624-1626.

¹² *Tadić* case, IT-94-1.

¹³ See *In the Matter of Surrender of Elizaphan Ntakirutimana*, US District Court for the Southern District of Texas, in: *Yearbook of Int. Humanitarian Law*, 1998, 607.

tional obstacles to extradition in interstate proceedings. In certain circumstances, however, this choice could “backfire”, in the sense that it could provide an argument against the application (by analogy or by way of a wide interpretation) of national provisions on extradition for the purpose of complying with requests for arrest and surrender by the Court.

IV. The Lack for the Prosecutor of Any Power to Execute Warrants of Arrest Directly

The Statute does not provide for any power of the Prosecutor – or of any other organ of the Court¹⁴ – to execute a warrant of arrest directly, where a State fails to comply with a request for arrest and surrender by the Court because there is no implementing legislation or the State is otherwise unable and/or unwilling to cooperate. In this respect, the scheme for arrest and surrender differs from the cooperation regime provided for under the Statute in relation to “other forms of assistance”.¹⁵

The absence of an express provision in the Statute for the Prosecutor’s power to execute a warrant of arrest directly for the purpose of transferring a person to the Court should be contrasted with the provision of powers to conduct on-site investigations in the exceptional circumstances provided for under Article 57, paragraph 3 (d), of the Statute (albeit with the very significant exclusion of coercive measures!). A proposal to introduce an analogous provision for the purpose of allowing the Prosecutor to execute warrants of arrest directly was rejected in the course of the preparatory work. It would thus be difficult to construe any such power by way of interpretation of the Statute as an implied power of the Prosecutor.¹⁶

Limitations posed by the Statute to the powers of the Prosecutor could not even be overcome by way of a State’s consent to the Prosecutor carrying out arrests in its territory. States certainly could commit themselves to cooperate with the Court (or an organ thereof), by assuming further obligations than those provided for under the Statute (e.g., accepting to give priority to a Court’s request for arrest and surrender even in cases where it conflicts with a pre-existing international obligation *vis-à-vis* a State not party to the Statute). However, the fact that Part 9 does not prevent this has no bearing on the question of the extent of the Court’s functions and powers under the Statute.

¹⁴ According to Art. 34 of the Statute: “The Court shall be composed of the following organs: (a) The Presidency; (b) An Appeals Division, a Trial Division and a Pre-Trial Division; (c) The Office of the Prosecutor; (d) The Registry”.

¹⁵ This is another difference between the two forms of cooperation, which adds to the one outlined in para. II. See *supra*, note 8 and the corresponding text.

¹⁶ On the use of the preparatory work as a supplementary means of interpretation see Art. 32 of the Vienna Convention on the Law of Treaties of 1969, which can be considered as corresponding to the rules of general international law on interpretation of treaties.

As a legal entity created by a treaty, the ICC can only exercise powers which are conferred upon it by the Statute, be they the powers expressly provided for or the “powers which, though not expressly provided [...] are conferred upon it by necessary implication as being essential to the performance of its duties”.¹⁷ This principle, which is restated in several provisions of the Statute,¹⁸ applies in respect of the Court as a whole as well as in relation to each organ of the Court, including the Prosecutor. It follows that the Prosecutor cannot extend its powers beyond those which are expressly provided for, or can be implicitly construed, under the Statute.

The practice of the Office of the Prosecutor (OTP) confirms – implicitly, at least – the exclusion under the Statute of the Prosecutor’s power to execute arrest warrants directly in the territory of the States parties. Apparently, none of the bilateral agreements concluded by the OTP with States parties for the purpose of facilitating and speeding up their cooperation with the ICC,¹⁹ mentions any power of the Prosecutor to execute warrants of arrest directly. Were it otherwise, the conclusion of the agreement would be *ultra vires*.²⁰ The question of the validity of the agreement allegedly concluded *ultra vires* by the Prosecutor could be raised before (or by) the judicial organs of the Court by way of a challenge to the lawfulness of any arrest executed on the basis of that agreement.

V. The Scenarios Currently Before the ICC in the Situation of (a) “Self-Referrals” by States ...

The current scenarios before the ICC must be assessed against the background of the main features of the Court’s exercise of jurisdiction under the Statute.

¹⁷ Reparation for injuries suffered in the service of the United Nations, I.C.J. Reports 1949, at para. 182.

