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INTERNATIONAL VERSUS NATIONAL JURISDICTION

19.1 PRIMACY AND COMPLEMENTARITY

The establishment of international criminal courts and tribunals has posed the tricky problem of how to co-ordinate their action with that of national courts: whenever both classes of courts are empowered to pronounce on the same crimes, which should take precedence, and under what conditions? Obviously, the problem does not arise in the area where those courts do not have *concurrent jurisdiction*, that is, with regard to crimes that fall under the exclusive jurisdiction of national courts (for example, piracy, serious instances of international terrorism falling short of crimes against humanity or of war crimes, large-scale drug trafficking, etc.). The problem only arises when one or more States may assert their criminal jurisdiction over a specific crime on such legal grounds as territoriality, active or passive nationality, or universality (see above 15.2-5), and at the same time an international tribunal is empowered to adjudicate the same crime by virtue of its Statute.

There are no *general* international rules determinative of this matter, just as there are no international customary rules designed to resolve the question of concurrent jurisdiction of two or more States, by giving pride of place to one legal ground of national jurisdiction (say, territoriality) over another such ground (say, passive nationality). Luckily, while not even treaty rules have settled the possible conflict between States asserting jurisdiction over the same person accused of the same crime, in the case of conflict between national and international courts the conflict has been resolved by *treaty rules* or otherwise *binding resolutions*. In short, in the case of the ICTY and the ICTR, primacy has been given to the international tribunals, whereas in the case of the ICC national courts take precedence over the Court. Let us now dwell at some length on this matter, to consider both the legal implications and the underlying political motivations.

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19.2 THE PRIMACY OF THE ICTY AND THE ICTR

The Statutes of these two Tribunals, respectively at Articles 9 and 8, provide that each international Tribunal shall have concurrent jurisdiction with national courts to prosecute persons for serious violations of international humanitarian law, but add under paragraph 2 that the Tribunal 'shall have primacy over national courts':

At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence [RPE] of the International Tribunal.

The reasons for proclaiming the Tribunals' primacy were clear. In the case of the former Yugoslavia, the ongoing armed conflict among the successor States and the deep-seated animosity between the various ethnic and religious groups made it unlikely that national courts would be willing or able to conduct fair trials. It was considered that the authorities would have hesitated to bring their own people (Muslims, Croats, and Serbs) to book, whereas, had they initiated proceedings against their adversaries, the experience built up until that time showed that they shied away from bringing to trial alleged perpetrators of crimes committed elsewhere. Hence the need was felt to affirm the overriding authority of the international Tribunal. Similar considerations held true for Rwanda, where in addition the national judicial system had collapsed and consequently seemed unable to render justice.

However, the Statutes do not specify on what conditions and how primacy is to be exercised. In his Report to the Security Council elaborating upon the draft Statute of the ICTY, the UN Secretary-General simply stated that 'The details of how the primacy will be asserted shall be set out in the rules of procedure and evidence of the International Tribunal' (\$65). The judges of the ICTY skillfully and wisely drew up a set of rules on primacy, which were subsequently taken up by the judges of the ICTR. These rules do not lay down the absolute primacy of the Tribunal; rather, they provide that the concurrent jurisdiction of the Tribunal and national courts may lead to the prevalence of national courts, and even that the Tribunal may divest itself of a case when it considers that the case may more appropriately be tried by a national court (Rule 11 *bis* of the ICTY RPE). Thus, judges worked out a mechanism whereby a case could be referred back to national courts whenever they deemed it appropriate. However, the Rules provide that at the request of the Prosecutor the Tribunal may assert its primacy in three cases:

1. When a national prosecutor investigates an international crime or a national court conducts criminal proceedings with regard to the crime not as an international crime, but as 'ordinary crime' (for instance, genocide is being investigated or tried as 'multiple murder', or serious ill-treatment of prisoners of war is handled as 'assault' and not as a war crime). In this case the classification of the offence as an ordinary crime presupposes a deliberate (or unconscious) proclivity to *misperceive* the very

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nature, hence to *belittle the seriousness*, of international crimes. In other words, the national court shows that, either intentionally or unwittingly, it is not cognizant of both the international dimension and the gravity of the criminal offence.