¹⁸ See, e.g., Art. 4 – on the territories where the Court can exercise its powers – which refers to the “functions” and “powers” of the Court “as provided in this Statute”.

¹⁹ The governments of the DRC and of Uganda concluded agreements on judicial cooperation with the OTP on 6 October and September 2004 respectively. Although these agreements might result in a more enhanced form of cooperation than the one envisaged under Part 9 of the Statute, they resulted from the absence of implementing legislation. Similarly, on 12 October 2004, a provisional Memorandum of Understanding was signed between the Court and the DRC in order to facilitate the independence, safety and confidentiality of the Court’s activities in the field. This measure will remain in force only until the Congolese authorities ratify the Agreement on the Privileges and Immunities of the International Criminal Court. But for the agreement with the DRC, the content of these (and other similar) agreements has yet to be made public. See *Accord de coopération judiciaire entre la République démocratique du Congo et le bureau du Procureur de la Cour Pénale Internationale*, released as public document ICC-01/04-01/06-39-US-AnxB9 of 23 March 2006, available at: <http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-39-AnxB9_French.pdf>.

²⁰ According to Art. 46 of the Vienna Convention on the Law of Treaties between International Organizations and between International Organizations and States of 1986, a violation of the internal rule of the organisation gives rise to the possibility to challenge the validity of the treaty where it concerns a provision of fundamental importance and it is of manifest character. Such a challenge, however, could only be brought by the organization the rules of which have been breached.

The first of such features concerns crimes within the jurisdiction *ratione materiae* of the Court: crimes of genocide, crimes against humanity and war crimes are all crimes typically committed by State organs or “under colour” of governments. This nature of the crimes in relation to which the Court may exercise its jurisdiction, coupled with the policy adopted by the OTP to focus investigations on those who bear the greatest responsibility for the most serious crimes,²¹ will result in most (if not all) situations in the issuance of warrants of arrest against State organs or members of a party to an internal armed conflict. The natural addressee of these arrest warrants would be the national State of the persons sought, that is the State most directly implicated with the crimes in question.

Another feature which affects the cooperation scheme for surrender to the ICC is the complementarity principle which qualifies the Court’s exercise of jurisdiction. Under the complementarity principle, a case is only admissible before the ICC in situations in which no State is willing or able (or both) to prosecute the crimes in question genuinely.²² Now, inability or unwillingness to prosecute the crimes within the jurisdiction of the Court cannot automatically be equated to inability or unwillingness to cooperate with the latter. The two concepts are, however, related. For example, the “total” or “substantial” collapse – or unavailability – of a national judicial system which results in the “inability” of the State to investigate and prosecute crimes before its national authorities may well also result in the inability of that State to cooperate with the Court in its investigations and prosecutions. In the case of “unwillingness”, the possibility of a coincidence – between unwillingness to prosecute and unwillingness to cooperate – is even more evident.

The cooperation regime is also affected – at least, in part – by the mechanism which “triggers” the Court’s exercise of jurisdiction. According to the Statute, the Court may exercise its jurisdiction if a situation is referred to the Prosecutor by a State party to the Statute or by the Security Council acting under Chapter VII of the UN Charter, as well as following investigations initiated *proprio motu* by the Prosecutor.²³ However, in practice only the first two options have materialized. It seems unlikely that the Prosecutor will take an initiative to start investigations *proprio motu* in the near future.²⁴

We shall now consider how each of these features, and the combination thereof, may actually contribute to making the delivering up of persons to the ICC in ac-

²¹ See “Paper on Some Policy Issues Before the Office of the Prosecutor”, available on the website of the OTP at: <<http://www.icc-cpi.int/otp/030905%20Policy%20Paper.pdf>>.

²² See Art. 17 of the Statute.

²³ See Art. 13 of the Statute.

²⁴ The clearest manifestation of priority given by the Prosecutor to situations referred by the State concerned (or the Security Council) rather than to situations where investigations are carried out *proprio motu* is the situation in the DRC, in which the Prosecutor announced “informal” investigations on 16 July 2003, but decided to open investigations formally only after the attempt – which was eventually successful – to have the DRC refer the situation to the Prosecutor. See Annalisa Ciampi, *The International Criminal Court, Law and Practice of Int.l Courts and Tribunals*, 2004, 375-379, at 377.

cordance with the Statute's scheme for cooperation particularly difficult in all the situations currently (or in the future likely to be taken) before the ICC.

Since the entry into force of the Statute, four situations have been referred to the Prosecutor: three by a State party, one by the Security Council. The first State to make a referral was Uganda in December 2003, eventually followed by the DRC and the Central African Republic (CAR) in March and December 2004, respectively. These States have referred situations concerning crimes committed in their respective territories. In all these situations, there is a coincidence between the State making the referral and the State most directly concerned. With resolution 1593 (2005) of 31 March 2005, the Security Council for the first time exercised in relation to Darfur (Sudan, a State not party to the Statute) its power to refer a situation to the Prosecutor of the ICC.

Acting upon these referrals, the Prosecutor opened formal investigations in three situations: in the DRC and Uganda (in June and July 2004, respectively) and in Darfur (Sudan; in June 2005). Arrest warrants, however, have so far only been issued in relation to the DRC and Uganda,²⁵ not yet in relation to the situation in Darfur (Sudan).²⁶ We shall start by discussing the first two situations.

A referral made by the State that is most directly concerned with a certain situation (so-called "self-referral") creates a scenario that was probably not foreseen by the drafters of the Statute. It has been held that a self-referral would imply a waiver of complementarity by the State concerned, thus relieving – at least in part – the Prosecutor (and as a consequence thereof, the other organs of the Court) from the burden of showing the "inability" or "unwillingness" of this State to genuinely prosecute the crimes in question.²⁷

Although – as mentioned above – inability or unwillingness to prosecute crimes within the jurisdiction of the ICC should not automatically be equated to inability or unwillingness to cooperate with the Court, the "self" character of a referral raises doubts as to the ability and/or willingness of the referring State to cooperate with the Court. It is submitted that in the situations of both the DRC and Uganda, either the ability or willingness, or both, of the concerned governments are – at very least – highly questionable.²⁸

In the situation of Uganda, the warrants of arrest requested by the Prosecutor and issued by PTC II concern five commanders of LRA, an armed group that has been terrorizing northern Uganda for almost two decades. However, when the Prosecutor received the government of Uganda's referral of the crimes committed

²⁵ See *supra*, para. I.

²⁶ Arrest warrants might, however, have been requested and issued under seal in connection with this situation.

²⁷ See, e.g., P. Akhavan, *The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court*, *American Journal of Int'l L.*, 2005, 403-421, at 412 et seq., discussing admissibility of State referrals under the ICC complementarity system in relation to the situation in Uganda.

²⁸ This submission is independent from the answer one should give to the question whether the requirements of complementarity should apply (or apply differently) in case of self-referrals.

by the LRA in the north of the country, he made it clear that the referral was intended to concern all crimes committed in the region, for it was not in the power of the referring State to limit the referral to the crimes allegedly committed only by one party to the conflict. Therefore, prosecution of members of the Uganda's government remains possible in principle.²⁹

In light of all these circumstances, the question whether the Ugandan government is "willing" to comply with the warrants of arrest actually issued against the LRA commanders should be given an affirmative answer. In fact, the government of Uganda has constantly expressed its full support to the Prosecutor's investigations and efforts to seek the arrest and surrender of the persons named in the warrants.³⁰ It also signed an agreement of cooperation with the OTP for the purpose of speeding up and facilitating its cooperation in the investigations and prosecutions of the ICC.³¹ The government's "ability" to actually cooperate with the Court, however, is far less certain. The time which has passed since the PTC II ordered that a request for the arrest and surrender of the persons named in the warrants be transmitted to the government of Uganda, without any arrest having yet been executed, seems to support the conclusion that doubts are not without reason.

Moreover, should the Prosecutor seek the issuance of warrants of arrest against members of the Ugandan government itself, the "willingness" of this State to cooperate with the Court would also be put into question.