2. When a national court proves to be *unreliable*, this happens where it is proved, under Rule 9(ii) of the ICTY RPE, that there is 'a lack of impartiality or independence, or the investigations or proceedings are designed to shield the accused from international criminal responsibility, or else the case is not diligently prosecuted'. Clearly, in all these instances national authorities may not be trusted because they are intent on 'protecting' the accused or else take a persecutory attitude to him.

3. When, although the relevant national court appears to be reliable and able to conduct a fair trial, nonetheless the case is *closely related, or may be relevant, to other cases* being tried by the International Tribunal. Under Rule 9(iii), 'what is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal'. Plainly, these cases are of such overriding significance, or general import, or wide ramifications, that it appears appropriate for them to be brought before an international court rather than be adjudicated by a national court.¹

By and large, the scheme adopted by the judges of the ICTY (and of the ICTR) seems wisely to reconcile (i) the need not to overload international institutions with relatively minor cases, leaving these cases to national courts, as well as (ii) the demands of State sovereignty, with (iii) the requirement that international courts should *replace* national institutions when these prove unreliable or unfair, and in addition should deal with *major international crimes* of relevance to the international community as a whole.

So far the two Tribunals have seldom relied upon their primacy. (See, for instance, the *Tadić* case, as far as the ICTY is concerned: on 8 November 1994 the ICTY made a request for deferral to the Federal Republic of Germany, whose authorities were investigating *Tadić's* alleged crimes; Germany immediately complied with the request and surrendered the accused to the Tribunal: see *Tadić, Decision on deferral to the competence of Tribunal*.² See also the order of 4 October 2002 in *Republic of Macedonia*

¹ Interestingly the first two exceptions are also exceptions for *non bis in idem*, and therefore can be justified by reference to the Statute's provisions on *non bis in idem*. (There is a clear parallel between conditions for exercising primacy and *non bis* in the sense that what justifies the court retrying an accused are surely also grounds for taking over the proceedings before they have reached their conclusion.) Instead, case (3) is somewhat unusual and dubious in that it has no basis in the Statute. Moreover it will nearly always apply—any national war crimes prosecution in the former Yugoslavia is bound to have implications for the ICTY's proceedings. This may therefore seem to be too all-encompassing.

² In that case the defence challenged the Tribunal's jurisdiction, arguing that its 'primacy' found no basis in international law because the national courts of Bosnia and Herzegovina or, alternatively, of the entity known as the Bosnian Serb Republic (known today as Republika Srpska) had primary jurisdiction to try the accused. The Trial Chamber dismissed the argument, noting, first, that in any case 'the two States most closely affected by the indictment against the accused', namely Bosnia and Herzegovina (where the accused had allegedly committed his crimes) and Germany (where he resided at the time of his arrest), had 'unconditionally accepted the jurisdiction of the International Tribunal and the accused cannot claim the rights that have

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In recent times, the two ad hoc Tribunals have even emphasized the importance of national courts dealing with the crimes falling under the Tribunals' jurisdiction. There seem to be two grounds behind this new trend. First, national courts of the States concerned (those of the successors to the former Yugoslavia, and those of Rwanda) are now better structured, more efficient, and less prone to bias. Secondly, the workload of the international Tribunals is increasing and it therefore proves appropriate for national courts gradually to share the burden and even start to take over the job from the Tribunals.

19.3 THE COMPLEMENTARITY OF THE ICC

Unlike the ICTY and the ICTR, the ICC is based on the principle of complementarity whereby the Court is subsidiary or complementary to national courts: these courts enjoy *priority* in the exercise of jurisdiction except under special circumstances, when the ICC is entitled to take over and assert its jurisdiction. There are two underlying reasons for this approach.

First, States saw a practical ground: they considered it inappropriate for the Court to be flooded with cases from all over the world. The Court, having a limited number of judges and limited financial resources and infrastructure, would be unable to cope with a broad range of cases. It is healthy, it was thought, to leave the vast majority of cases concerning international crimes to national courts, which may properly exercise their jurisdiction based on a link with the case (territoriality, nationality) or even on universality. Among other things, these national courts may have more means available to collect the necessary evidence and to lay their hands on the accused.