In this respect, the situation of the DRC appears a simpler one, at least in political terms. There, the arrest warrant issued under seal against Mr. Lubanga by PTC I, and transmitted – at the request of the latter – to the Congolese authorities together with a request for his arrest and surrender, was executed on 17 March 2005. He is alleged to be the founder and leader of the Union des patriotes congolais (UPC) as well as the founder and commander-in-chief of the Forces patriotiques pour la libération du Congo (FPLC), the military wing of the UPC and one of the militias which has committed the worst atrocities in the Ituri region.³² Although the details are not known, Lubanga was arrested in Kinshasa by the Congolese authorities. In the situation of the DRC, therefore, the cooperation scheme for surrender to the ICC seems to have worked in practice in a manner very similar to that originally envisaged for situations referred to the Prosecutor by

²⁹ The Prosecutor's requests indicated that the crimes in relation to which arrest warrants have been sought were selected on the grounds of their gravity. Moreover, the Prosecutor denied that any decision not to prosecute members of the Ugandan government was ever taken by the OTP, while investigations continue in all directions. See Annalisa Ciampi, *The International Criminal Court, The Law and Practice of Int'l Courts and Tribunals*, 2006, 213-226, at 224.

³⁰ See e.g. the Statement delivered by the representative of the Republic of Uganda at the fourth Session of the Assembly of States parties, The Hague, of 2 December 2005 (on file with the author).

³¹ See *supra*, note 19.

³² See the PTC I *Decision on the Prosecutor's Application for a Warrant of Arrest*, Art. 58, of 10 February 2006, in Annex I to *Decision Concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case Against Mr Thomas Lubanga Dyilo*, of 24 February 2006 (ICC-01-04-01/06; available at: <http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-8-US-Corr_English.pdf>).

a State (other than the State most directly concerned with the crimes in question), in accordance with the original intent of the framers of the Statute.

The investigation is, however, ongoing and will possibly lead to other arrest warrants being sought against members of other armed groups active in the Ituri region. The “willingness” and “ability” of the Congolese government to cooperate with the ICC genuinely will thus have to be further tested.

Obviously, doubts which have been raised as to the actual cooperation of the governments of Uganda and the DRC with the Court in promptly executing requests for arrest and surrender do not touch upon the existence of their international obligations with the ICC under the Statute. All referring States are, in fact, bound to cooperate in its investigations and prosecutions *qua* States parties to the Rome Statute. Moreover, in the cases of Uganda and the DRC the obligations laid down in Part 9 of the Statute are further detailed and specified in bilateral agreements concluded with the OTP.

These obligations, however, are hardly enforceable against the will of the State requested to cooperate. Of course, in its broadest meaning this proposition applies to most obligations under international law. However, a special significance should be attached to this when one considers the obligation to cooperate with an international criminal tribunal. This is true for all forms of cooperation, and in particular for requests for arrest and surrender, compliance with which is a decisive factor for the Court’s exercise of jurisdiction, because – as pointed out above – trials *in absentia* are not allowed before the ICC.³³

States, other than the referring State and/or the State directly concerned by the commission of the alleged crimes, can contribute to the effectiveness of the cooperation scheme for surrender to the Court in at least two different ways.

Firstly, and most obviously, they can directly cooperate with the Court by promptly executing requests for arrest and surrender. In fact, while evidence is often mostly located in the territory of one or more States and seldom “travels” from one country to another, people do travel, and can travel, in principle, to any State.³⁴ Secondly, but not less importantly, the fact that other States are under an obligation to cooperate with the Court and are willing to do so can have the effect of placing the government most directly concerned with the situation under pressure, thereby winning over its unwillingness to cooperate.

On the importance of the cooperation of States other than the State most directly concerned with the situation, we shall come back in the final paragraph, after examining the actual and potential scenarios in a situation referred to the Prosecutor of the ICC by the Security Council. In relation to this situation, however, the discussion will necessarily be, in many respects, more hypothetical, for the Prose-

³³ Cooperation in the taking of evidence can also be decisive for investigations and prosecutions under certain – albeit not necessarily all – circumstances.

³⁴ For other differences between cooperation for arrest and surrender and cooperation for other forms of assistance see *supra*, notes 8 and 15.

curator has yet to seek the issuance of arrest warrants by PTC I (which was assigned the situation of Darfur, in addition to the situation of the DRC).