Secondly, there was perhaps a principled motivation, namely the intent to respect State sovereignty as much as possible.

been specifically waived by the States concerned. To allow the accused to do so would be to allow him to select the forum of his choice, contrary to the principles relating to coercive criminal jurisdiction' (§41). Secondly, the crimes which the Tribunal was called upon to try were not 'of a purely domestic nature. They are really crimes which are universal in nature, well recognized in international law as serious breaches of international humanitarian law, and transcending the interests of any one State . . . in such circumstances, the sovereign rights of States cannot and should not take precedence over the right of the international community to act world. There can therefore be no objection to an international tribunal properly constituted trying these crimes on behalf of the international community' (§42). The Appeals Chamber upheld these conclusions. It noted among other things that 'when an international tribunal such as the present one is created, it *must* be endowed with primacy over national courts. Otherwise, human nature being what it is, there would be a perennial danger of international crimes being characterized as 'ordinary crimes' . . . or proceedings being designed to shield the accused', or cases not being diligently prosecuted . . . If not effectively countered by the principle of primacy, any one of those stratagems might be used to defeat the very purpose of the creation of an international criminal jurisdiction, to the benefit of the very people whom it has been designed to prosecute' (*Tadić, Interlocutory appeal*, §58).

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Complementarity is laid down in paragraph 10 of the Preamble as well as in Article 1 of the Statute (whereby the ICC 'shall be complementary to national criminal jurisdictions') and is spelled out in Articles 15, 17, 18, and 19. In short, the Court is *barred from exercising its jurisdiction* over a crime whenever a national court asserts its jurisdiction over the same crime and (i) under its national law the State has jurisdiction; (ii) the case is being duly investigated or prosecuted by its authorities or these authorities have decided, in a proper manner, not to prosecute the person concerned; and (iii) the case is not of sufficient gravity to justify action by the Court (ex Article 17). In addition, the Court (iv) may not prosecute and try a person who has already been convicted of or acquitted for the same crimes, if the trial was fair and proper (Articles 17(c) and 20).

The Court is instead authorized to exercise its jurisdiction over a crime even if a case concerning the crime is pending before national authorities, and thus to override national criminal jurisdiction, whenever: (i) the State is unable or unwilling genuinely to carry out the investigation or prosecution, or its decision not to prosecute the person concerned has resulted from its unwillingness or inability genuinely to prosecute that person; and (ii) the case is of sufficient gravity to justify the exercise of the Court's jurisdiction.

The question of course arises of what is meant by 'unwillingness' or 'inability' of a State to prosecute or try a person accused or suspected of international crimes. These two notions are spelled out in Article 17(2) and (3). A State may be considered as 'unwilling' when: (i) in fact the national authorities have undertaken proceedings for the purpose of shielding the person concerned from criminal responsibility; or (ii) there has been an 'unjustified delay' in the proceedings showing that in fact the authorities do not intend to bring the person concerned to justice; or (iii) the proceedings are not being conducted independently or impartially or in any case in a manner showing the intent to bring the person to justice. A State is 'unable' when, chiefly on account of a total or partial collapse of its judicial system, it is not in a position: (i) to detain the accused or to have him surrendered by the authorities or bodies that hold him in custody; or (ii) to collect the necessary evidence; or (iii) to carry out criminal proceedings. One should also add cases where the national court is unable to try a person not because of a collapse or malfunctioning of the judicial system, but on account of legislative impediments, such as an amnesty law, or a statute of limitations, making it impossible for the national judge to commence proceedings against the suspect or the accused.

Complementarity applies not only with regard to the States parties to the ICC Statute but also with respect to States not parties (see Article 18(1)). Thus, for instance, if the national of a State not party (A) has committed an international crime on the territory of a State party (B) and then escapes to another State not party (C), and this State asserts its jurisdiction on the ground that the crime is provided for in an international treaty and the suspect is present on its territory (the *forum deprehensionis* principle) or on the ground of universality, the ICC may not exercise jurisdiction if it is proved that State C is willing and able to conduct a proper and fair trial.

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Complementarity applies whatever the trigger mechanism of the Court's proceedings, that is, both when the case (i) has been brought to the Court by a State party (Articles 13(a) and 14), or (ii) has been initiated by the Prosecutor *motu proprio*, and the Prosecutor has been authorized by the Pre-Trial Chamber to commence a criminal investigation (Articles 13(c) and 15), and when (iii) it is the UN Security Council that has referred to the Court a 'situation in which one or more of... [the] crimes [falling under the Court's jurisdiction] appears to have been committed' (Articles 13(b) and 52(c)).