VI. ... and in the Situation of (b) Referrals by the Security Council

The International Commission of Inquiry on Darfur established pursuant to Security Council Resolution 1564 (2004), submitted, in connection with its Report – in which it strongly recommended that the Security Council immediately refer the situation of Darfur to the ICC³⁵ – a sealed list of suspects of grave international crimes in Darfur. The list, which includes the names of 51 individuals and the reasons for inclusion given by the Commission, was transmitted by the Secretary General to the Prosecutor. The list has been re-sealed in order to maintain full confidentiality over the identity of the individuals named by the Commission. From the content of the Report, however, it can be inferred that among those responsible for the most serious crimes in Darfur there are members of the rebel groups, but also officials of the government of Sudan, members of the government's armed forces as well as members of the "Janjaweed", the militia supported and/or controlled by the Sudanese government. Therefore, although the Prosecutor will make his determination independently of the Commission's finding and documentation,³⁶ it seems unlikely that a selection of the cases to be initiated in the situation of Darfur on the basis of the gravity of the alleged crimes would result in the indictment only of members of the rebel groups and not include government's officials or members of government-controlled military forces and militias.

Resolution 1593 (2005) – which embodies the Security Council's decision to refer the situation of Darfur to the Prosecutor of the ICC – places an obligation to cooperate upon the government of Sudan and the other parties to the conflict only. All other States, which are not a party to the Statute (together with concerned regional and other international organizations) are only "urged" to cooperate fully with the Court's investigations and prosecutions in connection with the situation of Darfur (paragraph 2). It follows that apart from Sudan – which is not a State party to the Statute and, therefore, in the absence of a decision of the Security Council to this effect, would not have been under an obligation to cooperate with the Court – the position of all other States *vis-à-vis* the ICC is not altered by the Security Council's decision to trigger the jurisdiction of the Court.³⁷

³⁵ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General. Pursuant to Security Council Resolution 1564 of 18 September 2004 (UN Doc. S/2005/60, available at: <http://www.un.org/News/dh/sudan/com_inq_darfur.pdf>).

³⁶ See Second Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the Security Council Pursuant to UNSC 1593 (2005), 13 December 2005 (available at: <http://www.icc-cpi.int/library/organs/otp/LMO_UNSC_ReportB_En.pdf>).

³⁷ For a critique of this part of resolution 1593 (2005), in particular in so far as it excludes the possibility to construe by implication of the decision of referral an obligation to cooperate with the Court

From the point of view of the cooperation scheme, therefore, the situation of Darfur does not then differ from the situations referred (or “self-referred”) to the Prosecutor by States. One apparent difference would lie in the legal basis of the obligation of the Government of Sudan to cooperate with the Court, which is not the Statute, but a resolution of the Security Council. As a consequence thereof, the obligation of Sudan to comply with the Court’s requests for arrest and surrender is not only “absolute” – in the sense outlined above³⁸ – but also overriding any conflicting obligation by virtue of Article 103 of the Charter of the United Nations. As already mentioned, however, this circumstance alone does not *per se* make cooperation more effective.

Indeed, should Sudan fail to cooperate with the ICC (e.g., by not complying with a request for arrest and surrender of a government’s member), it would breach its international obligations under the Charter of the United Nations.

As Security Council resolution 1593 ascertained that the situation in Darfur amounted to a threat to international peace and security and in relation thereof decided to refer the situation to the Prosecutor of the ICC, it seems plausible that a failure by the government of Sudan to cooperate with the Court, which would prevent the Court from exercising its functions and powers, would also constitute a threat to the peace. Whether this determination would also be politically feasible in the situation of Darfur, however, is another matter.³⁹

The Statute provides that where a State fails to comply with a request by the Court thereby preventing it from exercising its functions and powers, the Court – where the matter was referred by the Security Council – may report this finding to the Security Council. The measures which may subsequently be taken by the Security Council, however, are not envisaged in the Statute but must be determined in accordance with the Charter of the United Nations. In principle, therefore, the same course of action should be open to the Security Council in all situations, independently from the mechanism which “triggers” the Court’s jurisdiction, provided that it will be consistent with the relevant provisions of the Charter.

for all member States of the United Nations, see Luigi Condorelli/Annalisa Ciampi, Comments on the Security Council Referral of the Situation in Darfur to the ICC, in: *Journal of Int'l Criminal Justice*, 2005, 590-599, at 592-594.

³⁸ *Supra*, para. II.

³⁹ Whether, and to what extent, the Security Council would take action against Sudan, should it fail to cooperate with the Court when requested to do so, is uncertain, because of the opposition, in principle, of the US to the ICC; in fact, that this opposition was exceptionally overcome in relation to the situation of Darfur does not necessarily make even the decision of referral a precedent for future cases.

VII. The Case for Security Council's Enforcement Action and Other Forms of "International" Political Pressure

Security Council's practice in relation to the ICTY has shown how hard it could be to overcome the unwillingness of a State to cooperate with an international criminal tribunal.⁴⁰ One cannot say, however, that all the actions by the Security Council against Serbia and Montenegro, Croatia and Bosnia-Herzegovina have had no effect on these States' efforts to cooperate with the ICTY's requests for arrest and surrender of suspects located in their territory. Their limited effects have also to be considered within the particular – albeit not necessarily unique – context of the former Yugoslavia – and the new States born out of its dissolution – which had been under sanctions even before the Security Council decided to establish the ICTY. The imposition of sanctions (or the threat thereof) could prove decisive under different circumstances.

In recent years, the Security Council has resorted to the exercise of its powers under Chapter VII of the UN Charter for the purpose of obtaining from the targeted State the arrest and surrender of suspects of heinous crimes such as terrorist bombings or other terrorist acts.

The first case in which the Security Council acted under Chapter VII to address the specific problem of unwillingness to extradite suspects for trial concerned compliance by the Libyan Arab Jamahiriya with requests for extradition of two Libyan officials who were suspects of terrorist bombing. While resolution 731 (1992) of 21 January 1992, merely "urged" the government of Libya to provide a full and effective response, by resolution 748 (1992) of 31 March 1992, the Security Council acting under Chapter VII decided that Libya must comply without delay, failing which a set of enforcement measures would be imposed. Enforcement measures were eventually imposed, remained into force for a decade and were finally lifted following not only the surrender of the two suspects to the Netherlands for trial before a Scottish tribunal, but also acceptance of responsibility by government of Libya for the actions of its officials, payment of appropriate compensation to the victims and an express renunciation of terrorism.⁴¹

In resolution 1044 (1996) of 31 January 1996, the Security Council called upon the government of the Sudan to "undertake immediate action to extradite to Ethiopia for prosecution the three suspects sheltering in the Sudan and wanted in connection with the assassination attempt on the basis of the 1964 Extradition treaty between Ethiopia and Sudan". In resolution 1054 (1996) of 26 April 1996, expressing its deep alarm that the government of Sudan had failed to comply with

⁴⁰ For the view that "the experience of ICTY has shown that a legal foundation in Chapter VII may not necessarily guarantee effective enforcement *in practice*", see, e.g., *Report to the Secretary-General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (then East Timor) in 1999*, of 26 May 2005, at para. 417 (UN Doc. S/2005/458; emphasis in the original).

⁴¹ See Resolution 1506 (2003), of 12 September 2003.

its request and determining that its non-compliance constituted a threat to international peace and security, the Security Council reiterated its demand that Sudan extradite to Ethiopia for prosecution the three suspects and decided to impose enforcement measures.

More recently, by resolution 1267 (1999) of 15 October 1999, the Security Council acting under Chapter VII demanded that the Taliban authorities in Afghanistan “turn over Usama bin Laden without further delay to appropriate authorities in a country where he has been indicted, or to appropriate authorities in a country where he will be returned to such a country, or to appropriate authorities where he will be arrested and effectively brought to justice”. Following thereof, resolution 1333 (2000) of 19 December 2000, determined that the failure of the Taliban authorities to comply with its demand constituted a threat to international peace and security and imposed a suite of enforcement measures.

This practice shows that the Security Council considers among its powers under Chapter VII of the UN Charter that of seeking the delivery to justice of individuals allegedly responsible of international crimes. This is premised upon the notion that the prosecution of international crimes is a means which can contribute to re-establish, or the maintenance of, international peace and security and – vice-versa – that lack thereof may itself constitute a threat to the peace.

The fact that the Security Council requires extradition of suspects for prosecution by States and that this has generally occurred in the context of combating international terrorism does not mean that similar action should not be taken with regard to international criminal tribunals. Security Council’s practice in relation to the ICTY offers a precedent for this kind of action.