The ICC system of complementarity, globally considered, shows that the Court must generally defer to national courts, except when these courts are not in a position to do justice in a proper and fair way, and in addition the case is of sufficient gravity to warrant the Court's stepping in. Although one should of course wait until the system begins to operate in practice, at present the appraisal of complementarity is largely positive.³ Its chief merits lie both in its substantial respect for national courts, and in the indirect but powerful incentive to their becoming more operational and effective, inherent in the power of the ICC to substitute for national judges, whenever they are not in a position to dispense justice or they deliberately fail to do so (see however what will be pointed out in 19.4).

19.4 THE NUREMBERG SCHEME VERSUS THE ICC SCHEME

It may be useful to ask ourselves about the proper role to assign to an international criminal court. It would seem that two major models or schemes have so far been worked out.

One is that adopted in Nuremberg. This scheme was first drawn up in 1944 by an American officer (Lieutenant Colonel Murray C. Bernays, chief of the Special Projects Office of the Personnel Branch at the US War Department), was then refined by other staff, subsequently upheld by the US Secretary of War Henry L. Stimson⁴ and finally accepted by the other three Great Powers in London in 1945. Under this scheme an international court was entrusted with the task of dealing with the major leaders accused of international crimes, whereas national courts were called upon to handle the criminal offences of minor culprits (after the Second World War, German courts were requested to adjudicate upon crimes committed

³ One should also note that the ICC Statute provides for a monitoring mechanism enabling the ICC to be kept abreast of developments in national investigations and prosecutions, whenever the ICC defers to national courts. Pursuant to Article 18(5), 'When the Prosecutor has deferred an investigation in accordance with para 2, the Prosecutor may request that the State concerned periodically inform the Prosecutor of the progress of its investigations and any subsequent prosecutions. States Parties shall respond to such requests without undue delay.'

⁴ See the documents published in B. F. Smith, *The American Road to Nuremberg—The Documentary Record, 1944–1945* (Stanford, Ca. Hoover Institution Press: 1982), 33–130.

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by Germans against other Germans, while national courts of the Allies pronounced upon crimes committed by Germans against foreign nationals). Interestingly, the two ad hoc International Criminal Tribunals set up for the former Yugoslavia and Rwanda respectively, were based, as pointed out above (19.2) on the principle of their primacy over national courts because initially they were intended as a substitute for the national courts of States deemed unable or unwilling to dispense justice. Nonetheless, from the outset the ICTR concentrated on military and civilian leaders, leaving to Rwandan courts the task of trying minor offenders. The ICTY, whose first Prosecutor did not envisage at the prosecutorial level a distinction between major and minor offenders, is now gradually moving towards the Nuremberg scheme, in that it is increasingly asking national courts of the States concerned to try lesser accused, so that it may better concentrate on the trials of major defendants⁵.

A different division of labour is provided for in the Statute of the ICC. As emphasized above (19.3), all crimes may be brought before national courts, whatever the magnitude of the crime or the status, rank, or importance of the accused. The ICC steps in only when such courts prove unable or unwilling to do justice, and provided the case 'is of sufficient gravity' to justify action by the Court (ex Article 17(1)(d) of the Court's Statute).

It would seem that the Nuremberg model still has much merit. It is logical and consistent for very serious international crimes allegedly perpetrated by leaders to be adjudicated by an international court offering all the advantages that will be outlined *infra* (see 22.22 and 23.5). Trials held in the country where the crime has been committed or where the victims or their relatives live, may arouse animosity and conflict and, by the same token, it may turn out to be difficult for judges to remain impartial. In particular, when crimes are very serious and large scale (think, for example, of grave instances of genocide or crimes against humanity) and where such crimes cannot but have been committed either by the central authorities or with their (tacit or explicit) approval, it will be difficult for a national court to prosecute the alleged planner or perpetrators, unless there is a change in government, in which case, there may be a risk of 'witch hunting' or of using the criminal courts for settling political accounts, a situation which cannot contribute to the fair and impartial administration

⁵ See among other things the recently amended Rule 11 *bis* of the RPE. Under this provision, concerning Referral of the Indictment to Another Court:

(A) If an indictment has been confirmed, irrespective of whether or not the accused is in the custody of the Tribunal, the President may appoint a Trial Chamber for the purpose of referring a case to the authorities of a State (i) in whose territory the crime was committed; or (ii) in which the accused was arrested, so that those authorities should forthwith refer the case to the appropriate court for trial within that State.

(B) The Trial Chamber may order such referral *proprio motu* or at the request of the Prosecutor, after having given to the Prosecutor and, where applicable, the accused, the opportunity to be heard.

(C) In determining whether to refer the case in accordance with paragraph (A), the Trial Chamber shall, in accordance with Security Council Presidential Statement S/PRST/2002/21, consider the gravity of the crimes charged and the level of responsibility of the accused.

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of justice. Hence, international courts are by definition better suited to pronounce upon large scale and very grave crimes allegedly perpetrated by political or military leaders. For such cases the rule of complementarity laid down in the Statute of Rome may appear to be questionable. However, since the draftsmen of the Statute have opted for that model, one can only hope that the Court will interpret and apply the relevant rules of the Statute in such a way as to assert the Court's jurisdiction whenever cases in that category are brought before the Court.

Perhaps a better path for the future might lie in both enhancing the role of international courts for major cases of criminality, and, with regard to other cases, in combining the action of those courts with that not only of national courts but also of other bodies charged with 'restorative justice', such as truth and reconciliation commissions.

19.5 THE NEED FOR INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS TO RELY UPON STATE CO-OPERATION

For international criminal tribunals, State co-operation is crucial to the effectiveness of judicial process. Only other bodies or entities, that is, national authorities or international organizations, can enforce the decisions, orders, and requests of such criminal tribunals. Unlike domestic criminal courts, international tribunals have no enforcement agencies at their disposal: without the intermediary of national authorities, they cannot seize evidentiary material, compel witnesses to give testimony, search the scenes where crimes have allegedly been committed, or execute arrest warrants. For all these purposes, international courts must turn to State authorities and request them to take action to assist the courts' officers and investigators. Without the help of these authorities, international courts cannot operate. Admittedly, this holds true for all international institutions, which need the support of States to be able to operate. However international criminal courts are much more in need of such support, and more urgently, because their action has a direct impact on individuals living on the territory of sovereign States and subject to their jurisdiction. Trials must be expeditious; evidence must be collected before it becomes stale; the court must be able to summon witnesses to testify at short notice.

19.6 MODELS OF CO-OPERATION

In deciding upon how to regulate the co-operation of States with an international criminal court, the framers of the Statute of international criminal tribunals may

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choose between two possible models, namely, as the ICTY Appeals Chamber put it in *Blaskić (subpoena)* (§§47 and 54), the 'horizontal' and the 'vertical' model.

Under the former model the relations between States and the international court are shaped on the pattern of interstate judicial co-operation in criminal matters. As *assistance* shows the following hallmarks: (i) it has a consensual basis, being grounded on treaty relations; (ii) treaties normally require that the offence for which extradition is requested be considered such in both the requesting and the requested State; (iii) often treaties provide for exceptions to extradition, relating to certain offences (for example, political or fiscal offences) or to some categories of persons (for instance, nationals of the requested State), or for some sentences (for instance, extradition is often excluded when the requesting State may impose the death penalty); (iv) extradition may be refused also when the requested State can assert its jurisdiction over the offence; (v) judicial assistance or co-operation may normally be refused on grounds of security, public order, overriding national interests, etc.; (vi) as a rule the collection of evidence, search, and other investigatory actions requested by a State may not be undertaken by the authorities of that State, but only by those of the requested State, through the system of 'letters rogatory'; normally a foreign country may not enter into direct contact with individuals subject to the sovereignty of the requested State.

If this model is applied to international courts, it follows that the court has no superior authority over States except for the legal power to adjudicate crimes perpetrated by individuals subject to State sovereignty. Otherwise, the international court cannot in any way force States to lend their co-operation, let alone exercise coercive powers within the territory of sovereign States.

The second model could be termed 'vertical' or 'supra-State'. It departs from the traditional setting of State-to-State judicial co-operation, where by definition all co-operating States are on an equal footing. This more progressive model presupposes that the international judicial body is vested with sweeping powers not only *vis-à-vis* individuals subject to the sovereign authority of States, but also towards States themselves. Under this model the international court is empowered to issue binding orders to States and, in case of non-compliance, may set in motion enforcement mechanisms. What is no less important, the international court is given the final say on evidentiary matters: States are not allowed to withhold evidence on grounds of self-defined national interests or to refuse to execute arrest warrants or other courts' orders. In short, the international court is endowed with an authority over States that markedly differentiates it from other international institutions.