More generally, the practice referred to is a part of a larger development initiated with the establishment of the ICTY and the ICTR and subsequently confirmed and expanded through the adoption of a spectrum of measures addressing impunity, criminal adjudication and the administration of justice. One can think, for example, of the role of the Security Council in the establishment of the Special Court for Sierra Leone or actions taken in specifically addressing the situation in Timor-Leste since 1999. In specific contexts, even the mere possibility that the Security Council requires the surrender of suspects under the threat of sanctions has proved effective: for example, when the Prosecutor for the Sierra Leone Special Court advanced the proposal of a Chapter VII Security Council resolution to compel Nigeria to arrest and transfer wanted fugitive Charles Taylor to the Special Court, Charles Taylor was eventually turned over by the Nigerian government before any Security Council’s action was taken against the latter.⁴²

The enforcement mechanism under Chapter VII of the Charter is not the only means which may enhance the effectiveness of States’ cooperation in the investiga-

⁴² On 29 March 2006, Charles Taylor was arrested at the Nigeria Cameroon border by Nigerian police officials and eventually transferred to Liberia, where he faces trial for war crimes, crimes against humanity and other serious violations of international humanitarian law before the Special Court for Sierra Leone. See also *infra*, note 46.

tion and prosecution of the ICC. Other international organizations can exercise their powers for the benefit of the ICC (or other international or “internationalized” criminal tribunals).

Besides organizations with a specific mandate such as the International Criminal Police Organization (Interpol) – the role of which in the transmittal of the Court’s requests for cooperation is expressly envisaged in the Statute⁴³ – it is worth mentioning here regional organizations such as the EU or the AU.⁴⁴

The best example of the decisive role these organizations can play for the arrest and surrender of suspects to the Court is the position taken by the EU towards Croatia in order to obtain its full cooperation with the ICTY, in particular in the arrest of former general, Ante G o t o v i n a: effective cooperation with the International Tribunal has been included among the conditions to be fulfilled for accession of this State to the EU.⁴⁵ Of course, the political pressure that the EU is in a position to keep on a State candidate to accession is not one which can easily be applied in other contexts, such as in the current scenarios before the ICC. Various mechanisms of so-called “conditionality” in the relations with the States concerned, however, could equally create a significant “incentive” for these States to cooperate with the Court.

⁴³ See Art. 87 of the Statute. With a view of defining a cooperation framework, on 22 December 2004, a Cooperation Agreement was signed between Interpol and the OTP. The agreement does not only grant OTP access to the Interpol telecommunications network and database but will also enable both institutions to exchange police information and criminal analysis, and to cooperate in the search for fugitives and suspects. Following a request by the OTP pursuant thereof, on 1 June 2006, Interpol issued Red Notice for the arrest of Joseph K o n y and the other LRA commanders sought in relation to the situation in Uganda. For information on the agreement, the text of which is not publicly available, see Press Release of 22 December 2004, at: <<http://www.icc-cpi.int/press/pressreleases/86.html>>. For information on Interpol Red Notices, see <<http://www.interpol.int/Public/Notices/default.asp>>.

⁴⁴ On 10 April 2006, the ICC and the EU concluded an agreement on cooperation and assistance. This agreement, which entered into force on 1 May 2006, covers areas such as attendance of meetings, exchange of information, security, testimony of staff of the European Union and cooperation between the European Union and the Prosecutor. In order to facilitate cooperation and assistance, the agreement also provides for the establishment of regular contacts between the Court and the European Union and the establishment of the European Union Focal Point for the Court (Agreement between the International Criminal Court and the European Union on Cooperation and Assistance, Doc. ICC-PRES/02-01-06, available at: <http://www.icc-cpi.int/library/about/officialjournal/ICC-PRES-01-01-06_English.pdf>). The text of an Agreement between the ICC and the AU has been finalized but not yet adopted.

⁴⁵ Another example is the EU’s ultimatum to Serbia and Montenegro to arrest former Bosnian Serb military commander Ratko M l a d i c, expired on 1 May 2006: the EU had said it will suspend talks on potential membership for Serbia-Montenegro – due to resume on May 11 – if Mladic was not handed over to the ICTY by April 30. On 15 May 2006, the Council of the EU “regretted that Serbia and Montenegro was still not fully cooperating with the ICTY and it therefore supported the Commission’s decision to call off the negotiating round on a Stabilisation and Association Agreement scheduled for 11 May”. Moreover, indicating its support to resume negotiations as soon as full cooperation with the ICTY is achieved: “It once again urged the authorities in Belgrade to ensure that all remaining fugitive ICTY indictees, notably Ratko Mladic, are brought to justice without further delay” (Council Conclusions on the Western Balkans, 2728th External Relations Council meeting – Brussels, 15 May 2006, available at: <http://www.eu2006.at/en/News/Council_Conclusions/1505_WesternBalkans.pdf>).