⁶ See B. Swart, 'International Cooperation and Judicial Assistance—General Problems', in Cassese, Gaeta, and Jones, *ICC Commentary*, II, 1590–2. The present author relies heavily on the excellent paper by Swart (1592–1605).

19.7 CO-OPERATION OF STATES UNDER THE ICTY

AND ICTR SCHEME

The ICTY and the ICTR incarnate the coercive 'supra-State' model, both because they have the Chapter VII authority of the Security Council behind them, and on account of the practice developed by judges. Indeed, the law of the ad hoc international tribunals as it concerns State co-operation is largely judge-made. Article 29 of the ICTY Statute, and the corresponding Article 28 of the ICTR Statute, simply provide in a general way that 'States shall co-operate with the International Tribunal' and 'shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber'. However, the specific practice relating to arrest warrants and orders for transfer of an accused, requests for assistance, the question of the persons or entities to whom *subpoenas* may be addressed, that of the breadth and specificity of the 'sanctions' against non-co-operative States, and many related questions, were left to the judges to define. This happened in due course in the *Blaskić* (*subpoena*) case. A Trial Chamber had issued *subpoenas* to Croatia and one of its senior ministers. On appeal the Appeals Chamber overturned the decision, confining *subpoenas* to individuals acting in a private capacity, while allowing binding orders to be directed to States.

It is apparent from the provisions of the Statute of the ICTY as developed and spelled out by the judges in the aforementioned case that the relations between the ICTY (and the ICTR) and States are shaped as follows: (i) the Statutes of the Tribunals impose upon States an obligation to co-operate; this obligation is at the same time sweeping (for it embraces any matter where the Tribunal may need the co-operation of a State), and strict (for it is assisted by the sanctioning powers of the Security Council in case of non-compliance by a State); (ii) it follows from that obligation that States are not allowed to rely upon such traditional clauses for refusing co-operation or extradition as 'double criminality', political offence, nationality of the person requested for surrender, etc.; (iii) the Tribunal is endowed with broad and binding powers, for it can issue binding orders to States (for the handing over of evidence, arrest of suspects, etc.), or *subpoenas* to individuals acting in a private capacity; (iv) although States may invoke national security concerns as a ground for refusing the transmission of documents and other evidence, this is subject to strict limitations, and the Tribunal may have the final say on the matter (see *Blaskić* (*subpoena*), §§61-9); (v) the collection of evidence may be carried out by the authorities of the relevant State, but the Tribunal's Prosecutor is authorized to undertake investigations and gather evidence directly (that is, without going through the official channels) on the territory of the States of the former Yugoslavia, as well as on the territory of those States which have passed implementing legislation authorizing such Tribunal's activity (see *Blaskić* (*subpoena*), §§53-4); (vi) in case of non-compliance by a State with the obligation to co-operate stemming from the Statutes, the Tribunals may make a judicial finding of failure to co-operate, and the President is then authorized to submit it to the Security Council. This organ, according to *Blaskić* (*subpoena*), §§36-7, is then legally bound by

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that finding, that is, it may not contest that that particular State has indeed failed to co-operate, as found by the Tribunal (the Security Council is however free to take, or not to take, sanctions); if it is an individual who fails to co-operate, the Tribunal may hold him in contempt and initiate contempt proceedings, even *in absentia* (*Blaskic* (*subpoena*), §§57–60).

19.8 CO-OPERATION OF STATES UNDER THE ICC SCHEME

In contrast to the ICTY and ICTR, which are creatures of the Security Council moulded into their present shape in large part by the judges, States have had the opportunity, in drawing up the ICC Statute (an international treaty that States may or may not ratify, given its consensual nature), to express themselves, in no uncertain terms, about how they wish international justice to work, and they have adopted a mostly *State-oriented* approach, which however, as has been rightly pointed out, may be held to be 'a mixture of the "horizontal" and the "vertical" [model].'⁷

A few points are relevant in this regard. First, the Statute does lay down in Article 86 a general obligation to co-operate. However, this obligation essentially serves as a general statement that is specified and spelled out in a number of specific provisions; as has been stated, in the ICC Statute 'the choice has been made to list the specific obligations of the States parties exhaustively and to indicate their scope and contents as precisely as possible'.⁸ Plainly, this specific enumeration is intended to restrict as much as possible the judicial power of interpretation of the duty to co-operate, and by the same token to lay down extensive 'legislative' safeguards for States.