Finally, a very special role in the cooperation scheme for surrender to the ICC can be played by peace-keeping forces authorized or established by the Security Council. In the current scenarios, two forces could be particularly relevant in securing the presence of the accused at trial: the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC), which has been operating in the DRC since 2000, and the United Nations Mission in Sudan (UNMIS) established to reinforce efforts to foster peace in Darfur in 2005.

Of course, this raises the issue whether these forces have the power to proceed to the arrest and delivery of suspects to the ICC, in accordance with their respective mandate.⁴⁶ Any extension thereof would require the consent of the State concerned, being of no relevance in this respect that this State be a party to the Statute (the DRC) or under a Charter based obligation to cooperate with ICC by virtue of a resolution of the Security Council (the Sudan).⁴⁷

Again, the ICTY offers a useful precedent for this kind of action. Although in the 1990s it was unclear whether the mandates of the forces led by NATO – the Interim Force (IFOR) and the Stabilisation Force (SFOR) – permitted these bodies to carry out coercive arrests on ICTY's behalf, NATO led forces in Bosnia and Herzegovina proceeded to the arrest of several suspects on behalf of the ICTY. The authority of IFOR/SFOR was based on a resolution of the North Atlantic Council of 16 December 1995 and the provisions of the General Framework Agreement for Peace in Bosnia and Herzegovina, which empowered NATO to cooperate with the ICTY.⁴⁸

Under the Agreement negotiated with MONUC by the OTP together with the Registry of the ICC, MONUC may provide support in the operations of transfer of suspects to the ICC; it is not clear, however, whether this also implies the power to execute arrests directly. This Agreement, the content of which is confidential, was concluded in the framework of the Relationship Agreement between the International Criminal Court and the United Nations.⁴⁹ A similar agreement could be

⁴⁶ The current mandate of MONUC is mostly provided by resolution 1493 (2003) of 28 July 2003. For the mandate of UNMIS see resolution 1590 (2005), of 24 March 2005, para. 4 (a)-(d). For a precedent, see resolution 1638 (2005), of 11 November 2005, which extended the mandate of the United Nations Mission in Liberia (UNMIL) to include the following additional element: "to apprehend and detain former President Charles Taylor in the event of a return to Liberia and to transfer him or facilitate his transfer to Sierra Leone for prosecution before the Special Court for Sierra Leone and to keep the Liberian Government, the Sierra Leonean Government and the Council fully informed."

⁴⁷ In this context, the possibility to include in the mandate of international forces authorized or established by the Security Council remains subject to the non opposition of the United States. A similar shortcoming would be absent in the case of forces constituted by other organizations such as the EU, outside the framework of a resolution of the Security Council.

⁴⁸ Arrests were then carried out by ICTY personnel on the basis of Rule 95 *bis* of the ICTY Rules of Procedure and Evidence.

⁴⁹ The Relationship Agreement was concluded in furtherance of Art. 2 of the Statute according to which "[t]he Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties [...] and thereafter concluded by the President of the Court on its behalf". Art. 21 of the said Agreement provides that: "The Secretary General and the Court may, for the purpose of implementing the present Agreement, make such supplementary ar-

negotiated for UNMIS. It is submitted that here lies – at least in the current scenarios – one of the best prospects for the Court to obtain the presence of the accused at trial.

VIII. Final Remarks

Summing up, the main incentive available to the international community to compel a State to cooperate with the ICC (and, more generally, with international criminal tribunals) is through political pressure, eventually accompanied by the imposition (or threat) of sanctions or other enforcement measures against the non-cooperating State. In this sense, commitment to the Court by States which are not directly connected with the crimes in question can be a crucial factor underpinning the Court's scheme for cooperation provided for under the Statute.

This conclusion leaves us with the following – somehow provocative and paradoxical – question: is the reluctance of States – other than States most directly concerned with the situation – to push forward their support for the Court where this can be done by way of a political decision of an international organization (be it the UN or the EU), easier to win than the reluctance to cooperate with the Court of the concerned State?

rangements as may be found appropriate.” Relationship Agreement between the International Criminal Court and the United Nations, of 4 October 2004, Doc. ICC-ASP/3/Res.1, available at: <http://www.icc-cpi.int/library/asp/ICC-ASP-3-Res1_English.pdf>.