Secondly, the ICC Statute does not specify whether the taking of evidence, execution of summonses and warrants, etc. is to be undertaken by officials of the Prosecutor with the assistance, when needed, of State authorities, or whether instead it will be for State enforcement or judicial authorities to execute those acts at the request of the Prosecutor. Judging from the insistence in the Statute on the need to comply with the requirements of *national* legislation, however, the conclusion seems warranted that the framers of the Statute intended the latter. It would seem that this conclusion is borne out by the implementing legislation so far adopted by some of the States parties.⁹

Thirdly, both the principle of complementarity (with the ensuing power of the States concerned to decide whether they intend to exercise their jurisdiction over a crime) and

⁷ B. Swart, cit., at 1594.

⁸ Ibid., at 1595.

⁹ See for instance the Canadian Crimes Against Humanity and War Crimes Act 2000, the Norwegian Act on Implementation of the Rome Statute of 15 June 2001, the Swiss Federal Law on Cooperation with the ICC of 22 June 2001, the French Law on the same matter of 26 February 2002. See however Article 2(1) of Part II of the United Kingdom International Criminal Court Act 2001 (C.17) whereby the British Secretary of State transmits any ICC request for arrest or surrender to 'the appropriate judicial officer', without exercising any scrutiny (see also Article 5(5) and (8)).

the general right of States to challenge the Court's jurisdiction may create obstacles to, or slow down or even hamper, States' co-operation and the Court's jurisdiction. Fourthly, the possible surrender of persons to the Court is subject to a condition typical of interstate judicial co-operation: the principle of speciality, laid down in Article 101(1), whereby:

A person surrendered to the Court under this Statute shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered.

Fifthly, in case of competing requests for surrender or extradition, i.e. a request for arrest and surrender of a person, emanating from the Court, and a request for extradition from a State not party, the request from the Court does not automatically prevail. Under Article 90(6) and (7), a State party may decide between compliance with the request from the Court and compliance with the request from a non-party State with which the State party is bound by an extradition treaty. This seems odd, for one would have thought that the obligations stemming from the Rome Statute should have taken precedence over those flowing from other treaties. Arguably, this priority would follow both from the primacy of a Statute establishing a *universal* criminal court over bilateral treaties (or multilateral treaties binding on a group of States) and from the very purpose of the Statute, to administer international justice in the interest of peace. It seems instead that the Statute, faced with the dilemma of international justice versus national justice, has left the option to the relevant States.

Furthermore, as regards the protection of national security information, the Statute substantially caters to State concerns by creating a national security exception to requests for assistance. Article 93(4) provides that 'a State Party may deny a request for assistance, in whole or in part, only if the request concerns the production of any documents or disclosure of evidence which relates to its national security'. Admittedly, Article 72, to which this provision refers, does envisage a complex mechanism designed to induce a State invoking national security concerns to disclose as much as possible of the information it wishes to withhold. This mechanism is largely based on the *Blaskić* (*subpoena*) decision of the ICTY Appeals Chamber. However, the various stages of this mechanism are turned in the Statute into formal modalities that will be cumbersome and time-consuming.¹⁰ In addition, in *Blaskić* (*subpoena*) the emphasis

¹⁰ Indeed, Article 72 ('Protection of national security information') establishes a three-step procedure when a State—or individual—invokes national security. Article 72 is triggered when a State is of the opinion that 'disclosure of information [requested by the Court or Prosecutor] would prejudice its national security interests'. First, co-operative means are employed to reach an amicable settlement, e.g. modification of the requests, a determination by the Court of the relevance of the information sought or agreement of conditions under which the assistance could be provided. Secondly, if co-operative means fail, and the State decides against disclosure, it must notify the Court or Prosecutor of the specific reasons for its decision, unless a specific description of the reasons would itself necessarily result in such prejudice to the State's national security interests. The Court may then hold further consultations on the matter, if need be *ex parte* and/or in camera. The third step in the event that the State is found not to be complying with its obligations is for the Court to refer the matter to the Assembly of States Parties or, if the Security Council originally referred the matter to the Court, to the Security Council.

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was on the obligation of States to disclose information; only in exceptional circumstances were States allowed to resort to special steps for the purpose of shielding that information from undue disclosure to entities other than the Court. In Article 72 emphasis is instead laid on the right of States to deny the Court's request for assistance. Finally, in the event of failure of States to co-operate, Article 87(7) provides for the means substantially enunciated by the ICTY in the Appeals Chamber decision in *Blaskić (subpoena)*, namely, 'the Court may make a finding to that effect and refer the matter to the Court, to the Security Council'. However, the ICC could arguably have gone further and articulated the consequences of a Court's finding of non-co-operation by a State. The Statute could have specified that the Assembly of States Parties might agree upon countermeasures, or authorize contracting States to adopt such countermeasures, or, in the event of disagreement, that each contracting State might take such countermeasures. In addition, it would have been appropriate to provide for the possibility of the Security Council's stepping in and adopting sanctions even in cases where the matter had not been previously referred by this body to the Court; one fails to see why the Security Council should not act upon Chapter VII if a State refuses to co-operate and such refusal amounts to a threat to the peace, even in cases previously referred to the Court by a State or initiated by the Prosecutor *proprio motu*. Of course, the ICC Statute does not *exclude* this possibility, but it also would have been a good idea expressly to include it.

19.9 THE QUESTION OF SURRENDER OF NATIONALS

The constitution or the laws of many civil law countries lay down the principle that nationals may not be extradited for prosecution abroad. The principle can be found, for example, in the Constitutions of Brazil (1988, revised in 1996; Article 50), the German Federal Republic (1949, Article 16(2), now amended to allow the handing over of Germans to the ICC and other members of the European Union), the Federal Republic of Yugoslavia (1992, Article 17-3), Poland (1997, Article 55-1), Slovenia (1991, revised in 2000, Article 47). The principle finds legislative recognition in France, in Article 3 of the Law of 10 March 1927, as well as in most bilateral treaties concerning mutual judicial assistance.

This rule is clearly the remnant of a bygone era when States intended to protect their nationals as much as possible against any foreign interference. It is a typical expression of the Westphalian international community of sovereign States that distrust one another and lack any common values of universal scope and purport. In today's international community, where respect for human rights counts among the universal values that all States are required to abide by, this rule has become a relic of the past. Provided that the rights of the accused are safeguarded and the trial is fair and expeditious, why should a State have the right to refuse the extradition of one of its nationals to another State on the territory of which the individual has committed a

¹¹ For this at 1996, §7), the 1996), at §182, 12 The argu Yearbook 1997,

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Immanuel] principles, national ju judicial bo more, givetransfer of extradition equality, w and an inte only apply ever, innov international may not it have held The reac serious cri of the pers refusal is a State takes Hague req the work c crime? Th

crime? The outdated nature of this legal tradition has come to light in the course of the work of the international criminal tribunals. Often, when the Prosecutor in The Hague requests a State to hand over a national accused of international crimes, the State takes refuge behind a constitutional provision forbidding extradition. This refusal is all the more absurd, in such cases, because it leads to the effective impunity of the persons in question, by protecting them against criminal prosecution for very serious crimes which transgress universal values.

The reaction of international tribunals has been twofold. First of all, such tribunals have held that, by virtue of a well-established principle of international law, States may not invoke their national legislation, even of constitutional rank, to evade an international obligation.¹¹ This objection is, of course, traditional. The other is, however, innovative. It posits that, at the very most, the constitutional rules in question only apply to relations between sovereign States, and not to relations between a State and an international court. The former relations are based on the principle of formal equality, whereas the latter are hierarchical in nature. Thus, while one may speak of *extradition* of the accused from one State to another, it is more appropriate to speak of *transfer* of the accused from a State to an international criminal tribunal.¹² Furthermore, given that the rights of the accused are fully respected before international judicial bodies, the protection of the national State no longer makes any sense. International judges have thus introduced a new legal concept, dissociated from obsolete principles, where the vision of the international community propounded by Immanuel Kant prevails over that extolled by Hobbes.

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¹¹ For this argument see, although on different matters, the Order of the ICTY President in *Blaskić* (3 April 1996, §7), the annual report for 1996 of the ICTY President to the General Assembly (A/51/292, 16 August 1996), at §182, as well as *Milosević* (decision on preliminary motions) (§47).
¹² The argument is for example set forth in the ICTY President's report to the UN General Assembly on the activities of the Tribunal during 1977 (UN Doc. A/RES/52/375, 18 September 1997, §§186-9; also in *ICTY Yearbook* 1997, at 145).

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